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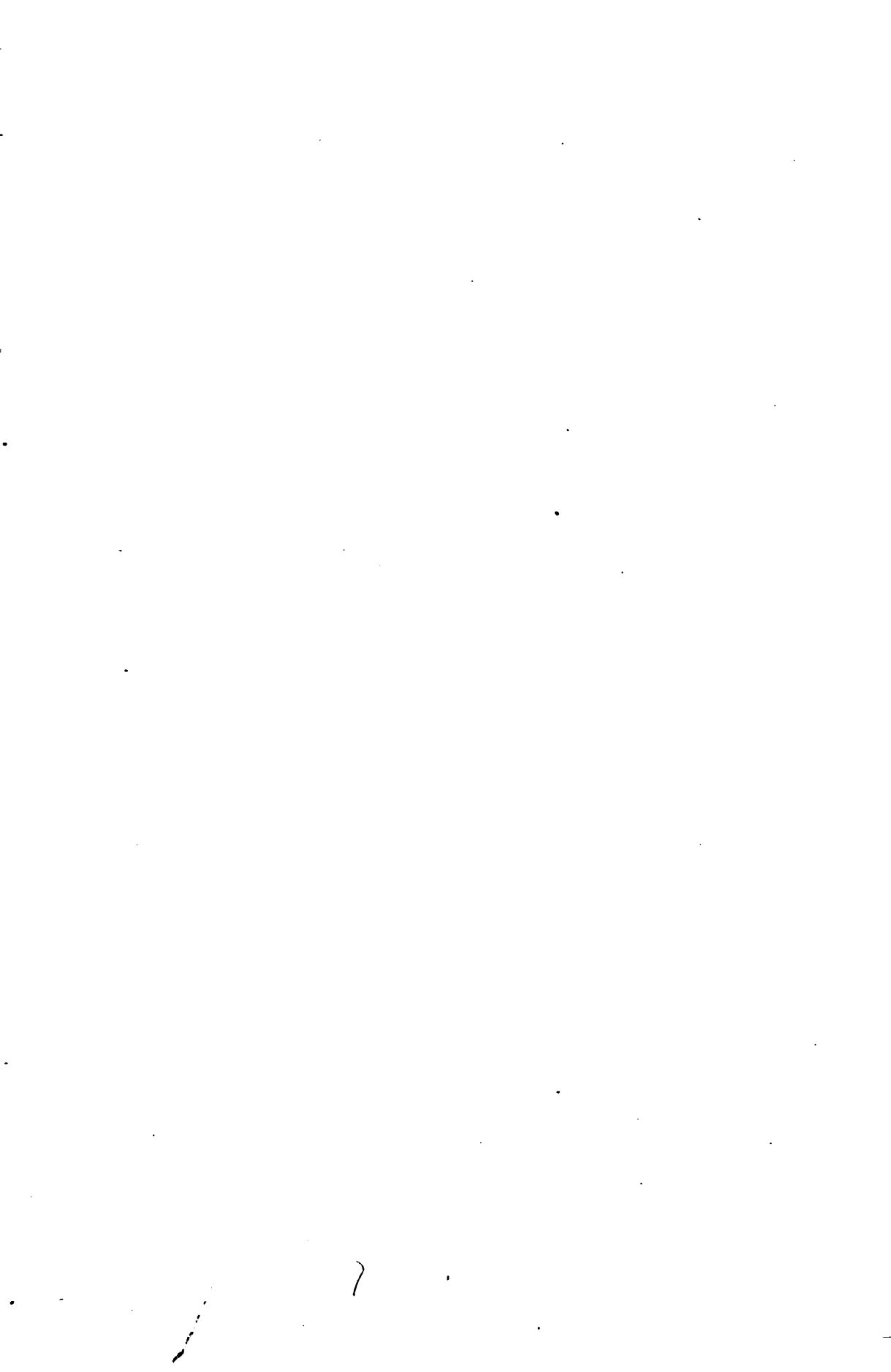
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*United States  
- Laws, 1916*

# FEDERAL STATUTES ANNOTATED *c7*

SECOND EDITION

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Containing all the Laws of the United States of a  
General, Permanent and Public Nature in force  
on the first day of January, 1916

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COMPILED UNDER THE EDITORIAL SUPERVISION OF

WILLIAM M. MCKINNEY

2290

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VOLUME I

AGRICULTURE TO BIGAMY

WITH A PRELIMINARY ARTICLE ON STATUTES  
AND STATUTORY CONSTRUCTION

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EDWARD THOMPSON COMPANY  
NORTHPORT, LONG ISLAND, NEW YORK

1916

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## PREFACE TO THE SECOND EDITION

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WHEN the original edition of Federal Statutes, Annotated, was published in 1903, it was to meet a long existing and pressing need, as all know who remember the condition of the laws of the United States at that time. Since then Congress has passed many hundreds of acts of a general and permanent nature, and the decisions construing these and the previous statutes are numbered by thousands. All this new matter—statutes and annotations—has been presented from time to time in supplemental volumes. But periodical compilations of statutes are necessary, because amendments, repeals and new enactments scattered through many volumes make it laborious and time consuming to find the law. This is emphatically true of federal legislation in the last decade. A striking instance of this is found in the codification of the penal laws and the codification of the laws relating to the judiciary, which by repeal and re-enactment have superseded nearly six hundred sections of the Revised Statutes and sixty-six separate acts, thus necessitating a redistribution of the annotations to the superseded laws.

Out of these conditions has come a demand for recompilation, and therefore Federal Statutes, Annotated, has passed into its second edition.

The general plan of the original work is preserved as far as the nature of the changes in the law permits, but new legislation has made some new titles imperative, and experience has suggested new and valuable features. In the work of recompiling and consolidating the statutes the editors have aimed at thoroughness and accuracy. All statutes of a general and permanent nature in force on January 1, 1916, are now to be found under appropriate titles arranged under one alphabet. The annotations likewise have been completely revised, consolidated and brought down to date, and are greatly enriched by the incorporation of the well-known Gould and Tucker's Notes on the Revised Statutes. They have also been improved by giving, in addition to the citation of the official reports, parallel references to all other reports, including Ann. Cas., L. R. A., and the Trinity Series.

As in the former edition the statutes are, for convenience, briefly indexed in each volume while the full general index at the close covers both the statutes and the annotations. The tables of statutes in this final volume have been enlarged by the addition of one based upon the citations of the Statutes at Large.

A notable feature of the original edition was the preliminary article on "Statutes and Statutory Construction" by Mr. Charles C. Moore. This article has been carefully revised and expanded by the addition of the matter on the subject contained in the decisions of the federal courts during the past thirteen years.

E. T. Co.



## PREFACE TO THE FIRST EDITION

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THE design of this work is to give under obvious titles, alphabetically arranged and thoroughly annotated, all the Acts of Congress of a permanent and general nature, except those relating exclusively to the District of Columbia, in force on the first day of January, 1903. The need of such a work has long been apparent. In the official publications of the Government the statutes of the United States are scattered through three works — the Revised Statutes, the Supplements thereto, and the Statutes at Large — comprising thirty-six large volumes in all. These various works not only contain a large number of repealed, obsolete, and superseded enactments, but provisions relating to the same subjects are so widely scattered, amendments are so intertangled, and the indexing is sometimes so imperfect, that the practitioner frequently has great difficulty in ascertaining the real state of the law.

The Revised Statutes furnishes, of course, the basis of this work, but provisions in force prior to the time when the revision went into effect and not included therein, which have been decided by the courts to be still in force, have been incorporated. The Supplements to the Revised Statutes have not been relied upon to furnish all public and general acts for the period which they purport to cover. A careful examination of the Statutes at Large shows that numerous enactments which should have been included in the Supplements have been omitted therefrom. These are given in their proper places. The accurate noting of all repeals has received special attention, and great care has been taken to have each amendatory and supplemental enactment properly placed. Riders in appropriation bills have been carefully extracted and preserved. Since the titles of acts are often referred to in construing them, these have in all cases been given. The only acts or statutory provisions, otherwise within the scope of this work, which have been omitted are such as relate exclusively to the District of Columbia. These laws and the notes thereto, if given, would add several volumes and are of purely local interest. Statutes relative to the Territories, including Alaska, and to the Indians are, however, here given without abridgment. The greatest care has been taken to insure an accurate text. By a process of comparison, checking, and counterchecking it is believed that not a line or a word of the public and general statutes is lost.

The sole liberty taken with the official text of the statutes is the omission of the enacting clause which precedes each act, viz., the words "Be it enacted," etc. The constant repetition of this clause would unnecessarily consume valuable space. Misprints, bad spelling, glaringly incorrect English, and other defects which occur in the official text have been reproduced, usually corrected, however, by the obviously proper reading inclosed in brackets [ ], or by explanation in the notes. All section headings, dates, references to Statutes at Large, etc., which appear in the text are likewise inclosed in brackets, that there may be no confusion as to what actually constitutes the statutory language of Congress. The notes, constituting the

matter of smaller type, are, of course, the work of the editors. At the close of each section is given the number of the corresponding section of the Revised Statutes or the volume and page of the Statutes at Large, according as the matter is taken from one or the other. Thus it will always be possible to make an exact reference to the official publication. Whenever Congress has enacted a new section as a substitute for an old one, the text of the repealed section is, for purposes of comparison, generally set out in the notes. The statutes are grouped under such titles as will naturally occur to the investigator considering the subject-matter thereof.

The pernicious custom of Congress of enacting statutes upon subjects already covered by existing law without repealing or even mentioning the older acts, has caused considerable embarrassment. In such cases it has seemed undoubtedly best to err on the side of fullness. Many acts and sections of the Revised Statutes will therefore be found printed in juxtaposition with later acts which probably supersede the earlier provisions. The editors have, in the notes, often expressed their opinion as to the state of the law, and frequently the decisions and rulings set out in the notes throw light on the situation, but each investigator will desire the opportunity to form his own conclusions.

It is hoped that the usefulness of the annotation will be proportionate to the pains expended upon it. In order that the collection of cases citing or construing United States statutes may be complete, every volume of the reports of the decisions of the United States Courts and the Opinions of the Attorneys-General has been examined page by page. It is believed that in thoroughness these notes will thus go beyond anything heretofore attempted in statutory annotation. It will be observed that the notes do not consist of mere lists of cases, but are explanatory and state just what the courts have decided with reference to the section or chapter of statutes under which they are placed. To the practitioner in the federal courts they should save much time and labor.

Preceding the text of the statutes in the first volume is an article on "Statutes and Statutory Construction," by Charles C. Moore, Esq., a writer eminently fitted by learning and previous authorship to deal with this topic, who occupies the position of associate editor of the work. This article deals with canons of construction of statutes, devoting special attention to those rules which have arisen out of peculiarities of federal legislation and administration. None but federal cases, including opinions of the Attorneys-General, are cited, but the article exhausts those citations to the last degree. Every scrap of authority has been gleaned from the federal reports. This article would be of great value merely as a collection of authorities, not readily accessible from other sources, because the digests are chiefly concerned with concrete application of principles of construction, and commonly do not even allude to the principles themselves.

Valuable assistance has been rendered by Peter Kemper, Jr., Esq., of the New York bar, in extracting from the Statutes at Large the public and general Acts and in classifying the entire statutory matter.

In the last volume of the set, or in an appendix, will be printed all general and public laws enacted by Congress (excepting a general revision of all or a substantial part of the statutes) during the course of the publication of the work. Thus, when the last volume is published, the statutes will be

strictly up to date. At the close of the work will also be given the Constitution of the United States, the Articles of Confederation, the Declaration of Independence, and the Ordinance of 1787 for the Government of the Northwest Territory.

Each volume will be separately but briefly indexed. At the close, however, will be given an exhaustive and minute index of the entire work. There will also be tables showing where in this work each section of the Revised Statutes and the later Acts can be found.

W. M. McK.

NORTHPORT, L. I., N. Y., *Feb. 2, 1903.*



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**PRELIMINARY ARTICLE**  
**ON**  
**STATUTES AND STATUTORY**  
**CONSTRUCTION**



# STATUTES AND STATUTORY CONSTRUCTION\*

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- II. RULES OF INTERPRETATION
- III. AIDS TO INTERPRETATION
- IV. OBJECTIONABLE CONSEQUENCES AS AFFECTING INTERPRETATION
- V. MEANING OF WORDS AND PHRASES
- VI. CONSTRUCTION OF PARTICULAR CLASSES OF STATUTES
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- VIII. TERMINATION AND REVIVAL OF STATUTES
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\* By Charles C. Moore, author of *Moore on Facts*; supplemented for this edition by George V. Strong.

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**I. INTRODUCTORY***Efficacy*

**1. Sufficiency of enactment.**—"The question whether a seeming act of a legislature has become a law in accordance with the fundamental law is a judicial one to be tested by the courts and judges, and not a question of fact to be tried by a jury."<sup>1</sup> The signing by the speaker of the House of Representatives and by the president of the Senate in open session of an enrolled bill is an official attestation of such bill as one that has passed Congress; and when the bill thus attested receives the approval of the President and is deposited in the Department of State according to law, its authentication as a bill that has passed Congress is complete and unimpeachable<sup>2</sup> unless Congress shall declare under what circumstances or by what evidence an act thus authenticated may be shown not to be in the form in which it was when passed by Congress.<sup>3</sup> The same rule applies in parallel circumstances as to the validity of state or territorial statutes<sup>4</sup> unless a different rule is prescribed by the local legislature or

1. *Lyons v. Woods*, 153 U. S. 662, 14 S. Ct. 959, 38 U. S. (L. ed.) 854 [citing *South Ottawa v. Perkins*, 94 U. S. 267, 24 U. S. (L. ed.) 154; *Post v. Kendall County*, 105 U. S. 667, 26 U. S. (L. ed.) 1204; *Walnut v. Wade*, 103 U. S. 689, 26 U. S. (L. ed.) 526; *Portland Gold Min. Co. v. Duke*, (C. C. A.) 164 Fed. 180; *Portland Gold Min. Co. v. Duke*, (C. C. A.) 191 Fed. 692.

2. *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495, 36 U. S. (L. ed.) 294. See also *Lyons v. Woods*, 153 U. S. 662, 14 S. Ct. 959, 38 U. S. (L. ed.) 854; *U. S. v. Ballin*, 144 U. S. 1, 12 S. Ct. 507, 36 U. S. (L. ed.) 321; *Harwood v. Wentworth*, 162 U. S.

547, 16 S. Ct. 890, 40 U. S. (L. ed.) 1069; *U. S. v. Weil*, 29 Ct. Cl. 523; 9 Op. Atty.-Gen. 1 (Black, 1857); *Chesapeake, etc., Telephone Co. v. Manning*, 186 U. S. 238, 22 S. Ct. 881, 46 U. S. (L. ed.) 1144.

The day officially indicated as the date of approval of a duly authenticated statute is conclusive; and the record cannot be impeached by proof that the statute was in fact approved on some other date. *Gibson v. Anderson*, (C. C. A.) 141 Fed. 39.

3. See *Harwood v. Wentworth*, 162 U. S. 560, 16 S. Ct. 890, 40 U. S. (L. ed.) 1069.

4. *Harwood v. Wentworth*, 162 U. S. 547, 16 S. Ct. 890, 40 U. S. (L. ed.) 1069;



recognized by the local decisions.<sup>5</sup> Whether the journals of the houses of Congress can be referred to for the purpose of determining that an act for raising revenue duly attested by the official signatures of the president of the Senate, the speaker of the House of Representatives, and the President, and which is of record in the State Department as an act passed, originated in the one body or in the other, is a question that has been raised but not decided.<sup>6</sup> Whether an act of Congress signed by the President after the adjournment or expiration of the Congress which passed it is valid, has not been judicially determined.<sup>7</sup> Under such circumstances an *Illinois* statute was held to be constitutional, in view of the provisions of the state constitution.<sup>8</sup> "It has properly been the practice of the President to inform Congress by message of his approval of bills, so that the fact may be recorded. But the essential thing to be done in order that a bill may become a law by the approval of the President is that it be signed within the prescribed time after being presented to him. That being done, and as soon as done, whether Congress is informed or not by message from the President of the fact of his approval of it, the bill becomes a law, and is delivered to the secretary of state as required by law."<sup>9</sup>

A general law prescribing formalities to be observed on the passage of special laws is not binding on subsequent legislatures, and a special act passed in disregard of those provisions is not invalid.<sup>10</sup> A decision of the highest court of a state that a statute enacted by the state legislature was or was not passed in conformity to the requirements of the state constitution is binding upon the federal courts.<sup>11</sup> Joint resolutions of Congress are not distinguishable from bills, and, if approved by the President or if duly passed without his approval, they have all the effect of acts of Congress.<sup>12</sup> But it is "little better than a mere truism to say that a separate resolution of either House of Congress is not a law."<sup>13</sup>

*Lyons v. Woods*, 153 U. S. 649, 14 S. Ct. 959, 38 U. S. (L. ed.) 854; *Ames v. Union Pac. R. Co.*, 64 Fed. 168. See also *Stanly County v. Coler*, (C. C. A.) 96 Fed. 284; *John V. Farwell Co. v. Matheis*, 48 Fed. 364; *Clough v. Curtis*, 134 U. S. 361, 10 S. Ct. 573, 38 U. S. (L. ed.) 945. Compare *Railroad Tax Cases*, 13 Fed. 722; 13 Op. Atty-Gen. 225 (Hoar, 1870).

5. *South Ottawa v. Perkins*, 94 U. S. 269, 24 U. S. (L. ed.) 154; *Walnut v. Wade*, 103 U. S. 689, 26 U. S. (L. ed.) 526; *Chicago, etc., R. Co. v. Smyth*, 103 Fed. 376.

6. *Twin City Bank v. Nebeker*, 167 U. S. 196, 17 S. Ct. 766, 42 U. S. (L. ed.) 134; *Rainey v. U. S.*, 232 U. S. 310, 34 S. Ct. 429, 58 U. S. (L. ed.) 617.

7. *Hodges v. U. S.*, 18 Ct. Cl. 700, a case decided in 1883, wherein Chief Justice Richardson said that the Abandoned and Captured Property Act of March 12, 1863, 12 Stat. at L. 820, was "the only act which has ever been signed by the President since the foundation of the government, after the Congress which passed it had adjourned or expired," but that the act had always been treated as valid by the legislative, executive, and judicial branches of the government.

8. *Seven Hickory v. Ellery*, 103 U. S. 423, 26 U. S. (L. ed.) 435, *citing*, as in accordance with this ruling, *People v. Bowen*, 21 N. Y. 517; *State v. Fagan*, 22 La. Ann. 545, and *Solomon v. Cartersville*, 41 Ga. 157, decided under similar provisions in state constitutions.

9. *La Abra Silver Min. Co. v. U. S.*, 175 U. S. 454, 20 S. Ct. 168, 44 U. S. (L. ed.) 232.

10. *Manigault v. Springs*, 199 U. S. 473, 26 S. Ct. 127, 50 U. S. (L. ed.) 274.

11. *Peters v. Gilchrist*, 222 U. S. 483, 32 S. Ct. 122, 56 U. S. (L. ed.) 278; *In re Duncan*, 139 U. S. 449, 11 S. Ct. 573, 35 U. S. (L. ed.) 219; *Post v. Kendall County*, 105 U. S. 667, 26 U. S. (L. ed.) 1204; *Nesmith v. Sheldon*, 7 How. 812, 12 U. S. (L. ed.) 925; *Norton v. Shelby County*, 118 U. S. 440, 6 S. Ct. 1121, 30 U. S. (L. ed.) 178; *Simpson v. Union Stock Yards Co.*, 110 Fed. 799; *In re Moore*, 81 Fed. 356; *Comstock v. Tracey*, 46 Fed. 162. See also *Chicago, etc., R. Co. v. Smyth*, 103 Fed. 376; *Pease v. Peck*, 18 How. 595, 15 U. S. (L. ed.) 518.

12. 6 Op. Atty-Gen. 680 (Cushing, 1854).

13. *Per Attorney-General Cushing*, 6 Op. Atty-Gen. 684.

**2. When operative.**—At common law, before the statute of 1793 (33 Geo. III, c. 13) every act of Parliament, unless a different time was fixed, took effect from the first day of the session.<sup>14</sup> In this country the rule is that a statute takes effect, if not otherwise provided,<sup>15</sup> on the day of its passage<sup>16</sup> and needs no promulgation to give it operation.<sup>17</sup> Provisions of general law contained in an appropriation act, such as allowances of private claims, regulations of salaries by addition or diminution, etc., take effect immediately upon the approval of the act by the President, if such be their natural sense and signification; and it makes no difference in this behalf that the act is one which by its title and tenor purports to provide for the ensuing fiscal year.<sup>18</sup> Where an act passed March 3 made appropriations for the fiscal year beginning on the first of the following July, and provided that on and after July first leaves of absence to certain employees should be limited to sixty days in "any one calendar year," it was held that absences by leave prior to July first must be counted in making up the sixty days for the year ending December 31.<sup>19</sup> The Constitution provides that "every bill \* \* \* shall, before it become a law, be presented to the President. \* \* \* If he approve he shall sign it,"<sup>20</sup> and in case of a bill which is approved by the President it takes effect only by such approval, or from the time of such approval.<sup>21</sup> In the absence of evidence showing at what hour of the day an act of Congress was approved by the President, it is presumed to have been approved on the first minute of that day.<sup>22</sup> But in cases where the effect of this presumption would be to make the legislation retroactive, and therefore harsh and unjust, the hour and minute when the act was signed may be shown or judicially noticed from official records, and effect will be given to it only from that

14. *U. S. v. Stoddard*, 89 Fed. 700; *Matter of Ankrim*, 3 McLean 286, 1 Fed. Cas. No. 395, quoting *Bac. Abr.* 636, C.

15. This operation of an act, or of particular provisions therein, may, by its own terms, be postponed to a future day. *McElrath v. U. S.*, 102 U. S. 426, 26 U. S. (L. ed.) 189; *Auffmordt v. Rasin*, 102 U. S. 620, 26 U. S. (L. ed.) 262; *U. S. v. Burr*, 159 U. S. 82, 15 S. Ct. 1002, 40 U. S. (L. ed.) 82; *In re Horton*, 5 Law Rep. 462, 12 Fed. Cas. No. 6,708; 7 Op. Atty.-Gen. 58.

16. *Robertson v. Bradbury*, 132 U. S. 491, 10 S. Ct. 158, 33 U. S. (L. ed.) 405; *Gardner v. Collector*, 6 Wall. 504, 18 U. S. (L. ed.) 890; *Lapeyre v. U. S.*, 17 Wall. 198, 21 U. S. (L. ed.) 606; *Matthews v. Zane*, 7 Wheat. 211, 5 U. S. (L. ed.) 425; *U. S. v. Chong Sam*, 47 Fed. 883; *Matter of Ankrim*, 3 McLean 285, 1 Fed. Cas. No. 395; *Warren Mfg. Co. v. Etna Ins. Co.*, 2 Paine 517, 29 Fed. Cas. No. 17,206.

Where an act provided that corporations "hereafter to be created in this state" should be subject to its provisions, a corporation created the same day on which the act was passed came within its provisions. *Weed v. Snow*, 3 McLean 267, 29 Fed. Cas. No. 17,347.

The phrase "subsequent to the passage of this act" in an act means subsequent to its approval by the executive. *Walker v.*

*Mississippi Valley, etc., R. Co.*, 2 Cent. Law J. 481, 29 Fed. Cas. No. 17,079.

Whether an act of Congress becomes a law as soon as it is signed by the President, or whether it must be delivered to the secretary of state before it can become operative as a law, was made a query in *American Wood Paper Co. v. Glen's Falls Paper Co.*, 8 Blatchf. 513, 1 Fed. Cas. No. 321, 321a.

17. *Arnold v. U. S.*, 9 Cranch 119, 3 U. S. (L. ed.) 671; *Lapeyre v. U. S.*, 17 Wall. 199, 21 U. S. (L. ed.) 606; *The Brig Ann*, 1 Gall. 66, 1 Fed. Cas. No. 397. Compare *The Ship Cotton Planter*, 1 Paine 26, 6 Fed. Cas. No. 3,270.

18. 7 Op. Atty.-Gen. 306 (*Cushing*, 1855).

19. 20 Op. Atty.-Gen. 670 (*Olney*, 1893).

20. Const. U. S., art. 1, § 7.

21. *U. S. v. Stoddard*, 89 Fed. 701.

22. *U. S. v. Norton*, 97 U. S. 164, 24 U. S. (L. ed.) 907; *Lapeyre v. U. S.*, 17 Wall. 191, 21 U. S. (L. ed.) 606; *Arnold v. U. S.*, 9 Cranch 104, 3 U. S. (L. ed.) 671; *In re Welman*, 20 Vt. 653, 29 Fed. Cas. No. 17,407; *In re Carrier*, 13 Nat. Bankr. Reg. 208, 5 Fed. Cas. No. 2,443; *Leidigh Carriage Co. v. Stengel*, (C. C. A.) 95 Fed. 640; *U. S. v. Hartwell, etc., Co.*, (C. C. A.) 142 Fed. 432, *affirming* 128 Fed. 306; *In re Williams*, 6 Biss. 233, 11 Nat. Bankr. Reg. 145, 29 Fed. Cas. No. 17,700; *Matter*

time.<sup>23</sup> The opinion has been expressed, however, that "where there is no retroactive effect possible, the court should hear no evidence upon the point, but should, in order to secure certainty, hold the presumption that the act was approved on the first moment of the day of its date to be conclusive."<sup>24</sup> Neither the Constitution nor any statute imposes upon the President the duty of affixing a date to his signature to a bill; and where the original enrolled act showed no other date of signature than the day of the month it was declared to be proper for the court to ascertain the exact date by reference to the record of the secretary of state of the time of filing the paper, the journals of the two houses of Congress, the message of the President, or by resorting to any other source from which clear and satisfactory information could be obtained.<sup>25</sup> The same rule of evidence is applicable in fixing the date upon which a bill passed by Congress was vetoed by the President so as to prevent its operation as a law.<sup>26</sup> A statute relating to a subject over which the several states may exercise control only in the absence of congressional regulation thereof, takes effect on passage for the purpose of annulling all state legislation thereon even though by its terms its provisions are not actually effective until some future date.<sup>27</sup> A proclamation of the President takes effect when it is signed by him and sealed with the seal of the United States, officially attested, and presumptively from the first moment of that day.<sup>28</sup>

### Classification

**3. Public or private.**—"A general or public act," says Blackstone, "is a universal rule, that regards the whole community," while "special or private acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns."<sup>29</sup> These definitions have

of *Howes*, 21 Vt. 619, N. Y. Leg. Obs. 271, 12 Fed. Cas. No. 6,788.

<sup>23.</sup> *Burgess v. Salmon*, 97 U. S. 381, 24 U. S. (L. ed.) 1104 [*affirming* *Salmon v. Burgess*, 1 Hughes 356, 21 Fed. Cas. No. 12,262]; *U. S. v. Stoddard*, 89 Fed. 699; *U. S. v. Hartwell, etc., Co.*, (C. C. A.) 142 Fed. 432, *affirming* 128 Fed. 306, where the authorities are carefully examined; *U. S. v. Iselin*, 87 Fed. 194, where the precise time was admitted by stipulation; *Matter of Richardson*, 2 Story 571, 20 Fed. Cas. No. 11,777; *In re Wynne*, Chase 227, 30 Fed. Cas. No. 18,117; 3 Op. Atty.-Gen. 82 (Butler, 1836). See also *Louisville Tp. v. Portsmouth Sav. Bank*, 104 U. S. 469, 26 U. S. (L. ed.) 775; *Jones v. U. S.*, 137 U. S. 216, 11 S. Ct. 80, 34 U. S. (L. ed.) 691; *Leidigh Carriage Co. v. Stengel*, (C. C. A.) 95 Fed. 641; *Maine v. Gilman*, 11 Fed. 216.

<sup>24.</sup> *Per* Taft, C. J., in *Leidigh Carriage Co. v. Stengel*, (C. C. A.) 95 Fed. 641.

<sup>25.</sup> *Gardner v. Collector*, 6 Wall. 499, 18 U. S. (L. ed.) 890.

<sup>26.</sup> *U. S. v. Allen*, 36 Fed. 174.

<sup>27.</sup> *Northern Pac. R. Co. v. Washington*, 222 U. S. 370. In that case these remarks were made: "That the right of a state to apply its police power for the purpose of regulating interstate commerce, in a

case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the state. To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute."

<sup>28.</sup> *Lapeyre v. U. S.*, 17 Wall. 191, 21 U. S. (L. ed.) 606; *U. S. v. Norton*, 97 U. S. 164, 24 U. S. (L. ed.) 907.

<sup>29.</sup> 1 Black. Com. 86.

been quoted by the United States Supreme Court,<sup>30</sup> and no different test for distinguishing between public and private acts of Congress can be found in the United States Constitution or statutes. Although the "public laws" and "private acts" of Congress are collected under those separate heads in the Statutes at Large, there is nowhere a legislative affirmation that such division has any weight. Congress has given no directions for the compilation of the Statutes at Large further than to provide that the secretary of state shall cause to be edited, printed, published, and distributed, pamphlet copies of the statutes of each session of Congress, and that "after the close of each session, the secretary of state shall have edited and bound a sufficient number of the volumes containing the Statutes at Large enacted by that Congress to enable him to distribute copies," etc.<sup>31</sup> In one instance where the main portion of an act was purely private, but other parts of it were unquestionably general and permanent, the entire act was printed in the Statutes at Large among the private acts, and the general provisions were then overlooked by the compiler of the Supplement to the Revised Statutes, but subsequently discovered and inserted after the lapse of many years.<sup>32</sup> Nevertheless, those general provisions must have been a part of the public statutes of the United States during all of that period. In the acts of Congress providing for the revision of the United States statutes, the legislation to be embodied in the revision was described as statutes "general and permanent in their nature,"<sup>33</sup> and the same language is used in the act of Congress providing for the compilation of supplements to the Revised Statutes.<sup>34</sup> These compilations were undoubtedly intended to comprise all the "public" statutes, and the designation above quoted in the acts of Congress may be regarded as a general definition of "public" statutes of the United States. Mr. Justice Woods said that "in this country the disposition has been, on the whole, to enlarge the limits of the class of public acts, and to bring within it all enactments of a general character, or which in any way affect the community at large."<sup>35</sup> Mr. Justice Miller, in discussing the character of a charter granted to a railroad corporation by a state, remarked that "the distinction between public and private acts has become very artificial and shadowy since legislative bodies have adopted the principle of publishing in printed form all statutes which they pass. Some of the states keep up the distinction by making a difference in the manner in which public and private acts shall be published, and in such cases this difference is to be observed and may become of some consequence."<sup>36</sup> A declaration by the legislature in any case, or a provision in a constitution, that after

30. *Unity v. Burrage*, 103 U. S. 454, 26 U. S. (L. ed.) 405.

A party claiming under a private act appropriating a specific amount for his relief has a claim "founded upon a law of Congress" within the meaning of those terms in the statute conferring jurisdiction thereof upon the Court of Claims. *Jordan v. U. S.*, 19 Ct. Cl. 108.

31. Act of January 12, 1895, c. 23, § 73, 28 Stat. at L. 601.

32. See Act of January 31, 1881, c. 32, 21 Stat. at L. 603, republished in 2 Supp. Rev. Stat. U. S., p. 140, with a note of explanation by the compiler.

33. Act of June 27, 1866, c. 140, § 1, 14 Stat. at L. 74; Act of June 20, 1874, c. 333, § 3, 18 Stat. at L. 113.

34. Res. June 7, 1880, No. 44, 21 Stat. at L. 308; Act of April 9, 1890, c. 73, 26 Stat. at L. 50.

35. *Unity v. Burrage*, 103 U. S. 455, 26 U. S. (L. ed.) 405. Mr. Justice Harlan made the same statement in *Ketchum v. St. Louis*, 101 U. S. 315, 25 U. S. (L. ed.) 999.

36. *Case v. Kelly*, 133 U. S. 27, 10 S. Ct. 216, 33 U. S. (L. ed.) 513.

the passage and publication of any laws they shall be judicially noticed as public acts, is binding upon the courts.<sup>37</sup> Where a state statute was declared by the legislature to be a public act, it was held that a subsequent statute, supplementing and amending it, was also a public act.<sup>38</sup>

4. *Same*—illustrations.—In a very early case the United States Supreme Court held that a state act incorporating a bank was a public law. The act made it a felony to counterfeit the notes of the bank, and that alone was thought to make it a public act.<sup>39</sup> And an act of Congress incorporating a bank in the District of Columbia and containing certain penal provisions was held to be a public act.<sup>40</sup> The United States Supreme Court has taken judicial notice that a railroad company was created by act of Congress.<sup>41</sup> A charter of incorporation which contained a monopoly feature was pronounced a public act. "It is the exclusiveness of the privilege," said the court, "which undoubtedly brings it, so far as it made a monopoly, within the category of public laws."<sup>42</sup> A state statute authorizing a county to loan its bonds to a railroad corporation and providing for appropriations of the earnings of the road in payment of the bonds was held to be a public act, since it "related to matters in which the general public were concerned."<sup>43</sup> A state statute validating elections held by the inhabitants of a county and a vote for the issuance of county bonds in aid of a railroad company, and authorizing township aid in like manner,<sup>44</sup> and an act passed by a state legislature incorporating a railroad company and providing for subscriptions to the stock of the company by the commissioners of any county through which its road might pass, and an issue of bonds of the county to pay for the same,<sup>45</sup> were held to be public acts. An act of Congress imposing a duty on an imported article is, of course, a public act.<sup>46</sup> An act "to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers" was held to be certainly a public act.<sup>47</sup> A proclamation of pardon and amnesty by the President had the force of a public law.<sup>48</sup> Speaking for the Circuit Court of Appeals, Judge Lurton said that the several acts of the legislatures of Georgia and Tennessee providing for the construction, operation and leasing of a Georgia railroad, "are of the class now generally regarded as public acts," and that "of such the United States courts take judicial

37. *Case v. Kelly*, 133 U. S. 28, 10 S. Ct. 216, 33 U. S. (L. ed.) 513; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 678, 14 S. Ct. 533. 38 U. S. (L. ed.) 311; *Covington Drawbridge Co. v. Shepherd*, 20 How. 232, 15 U. S. (L. ed.) 896; *Beatty v. Knowler*, 4 Pet. 167, 7 U. S. (L. ed.) 813; *Pullan v. Cincinnati, etc., Air-Line R. Co.*, 4 Biss. 41, 20 Fed. Cas. No. 11,461.

38. *Unity v. Burrage*, 103 U. S. 447, 26 U. S. (L. ed.) 405.

39. *Young v. Alexandria Bank*, 4 Cranch 388, 2 U. S. (L. ed.) 655, affirming 1 Cranch 458, 2 Fed. Cas. No. 857. To precisely the same point see *U. S. v. Porte*, 1 Cranch 369, 27 Fed. Cas. No. 16,070.

40. *Central Bank v. Tayloe*, 2 Cranch 428, 5 Fed. Cas. No. 2,548, where, however, the court did not allude to the circumstances which we have stated in the text.

41. *In re Dunn*, 212 U. S. 374, 29 S. Ct.

299, 53 U. S. (L. ed.) 558; *Texas, etc., R. Co. v. Cody*, 166 U. S. 610, 17 S. Ct. 703, 41 U. S. (L. ed.) 1132. See *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617, 17 S. Ct. 707, 41 U. S. (L. ed.) 1136.

42. *Per Billings, J.*, in *Putnam v. Ruch*, 56 Fed. 418.

43. *Ketchum v. St. Louis*, 101 U. S. 316, 25 U. S. (L. ed.) 999. See also *Tompkins v. Little Rock, etc., R. Co.*, 15 Fed. 18.

44. *Unity v. Burrage*, 103 U. S. 447, 26 U. S. (L. ed.) 405.

45. *Knox County v. Aspinwall*, 21 How. 539, 16 U. S. (L. ed.) 208.

46. *Gardner v. Collector*, 6 Wall. 508, 18 U. S. (L. ed.) 890.

47. *U. S. v. Leathers*, 6 Sawy. 22, 26 Fed. Cas. No. 15,581.

48. *Armstrong v. U. S.*, 13 Wall. 154, 20 U. S. (L. ed.) 614; *Jenkins v. Collard*, 145 U. S. 546, 12 S. Ct. 868, 36 U. S. (L. ed.) 812.

cognizance."<sup>49</sup> However, charters of private corporations appear to be usually regarded as private acts, unless the legislature has ordained otherwise.<sup>50</sup> Private acts are strictly construed,<sup>51</sup> especially when they conflict with earlier public acts.<sup>52</sup>

**5. Permanent or temporary.**—A general law is permanent if its duration is not limited by its own terms.<sup>53</sup> But questions frequently arise whether annual appropriation acts which spend their power in the course of the year contain independent legislation. "It would be somewhat unusual," said Mr. Justice Story, in 1841, "to find engrafted on an act making special and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed unless it is expressed in the most clear and positive terms, and when the language admits of no other reasonable interpretation."<sup>54</sup> And in 1846 the opinion was expressed that if the legislature annex to an annual appropriation act any special provision which has a proper application to the subject-matter of the act, and use no words indicating an intention to give to it a more extensive operation, the just conclusion would seem to be that the special regulation was intended to be confined to the matters embraced in the act.<sup>55</sup> But in 1855 Attorney-General Cushing said: "Congress has of late fallen into the very inconvenient practice of inserting provisions of general legislation in the acts of appropriation for a subsequent year. We have now to scan and scrutinize each separate clause or provision in those acts, and determine its legal meaning according to its particular tenor, wholly regardless of the place, or the general nature of the act, in which it is found."<sup>56</sup> In a later case it was held that "a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the

49. *Western, etc., R. Co. v. Roberson*, (C. C. A.) 61 Fed. 594.

50. See *Case v. Kelly*, 133 U. S. 21, 10 S. Ct. 216, 33 U. S. (L. ed.) 513; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 678, 14 S. Ct. 533, 38 U. S. (L. ed.) 311; *Covington Drawbridge Co. v. Shepherd*, 20 How. 232, 15 U. S. (L. ed.) 896; *Pullan v. Cincinnati, etc., Air-Line R. Co.*, 4 Biss. 41, 20 Fed. Cas. No. 11,461, all of which were charters of railroad companies; *Hatch v. Burroughs*, 1 Woods 444, 11 Fed. Cas. No. 6,203, which was a case for a bank charter; *Beatty v. Knowler*, 4 Pet. 167, 7 U. S. (L. ed.) 813, a case of a land corporation.

51. *Roberts's Case*, 6 Ct. Cl. 89.

52. *Hubbell's Case*, 6 Ct. Cl. 56.

53. *The Reform*, 3 Wall. 629, 18 U. S. (L. ed.) 105.

54. *Minis v. U. S.*, 15 Pet. 445, 10 U. S. (L. ed.) 791, *quoted* in *U. S. v. Vulta*, 233 U. S. 509, 34 S. Ct. 664, 58 U. S. (L. ed.) 1071. See also *U. S. v. Jarvis*, 2 Ware 278, 26 Fed. Cas. No. 15,468.

In *Minis v. U. S.*, 15 Pet. 423, 10 U. S. (L. ed.) 791, first above cited, an appropriation contained a proviso that "no officer of the army shall receive any per cent.

or additional pay, extra allowance, or compensation in any form whatsoever, on account of disbursing any public money appropriated by law during the present session, for fortifications," etc., "unless authorized by law." The proviso was held to be limited to the appropriation for that year, and not to be permanent in its operation.

55. *Per Ware, J.*, in *U. S. v. Jarvis*, 26 Fed. Cas. No. 15,468.

"The practice, however, of embodying general laws in appropriation bills has become so common that to adopt a narrow and restrictive construction confining their language to the subject-matter generally dealt with by the appropriation act would go far to nullify a good deal of the legislation of Congress. These provisos that are attached to appropriation acts for the purpose of procuring what is believed to be needed legislation, but which could not be accomplished by an independent statute by reason of the press of business before Congress must be treated the same as if they were separate and independent enactments." *Nat. Bank of Commerce v. Cleveland*, 156 Fed. 251.

56. 7 Op. Atty-Gen. 306.

services of that officer for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the previous law;'' and accordingly the officer was held entitled to recover from the United States the difference between the amounts paid him pursuant to the appropriation acts and the amount prescribed by the general statute. ''Repeals by implication are not favored,''' said the court. ''It cannot be said that there is a positive repugnancy between the old and the new statutes in question. If by any reasonable construction they can be made to stand together, our duty is to give effect to the provisions of each.'''<sup>57</sup> But in all cases ''the whole question depends on the intention of Congress as expressed in the statutes,'''<sup>58</sup> and where the appropriation was ''in full compensation'' it was considered to be a clear expression of legislative intent that the officer could recover no more.<sup>59</sup> And in the absence of such an expression, the courts have usually found and adjudged that Congress in some other way sufficiently expressed its purpose to reduce the salary to the amount appropriated for the period covered by the act.<sup>60</sup> The Court of Claims held that where a series of appropriation acts provided that no part of the moneys appropriated should be paid for commutation of fuel and quarters, it was conclusive against a claim therefor based on an existing general statute.<sup>61</sup> The word ''annually,''' in a direction in an appropriation act, is necessarily prospective and extends its operation to future years.<sup>62</sup> Where some of the provisions in a section are unquestionably permanent, a presumption arises that other provisions in the same section, without any restrictive words, are permanent, for ''it would be very unusual to unite, in a single section of a law, one provision intended to be permanent with another intended to be temporary, without clearly distinguishing the permanent from the temporary part.''<sup>63</sup> Where a section of an annual appropriation act contained a special regulation applying to collectors of the customs requiring them to place money received on unascertained duties, or duties paid under protest, at once to the credit of the treasurer, and the first words of the section were,

57. *U. S. v. Langston*, 118 U. S. 389, 6 S. Ct. 1185, 30 U. S. (L. ed.) 164 [*affirming* *Langston v. U. S.*, 21 Ct. Cl. 10]; *U. S. v. Vulte*, 233 U. S. 509, 34 S. Ct. 664, 58 U. S. (L. ed.) 1071. See also *U. S. v. Swiggett*, (C. C. A.) 83 Fed. 97; *Erwin v. U. S.*, 37 Fed. 470; *Converse v. U. S.*, 26 Ct. Cl. 6; *Upton v. U. S.*, 19 Ct. Cl. 46; *Belcher v. U. S.*, 34 Ct. Cl. 421; *French's Case*, 16 Ct. Cl. 419, where in a similar case the court said: ''It was simply a case of inadequate appropriation to meet an existing legal obligation; and we have repeatedly held that an inadequate appropriation affects no legal right,''' citing *Graham's Case*, 1 Ct. Cl. 380; *Collins's Case*, 15 Ct. Cl. 22; *Briggs's Case*, 15 Ct. Cl. 48, and *Freedman's Bank Case*, 16 Ct. Cl. 19.

58. *Per* Justice Woods in *U. S. v. Mitchell*, 109 U. S. 150, 3 S. Ct. 151, 27 U. S. (L. ed.) 887, *quoted* with approval in *Belknap v. U. S.*, 150 U. S. 594, 14 S. Ct. 183, 37 U. S. (L. ed.) 1191.

59. *U. S. v. Fisher*, 109 U. S. 143, 3 S. Ct. 154, 27 U. S. (L. ed.) 885, *reversing*

the *pro forma* judgment in *Fisher's Case*, 15 Ct. Cl. 323.

60. *Belknap v. U. S.*, 150 U. S. 588, 14 S. Ct. 183, 37 U. S. (L. ed.) 1191; *U. S. v. Mitchell*, 109 U. S. 146, 3 S. Ct. 151, 27 U. S. (L. ed.) 887. See also *Dunwoody v. U. S.*, 143 U. S. 578, 12 S. Ct. 465, 36 U. S. (L. ed.) 269; *Wallace v. U. S.*, 133 U. S. 180, 10 S. Ct. 251, 33 U. S. (L. ed.) 571; *Kidder v. U. S.*, 20 Ct. Cl. 46; *Dyer v. U. S.*, 20 Ct. Cl. 166; *Francis v. U. S.*, 22 Ct. Cl. 403.

61. *Lander v. U. S.*, 30 Ct. Cl. 317, where Chief Justice Richardson said: ''In our opinion such a prohibition in an appropriation act forbidding payment of the only appropriation applicable thereto, although inartistically expressed for that purpose, as clauses often are in appropriation acts, reaches beyond the mere manner of settlement and for the year suspends the previous law.''

62. *U. S. v. Jarvis*, 26 Fed. Cas. No. 15,468.

63. *Per* Ware, J., in *U. S. v. Jarvis*, 26 Fed. Cas. No. 15,468, wherein the fol-

"from and after the passage of this act all moneys paid to any collector," the court regarded it as clearly intended to be permanent.<sup>64</sup> Although the formal words just quoted are most usually employed to exclude a doubt whether the regulation was intended to be permanent or not, they may be supplied by other language clearly indicating the intention of the legislature.<sup>65</sup> A provision in an annual appropriation act declaring that "no act passed authorizing the Secretary of the Treasury to purchase a site and erect a building thereon shall be held or construed to appropriate money, unless the act in express language makes such appropriation," was held to be permanent in its character.<sup>66</sup> Where the Supreme Court decided that United States commissioners were entitled to docket fees, and Congress a few months afterward appropriated money for their fees with the proviso added to the appropriation clause, "but they shall not be entitled to any docket fees," it was held that the legislative purpose was to abolish such fees in the future.<sup>67</sup> In determining whether legislation in an appropriation act is permanent and general or not, it is of little or no consequence that it is enacted in the form of a proviso, since it is a well-known practice of Congress to enact general legislation by provisos in appropriation acts.<sup>68</sup>

**6. Mandatory: generally.**—"The question whether a duty imposed by statute upon a ministerial or executive officer, the performance or non-performance of which affects the rights of others, is merely directory to the officer and only confers on parties injured a right of action against the officer, or, on the other hand, is a condition essential to fix the rights of other parties as between themselves, is a very common but often a very difficult one to decide. Its decision depends mainly upon a consideration of the nature of the duty thus imposed in its relation to the rights of parties to be affected, but often also upon the proper construction of the language employed in the statute as being chiefly directed to the officer, or as declaratory of a principle governing the rights of parties."<sup>69</sup> Where affirmative words in an act are absolute, explicit and peremptory, the act should as a general rule be held mandatory and not directory.<sup>70</sup> When statutory requisitions concerning the assessment and collection of taxes are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of them his rights might be and generally would be injuriously affected, they are not directory, but mandatory,

lowering provision in an annual appropriation act was held to be permanent, and not confined to the disbursements of the appropriations contained in the act: "No officer in any branch of the public service, or any other person whose salary and emoluments are fixed by law and regulation, shall receive any extra allowance or compensation in any form whatever for the disbursements of public money, or the performance of any other extra service, unless the said extra allowance or compensation be authorized by law."

<sup>64</sup> U. S. v. Jarvis, 26 Fed. Cas. No. 15,468; U. S. v. Puleston, (C. C. A.) 106 Fed. 294.

<sup>65</sup> U. S. v. Jarvis, 26 Fed. Cas. No. 15,468.

<sup>66</sup> 19 Op. Atty.-Gen. 131 (Garland, 1888).

<sup>67</sup> U. S. v. Ewing, 140 U. S. 142, 11 S.

Ct. 743, 35 U. S. (L. ed.) 388; McKinstry v. U. S., 34 Fed. 211; Strong v. U. S., 34 Fed. 17; Calvert v. U. S., 37 Fed. 762; Marvin v. U. S., 44 Fed. 405; Thornley v. U. S., 37 Fed. 765; Faris v. U. S., 23 Ct. Cl. 374.

Prior to the decision by the Supreme Court some of the Circuit Courts had held otherwise. Hoyne v. U. S., 38 Fed. 542; Rand v. U. S., 36 Fed. 671; Bell v. U. S., 35 Fed. 889; Gardner v. U. S., 25 Ct. Cl. 24.

<sup>68</sup> The Ship Concord, 27 Ct. Cl. 142. See also U. S. v. Babbitt, 1 Black 55, 17 U. S. (L. ed.) 94.

<sup>69</sup> Per Mr. Justice Miller in Peabody v. Stark, 16 Wall. 242, 21 U. S. (L. ed.) 311.

<sup>70</sup> Henderson's Case, 4 Ct. Cl. 83, quoting Davison v. Gill, 1 East 64; Stovall v. U. S., 26 Ct. Cl. 226; *In re Comstock*, 3



and they must be followed or the acts done will be invalid.<sup>71</sup> An act of Congress providing for the reimbursement of persons named for taxes unlawfully collected from them was construed as vesting no discretion to withhold the money.<sup>72</sup> Provisions in a statute prescribing the manner of selling property assigned for the benefit of creditors were held to be mandatory.<sup>73</sup> "Shall" in a statute prescribing the mode of exercising the right of eminent domain is mandatory.<sup>74</sup> A state auditor "authorized and required" by statute to transfer moneys to the sinking fund and thereupon to call in for payment a like amount of state bonds was held to have no discretion in the matter.<sup>75</sup> An act of Congress providing that "it shall be the duty" of certain heads of departments to cause government contracts to be reduced to writing operates as a statute of frauds and makes contracts not in writing void;<sup>76</sup> "a matter of such great public importance was never intended to be left to the discretion of those whose conduct it was intended to control and regulate."<sup>77</sup> An act of Congress requiring the chief of a bureau to submit estimates of the cost of certain proposed work and to perform the work if his estimates were lower than the proposals of other bidders was pronounced mandatory in its provisions.<sup>78</sup> The act of Congress providing that federal courts "shall amend" every defect and want of form is mandatory to the extent of its positive requirements.<sup>79</sup> A provision in the federal statutes that where a person is indicted for a capital offense a "copy of the indictment and list of the jurors and witnesses shall be delivered to him," being enacted for his benefit, is mandatory to the government and the trial cannot lawfully proceed in disregard of the statute.<sup>80</sup> In a case where the word "shall" was construed in its ordinary sense the court concluded that "when a statute gives a new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the act should be strictly construed; and the validity of all acts done under authority of such an act will depend upon a compliance with its terms. In respect to such acts the steps pointed out for the acquisition, preservation, and enforcement of the remedies provided should be considered as mandatory, rather than optional."<sup>81</sup> "When a government declares that certain specified acts must be done, in order to a citizen's becoming entitled to a gratuity out of the public treasury, to which, aside from that law, he would have no right, every one of the acts must be done before he can claim the gratuity."<sup>82</sup> Certain statutes regulating the form of policies of insurance,

Sawyer, 218, 6 Fed. Cas. No. 3,078. See also *U. S. v. De Visser*, 10 Fed. 642.

71. *French v. Edwards*, 13 Wall. 511, 20 U. S. (L. ed.) 702; *Lyon v. Alley*, 130 U. S. 184, 9 S. Ct. 480, 32 U. S. (L. ed.) 899; *Powder River Cattle Co. v. Custer County*, 45 Fed. 323. See also *Erhardt v. Schroeder*, 155 U. S. 128, 15 S. Ct. 45, 39 U. S. (L. ed.) 94.

72. *U. S. v. Jordan*, 113 U. S. 418, 5 S. Ct. 585, 28 U. S. (L. ed.) 1013.

73. *Jaffray v. McGehee*, 107 U. S. 361, 2 S. Ct. 367, 27 U. S. (L. ed.) 495.

74. *Madison v. Daley*, 58 Fed. 751.

75. *Ralston v. Crittenden*, 13 Fed. 508.

76. *McLaughlin v. U. S.*, 36 Ct. Cl. 177 [citing *Clark v. U. S.*, 95 U. S. 539, 24 U.

S. (L. ed.) 518; *South Boston Iron Co. v. U. S.*, 118 U. S. 37, 6 S. Ct. 928, 30 U. S. (L. ed.) 69]; *Henderson's Case*, 4 Ct. Cl. 75.

77. *Per Casey*, C. J., in *Henderson's Case*, 4 Ct. Cl. 83.

78. 20 Op. Atty.-Gen. 132 (Miller, 1891).

79. *Thomas's Motion*, 15 Ct. Cl. 335.

80. *Logan v. U. S.*, 144 U. S. 304, 12 S. Ct. 617, 36 U. S. (L. ed.) 429, citing *U. S. v. Stewart*, 2 Dall. 343, 1 U. S. (L. ed.) 408, and *U. S. v. Curtis*, 4 Mason 232, 25 Fed. Cas. No. 14,905.

81. *Campbellsville Lumber Co. v. Hulbert*, (C. C. A.) 112 Fed. 724.

82. *Per Drake*, C. J., in *Davis's Case*, 17 Ct. Cl. 301.

and containing prohibitory words, were held to be absolutely controlling;<sup>83</sup> and prohibitions of forfeiture of a policy until a stated time after notice "are not subject to be set aside or waived either by the company, or the assured, or by both together."<sup>84</sup>

**7. Permissive words as mandatory.**— In the leading federal case giving mandatory construction to statutes an act of a state legislature provided that county supervisors "may, if deemed advisable," levy a special tax to pay debts of the county which the current revenues were insufficient to pay, and the court held that a judgment creditor was entitled to a mandamus to compel the levy of a tax of sufficient amount to satisfy his judgment. The conclusion deduced from the authorities by Mr. Justice Swayne was "that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to its aid, and who would otherwise be remediless."<sup>85</sup> Authority given to a municipal corporation to sell land for taxes is imperative as to its provisions respecting the quantity to be sold if such construction is necessary to prevent sacrifice and speculation.<sup>86</sup> An act of Congress authorizing the secretary of agriculture to make rules and regulations to prevent the transportation of infected cattle, etc., was held to impose a duty, under the general rule that "permissive words in a statute are peremptory when used to clothe a public officer with power to do an act which concerns the public interest."<sup>87</sup> Under an act by which the secretary of war was "authorized to reopen the settlement made by the United States" with a certain railroad company, the exercise of the power was adjudged to be imperative upon application by the party interested.<sup>88</sup> The provision in a federal statute that the Court of Claims "may" grant a new trial on behalf of the United States upon such evidence "as shall satisfy the court that," etc., imposes an absolute duty to order a new trial in a case coming within the terms of the statute.<sup>89</sup>

**8. Directory: generally.**— But while the word "may," or other permissive language in a statute, is sometimes construed as imposing a duty rather than conferring a discretion, that rule of construction is by no means

83. *Equitable L. Assur. Soc. v. Clements*, 140 U. S. 226, 11 S. Ct. 822, 35 U. S. (L. ed.) 497.

84. *Equitable L. Assur. Soc. v. Nixon*, (C. C. A.) 81 Fed. 802.

85. *Rock Island County v. U. S.*, 4 Wall. 435, 18 U. S. (L. ed.) 419.

The case was followed under similar circumstances in *Galena v. Amy*, 5 Wall. 705, 18 U. S. (L. ed.) 560; *Boswell v. Big Vein Pocahontas Coal Co.*, 217 Fed. 822; *U. S. v. Cornell*, (C. C. A.) 137 Fed. 455; *Kent v. U. S.*, (C. C. A.) 113 Fed. 232. See also *Provisional Municipality v. Lehman*, (C. C. A.) 57 Fed. 324; *Ralston v. Crittenden*, 13 Fed. 512.

86. *Mason v. Fearson*, 9 How. 248, 13 U. S. (L. ed.) 125, criticised in 8 Op.

Atty.-Gen. 568 (Cushing, 1896). See also *Steads v. Course*, 4 Cranch 403, 2 U. S. (L. ed.) 660.

87. *Per Attorney-General Olney* in 21 Op. Atty.-Gen. 167, citing *Reg. v. Tithe Com'rs*, 14 Q. B. 459, 68 E. C. L. 459.

88. 15 Op. Atty.-Gen. 621 (Phillips, Sol.-Gen., 1877).

89. *Henry's Motion*, 15 Ct. Cl. 166, where the court said: "Where a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*, *Rex v. Barlow*, 2 Salk. 609; and when a statute confers authority to do a judicial act in a prescribed case it is imperative on the court to exercise the authority when the case arises."

invariable, and its application depends on the context of the statute, and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty.<sup>90</sup> Where the act to be done affects no third persons, and is not clearly beneficial to them or the public, the words "may" do an act or it is "lawful" to do it, do not mean "must," but rather indicate an intent in the legislature to confer a discretionary power.<sup>91</sup> Where the President was "authorized" by an act of Congress to reconsider a certain contract theretofore made by him, the language was not mandatory in its legal effect.<sup>92</sup> And where a statute conferred "power" upon county supervisors to cause bonds to be issued when the people voted in favor of railroad aid, "we are not at liberty," said the court, "to say that the legislature means such vote to be a positive command to exercise that power without regard to the circumstances arising after the expression of the popular will."<sup>93</sup>

**9. Mandatory words as directory.**—"It is only where it is necessary to give effect to the clear policy and intention of the legislature that such a liberty can be taken with the plain words of a statute," as to construe the word "may" to mean "must."<sup>94</sup> Mr. Justice Story, speaking for the court in a case where it was held that the word "may" in a bank charter merely gave a discretionary power, said that "no general rule can be laid down upon this subject further than that that exposition ought to be adopted in this as in other cases, which carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provision."<sup>95</sup> "The protection of the convenience only of a taxpayer," said Mr. Justice Shiras, "is not of such a vital nature as to authorize a court to treat a statute primarily directed to public officers for their guidance, and the substantial protection of the government, as mandatory, and to render official acts not in strict conformity with the statute as void. The protection must be substantial, and must be intended as a guard of rights or property."<sup>96</sup> And Mr. Justice Field said, "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected."<sup>97</sup> Provisions regulating the time, form and mode of proceeding by courts and

90. *U. S. v. Thoman*, 156 U. S. 359, 15 S. Ct. 378, 39 U. S. (L. ed.) 450.

91. *Per* Justice Woodbury in *Mason v. Fearson*, 9 How. 259, 13 U. S. (L. ed.) 125. See also *Minor v. Mechanics Bank*, 1 Pet. 46, 7 U. S. (L. ed.) 47.

92. 8 Op. Atty.-Gen. 41 (Cushing, 1856).

93. *Wadsworth v. Eau Claire County*, 102 U. S. 538, 26 U. S. (L. ed.) 221.

94. *Per* Justice Grier in *Thompson v. Carroll*, 22 How. 434, 16 U. S. (L. ed.) 387. See also *Apperson v. Memphis*, 2 Flipp. 372, 1 Fed. Cas. No. 497; 21 Op. Atty.-Gen. 420 (Harmon, 1896); 8 Op. Atty.-Gen. 546, containing an elaborate

discussion by Attorney-General Cushing on the subject of mandatory and directory provisions in statutes.

95. *Minor v. Mechanics Bank*, 1 Pet. 64, 7 U. S. (L. ed.) 47.

96. *Erhardt v. Schroeder*, 155 U. S. 129, 15 S. Ct. 45, 39 U. S. (L. ed.) 94, *citing* *Cooley on Taxation*, 215, 216.

97. *French v. Edwards*, 13 Wall. 511, 20 U. S. (L. ed.) 702. See also *Semmes's Case*, 14 Ct. Cl. 493; *U. S. v. Ranlett*, 172 U. S. 142, 19 S. Ct. 114, 43 U. S. (L. ed.) 393; *Floyd's Case*, 2 Ct. Cl. 429, where the general subject is discussed at much length.

public officers are generally to be deemed directory, even though the word "shall" be used in the statute.<sup>98</sup> Mr. Justice Story said that "whenever a statute gives discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him sole and exclusive judge of the existence of those facts."<sup>99</sup> So an act of Congress providing that the lease of certain buildings "shall be continued if the said buildings shall be made fire-proof by the owners thereof to the satisfaction of the said secretary" was held to vest a complete discretion in the secretary.<sup>1</sup> In the federal statute providing that the clerk of court shall "insert the names of as many witnesses in a cause in a subpoena as convenience in serving the same will permit," the last part of the clause implies that the provision is directory and not mandatory.<sup>2</sup> A provision in an act of Congress that certain officers "shall be present and certify to the delivery of all goods or money required to be paid or delivered to the Indians," was construed as directory to the officers and not mandatory upon the vendors of the goods.<sup>3</sup> An act prescribing the form and purport of official bonds to be taken by the head of a department carries no implication that all other bonds not taken in the prescribed form shall be utterly void.<sup>4</sup>

### *Judicial Notice*

**10. Federal Constitution; statutes; treaties; proclamations.**—Every court takes judicial notice, without pleading or proof, of the Constitution of the United States,<sup>5</sup> the public statutes enacted by Congress,<sup>6</sup> the treaties of the United States,<sup>7</sup> and proclamations by the President.<sup>8</sup>

**98.** *In re Stein*, (C. C. A.) 105 Fed. 750, holding that a court of bankruptcy did not lose jurisdiction where a subpoena to answer the original petition was not served in compliance with the provisions of the bankruptcy act of 1898. See also *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 301, 23 U. S. (L. ed.) 898; *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 24 U. S. (L. ed.) 71; *Labadie v. U. S.*, 31 Ct. Cl. 436; *Woolridge v. McKenna*, 8 Fed. 650; *Thomas's Motion*, 15 Ct. Cl. 335.

**99.** *Martin v. Mott*, 12 Wheat. 31, 6 U. S. (L. ed.) 537. See also 8 Op. Atty.-Gen. 39, 111 (Cushing, 1856).

**1.** *Semmes's Case*, 14 Ct. Cl. 493. See also 21 Op. Atty.-Gen. 420 (Harmon, 1896), for a similar case; 21 Op. Atty.-Gen. 391 (Harmon, 1896).

**2.** *Carroll v. U. S.*, 31 Ct. Cl. 314.

**3.** *Belt's Case*, 15 Ct. Cl. 92.

**4.** *U. S. v. Bradley*, 10 Pet. 343, 9 U. S. (L. ed.) 448; *U. S. v. Linn*, 15 Pet. 290, 10 U. S. (L. ed.) 742; *U. S. v. Hodson*, 10 Wall. 395, 19 U. S. (L. ed.) 937; *U. S. v. Humason*, 5 Sawy. 537, 26 Fed. Cas. No. 15,420. See also for an application of the same principle *U. S. Bank v. Dandridge*, 12 Wheat. 64, 6 U. S. (L. ed.) 552.

**5.** *Furman v. Nichol*, 8 Wall. 57, 19 U. S. (L. ed.) 370; *Central Bank v. Tayloe*, 2 Cranch 423, 5 Fed. Cas. No. 2,548; *Marbury v. Madison*, 1 Cranch 137, 2 U. S. (L. ed.) 60; *Young v. Montgomery, etc., R. Co.*, 2 Woods 612, 30 Fed. Cas. No. 18,166. See also *Jones v. U. S.*, 137 U. S. 202, 11 S. Ct. 80, 34 U. S. (L. ed.) 691.

**6.** *Missouri, etc., R. Co., v. Wulf*, 226 U. S. 570, 33 S. Ct. 135, 57 U. S. (L. ed.) 355, *affirming* (C. C. A.) 192 Fed. 919; *Gardner v. Collector*, 6 Wall. 507, 18 U. S. (L. ed.) 890; *Bruer v. U. S.*, (C. C. A.) 202 Fed. 98; *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, 37 Fed. 129; *U. S. v. Johnson*, 2 Sawy. 482, 26 Fed. Cas. No. 15,488; *In re Muller*, *Deady* 519, 17 Fed. Cas. No. 9,912; *U. S. v. Randall*, *Deady* 524, 27 Fed. Cas. No. 16,118.

**7.** *U. S. v. Schooner Peggy*, 1 Cranch 103, 2 U. S. (L. ed.) 49; *Denn v. Harnden*, 1 Paine 60, 9 Fed. Cas. No. 4,819.

**8.** *Armstrong v. U. S.*, 13 Wall. 154, 20 U. S. (L. ed.) 614; *Pargoud v. U. S.*, 13 Wall. 156, 20 U. S. (L. ed.) 646; *Jenkins v. Collard*, 145 U. S. 546, 12 S. Ct. 868, 36 U. S. (L. ed.) 812, *citing Jones v. U. S.*, 137 U. S. 202, 11 S. Ct. 80, 34 U. S. (L. ed.) 691.

Judicial notice of an act of Congress extends not only to the existence of the act, but to the time when it was signed by the President.<sup>9</sup>

**11. Departmental regulations.**—The general rule is that “wherever by the express language of any act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice.”<sup>10</sup> Such rules and regulations duly prescribed have the force of law.<sup>11</sup>

**12. Laws of states and territories: notice by courts of original jurisdiction.**—All federal courts when exercising original jurisdiction<sup>12</sup> take notice without pleading or proof of the Constitution and public<sup>13</sup> statutes not only of the state wherein they are sitting<sup>14</sup> but of every other state

9. *Gardner v. Collector*, 6 Wall. 499, 18 U. S. (L. ed.) 890.

10. *Caha v. U. S.*, 152 U. S. 222, 14 S. Ct. 513, 38 U. S. (L. ed.) 415, where Mr. Justice Brewer said: “Without attempting to notice all the cases bearing upon the general question of public notice we may refer to the following: *U. S. v. Teschmaker*, 22 How. 405, 16 U. S. (L. ed.) 353; *Romero v. U. S.*, 1 Wall. 721, 17 U. S. (L. ed.) 627; *Armstrong v. U. S.*, 13 Wall. 154, 20 U. S. (L. ed.) 614; *Jones v. U. S.*, 137 U. S. 202, 11 S. Ct. 80, 34 U. S. (L. ed.) 691; *Knight v. U. S. Land Assoc.*, 142 U. S. 169, 12 S. Ct. 258, 35 U. S. (L. ed.) 974; *Jenkins v. Collard*, 145 U. S. 546, 12 S. Ct. 868, 36 U. S. (L. ed.) 812.” To the same point see *Bruce v. U. S.*, (C. C. A.) 202 Fed. 98; *U. S. v. Van Wert*, 195 Fed. 974; *U. S. v. Louisville, etc., R. Co.*, 165 Fed. 936; *U. S. v. Moody*, 164 Fed. 269; *Numberger v. U. S.*, (C. C. A.) 156 Fed. 721; *U. S. v. Burkett*, 150 Fed. 208; *Wilkins v. U. S.*, (C. C. A.) 96 Fed. 837; *U. S. v. Flournoy Live-Stock, etc., Co.*, 71 Fed. 578. See further in the same line *The Paquete Habana*, 175 U. S. 696, 20 S. Ct. 290, 44 U. S. (L. ed.) 320; *Heath v. Wallace*, 138 U. S. 584, 11 S. Ct. 380, 34 U. S. (L. ed.) 1063; *Southern Pac. R. Co. v. Groeck*, 68 Fed. 612.

11. *U. S. v. Eaton*, 144 U. S. 688, 12 S. Ct. 764, 36 U. S. (L. ed.) 591; *Wilkins v. U. S.*, (C. C. A.) 96 Fed. 841.

12. By “original jurisdiction” we mean to include jurisdiction by removal from state courts, because the acts of Congress regulating removal of causes provide that the removed cause shall proceed in the federal court as if it had been originally commenced there. 18 Stat. at L. 472, c. 137, § 6 (now Judicial Code, § 29), and 18 ENCYC. OF PL. AND PR., p. 357 *et seq.* But see a remark of the court in *Union Pac. R. Co. v. Wyler*, 158 U. S. 296, 15 S. Ct. 877, 39 U. S. (L. ed.) 983, which appears to express the view that in a removed case the judicial notice of the

federal court extends no farther than did the judicial notice of the court whence the cause was removed. It is doubtful if the court meant to be so understood, for if the proposition is sound the judicial notice taken by the Supreme Court in the exercise of its appellate jurisdiction over federal Circuit Courts must be equally limited where the Circuit Court acquired jurisdiction by removal, and, so far as we are aware, the Supreme Court has never made any distinction between original and removed cases in respect of the extent of its judicial notice or review of judgments and decrees of Circuit Courts as laid down in the next section of the text.

In a removed case the federal Circuit Court of course takes judicial notice of the constitution and public laws of the state whence the case was removed. *State v. Coosaw Min. Co.*, 45 Fed. 804.

**13. Private acts and special proceedings** of the legislature of the state cannot be judicially noticed by a federal court sitting therein if the state statute does not require them to be judicially noticed by the state courts. *Leland v. Wilkinson*, 6 Pet. 317, 8 U. S. (L. ed.) 412.

But courts take judicial notice of public local statutes. *Bealmear v. Hutchins*, 134 Fed. 257.

**14. Martin v. Baltimore, etc., R. Co.**, 151 U. S. 678, 14 S. Ct. 533, 38 U. S. (L. ed.) 311; *Unity v. Burrage*, 103 U. S. 447, 26 U. S. (L. ed.) 405; *Luther v. Borden*, 7 How. 46, 12 U. S. (L. ed.) 581; *U. S. v. Turner*, 11 How. 668, 13 U. S. (L. ed.) 857; *Holly v. McDowell, etc., Co.*, (C. C. A.) 203 Fed. 668; *Davidow v. Pennsylvania R. Co.*, 85 Fed. 943; *Davenport v. Moore*, 74 Fed. 946; *Swann v. Swann*, 21 Fed. 300. See also *Mills v. Green*, 159 U. S. 657, 16 S. Ct. 132, 40 U. S. (L. ed.) 293; *The Borrowdale*, 39 Fed. 376; and for an exception to the rule under peculiar circumstances, see *Griffing v. Gibb*, 2 Black 519, 17 U. S. (L. ed.) 353.

in the Union<sup>15</sup> and of every United States territory.<sup>16</sup> They take notice in like manner of the public statutes in force in the District of Columbia,<sup>17</sup> of all private laws of a state wherein they are sitting if by the statutes of that state its own courts are bound to take judicial notice thereof,<sup>18</sup> of public statutes in force in the states before the adoption of the Federal Constitution;<sup>19</sup> and they have taken judicial notice of the laws of Mexico in force in territory acquired afterward by the republic of Texas and then by the United States,<sup>20</sup> of the laws and regulations of Mexico prior to the

15. *Gormley v. Bunyan*, 138 U. S. 635, 11 S. Ct. 453, 34 U. S. (L. ed.) 1086; *New York Fourth Nat. Bank v. Franklyn*, 120 U. S. 751, 7 S. Ct. 757, 30 U. S. (L. ed.) 825; *Roberts v. Reilly*, 116 U. S. 96, 6 S. Ct. 291, 29 U. S. (L. ed.) 544; *Mitchell v. Overman*, 103 U. S. 64, 26 U. S. (L. ed.) 369; *Elwood v. Flannigan*, 104 U. S. 568, 26 U. S. (L. ed.) 842; *Pennington v. Gibson*, 16 How. 65, 14 U. S. (L. ed.) 847; *Cheever v. Wilson*, 9 Wall. 121, 19 U. S. (L. ed.) 604; *Owings v. Hull*, 9 Pet. 625, 9 U. S. (L. ed.) 246; *Baltimore & O. R. Co. v. Reed*, (C. C. A.) 223 Fed. 689; *Mather v. Stokely*, (C. C. A.) 218 Fed. 764; *Ritterbusch v. Atchison, etc., R. Co.*, (C. C. A.) 198 Fed. 46; *Denver, etc., R. Co. v. Wagner*, (C. C. A.) 167 Fed. 75; *Mutual L. Ins. Co. v. Hill*, (C. C. A.) 97 Fed. 269; *Andruss v. People's Bldg., etc., Assoc.*, (C. C. A.) 94 Fed. 580; *Barry v. Snowden*, 106 Fed. 573; *L'Engle v. Gates*, 74 Fed. 513; *Noonan v. Delaware, etc., R. Co.*, 68 Fed. 1; *Hathaway v. Mutual L. Ins. Co.*, 99 Fed. 534; *Knower v. Haines*, 31 Fed. 514; *Newberry v. Robinson*, 36 Fed. 843; *Merchants' Exch. Bank v. McGraw*, (C. C. A.) 59 Fed. 977; *Western, etc., R. Co. v. Roberson*, (C. C. A.) 61 Fed. 594; *Taylor v. Holmes*, 14 Fed. 504; *Bennett v. Bennett*, *Deady* 309, 3 Fed. Cas. No. 1,318; *Jasper v. Porter*, 2 McLean 579, 13 Fed. Cas. No. 7,229; *Gordon v. Hobart*, 2 Sumn. 405, 10 Fed. Cas. No. 5,609; *Pullan v. Cincinnati, etc., R. Co.*, 4 Biss. 41, 20 Fed. Cas. No. 11,461. See also *Lloyd v. Matthews*, 155 U. S. 227, 15 S. Ct. 70, 39 U. S. (L. ed.) 128; *Hanley v. Donoghue*, 116 U. S. 6, 6 S. Ct. 242, 29 U. S. (L. ed.) 535; *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 7 S. Ct. 398, 30 U. S. (L. ed.) 519; *Starr v. Moore*, 3 McLean 354, 22 Fed. Cas. No. 13,315.

"The law of every state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof." *Lamar v. Micou*, 114 U. S. 223, 5 S. Ct. 857, 29 U. S. (L. ed.) 94.

In *Owings v. Hull*, 9 Pet. 625, 9 U. S. (L. ed.) 246, holding that the federal Circuit Court sitting in Maryland should take judicial notice of a Louisiana statute, Mr. Justice Story said: "The Circuit Courts of the United States are created by Congress, not for the purpose of administering

the local law of a single state alone, but to administer the laws of all the states in the Union, in cases to which they respectively apply. The judicial power conferred on the general government, by the Constitution, extends to many cases arising under the laws of the different states. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. That jurisprudence is then, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established, but it is to be judicially taken notice of by these courts."

**Statutory jurisdiction of courts.**—In debt on a decree rendered by the Supreme Court of New York, the action of debt being brought in the federal Circuit Court for the District of Maryland, it was held that the Circuit Court should take judicial notice that the Supreme Court of New York is a court of general jurisdiction; and therefore the declaration in the action was sufficient without averment that the subject-matter of the decree was within the jurisdiction of the court which pronounced it. To precisely the same point of pleading in respect of a plea in a Circuit Court of Ohio, setting up a judgment of a state court in Michigan, see *Woodworth v. Spofford*, 2 McLean 175, 30 Fed. Cas. No. 18,020.

16. *Denver, etc., R. Co. v. Wagner*, (C. C. A.) 167 Fed. 75; *Breed v. Northern Pac. R. Co.*, 35 Fed. 643.

17. *Breed v. Northern Pac. R. Co.*, 35 Fed. 643.

18. *Case v. Kelly*, 133 U. S. 21, 10 S. Ct. 216, 33 U. S. (L. ed.) 513; *Covington Drawbridge Co. v. Shepherd*, 20 How. 232, 15 U. S. (L. ed.) 896; *Junction R. Co. v. Ashland Bank*, 12 Wall. 226, 20 U. S. (L. ed.) 385; *Beatty v. Knowler*, 4 Pet. 167, 7 U. S. (L. ed.) 813; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 678, 14 S. Ct. 533, 38 U. S. (L. ed.) 311; *Pullan v. Cincinnati, etc., R. Co.*, 4 Biss. 41, 20 Fed. Cas. No. 11,461.

19. *Loree v. Abner*, (C. C. A.) 57 Fed. 159. See also *Hinde v. Vattier*, 5 Pet. 398, 8 U. S. (L. ed.) 168.

20. *U. S. v. Perot*, 98 U. S. 430, 25 U. S. (L. ed.) 251; *Sandoval v. Priest*, (C. C.

cessions under the treaty of Guadalupe Hidalgo and the treaty of December 30, 1853, affecting title to land in New Mexico,<sup>21</sup> of the laws of California existing before that territory was acquired by the United States,<sup>22</sup> and of the Spanish laws which formerly prevailed in Louisiana,<sup>23</sup> and in our insular possessions.<sup>24</sup> Whenever the court takes judicial notice, without proof, of constitutions and public statutes, it takes notice of public general elections of members of state legislatures or of a convention to revise the fundamental law of a state as well as of the times of the commencement of the sitting of those bodies and of the dates when their acts take effect.<sup>25</sup>

**13. Same — notice by courts of appellate jurisdiction.**—The United States Supreme Court, in the exercise of its general appellate jurisdiction from a lower federal court, takes judicial notice of the constitution and public laws of every state of the Union<sup>26</sup> because, as hereinbefore stated, those laws are known to the court below as laws alone, needing no averment or proof.<sup>27</sup> Undoubtedly, the same judicial notice is taken by the Circuit Courts of Appeals.<sup>28</sup> On review of a judgment or decree of a court of the District of Columbia the Supreme Court takes the same judicial notice of state laws as in the exercise of its appellate jurisdiction over other courts created by Congress.<sup>29</sup> But on a writ of error to the highest court of a state, in which the revisory power of the Supreme Court is limited to determining whether a question of law depending upon the Constitution, laws, or treaties of the United States has been erroneously decided by the state court upon the facts before it—while the law of the state, being known to its courts as law, is of course within the judicial notice of the Supreme Court at the hearing on error<sup>30</sup>—yet, as in the state court the laws of another state are but facts, requiring to be proved in order to be considered, the Supreme Court does not take judicial notice of them,<sup>31</sup>

A.) 210 Fed. 814. See also *Brownsville v. Cavazos*, 2 Woods 293, 4 Fed. Cas. No. 2,043; *U. S. v. Chaves*, 159 U. S. 452, 16 S. Ct. 57, 40 U. S. (L. ed.) 215.

21. *U. S. v. Chaves*, 159 U. S. 452, 16 S. Ct. 57, 40 U. S. (L. ed.) 215.

22. *Fremont v. U. S.*, 17 How. 557, 15 U. S. (L. ed.) 241; *Bouldin v. Phelps*, 30 Fed. 555.

23. *U. S. v. Turner*, 11 How. 668, 13 U. S. (L. ed.) 857.

24. *Municipality of Ponce v. Roman Catholic Church*, 210 U. S. 296, 28 S. Ct. 737, 52 U. S. (L. ed.) 1068.

25. *Mills v. Green*, 159 U. S. 657, 16 S. Ct. 132, 40 U. S. (L. ed.) 293.

26. *New York Fourth Nat. Bank v. Franklyn*, 120 U. S. 751, 7 S. Ct. 757, 30 U. S. (L. ed.) 825; *Hanley v. Donoghue*, 116 U. S. 6, 6 S. Ct. 242, 29 U. S. (L. ed.) 535; *Lamar v. Micou*, 114 U. S. 223, 5 S. Ct. 857, 29 U. S. (L. ed.) 94; *Mitchell v. Overman*, 103 U. S. 64, 26 U. S. (L. ed.) 369; *Course v. Stead*, 4 Dall. 27, 1 U. S. (L. ed.) 724, note; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 678, 14 S. Ct. 533, 38 U. S. (L. ed.) 311, where the court said: "In West Virginia, statutes of that state or of the parent state of Virginia, creating railroad corporations, or licensing

or authorizing them to exercise their franchises within the state, are deemed public acts, of which the courts take judicial notice without proof. \* \* \* Doubtless, therefore, such statutes must be judicially noticed by the Circuit Court of the United States sitting within the state of West Virginia and administering its laws, and by this court on writ of error to that court."

Private laws of a state are not judicially noticed by the Supreme Court. *Leland v. Wilkinson*, 6 Pet. 317, 8 U. S. (L. ed.) 412.

27. See the preceding section.

28. *Bond v. Farwell*, (C. C. A.) 72 Fed. 58; *Bohlander v. Heikes*, (C. C. A.) 168 Fed. 886.

29. *Cheever v. Wilson*, 9 Wall. 121, 19 U. S. (L. ed.) 604.

30. *Hanley v. Donoghue*, 116 U. S. 6, 6 S. Ct. 242, 29 U. S. (L. ed.) 535; *Pennie v. Reis*, 132 U. S. 470, 10 S. Ct. 149, 33 U. S. (L. ed.) 426.

31. *Allen v. Alleghany Co.*, 196 U. S. 458, 25 S. Ct. 311, 49 U. S. (L. ed.) 551; *Eastern Building, etc., Assoc. v. Ebaugh*, 185 U. S. 114, 22 S. Ct. 566, 46 U. S. (L. ed.) 830; *Hanley v. Donoghue*, 116 U. S. 6, 6 S. Ct. 242, 29 U. S. (L. ed.) 535; *Lloyd v. Matthews*, 155 U. S. 222, 15 S.

unless they are made part of the record sent up,<sup>32</sup> or unless by the local law of the state its highest court is required to take judicial notice of the laws of other states.<sup>33</sup>

**14. Foreign laws.**—The rule is well established at common law, in equity, and in the admiralty, that foreign laws, written or unwritten, must be proved as facts in the courts of this country. "The court cannot be charged with knowledge of foreign laws."<sup>34</sup> It was held, however, that a court of admiralty would take judicial notice of a decree "promulgated in the United States as the law of France by the joint act of that department which is entrusted with foreign intercourse, and of that which is invested with the powers of war."<sup>35</sup>

## II. RULES OF INTERPRETATION

### *Generally*

**15. Object and utility of rules.**—"We must not lose sight of the fact," said Judge Sanborn, "that the sole object to be sought in the interpretation of a law is the intention of the legislative body which enacted it, and that rules of construction are only serviceable as they assist us to attain that object."<sup>36</sup> The controlling rule of decision in applying the statute in any particular case is, that, whenever the intention of the legislature can be discovered from the words employed, in view of the subject-matter and the surrounding circumstances, it ought to prevail unless it lead to absurd or irrational conclusions.<sup>37</sup> "Every technical rule as to the con-

Ct. 70, 39 U. S. (L. ed.) 128; *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 7 S. Ct. 398, 30 U. S. (L. ed.) 519.

"In the Supreme Court of the United States, when acting under its appellate jurisdiction, whatever was matter of fact in the state court whose judgment or decree is under review is matter of fact there. And whenever a court of one state is required to ascertain what effect a public act of another state has in that state, the law of such other state must be proved as a fact." *Lloyd v. Matthews*, 155 U. S. 227, 15 S. Ct. 70, 39 U. S. (L. ed.) 128.

**32.** As in *Green v. Van Buskirk*, 7 Wall. 139, 19 U. S. (L. ed.) 109.

**33.** In such a case "this court also, on writ of error, might take judicial notice of them," said the court in *Hanley v. Donoghue*, 116 U. S. 7, 6 S. Ct. 242, 29 U. S. (L. ed.) 535.

**34.** *Strother v. Lucas*, 6 Pet. 768, 8 U. S. (L. ed.) 573; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 445, 9 S. Ct. 469, 32 U. S. (L. ed.) 788; *Dainese v. Hale*, 91 U. S. 13, 23 U. S. (L. ed.) 190; *Yang-Tze Ins. Assoc. v. Furnace, etc., Co.*, (C. C. A.) 215 Fed. 859; *Guaranty Trust Co. v. Hannay*, (C. C. A.) 210 Fed. 810; *Barrielle v. Bettman*, 199 Fed. 838; *Crosby v. Cuba R. Co.*, 158 Fed. 144; *The Matterhorn*, (C. C. A.) 128 Fed. 863; *Dickerson v. Matheson*, 50 Fed. 76.

Cuba during the period of its military government by the United States was a foreign country within that rule. Good-

year Tire, etc., *Co. v. Rubber Tire Wheel Co.*, 164 Fed. 869.

**35.** *Talbot v. Seeman*, 1 Cranch 38, 2 U. S. (L. ed.) 15, wherein the court decided in favor of judicial notice the "question \* \* \* whether the public laws of a foreign nation, on a subject of common concern to all nations promulgated by the governing powers of a country, can be noticed as law by a court of admiralty of that country, or must be still further proved as a fact."

**36.** *In re Clerkship of Circuit Ct.*, 90 Fed. 251, citing *Kohlsaat v. Murphy*, 96 U. S. 160, 24 U. S. (L. ed.) 844; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 S. Ct. 563, 48 U. S. (L. ed.) 860; *White v. U. S.*, 191 U. S. 545, 24 S. Ct. 171, 48 U. S. (L. ed.) 295; *Interstate, etc., Co. v. Freeborn County*, (C. C. A.) 158 Fed. 270; *Miller v. U. S.*, (C. C. A.) 133 Fed. 337. See also *Butler v. Russel*, 3 Cliff. 255, 4 Fed. Cas. No. 2,243; *Budd v. Budd*, 59 Fed. 741; *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. 322.

**37.** *Per Justice Clifford in Kohlsaat v. Murphy*, 96 U. S. 160, 24 U. S. (L. ed.) 844.

"There is no inflexible rule in the interpretation of statutes. Courts, in attempting to construe statutes, are often 'born unto trouble as the sparks fly upwards.' It has been said of the statute of frauds of England, which was at the time of its adoption considered perfect in its parts, and has been since adopted in most,



struction or force of particular terms," said Mr. Justice Story, "must yield to the clear expression of the paramount will of the legislature."<sup>38</sup> Judge Lacombe remarked that "it is perfectly possible to make almost anything out of a tariff act by construction without violating rules for the interpretation of statutes."<sup>39</sup> And in another case the same experienced judge observed that "the more frequently we are called upon to interpret statutes, the greater likelihood there is of developing a tendency to overstrained construction."<sup>40</sup> When justices of the United States Supreme Court (or of any other court) divide on a question of statutory construction the minority rarely have difficulty in finding well-settled rules of interpretation to support their dissent.<sup>41</sup>

**16. Province of construction: as of time of enactment.**—"Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction," said Mr. Justice Lamar, in an opinion frequently quoted.<sup>42</sup> "The cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity," said Mr. Justice Brown,

if not all, the states of the Union, that it took more decisions of the courts than there are letters in the statute to determine what it really meant. In fact, there is still some doubt existing in the minds of many jurists and authors as to whether it really has been, or ever will be, made perfectly clear." *Per* Hawley, D. J., in *in re Wise*, 93 Fed. 445.

**38.** *Wilkinson v. Leland*, 2 Pet. 662, 7 U. S. (L. ed.) 542.

**39.** *Clay v. Erhardt*, 48 Fed. 294.

**40.** *Heller v. Magone*, 38 Fed. 911, where he continued: "It is wholesome occasionally to turn back to first principles, and to appreciate the force of the old rule, again reaffirmed by the Supreme Court in *Lake County v. Rollins*, 130 U. S. 662, that to get at the thought or meaning expressed in a statute, the first resort in all cases is to the natural signification of the words in the order of the grammatical arrangement in which the framers of the instrument have passed them; and that it is a perfectly safe assumption that the framers of an act meant exactly what they said."

**41.** See, for example, the dissenting opinions in *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 S. Ct. 540, 41 U. S. (L. ed.) 1007, and *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. 467, 17 U. S. (L. ed.) 805.

**42.** *Lake County v. Rollins*, 130 U. S. 670, 9 S. Ct. 651, 32 U. S. (L. ed.) 1060. To the same effect see *Adams Express Co. v. Kentucky*, 238 U. S. 190, 35 S. Ct. 824, 59 U. S. (L. ed.) 1267; *U. S. v. McCord*, 233 U. S. 167, 34 S. Ct. 550, 58 U. S. (L. ed.) 893; *U. S. v. Lexington Mill Co.*, 232 U. S. 399, 34 S. Ct. 339, 58 U. S. (L. ed.) 658; *Luria v. U. S.*, 231 U. S. 9, 34 S. Ct. 10, 58 U. S. (L. ed.) 101; *McLean v. U. S.*, 226 U. S. 374, 33 S. Ct. 122, 57 U. S. (L.

ed.) 260, reversing 45 Ct. Cl. 95; *U. S. v. Baltimore, etc.*, R. Co., 222 U. S. 8, 32 S. Ct. 6, 56 U. S. (L. ed.) 68; *Amer. Exp. Co. v. U. S.*, 212 U. S. 522, 29 S. Ct. 315, 53 U. S. (L. ed.) 635; *White v. U. S.*, 191 U. S. 545, 24 S. Ct. 171, 48 U. S. (L. ed.) 295; *Dewey v. U. S.*, 178 U. S. 521, 20 S. Ct. 981, 44 U. S. (L. ed.) 1170; *Calderon v. Atlas Steamship Co.*, 170 U. S. 280, 18 S. Ct. 588, 42 U. S. (L. ed.) 1033; *Yerke v. U. S.*, 173 U. S. 442, 19 S. Ct. 441, 43 U. S. (L. ed.) 760; *Folsom v. U. S.*, 160 U. S. 127, 16 S. Ct. 222, 40 U. S. (L. ed.) 363; *Thornley v. U. S.*, 113 U. S. 313, 5 S. Ct. 491, 28 U. S. (L. ed.) 999; *U. S. v. Fisher*, 109 U. S. 146, 3 S. Ct. 154, 27 U. S. (L. ed.) 885; *Doggett v. Florida R. Co.*, 99 U. S. 78, 25 U. S. (L. ed.) 301; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 663, 23 U. S. (L. ed.) 336; *Texas v. Chiles*, 21 Wall. 491, 22 U. S. (L. ed.) 650; *Morton v. Nebraska*, 21 Wall. 671, 22 U. S. (L. ed.) 639; *Barnes v. Philadelphia, etc., R. Co.*, 17 Wall. 302, 21 U. S. (L. ed.) 544; *The Cherokee Tobacco*, 11 Wall. 620, 20 U. S. (L. ed.) 227; *Doe v. Considine*, 6 Wall. 480, 18 U. S. (L. ed.) 869; *U. S. v. Wiltberger*, 5 Wheat. 95, 5 U. S. (L. ed.) 37; *U. S. v. Fisher*, 2 Cranch 386, 2 U. S. (L. ed.) 304; *Johnson v. U. S.*, (C. C. A.) 215 Fed. 679; *U. S. v. Missouri, etc., R. Co.*, (C. C. A.) 213 Fed. 169; *U. S. v. Alamogordo Lumber Co.*, (C. C. A.) 202 Fed. 700; *Baker v. Swigart*, (C. C. A.) 199 Fed. 865; *U. S. v. Thompson*, 189 Fed. 838; *U. S. v. Oregon, etc., R. Co.*, 186 Fed. 861; *Mannington v. Hocking Valley R. Co.*, 183 Fed. 133; *U. S. v. Shing Shun & Co.*, 173 Fed. 844; *U. S. v. Musgrave*, 160 Fed. 700; *St. Louis, etc., R. Co. v. Delt*, (C. C. A.) 158 Fed. 937; *U. S. v. Colorado, etc., R. Co.*, (C. C. A.) 157 Fed. 321; *Franklin Sugar Refining Co.*

"that an extended review of them is quite unnecessary."<sup>43</sup> Attempted judicial construction of the unequivocal language of a statute serves only to create doubt and to confuse the judgment.<sup>44</sup> "Affirmative discussion under such circumstances," said Mr. Justice Swayne, "is not unlike argument in support of a self-evident truth. The logic may mislead or confuse. It cannot strengthen the pre-existing conviction."<sup>45</sup> "A dispute about the construction of a statute does not always make an ambiguity, and not always a legal doubt as to its meaning."<sup>46</sup> In one case the Circuit Court of Appeals said that perhaps a sufficient reason for rejecting a construction for which counsel contended was the difficulty which the court had in stating the contention in an intelligible form, as well as the substance of the argument by which counsel sought to enforce it.<sup>47</sup> "There is always a tendency," said Mr. Justice Story, "to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after one sees the results of experience."<sup>48</sup> The true rule is that statutes are to be construed as they were intended to be understood when they were passed.<sup>49</sup>

*v. U. S.*, 153 Fed. 653; *Brun v. Mann*, (C. C. A.) 151 Fed. 145; *U. S. v. Ninety-nine Diamonds*, (C. C. A.) 139 Fed. 961; *Nottage v. Sawmill Phoenix*, 133 Fed. 979; *U. S. v. Williams*, 132 Fed. 894; *U. S. v. York*, 131 Fed. 323; *Moffitt v. U. S.*, (C. C. A.) 128 Fed. 375; *Swarts v. Siegel*, (C. C. A.) 117 Fed. 18; *In re Oliver*, 109 Fed. 788; *Dodge v. Nevada Nat. Bank*, (C. C. A.) 109 Fed. 730; *In re Fixen*, (C. C. A.) 102 Fed. 298; *In re Stevenson*, 94 Fed. 118; *Shreve v. Cheesman*, (C. C. A.) 69 Fed. 789; *Knox County v. Morton*, (C. C. A.) 68 Fed. 789; *Marine v. Packham*, (C. C. A.) 52 Fed. 580; *The Samuel E. Spring*, 27 Fed. 766; *Virginia Coupon Cases*, 25 Fed. 645; *Farmers' L. & T. Co. v. Oregon, etc., R. Co.*, 24 Fed. 410; *U. S. v. Starn*, 17 Fed. 437; *U. S. v. Marks*, 2 Abb. 540, 26 Fed. Cas. No. 15,721; *U. S. v. Ragdale, Hempst.* 501, 27 Fed. Cas. No. 16,113; *Ogden v. Strong*, 2 Paine 587, 18 Fed. Cas. No. 10,460; *In re Irwine*, 1 Pa. L. J. Rep. 82, 1 Pa. L. J. 291, 13 Fed. Cas. No. 7,086; *The Schooner Alaska*, 7 Ben. (U. S.) 183, 1 Fed. Cas. No. 130; *Cross's Case*, 5 Ct. Cl. 91.

For other cases where statutes were pronounced too plain for construction, see *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 36, 15 S. Ct. 508, 39 U. S. (L. ed.) 601; *St. Paul, etc., R. Co. v. Phelps*, 137 U. S. 536, 11 S. Ct. 168, 34 U. S. (L. ed.) 767; *U. S. v. Temple*, 105 U. S. 99, 26 U. S. (L. ed.) 967; *Merritt v. Welsh*, 104 U. S. 702, 26 U. S. (L. ed.) 896; *Ketchum v. St. Louis*, 101 U. S. 315, 25 U. S. (L. ed.) 999; *Lawrence v. Caswell*, 13 How. 497, 14 U. S. (L. ed.) 235; *Southern Pac. Co. v. Schoer*, (C. C. A.) 114 Fed. 469; *Frick Co. v. Norfolk, etc., R. Co.*, (C. C. A.) 86 Fed. 738; *Barber Asphalt Paving Co. v. Denver*, (C. C. A.) 72 Fed. 345; *U. S. v. Chong Sam*, 47 Fed. 883; *U. S. v. The Sadie*, 41 Fed. 398; *Bate Refrigerat-*

*ing Co. v. Gillett*, 13 Fed. 556; *The Saratoga*, 9 Fed. 325; *U. S. v. Webber*, 1 Gall. 392, 28 Fed. Cas. No. 16,656.

"If the language be clear it is conclusive. There can be no construction where there is nothing to construe." *Per Justice Swayne in U. S. v. Hartwell*, 6 Wall. 396. 18 U. S. (L. ed.) 830.

"Construction should be reserved for doubtful language." *Per Lacombe, J.*, in *Clay v. Erhardt*, 48 Fed. 294.

43. *Hamilton v. Rathbone*, 175 U. S. 421, 20 S. Ct. 155, 44 U. S. (L. ed.) 219; *U. S. v. Lexington Mill Co.*, 232 U. S. 399, 34 S. Ct. 337, 58 U. S. (L. ed.) 658.

44. *St. Louis, etc., R. Co. v. Taylor*, 210 U. S. 281, 28 S. Ct. 616, 52 U. S. (L. ed.) 1061; *U. S. v. Alamogordo Lumber Co.*, (C. C. A.) 202 Fed. 700; *U. S. v. Lanabough*, 158 Fed. 314; *Swarts v. Siegel*, (C. C. A.) 117 Fed. 18; *Holmes v. Phenix Ins. Co.*, (C. C. A.) 98 Fed. 240; *Webber v. St. Paul City R. Co.*, (C. C. A.) 97 Fed. 144; *St. Paul, etc., R. Co. v. Sage*, (C. C. A.) 71 Fed. 47.

45. *Lewis v. U. S.*, 92 U. S. 621, 23 U. S. (L. ed.) 513.

46. *Northern Pac. R. Co. v. Sanders*, 47 Fed. 610.

47. *Ardmore Coal Co. v. Bevil*, (C. C. A.) 61 Fed. 759.

48. *Platt v. Union Pac. R. Co.*, 99 U. S. 63, 25 U. S. (L. ed.) 424.

49. *Schuyler County v. Thomas*, 98 U. S. 172, 25 U. S. (L. ed.) 88, where Mr. Justice Hunt said: "The after wisdom, obtained by unfortunate results, cannot justly be applied in their interpretation;" *Woodward v. De Graffenried*, 238 U. S. 284, 35 S. Ct. 764, 59 U. S. (L. ed.) 1310; *Louisville R. Co. v. Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297; *Platt v. Union Pac. R. Co.*, 99 U. S. 64, 25 U. S. (L. ed.) 424; *U. S. v. Union Pac. R. Co.*, 91 U. S. 81, 23 U. S. (L. ed.) 224; *U. S.*

*Legislative Intent Controlling*

**17. Rule stated.**—A legislative act is to be interpreted according to the intention of the legislature apparent upon its face.<sup>50</sup> "The intent of the lawmaker is the law,"<sup>51</sup> and the primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used.<sup>52</sup> "It may be \* \* \* that searching for legislative intent is often like 'hunting for a needle in a haystack;' but it is nevertheless the duty of courts to make the search by applying the usual magnets of construction, and drawing therefrom, through the ordinary channels of thought, such intent."<sup>53</sup> It is, however, "the intention expressed in the statute, and that alone, to which the courts may lawfully give effect. They may not assume or presume purposes and intentions that the terms of the law do not indicate, and then enact and expunge provisions to carry out those supposed intentions."<sup>54</sup>

**18. Awkward or inartistic language; verity of recitals.**—Legislatures are not bound to use any set or particular formula in the enactment of laws. Language which has a distinct meaning, however awkwardly inserted in a statute, must be held to express the legislative will as fully as though it were introduced in the most artistic manner.<sup>55</sup> "It cannot be pretended,"

*v. Oregon, etc., R. Co.*, 186 Fed. 861; *Govin v. Chicago*, 132 Fed. 848. See also *U. S. v. Detroit First Nat. Bank*, 234 U. S. 245, 34 S. Ct. 846, 58 U. S. (L. ed.) 1298; *Washington Market Co. v. Hoffman*, 101 U. S. 119, 25 U. S. (L. ed.) 782.

**50.** *Per Mr. Justice Woods* in *U. S. v. Fisher*, 109 U. S. 145, 3 S. Ct. 154, 27 U. S. (L. ed.) 885; *U. S. v. Oregon, etc., R. Co.*, 186 Fed. 861; *Wadsworth v. Boysen*, (C. C. A.) 148 Fed. 771; *U. S. v. Standard Oil Co.*, 148 Fed. 719; *McDougald v. New York L. Ins. Co.*, (C. C. A.) 146 Fed. 674; *U. S. v. Downing*, (C. C. A.) 146 Fed. 56, *reversing* 135 Fed. 250, 139 Fed. 58; *U. S. v. Ninety-nine Diamonds*, (C. C. A.) 139 Fed. 961.

**51.** *Per Mr. Justice Swayne* in *Jones v. Guaranty, etc., Co.*, 101 U. S. 626, 25 U. S. (L. ed.) 1030; *Louisville, etc., R. Co. v. Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297; *Thompson v. Thompson*, 218 U. S. 611, 31 S. Ct. 117, 54 U. S. (L. ed.) 1180; *U. S. v. Mescall*, 215 U. S. 26, 30 S. Ct. 19, 54 U. S. (L. ed.) 77; *Burton v. U. S.*, 202 U. S. 344, 26 S. Ct. 688, 50 U. S. (L. ed.) 1057; *U. S. v. Crosley*, 196 U. S. 327, 25 S. Ct. 261, 49 U. S. (L. ed.) 497; *Helwig v. U. S.*, 188 U. S. 605, 23 S. Ct. 427, 47 U. S. (L. ed.) 614; *Rogers v. U. S.*, 185 U. S. 83, 22 S. Ct. 582, 46 U. S. (L. ed.) 816; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 300, 23 U. S. (L. ed.) 898; *Van Dyke v. Geary*, 218 Fed. 111; *Soliss v. General Elec. Co.*, (C. C. A.) 213 Fed. 204; *John J. Seamon Co. v. U. S.*, (C. C. A.) 182 Fed. 573; *Shallus v. U. S.*, (C. C. A.) 162 Fed. 653; *Interstate Drainage, etc., Co. v. Freeborn County*, (C. C. A.) 158 Fed. 276; *Stevens v. Nave-McCord, etc., Co.*, (C. C. A.) 150 Fed. 71; *Govin v. Chicago*, 132 Fed. 848; *Mosle v. Bid-*

*well*, (C. C. A.) 130 Fed. 334; *Flint, etc., R. Co. v. Marine Ins. Co.*, 71 Fed. 215; *Aspley v. Murphy*, 50 Fed. 377; *In re Muser*, 49 Fed. 832. See also *Heike v. U. S.*, (C. C. A.) 192 Fed. 83.

"The intention of the lawmakers is the controlling principle, if it can be ascertained." *U. S. v. Hogg*, 111 Fed. 294.

"The meaning of the legislature constitutes the law." *Raymond v. Thomas*, 91 U. S. 715, 23 U. S. (L. ed.) 434.

**52.** *Per Mr. Justice Brewer* in *U. S. v. Goldenberg*, 168 U. S. 102, 18 S. Ct. 3, 42 U. S. (L. ed.) 394; *Chott v. Ewing*, 237 U. S. 197, 35 S. Ct. 571, 59 U. S. (L. ed.) 913; *Louisville, etc., R. Co. v. Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 662, 23 U. S. (L. ed.) 336; *Schooner Paulina's Cargo v. U. S.*, 7 Cranch 60, 3 U. S. (L. ed.) 266; *U. S. v. Marks*, 2 Abb. 540, 26 Fed. Cas. No. 15,721; *Burke v. Southern Pac. R. Co.*, 222 Fed. 97; *Mannington v. Hocking Valley R. Co.*, 183 Fed. 133; *In re Coy*, 31 Fed. 800.

**53.** *Per Hawley, D. J.*, in *Massachusetts L. & T. Co. v. Hamilton*, (C. C. A.) 88 Fed. 591.

**54.** *Wabash R. Co. v. U. S.*, (C. C. A.) 178 Fed. 5. To same effect *U. S. v. Colorado, etc., R. Co.*, (C. C. A.) 157 Fed. 321; *U. S. v. Ninety-nine Diamonds*, (C. C. A.) 139 Fed. 961; *Union Cent. Life Ins. Co. v. Champlin*, (C. C. A.) 116 Fed. 858. See sections 21, 26, and 27 for further discussion of this principle.

**55.** *Per Chief Justice Richardson* in *Fisher's Case*, 15 Ct. Cl. 328. To the same effect see *U. S. v. Healey*, 160 U. S. 148,

said Chief Justice Marshall, "that the natural sense of words is to be disregarded, because that which they import might have been better or more directly expressed."<sup>54</sup> This vice of clumsy expression often appears in appropriation acts of Congress.<sup>57</sup>

"A mere recital in an act, whether of fact or of law, is not conclusive unless it be clear that the legislature intended that the recital should be accepted as a fact in the case."<sup>58</sup> Where the preamble to a private act recited that a certain building was private property, and the body of the act directed the court to determine whether the claimants thereof acquired a valid title to it, the recital was not taken to be a legislative concession of the vital and material fact forming the basis of the whole controversy.<sup>59</sup> But a mistake of fact upon which the action of Congress is predicated does not control a positive enactment founded thereon.<sup>60</sup>

16 S. Ct. 247, 40 U. S. (L. ed.) 369; *In re Matthews*, 109 Fed. 614.

54. U. S. v. Fisher, 2 Cranch 387, 2 U. S. (L. ed.) 304.

"It is not a well founded objection to this construction of the act that the most apt and appropriate phraseology to convey this meaning has not been employed." *Binnely v. Chesapeake, etc., Canal Co.*, 8 Pet. 212, 8 U. S. (L. ed.) 917.

57. *Lander v. U. S.*, 30 Ct. Cl. 317.

58. *Kinhead v. U. S.*, 150 U. S. 497, 14 S. Ct. 172, 37 U. S. (L. ed.) 1152.

59. *Kinhead v. U. S.*, 24 Ct. Cl. 459, affirmed in *Kinhead v. U. S.*, 150 U. S. 497, 14 S. Ct. 172, 37 U. S. (L. ed.) 1152, in which latter case the court said: "It was stated by the court in *Branson v. Wirth*, 17 Wall. 44, 21 U. S. (L. ed.) 566, that 'whilst the recital of public acts is regarded as evidence of the facts recited, it is otherwise, as we have seen, with reference to private acts. They are not evidence except against the parties who procure them.' We are referred, however, to the case of *The U. S. v. Jordan*, 113 U. S. 418, 5 S. Ct. 585, 28 U. S. (L. ed.) 1013, as sustaining a contrary doctrine. In this case an act of Congress provided 'that the secretary of the treasury be, and he is hereby, authorized and directed to remit, refund, and pay back, out of any moneys in the treasury not otherwise appropriated, to the following named citizens of Tennessee: \* \* \* the amount of taxes assessed upon and collected from the said named persons, contrary to the provisions of the regulations issued by the secretary of the treasury,' etc. *Jordan* was one of the parties named in the act. The secretary of the treasury having construed the act to mean only that such sums should be refunded as were collected from the persons named *contrary to the provisions of the regulations* issued by the secretary of the treasury, this court held that the statute did not admit of that interpretation, nor leave open any question for the court or for the accounting officers of the treasury, except the identity of the claimants with the persons named in it. 'Al-

though the act,' said Mr. Justice Blatchford, 'speaks of the sums as being "the amount of taxes assessed upon and collected from the said named persons, contrary to the provisions of the regulations" named, there is no indication of any intention to submit to any one the determination of the question whether the taxes in any case were collected contrary to the provisions of such regulations, or of the question how those provisions are to be construed.' It needs no argument to show that there is a wide distinction between an act directing a particular thing to be done, and an act reciting the existence of a certain fact which had long been a matter of dispute, and which the Court of Claims was authorized by the act to pass upon and determine." See further as to the effect of recitals in statutes *Erwin's Case*, 3 Ct. Cl. 49.

60. *Jordan v. U. S.*, 19 Ct. Cl. 119, where Justice Richardson said: "Such a mistake might be a good cause for the repeal of an act by the power which passed it, but would be no justification for a court or the executive officers to set it aside or to restrict its effect. This act is not peculiar on account of its recitals of facts. Such recitals abound in the multitude of special acts passed for the relief of individual persons, and to require all the facts recited to be proved in court or elsewhere before the parties can obtain the money granted to them would be an unjustifiable hardship. Take, for example, the Act August 7, 1882, c. 462 (22 Stat. at L. 737). It authorizes and directs the secretary of the treasury to pay to the executors of F. the sum of \$27,684, to reimburse the estate of the said F. for losses sustained by him while secretary of the Senate in making good the deficit in the accounts of the financial clerk.' No one would seriously urge, we think, that Congress had so fixed the amount to be paid, but had left it to be determined by proof before the accounting officers or before this court, if suit should be brought, of the exact amount of the losses incurred."

**19. Departure from literal construction; Holy Trinity Church case.—**

An act of Congress of 1885 prohibited under a penalty any assistance or encouragement to aliens to migrate to this country under contract "to perform labor or service of any kind in the United States," etc., making specific exceptions of certain classes of aliens.<sup>61</sup> The Church of the Holy Trinity, an incorporated religious society, made a contract with an alien by which he was to remove to the city of New York and enter into its service as rector and pastor; and in pursuance of such contract the alien did so remove and enter upon such service. In an action against the corporation to recover the penalty prescribed the Supreme Court held that the transaction was not forbidden by the statute.<sup>62</sup> After quoting the section of the act defining the offense, Mr. Justice Brewer, speaking for the unanimous court, said: "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind,' and further, as noticed by the circuit judge in his opinion,<sup>63</sup> the fifth section which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular case."<sup>64</sup> The justice then referred to the title of the act, the evil which it was designed to remedy, the situation existing when the act was passed,<sup>65</sup> the circumstances surrounding the appeal to Congress, the reports of the committee of each house, and the historic truth that "this is a religious

61. Act of Feb. 26, 1885, 23 Stat. at L. 332, c. 164.

62. *Holy Trinity Church v. U. S.*, 143 U. S. 457, 12 S. Ct. 511, 36 U. S. (L. ed.) 226.

63. *U. S. v. Holy Trinity Church*, 36 Fed. 303.

64. *Holy Trinity Church v. U. S.*, 143 U. S. 457, 12 S. Ct. 511, 36 U. S. (L. ed.) 226, citing among other cases *Margate Pier Co. v. Hannam*, 3 B. & Ald. 270, 5 E. C. L. 280; *State v. Clark*, 29 N. J. L. 96; *U. S. v. Kirby*, 7 Wall. 482, 19 U. S. (L. ed.) 278; *Henry v. Tilton*, 17 Vt. 479; *Ryegate v. Wardsboro*, 30 Vt. 746; *Ex p. Ellis*, 11 Cal. 222; *Ingraham v. Speed*, 30

Mass. 410; *Jackson v. Collins*, 3 Cow. (N. Y.) 89; *People v. Attica Ins. Co.*, 15 Johns. (N. Y.) 358; *Burch v. Newbury*, 10 N. Y. 374; *People v. Tax Com'rs*, 95 N. Y. 554; *People v. Lacombe*, 99 N. Y. 43, 1 N. E. 599; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 152; *Osgood v. Breed*, 12 Mass. 530; *Wilbur v. Crane*, 13 Pick. (Mass.) 284; *Oates v. Montgomery First Nat. Bank*, 100 U. S. 239, 25 U. S. (L. ed.) 580.

See also the cases cited in this article, sections 71-73, *Absurdity*.

65. Quoting from *U. S. v. Craig*, 28 Fed. 798, for "the motives and history of the act."

people," and "this is a Christian nation,"<sup>66</sup> all of which concurred in establishing the belief that Congress could not have "intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation."<sup>67</sup> This case of the Holy Trinity Church is now the leading federal case affirming, said a Circuit Court of Appeals, "that words may be \* \* \* wrenched from their obvious meaning when a court is satisfied by sufficient evidence that the framers of the act meant, not what they said, but its opposite,"<sup>68</sup> and "it has been invariably cited where the effort has been to induce this court to legislate and substitute its own notions of what the law should be for the plainly expressed will of the legislative body."<sup>69</sup>

**20. Same—further illustrations.**—The Holy Trinity Church case noticed in the preceding section promulgates no new rule of statutory interpretation. Many years before, in a case frequently cited, Chief Justice Taney had declared it to be "undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."<sup>70</sup> Various applications of the principle may be found in the following cases:<sup>71</sup> It has been laid down again and again that "a thing which is within the intention of a statute is as much within the statute as if it were within the letter; and

66. *Citing* as recognizing this truth, *Updegraph v. Com.*, 11 S. & R. (Pa.) 394; *People v. Ruggles*, 8 Johns. (N. Y.) 290; *Vidal v. Philadelphia*, 2 How. 198, 11 U. S. (L. ed.) 205.

67. *Holy Trinity Church v. U. S.*, 143 U. S. 457, 12 S. Ct. 511, 36 U. S. (L. ed.) 226. The soundness of the ruling was reaffirmed in *U. S. v. Laws*, 163 U. S. 258, 16 S. Ct. 998, 41 U. S. (L. ed.) 151, holding that the act did not apply to a contract made with an alien to come to this country as a chemist on a sugar plantation. See also *U. S. v. Gay*, (C. C. A.) 95 Fed. 226, holding that a contract made with an alien to employ him as a draper and window dresser in a drygoods store was not within the act.

68. *Per* Lacombe, C. J., in *In re Gardiner*, (C. C. A.) 53 Fed. 1014.

69. *Per* Wallace, J., in *In re Downing*, (C. C. A.) 56 Fed. 474.

70. *Brewer v. Blougher*, 14 Pet. 198, 10 U. S. (L. ed.) 408.

71. *Pickett v. U. S.*, 216 U. S. 456, 30 S. Ct. 265, 54 U. S. (L. ed.) 566; *Scott v. Deweese*, 181 U. S. 209, 21 S. Ct. 585, 45 U. S. (L. ed.) 822; *McKee v. U. S.*, 164 U. S. 293, 17 S. Ct. 92, 41 U. S. (L. ed.) 437; *U. S. v. Burr*, 159 U. S. 78, 15 S. Ct. 1002, 40 U. S. (L. ed.) 82; *Beley v. Naphataly*, 169 U. S. 359, 18 S. Ct. 354, 42 U. S. (L. ed.) 775; *Smith v. Townsend*, 148 U. S. 501, 13 S. Ct. 634, 37 U. S. (L. ed.) 533; *Chicago, etc., R. Co. v. Guffey*, 122 U. S. 574, 7 S. Ct. 693, 1300, 30 U. S. (L. ed.) 1135; *Kansas City, etc., R. Co. v.*

*Atty.-Gen.*, 118 U. S. 694, 7 S. Ct. 66, 30 U. S. (L. ed.) 281; *U. S. v. Moore*, 95 U. S. 763, 24 U. S. (L. ed.) 588; *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 24 U. S. (L. ed.) 71; *U. S. v. Saunders*, 22 Wall. 492, 22 U. S. (L. ed.) 736; *Stewart v. Kahn*, 11 Wall. 503, 20 U. S. (L. ed.) 176; *Lane County v. Oregon*, 7 Wall. 75, 19 U. S. (L. ed.) 101; *Brown v. Duchesne*, 19 How. 194, 15 U. S. (L. ed.) 598; *Shelby v. Guy*, 11 Wheat. 361, 6 U. S. (L. ed.) 495; *Merchant's Nat. Bank v. U. S.*, (C. C. A.) 214 Fed. 200; *Moffitt v. U. S.*, (C. C. A.) 128 Fed. 375; *Toi Sim v. U. S.*, (C. C. A.) 116 Fed. 920; *U. S. v. Chin Fee*, 94 Fed. 828; *Scott v. Latimer*, (C. C. A.) 89 Fed. 845; *Northern Pac. R. Co. v. Dudley*, 85 Fed. 82; *In re Rodriguez*, 81 Fed. 349; *Saltonstall v. Birtwell*, (C. C. A.) 66 Fed. 969; *National Waterworks Co. v. Kansas City*, 65 Fed. 697; *U. S. v. Wong Sing*, 51 Fed. 80; *In re Boston Book Co.*, 50 Fed. 915; *U. S. v. Bashaw*, (C. C. A.) 50 Fed. 754; *In re Muser*, 49 Fed. 832; *In re Chase*, 48 Fed. 631; *U. S. v. Morrissey*, 32 Fed. 147; *Virginia Coupon Cases*, 25 Fed. 668; *U. S. v. Campbell*, 16 Fed. 235; *Yuengling v. Schile*, 12 Fed. 106; *U. S. v. Buchanan*, 9 Fed. 601; *Butler v. Russel*, 3 Cliff. 255, 4 Fed. Cas. No. 2,243; *Eureka Consol. Min. Co. v. Richmond Min. Co.*, 4 Sawy. 302, 8 Fed. Cas. No. 4,548; *Mankel v. U. S.*, 19 Ct. Cl. 295; *Farden's Case*, 13 Ct. Cl. 352; 18 Op. Atty.-Gen. 500 (Garland, 1886). See also the cases cited *infra*, sections 67-82, *Objectionable Consequences as Affecting Interpretation*.

a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers,"<sup>72</sup> and that "the letter killeth, the spirit maketh alive,"<sup>73</sup> even in a criminal case.<sup>74</sup> An act of Congress declaring "absolutely null and void" "all transfers and assignments" of claims against the United States, concededly "broad enough, if such were the purpose of Congress, to include transfers by operation of law or by will,"<sup>75</sup> was held not to include a transfer by operation of law or in bankruptcy,<sup>76</sup> or a voluntary assignment for the benefit of creditors,<sup>77</sup> since none of these were within the evil at which the statute aimed; nor did the statute invalidate a payment made by the government to a claimant's attorney in fact under a power of attorney not revoked at the time of payment, as the object of the statute was to protect the government, not the claimant.<sup>78</sup> The provision in the Circuit Court of Appeals Act of 1891, by which appeals or writs of error may be taken from the district or circuit courts direct to the Supreme Court "in any case that involves the construction or application of the Constitution of the United States," does not confer upon the United States the right to sue out a writ of error in any criminal case.<sup>79</sup> An act of Congress providing for the payment to soldiers for the loss of horses was held to give no right of recovery to one who came within the very letter of the statute, but who subsequently deserted.<sup>80</sup> An act punishing as piracy a robbery committed by "any person or persons" on the high seas was held not to include the subjects of a foreign power who in a foreign ship committed robbery on the high seas.<sup>81</sup> Applying the rule hereinbefore mentioned, that a thing which is within the intention of the makers of the

72. *Jones v. Guaranty, etc., Co.*, 101 U. S. 626, 25 U. S. (L. ed.) 1030; *U. S. v. Farenholt*, 206 U. S. 226, 27 S. Ct. 629, 51 U. S. (L. ed.) 1036; *U. S. v. American Surety Co.*, 200 U. S. 197, 26 S. Ct. 168, 50 U. S. (L. ed.) 438; *Hawaii v. Mankichi*, 190 U. S. 197, 223, 247, 23 S. Ct. 787, 47 U. S. (L. ed.) 1016; *Hartman v. Oliver*, 125 U. S. 529, 8 S. Ct. 958, 31 U. S. (L. ed.) 913; *Northwest Mut. L. Ins. Co. v. Gridley*, 100 U. S. 615, 25 U. S. (L. ed.) 746; *Oates v. Montgomery First Nat. Bank*, 100 U. S. 244, 25 U. S. (L. ed.) 580 [citing *Suckley v. Furse*, 15 Johns. (N. Y.) 338; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358]; *U. S. v. Moore*, 95 U. S. 763, 24 U. S. (L. ed.) 588; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 300, 23 U. S. (L. ed.) 898; *Smythe v. Fiske*, 23 Wall. 380, 23 U. S. (L. ed.) 47; *Stewart v. Kahn*, 11 Wall. 503, 20 U. S. (L. ed.) 176; *Atkins v. Fibre Disintegrating Co.*, 18 Wall. 301, 21 U. S. (L. ed.) 841; *U. S. v. Babbitt*, 1 Black 61, 17 U. S. (L. ed.) 94; *U. S. v. Freeman*, 3 How. 565, 11 U. S. (L. ed.) 724; *Harper v. Victor*, (C. C. A.) 212 Fed. 903; *Coopersville Co-operative Creamery Co. v. Lemon*, (C. C. A.) 163 Fed. 145; *U. S. v. Tiffany*, (C. C. A.) 160 Fed. 408; *U. S. v. Buettner*, (C. C. A.) 133 Fed. 163; *U. S. v. York*, 131 Fed. 323; *Rothschild v. Alder-Weinberger Steamship Co.*, (C. C. A.) 130 Fed. 866; *Flint, etc., R. Co. v. Marine Ins. Co.*, 71 Fed. 215; *National Waterworks Co. v.*

*Kansas City*, 65 Fed. 697; *East Tennessee, etc., R. Co. v. Atlanta, etc., R. Co.*, 49 Fed. 615; *U. S. v. Morrissey*, 32 Fed. 149; *Barling v. Erdman*, 2 Fed. Cas. No. 981.

73. *Per Caldwell, J.*, in *Singer Mfg. Co. v. McCollock*, 24 Fed. 668.

74. *Per Brewer, J.*, in *U. S. v. Falkenhainer*, 21 Fed. 625.

75. *Goodman v. Niblack*, 102 U. S. 556, 26 U. S. (L. ed.) 229.

76. *Erwin v. U. S.*, 97 U. S. 392, 24 U. S. (L. ed.) 1065, where the court said it would not include a transfer by will.

77. *Goodman v. Niblack*, 102 U. S. 556, 26 U. S. (L. ed.) 229.

78. *Bailey v. U. S.*, 109 U. S. 432, 3 S. Ct. 272, 27 U. S. (L. ed.) 988.

79. *U. S. v. Sanges*, 144 U. S. 310, 12 S. Ct. 609, 36 U. S. (L. ed.) 445, where the common law was invoked in aid of interpretation.

80. *Tapia's Case*, 16 Ct. Cl. 561, where Nott, J., said: "It and all other statutes for his benefit are based on the supposition of his faithful service, and it would be a monstrous perversion of their purpose to hold that they could be used to encourage desertion or recompense deserters."

81. *U. S. v. Palmer*, 3 Wheat. 610, 4 U. S. (L. ed.) 471, where Chief Justice Marshall, writing the opinion, said: "General words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the leg-

statute is as much within the statute as if it were within the letter, "the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed — the limitation of the rule being that to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the lawmaker proceeded, and not only within a like reason."<sup>82</sup> A state statute modifying the common-law fellow-servant rule in actions by employees against railroad corporations was held to apply to such actions against "receivers" of railroad corporations; "to hold otherwise," said the court, "would be to subordinate the reason of the law altogether to the letter."<sup>83</sup> A United States commissioner was held to be a "United States judge" within the meaning of a Chinese exclusion act providing for the arrest of offenders and their arraignment before a "United States judge."<sup>84</sup> A corporation authorized by charter to build a bridge found one already built that answered every purpose and bought it, and the purchase was held to be *intra vires* and valid.<sup>85</sup> The word "fog" in a statutory regulation requiring steam vessels, "when in a fog," to go at a moderate speed, was construed to include all conditions of the atmosphere increasing the perils of navigation, such as mist or falling snow.<sup>86</sup> The same regulations required steam vessels "when towing other vessels" to carry certain lights, and the provision was enforced against a steam vessel towing a raft of logs.<sup>87</sup> An act regulating employment of pilots "upon waters which are the boundary between two states" was extended to a river constituting a boundary between a state and an organized United States territory, because the case was within the mischief which the law was intended to remedy.<sup>88</sup> A corporation organized under the laws of any of the United States is an "American citizen" within the meaning of the act of Congress providing that vessels employed in the ocean mail service "shall be owned and officered by American citizens."<sup>89</sup> A corporation which was incorporated under the laws of a state and all of whose members were citizens of the United States was within the meaning of a federal statute declaring valuable mineral deposits in lands belonging to

islature intended to apply them. \* \* \* In describing those who may commit misprision of treason or felony, the words used are 'any person or persons;' yet these words are necessarily confined to any person or persons owing permanent or temporary allegiance to the United States."

82. *Per* Justice Wayne, in *U. S. v. Freeman*, 3 How. 565, 11 U. S. (L. ed.) 724.

83. *Peirce v. Van Dusen*, (C. C. A.) 78 Fed. 696.

84. *In re Wong Fook*, 81 Fed. 558, where the argument of convenience had great weight in the construction.

85. *Thompson v. New York, etc., R. Co.*, 3 Sandf. Ch. (N. Y.) 625, cited with approval and followed in a similar case in *Jones v. Guaranty, etc., Co.*, 101 U. S. 626, 25 U. S. (L. ed.) 1030.

86. *Flint, etc., R. Co. v. Marine Ins. Co.*, 71 Fed. 210.

87. *The Annie S. Cooper*, 48 Fed. 703, where the court said: "In interpreting a

rule we must look at the reason of the rule. The object of the rule was to require steam tugs having things in tow to carry certain lights to enable all other vessels to know that they were not steam vessels without tows."

88. *The Ullock*, 19 Fed. 207.

89. 20 Op. Atty.-Gen. 167, where Acting Attorney-General Taft said: "To hold otherwise would be to practically destroy the operation of the act. The capital required to run a foreign steamship line is so great as to preclude individuals from undertaking such an enterprise. It is not to be supposed that Congress intended to hamper the construction of a new merchant marine by withholding all inducements for the use of aggregated and organized capital in attaining that end." *Pacific Steam Nav. Co. v. Arnaud*, 25 L. J. N. S. 50, was cited as "a strong English case on the same point."



the United States open to exploration and purchase by citizens of the United States.<sup>90</sup> A corporation has been held a "citizen" within the Indian Depredation Act.<sup>91</sup> A British citizen enrolled as a sailor on an American vessel has been held an American seaman within the purview of acts relating to American seamen.<sup>92</sup> The District of Columbia has been ruled a state within the meaning of an article in a treaty with France granting certain privileges to French citizens in the "states of the Union."<sup>93</sup> A land donation act of Congress which was entitled to a liberal construction was held to include an unmarried woman as a beneficiary within the words "single man,"<sup>94</sup> and grandchildren within the word "children."<sup>95</sup> Examples of confessedly liberal constructions depending upon a different rule from that above discussed will be found in another part of this article.<sup>96</sup>

**21. Limitations.**—Mr. Justice Brewer, who delivered the opinion of the Supreme Court in the Holy Trinity Church case,<sup>97</sup> discussing the same rule of interpretation in a later case, said: "It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise where there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."<sup>98</sup> And in a case a circuit, reported in Dallas, Mr. Justice Chase used the following language: "By the rules which are laid down in England for the construction of statutes, and the latitude which has been indulged in their application, the British judges have assumed a legislative power, and on the pretense of judicial exposition have in fact made a great portion of the statute law of the kingdom. Of those rules of construction none can be more dangerous than that which, distinguishing between the intent and the words of the legislature, declares that a case not within the meaning of a statute, according to the opinion of the judges, shall not be embraced in the operation of the statute, although it is clearly within the words; or, *vice versa*, that a case within the meaning, though not within the words, shall be embraced."<sup>99</sup> And Chief Justice Marshall was emphatic in deprecating a departure from the plain meaning of the words in a penal act to find an intention not suggested by the words themselves.<sup>1</sup>

90. *McKinley v. Wheeler*, 130 U. S. 630, 9 S. Ct. 638, 32 U. S. (L. ed.) 1048, where the court said: "The development of the mineral wealth of the country is promoted, instead of retarded, by allowing miners thus to unite their means."

91. *U. S. v. Northwestern Express, etc., Co.*, 164 U. S. 686, 17 S. Ct. 206, 41 U. S. (L. ed.) 599.

92. *In re Ross*, 140 U. S. 475, 11 S. Ct. 397, 35 U. S. (L. ed.) 581.

93. *Geofroy v. Riggs*, 133 U. S. 258, 10 S. Ct. 295, 33 U. S. (L. ed.) 642.

94. *Silver v. Ladd*, 7 Wall. 219, 19 U. S. (L. ed.) 138.

95. *Cutting v. Cutting*, 6 Fed. 259.

96. See *infra*, section 94 as to remedial statutes.

97. *Holy Trinity Church v. U. S.*, 143 U. S. 457, 12 S. Ct. 511, 36 U. S. (L. ed.) 226, discussed *supra*, section 19.

98. *U. S. v. Goldenberg*, 168 U. S. 103, 18 S. Ct. 3, 42 U. S. (L. ed.) 394. See also *Six Hundred Tons of Iron Ore*, 9 Fed. 599. And see *infra*, sections 26 and 27 as to avoidance of judicial legislation.

99. *Priestman v. U. S.*, 4 Dall. 30, 1 U. S. (L. ed.) 727, note, *affirmed* in the principal case.

1. *U. S. v. Wiltberger*, 5 Wheat. 96, 5 U. S. (L. ed.) 37. See *infra*, sections 103-108 as to construction of penal statutes.

*Purpose of Statute to Be Promoted*

**22. General spirit and purpose of statute.**—"In this country where statute law is the hurried work of over-busy individuals," said Judge Nott of the Court of Claims, "very little importance can be attached to accidents of phraseology. Every year of judicial experience renders plainer the fact that judges to interpret aright must put themselves in the position of the legislators who made the statute, and gather from its general purposes the meaning of its obscurer parts."<sup>2</sup> And Chief Justice Marshall said, "The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent."<sup>3</sup> Where the terms of a statute are ambiguous the court, in order to ascertain their meaning, must resort to the general spirit and intent of the enactment, keeping in view its known object and the mischief intended to be remedied.<sup>4</sup> What the legislative intention was, however, can be derived only from the words used in the statute; and the court is not at liberty to speculate beyond the reasonable import of those words. "The spirit of the act," said Mr. Justice Story, "must be extracted from the words of the act, and not from conjectures *aliunde*."<sup>5</sup> Where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature.<sup>6</sup>

2. *Upton v. U. S.*, 19 Ct. Cl. 49.

3. *Durousseau v. U. S.*, 6 Cranch 314, 3 U. S. (L. ed.) 232, *quoted* with approval in *The Paquete Habana*, 175 U. S. 685, 20 S. Ct. 290, 44 U. S. (L. ed.) 320.

4. *In re Matthews*, 109 Fed. 617.

"The law must be interpreted in accordance with its spirit so as to effectuate the purpose intended to be accomplished thereby." *Per* Justice White in *Glover v. U. S.*, 164 U. S. 297, 17 S. Ct. 95, 41 U. S. (L. ed.) 440.

"We are seeking for the intention of Congress and to discover that we may look at the paramount object which Congress had in view, as well as the means by which it proposed to accomplish that object." *Platt v. Union Pac. R. Co.*, 99 U. S. 59, 25 U. S. (L. ed.) 424.

"It may be that the statute under consideration is framed in an inartificial manner—that there is want of perspicuity or precision in it. When this is the case, courts are often required to look less at the letter or words of a statute than at the reason and spirit of the law." *Strong v. U. S.*, 34 Fed. 17.

See further to the point that the general object, purpose, and spirit of the statute are considerations entitled to weight in its construction, *U. S. v. Laws*, 163 U. S. 264, 16 S. Ct. 998, 41 U. S. (L. ed.) 151; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 222, 16 S. Ct. 666, 40 U. S. (L. ed.) 940; *U. S. v. Oregon, etc., R. Co.*, 164 U. S. 542, 17 S. Ct. 165, 41 U. S. (L. ed.) 541; *Tennessee v. Union,*

*etc., Bank*, 152 U. S. 462, 14 S. Ct. 654, 38 U. S. (L. ed.) 511; *Chicago, etc., R. Co. v. Guffey*, 122 U. S. 574, 7 S. Ct. 693, 1300, 30 U. S. (L. ed.) 1135; *Mercantile Nat. Bank v. New York*, 121 U. S. 154, 7 S. Ct. 826, 30 U. S. (L. ed.) 895; *Scipio v. Wright*, 101 U. S. 671, 25 U. S. (L. ed.) 1037; *U. S. v. Pugh*, 99 U. S. 269, 25 U. S. (L. ed.) 322; *Smythe v. Fiske*, 23 Wall. 380, 23 U. S. (L. ed.) 47; *U. S. v. Saunders*, 22 Wall. 492, 22 U. S. (L. ed.) 736; *Stewart v. Kahn*, 11 Wall. 505, 20 U. S. (L. ed.) 176; *U. S. v. Anderson*, 9 Wall. 65, 19 U. S. (L. ed.) 615; *Ex p. McCordle*, 6 Wall. 326, 18 U. S. (L. ed.) 816; *Union Ins. Co. v. U. S.*, 6 Wall. 763, 18 U. S. (L. ed.) 879; *Western Assur. Co. v. Halliday*, 127 Fed. 830; *U. S. v. Gay*, (C. C. A.) 95 Fed. 226; *Toledo, etc., R. Co. v. Continental Trust Co.*, (C. C. A.) 95 Fed. 526; *The Roanoke*, (C. C. A.) 59 Fed. 164; *In re Ng. Loy Hoe*, 53 Fed. 915; *Untermeyer v. Freund*, 50 Fed. 80; *The Pilot*, (C. C. A.) 50 Fed. 439; *State v. Sullivan*, 50 Fed. 603; *The Giles Loring*, 48 Fed. 475; *The Annie S. Cooper*, 48 Fed. 704; *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 43 Fed. 59; *The Ullock*, 19 Fed. 211; *U. S. v. Buchanan*, 9 Fed. 691.

5. *Gardner v. Collins*, 2 Pet. 92, 7 U. S. (L. ed.) 347. To the same effect see *Huidekoper v. Douglass*, 3 Cranch 70, 2 U. S. (L. ed.) 347. See further §§ 17, 21, 26, 27.

6. *Per* Justice McLean in *Denn v. Reid*, 10 Pet. 527, 9 U. S. (L. ed.) 519, *quoted*

**23. Mischief of prior law.**—It is always helpful to a court in interpreting a statute to put itself in the place of the legislative body which passed it, at the time of its enactment, with a complete knowledge of the state of the law on its subject at that time, and then to consider the evil which the statute was designed to prevent or remedy.<sup>7</sup> When the expressions used in a statute are ambiguous, "there is no better way of discerning its true meaning," said Mr. Justice Davis, "than by considering the necessity for it, and the causes which induced its enactment."<sup>8</sup> This is especially true in respect of remedial statutes, so called.<sup>9</sup> While a court in construing a penal statute is not required to shut its eyes to notorious mischiefs which it was intended to suppress,<sup>10</sup> care must be observed not to extend the statute to offenses not embraced within its language, merely because they involve the same mischief which the statute aimed to suppress.<sup>11</sup>

**24. Construction in furtherance of purpose.**—In the construction of a statute that exposition ought to be adopted which carries into effect the true intent and object of the legislature in its enactment.<sup>12</sup> "Courts should

with approval in *The Meteor*, 17 Fed. Cas. No. 9,498.

"When the will of the legislature is clearly expressed, it ought to be followed without regard to consequences. And a construction, derived from a consideration of its reason and spirit, should never be resorted to but where the expressions are so ambiguous as to render such mode of interpretation unavoidable." *Per Livingston, J.*, in *Denn v. Harnden*, 1 Paine 61, 9 Fed. Cas. No. 4,819.

7. *Woodward v. De Graffenried*, 238 U. S. 284, 35 S. Ct. 764, 59 U. S. (L. ed.) 1310; *U. S. v. Chavez*, 228 U. S. 525, 33 S. Ct. 595, 57 U. S. (L. ed.) 950; *Wells Fargo & Co. v. Jersey City*, 207 Fed. 871; *U. S. v. Lewis*, 192 Fed. 633; *Atlantic, etc., R. Co. v. U. S.*, (C. C. A.) 168 Fed. 175; *U. S. v. Williams*, 159 Fed. 310; *Brown v. Mann*, (C. C. A.) 151 Fed. 145; *Stevens v. Nave-McCord, etc., Co.*, (C. C. A.) 150 Fed. 71; *Stone v. Whitridge*, (C. C. A.) 129 Fed. 33; *Moffitt v. U. S.*, (C. C. A.) 128 Fed. 375; *Peonage Cases*, 123 Fed. 671; *In re Clerkship of Circuit Ct.*, 90 Fed. 252; *Billings v. U. S.*, 23 Ct. Cl. 180. See also *Nudd v. Burrows*, 91 U. S. 426, 23 U. S. (L. ed.) 286, an excellent case; *U. S. v. Eaton*, 169 U. S. 342, 18 S. Ct. 374, 42 U. S. (L. ed.) 767; *The Delaware*, 161 U. S. 474, 16 S. Ct. 516, 40 U. S. (L. ed.) 771; *Stewart v. Kahn*, 11 Wall. 505, 20 U. S. (L. ed.) 176; *Denn v. Reid*, 10 Pet. 527, 9 U. S. (L. ed.) 519; *Smith v. Townsend*, 148 U. S. 494, 13 S. Ct. 634, 37 U. S. (L. ed.) 533; *In re Matthews*, 109 Fed. 617; *In re Bailey*, 112 Fed. 414; *In re Richards*, (C. C. A.) 96 Fed. 940; *Danielson v. Northwestern Fuel Co.*, 55 Fed. 49; *U. S. v. Starn*, 17 Fed. 437; *Tuedt v. Carson*, 13 Fed. 356; 20 Op. Atty.-Gen. 187 (Miller, 1891).

"It is important to look at the dates of the statutes so that the imperfections

or mischiefs to which later statutes are aimed may furnish guides for interpretation." *Per Treat, J.*, in *In re District Attorney*, 23 Fed. 26.

"Street railroads" are not within the scope of a statute regulating railroads if innocent of the mischief sought to be corrected by the act. *Omaha, etc., R. Co. v. Interstate Com. Com'rs*, 230 U. S. 324, 33 S. Ct. 890, 57 U. S. (L. ed.) 1501, *reversing* 191 Fed. 40.

See, generally, § 43.

8. *Heydenfeldt v. Daney Gold, etc.*, Min. Co., 93 U. S. 638, 23 U. S. (L. ed.) 995.

9. *In re Matthews*, 109 Fed. 617.

10. *Holy Trinity Church v. U. S.*, 143 U. S. 463, 12 S. Ct. 511, 36 U. S. (L. ed.) 226; *U. S. v. Sullivan*, 43 Fed. 604; *U. S. v. Mattock*, 2 Sawy. 148, 26 Fed. Cas. No. 15,744.

11. *U. S. v. Chase*, 135 U. S. 261, 10 S. Ct. 756, 34 U. S. (L. ed.) 117; *Field v. U. S.*, (C. C. A.) 137 Fed. 6; *U. S. v. Hewecker*, 79 Fed. 64. See §§ 103-108 as to construction of penal statutes.

12. *Per Justice Story* in *Minor v. Mechanics' Bank*, 1 Pet. 64, 7 U. S. (L. ed.) 47. To the same effect see *McDougal v. McKay*, 237 U. S. 373, 35 S. Ct. 605, 59 U. S. (L. ed.) 1001; *Williams v. U. S. Fidelity Co.*, 236 U. S. 549, 35 S. Ct. 289, 59 U. S. (L. ed.) 713; *Cameron v. U. S.*, 231 U. S. 710, 34 S. Ct. 244, 58 U. S. (L. ed.) 448; *Chicago, etc., R. Co. v. Hall*, 229 U. S. 511, 33 S. Ct. 885, 57 U. S. (L. ed.) 1306; *U. S. v. Anderson*, 228 U. S. 52, 33 S. Ct. 500, 57 U. S. (L. ed.) 727; *McLean v. U. S.*, 226 U. S. 374, 33 S. Ct. 122, 57 U. S. (L. ed.) 260; *Low Wah Suey v. Backus*, 225 U. S. 460, 32 S. Ct. 734, 56 U. S. (L. ed.) 1165; *Robinson v. Baltimore, O. R. Co.*, 222 U. S. 506, 32 S. Ct. 114, 56 U. S. (L. ed.) 288; *Texas, etc., R. Co. v. Abilene, etc., R. Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 U. S. (L. ed.) 553;

ever lean to that interpretation of a statute which would further the object of the legislation in preference to a construction based on purely artificial rules." <sup>13</sup> An interpretation which defeats any of the manifest purposes of the statute cannot be accepted. <sup>14</sup> A rearrangement of clauses or parts

Cherokee Intermarriage Cases, 203 U. S. 76, 27 S. Ct. 29, 51 U. S. (L. ed.) 96; N. Y., etc., *R. Co. v. Interstate Commerce Com.*, 200 U. S. 361, 26 S. Ct. 272, 50 U. S. (L. ed.) 515; *Rogers v. Peck*, 199 U. S. 425, 26 S. Ct. 87, 50 U. S. (L. ed.) 256; U. S. *v. St. Anthony R. Co.*, 192 U. S. 524, 24 S. Ct. 333, 48 U. S. (L. ed.) 548; *Rhodes v. Iowa*, 170 U. S. 422, 18 S. Ct. 664, 42 U. S. (L. ed.) 1088; *In re Chapman*, 166 U. S. 667, 17 S. Ct. 677, 41 U. S. (L. ed.) 1154; *In re Ross*, 140 U. S. 475, 11 S. Ct. 897, 35 U. S. (L. ed.) 581; *Unity v. Burrage*, 103 U. S. 457, 26 U. S. (L. ed.) 405; *Oates v. Montgomery First Nat. Bank*, 100 U. S. 244, 25 U. S. (L. ed.) 580; *Sherman v. Buick*, 93 U. S. 215, 23 U. S. (L. ed.) 849; U. S. *v. Hartwell*, 6 Wall. 396, 18 U. S. (L. ed.) 830; *Brown v. Duchesne*, 19 How. 194, 15 U. S. (L. ed.) 595; U. S. *v. Atlantic Coast Line*, 224 Fed. 160; U. S. *v. Forty Barrels, etc., of Coca Cola*, (C. C. A.) 215 Fed. 535, *affirming* 191 Fed. 431; U. S. *v. Missouri, etc., R. Co.*, (C. C. A.) 213 Fed. 169; *Harper v. Victor*, (C. C. A.) 212 Fed. 903; U. S. *v. J. L. Hopkins & Co.*, 199 Fed. 649; *Spokane Valley Land, etc., Co. v. Kootenai County*, 199 Fed. 481; *In re Wyoming, etc., Assoc.*, 198 Fed. 436; *John J. Seamon Co. v. U. S.*, (C. C. A.) 182 Fed. 573; *Shulthis v. MacDougal*, 162 Fed. 331; *St. Louis, etc., R. Co. v. Deln*, (C. C. A.) 153 Fed. 931; *Interstate Drainage, etc., Co. v. Freeborn Co.*, (C. C. A.) 158 Fed. 70; U. S. *v. Hung Chang*, (C. C. A.) 134 Fed. 19, *reversing* 126 Fed. 400; *In re Emslie*, 98 Fed. 720; *In re Rhoads*, 98 Fed. 399; *Postal Tel. Cable Co. v. Southern R. Co.*, 89 Fed. 195; *Scott v. Latimer*, (C. C. A.) 89 Fed. 846; *Malcomson v. Wappoo Mills*, 86 Fed. 198; *Stryker v. Grand County*, (C. C. A.) 77 Fed. 576; *Wechselberg v. Flour City Nat. Bank*, (C. C. A.) 64 Fed. 95; *The Giles Loring*, 48 Fed. 475; *The Lizzie Henderson*, 20 Fed. 529; U. S. *v. One Raft Timber*, 13 Fed. 798; *Baring v. Erdman*, 2 Fed. Cas. No. 981; *Neurath's Motion*, 17 Ct. Cl. 225; *Converse v. U. S.*, 26 Ct. Cl. 10; 21 Op. Atty.-Gen. 376 (Harmon, 1896).

The purpose of the law is the ever insistent consideration in its interpretation. U. S. *v. Antikamnia Chemical Co.*, 231 U. S. 654, 34 S. Ct. 222, 58 U. S. (L. ed.) 419. See, generally, §§ 19, 20, and 25.

13. *Per Phillips, J.*, in *Budd v. Budd*, 59 Fed. 741.

14. U. S. *v. Lewis*, 235 U. S. 282, 35 S. Ct. 44, 59 U. S. (L. ed.) 229; *Rainey v. Grace*, 231 U. S. 703, 34 S. Ct. 242, 58 U. S. (L. ed.) 445; *Swigart v. Baker*, 229 U. S. 187, 33 S. Ct. 645, 57 U. S. (L. ed.)

1143; *Hannum v. U. S.*, 226 U. S. 436, 33 S. Ct. 172, 57 U. S. (L. ed.) 287; *Northern Pac. R. Co. v. Washington*, 222 U. S. 370, 32 S. Ct. 160, 56 U. S. (L. ed.) 237; *Berryman v. Whitman College*, 222 U. S. 334, 32 S. Ct. 147, 56 U. S. (L. ed.) 225, *reversing* 156 Fed. 112; *Interstate Commerce Com. v. Delaware, etc., R. Co.*, 220 U. S. 235, 31 S. Ct. 392, 55 U. S. (L. ed.) 448; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 25 S. Ct. 552, 49 U. S. (L. ed.) 925; *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 25 S. Ct. 443, 49 U. S. (L. ed.) 790; *Swan, etc., Co. v. U. S.*, 190 U. S. 143, 23 S. Ct. 702, 47 U. S. (L. ed.) 984; *Erhardt v. Schroeder*, 155 U. S. 134, 15 S. Ct. 45, 39 U. S. (L. ed.) 94; *Lau Ow Bew v. U. S.*, 144 U. S. 56, 12 S. Ct. 517, 36 U. S. (L. ed.) 340; *Kansas, etc., R. Co. v. Atty.-Gen.*, 118 U. S. 694, 7 S. Ct. 66, 30 U. S. (L. ed.) 281; *International Bank v. Sherman*, 101 U. S. 406, 25 U. S. (L. ed.) 866; *Jennison v. Kirk*, 98 U. S. 461, 25 U. S. (L. ed.) 240; *Ryan v. Carter*, 93 U. S. 83, 23 U. S. (L. ed.) 807; *Platt v. Union Pac. R. Co.*, 99 U. S. 62, 25 U. S. (L. ed.) 424; U. S. *v. Jonas*, 19 Wall. 605, 22 U. S. (L. ed.) 177; *Home L. Ins. Co. v. Dunn*, 19 Wall. 225, 22 U. S. (L. ed.) 68; *Stewart v. Kahn*, 11 Wall. 506, 20 U. S. (L. ed.) 176; *Stockwell v. U. S.*, 13 Wall. 552, 20 U. S. (L. ed.) 491; *Corbett v. Nutt*, 10 Wall. 477, 19 U. S. (L. ed.) 976; *Silver v. Ladd*, 7 Wall. 226, 19 U. S. (L. ed.) 138; *Lane County v. Oregon*, 7 Wall. 79, 19 U. S. (L. ed.) 101; *Moore v. Marsh*, 7 Wall. 522, 19 U. S. (L. ed.) 37; *Bronson v. Rodes*, 7 Wall. 253, 19 U. S. (L. ed.) 141; *Davidson v. Lanier*, 4 Wall. 455, 18 U. S. (L. ed.) 377; *Harris v. Runnels*, 12 How. 86, 13 U. S. (L. ed.) 901; *Villabola v. U. S.*, 6 How. 91, 12 U. S. (L. ed.) 352; *Wilson v. Rousseau*, 4 How. 678, 11 U. S. (L. ed.) 1141; *Wood v. U. S.*, 16 Pet. 366, 10 U. S. (L. ed.) 987; U. S. *v. Coombs*, 12 Pet. 82, 9 U. S. (L. ed.) 1004; *Sundry Goods, etc. v. U. S.*, 2 Pet. 367, 7 U. S. (L. ed.) 450; *Ross v. Doe*, 1 Pet. 667, 7 U. S. (L. ed.) 302; *The Palmyra*, 12 Wheat. 15, 6 U. S. (L. ed.) 531; *The Emily*, 9 Wheat. 389, 6 U. S. (L. ed.) 116; *Mutual Assur. Soc. v. Watts*, 1 Wheat. 289, 4 U. S. (L. ed.) 91; U. S. *v. Blendaur*, (C. C. A.) 128 Fed. 910, *reversing* 122 Fed. 703; *Atlantic v. Chattanooga Foundry Co.*, (C. C. A.) 127 Fed. 23; *In re Guggenheim Smelting Co.*, (C. C. A.) 126 Fed. 728, *reversing* 121 Fed. 153; *Whitwell v. Continental Tobacco Co.*, (C. C. A.) 125 Fed. 454; *Moch v. Market St. Nat. Bank*, (C. C. A.) 107 Fed. 898; *Corning v. Meade County*, (C. C. A.) 102 Fed. 60; *In re Emslie*, (C. C. A.) 102 Fed.

of sentences is justifiable in order that a statute may not be read contrary to its plain purpose.<sup>15</sup> But it is competent for the legislature to make an arbitrary exception to the general purposes of an act, and where this is clearly done such apparently repugnant provision cannot be disregarded.<sup>16</sup> And a statute worded in general language should not be restricted by construction to the effectuation of the object leading to its enactment.<sup>17</sup>

**25. Implications and incidents.**—Where an act of Congress prescribed a rate of compensation for “registers and receivers” of the land office, “whether in or out of office at the passage of this act,” with a proviso that “no register or receiver shall receive for his services during any year a greater compensation than the maximum now allowed by law,” the Supreme Court was of opinion that the proviso clearly implied that the same rule of compensation should apply to their successors as to the then incumbents and their predecessors. “What is implied in a statute, pleading, contract, or will,” said the court, “is as much a part of it as what is expressed.”<sup>18</sup> That case is cited more frequently than any other to the proposition just quoted.<sup>19</sup> Statutory provision that a national bank may lawfully, after its failure, “deliver special deposits,” implies that a national bank, as a part of its legitimate business, may receive such “special deposits,” and this implication is as effectual as an express declaration

292; *George v. Riddle*, 94 Fed. 693; *Davis v. Bohle*, (C. C. A.) 92 Fed. 328; *Keene Five Cent Sav. Bank v. Lyon County*, 90 Fed. 523; *In re Ng. Loy Hoe*, 53 Fed. 915; *U. S. v. Wong Sing*, 51 Fed. 80; *In re Coy*, 31 Fed. 801; *Singer Mfg. Co. v. McCollock*, 24 Fed. 669; *In re Ah Lung*, 18 Fed. 32; *Virginia, etc., Steam Nav. Co. v. U. S.*, Taney 420, 28 Fed. Cas. No. 16,973; *U. S. v. Stern*, 5 Blatchf. 514, 27 Fed. Cas. No. 16,389; *Cook v. Hamilton County*, 6 McLean 120, 6 Fed. Cas. No. 3,157; *Missouri River Packet Co. v. Hannibal, etc., R. Co.*, 1 McCrary 286; 20 Op. Atty-Gen. 167 (Taft, 1891).

“While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words.” *Pierce v. Van Dusen*, (C. C. A.) 78 Fed. 696.

**15.** *Werckmeister v. Pierce, etc., Mfg. Co.*, 63 Fed. 455.

**16.** *In re Schallenberger*, 72 Fed. 494.

**17.** *U. S. v. Mosley*, 238 U. S. 383, 35 S. Ct. 904, 59 U. S. (L. ed.) 1355.

**18.** *U. S. v. Babbitt*, 1 Black 61, 17 U. S. (L. ed.) 94 [citing *Koning v. Bayard*, 2 Paine 251, 14 Fed. Cas. No. 7,924; *Haight v. Holley*, 3 Wend. (N. Y.) 258; *Rogers v. Kneeland*, 10 Wend. (N. Y.) 218; *Fox v. Phelps*, 20 Wend. (N. Y.) 447; and *Com. Dig.*, tit. Devise, n. 12], *reaffirmed* in *U. S. v. Babbitt*, 95 U. S. 334, 24 U. S. (L. ed.) 480.

See, generally, § 17. And see §§ 19-21 as to departure from literal construction; § 107 as to intent as an implied element in statutory offense.

**19.** For authorities reiterating or applying the principle, see *Butz v. Muscatine*, 8 Wall. 581, 19 U. S. (L. ed.) 490; *Lynde v. Winnebago County*, 16 Wall. 13, 21 U. S. (L. ed.) 272; *Stewart v. Kahn*, 11 Wall. 506, 20 U. S. (L. ed.) 176; *U. S. v. Hodson*, 10 Wall. 406, 19 U. S. (L. ed.) 937; *Croxall v. Shererd*, 5 Wall. 268, 18 U. S. (L. ed.) 572; *Luria v. U. S.*, 231 U. S. 9, 34 S. Ct. 10, 58 U. S. (L. ed.) 101; *McHenry v. Alford*, 168 U. S. 672, 18 S. Ct. 242, 42 U. S. (L. ed.) 614; *Eckloff v. District of Columbia*, 135 U. S. 241, 10 S. Ct. 752, 34 U. S. (L. ed.) 120; *U. S. v. Corliass Steam-Engine Co.*, 91 U. S. 321, 23 U. S. (L. ed.) 397; *Wood County v. Lackawanna Iron, etc., Co.*, 93 U. S. 624, 23 U. S. (L. ed.) 989; *Pompton v. Cooper Union*, 101 U. S. 202, 25 U. S. (L. ed.) 803; *U. S. v. Allen*, (C. C. A.) 179 Fed. 13; *Thurber v. Miller*, (C. C. A.) 67 Fed. 376; *Tod v. Kentucky Union Land Co.*, 57 Fed. 50; *Kansas, etc., R. Co. v. Payne*, (C. C. A.) 49 Fed. 117; *Eastern Tp. Bank v. Vermont Nat. Bank*, 22 Fed. 188; *Leo v. Union Pac. R. Co.*, 19 Fed. 286; *McArthur v. Allen*, 3 Fed. 318; *National Exch. Bank v. Moore*, 2 Bond 170, 17 Fed. Cas. No. 10,041; *Baring v. Erdman*, 2 Fed. Cas. No. 981; *Schenck v. Peay*, 21 Fed. Cas. No. 12,451.

In *Union Tel. Co. v. Eyser*, 19 Wall. 427, 22 U. S. (L. ed.) 43, the court said: “It is expressly declared that the supersedeas bond may be executed within sixty days, and later, with the permission of the designated judge. It is not said when the writ of error shall be served. Its issuance must, of course, precede the execution of the bond, and, as the judge who

of the same thing would have been.<sup>20</sup> A statute authorizing the purchase of the rights and franchises of a named company, "heretofore incorporated by this state," is a clear affirmation of the existence of the corporation and of the possession of the rights and franchise conferred by its charter.<sup>21</sup> An appropriation by Congress for the salary of a consul at a place where there has previously been only a consular agency is sufficient warrant for the President to appoint a consul there.<sup>22</sup> When Congress by special legislation refers a claim to the Court of Claims of which that court has not jurisdiction, it must be held that the first purpose of the act is to confer it.<sup>23</sup> "Where a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."<sup>24</sup> Where power is conferred to do any act, it is to be construed as including all necessary, or usual, or proper modes and means of accomplishing the act.<sup>25</sup> A county has power to issue warrants in payment of its debts under a provision authorizing payment of county taxes by county warrants.<sup>26</sup> Express power granted to a public corporation to issue bonds must be taken to authorize bonds in the usual form of negotiable securities.<sup>27</sup> Power to issue bonds is plainly given to a county under statutory authority to subscribe to capital stock of a railroad company, which subscription is made payable in county bonds.<sup>28</sup> Express authority to a railroad corporation to construct a "continuous" line from a point on one side of a river to a town on the other confers authority to construct a railroad bridge across the river.<sup>29</sup>

Even in a criminal case it has been declared that "a statute often speaks as plainly by inference, and by means of the purpose which underlies the enactment, as in any other manner, and whenever it appears by necessary inference from what is expressed, that a given act or acts are opposed to the policy of the law, and will defeat its purpose, or the object had in view by the legislature, such acts should be held to be thereby prohibited."<sup>30</sup>

While it is true that courts may in certain cases impute a legislative intent not expressed with perfect clearness, where the words used import such intent, either necessarily or by a plain and manifest implication,

signs the citation is still required to take the bond, we think it is sufficiently implied that it may be served at any time before, or simultaneously with, the filing of the bond."

A provision that certain officers "shall receive no other pay or compensation than is now allowed them by law," sufficiently implies that they are to receive no less. *Whiting v. U. S.*, 35 Ct. Cl. 291.

20. *Carlisle First Nat. Bank v. Graham*, 100 U. S. 703, 25 U. S. (L. ed.) 750.

21. *Davis v. Gray*, 16 Wall. 223, 21 U. S. (L. ed.) 447.

22. *Sampson v. U. S.*, 30 Ct. Cl. 365.

23. *Cumming v. U. S.*, 22 Ct. Cl. 344.

24. *Raleigh, etc., Co. v. Reid*, 13 Wall. 270, 20 U. S. (L. ed.) 570. See also *U. S. v. O'Connor*, 31 Fed. 451; *Lender's Case*, 7 Ct. Cl. 530.

25. 17 Op. Atty.-Gen. 101 (*MacVeagh*, 1861); *Budd v. Budd*, 59 Fed. 741; *Custer County v. Anderson*, (C. C. A.) 68 Fed. 344.

Where a statute authorizes the building of vessels by the navy department, but makes no provision for procuring the necessary plans and specifications therefor, it is to be construed as impliedly authorizing the head of the department to procure such plans and specifications in the mode and manner which he shall deem best. 18 Op. Atty.-Gen. 244 (*Garland*, 1885).

26. *Little Rock v. U. S.*, (C. C. A.) 103 Fed. 420.

27. *Ashley v. Presque Isle County*, (C. C. A.) 60 Fed. 67.

28. *Wilson County v. National Bank*, 103 U. S. 770, 26 U. S. (L. ed.) 488; *Gelpcke v. Dubuque*, 1 Wall. 220, 17 U. S. (L. ed.) 520.

29. *Hughes v. Northern Pac. R. Co.*, 18 Fed. 106.

30. *Per Thayer, J.*, in *U. S. v. O'Connor*, 31 Fed. 451.

"it would be a dangerous exercise of judicial authority, not to be justified by any consideration, for a court to declare a law by the imputation of intent, when the words used do not import it, either necessarily or by plain implication, and when all the surroundings of the enactment clearly show that the construction claimed could not have been within the legislative thought." <sup>31</sup>

**26. Avoidance of judicial legislation: generally.**—Where the legislature has made no exception to the positive terms of a general statute, the conclusive presumption is that it intended to make none, and it is not the province of the courts to do so.<sup>32</sup> For example, it is not within the proper sphere of judicial power to import into a statute providing that a class of actions shall abate by the death of a party an exception in favor of certain actions belonging to that class.<sup>33</sup> Courts cannot engraft on a statute of limitations an exception which the statute does not contain.<sup>34</sup> A court will not declare a usurious contract of loan utterly void where the statute merely prescribes a loss of interest or other penalty for violation of the

31. *Per* Hawley, D. J., in *Massachusetts L. & T. Co. v. Hamilton*, (C. C. A.) 88 Fed. 596.

32. *Louisville, etc., R. Co. v. Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297; *Haas v. Henkel*, 216 U. S. 462, 30 S. Ct. 249, 54 U. S. (L. ed.) 569; *American Exp. Co. v. U. S.*, 212 U. S. 522, 29 S. Ct. 315, 53 U. S. (L. ed.) 635; *Hyde v. Shine*, 199 U. S. 62, 25 S. Ct. 760, 50 U. S. (L. ed.) 90; *Holden v. Stratton*, 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018; *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 340, 17 S. Ct. 540, 41 U. S. (L. ed.) 1007; *Farrington v. Tennessee*, 95 U. S. 689, 24 U. S. (L. ed.) 558; *Bailey v. Magwire*, 22 Wall. 228, 22 U. S. (L. ed.) 850; *Morton v. Nebraska*, 21 Wall. 671, 22 U. S. (L. ed.) 639; *The Cherokee Tobacco*, 11 Wall. 620, 20 U. S. (L. ed.) 227; *U. S. v. Anderson*, 9 Wall. 65, 19 U. S. (L. ed.) 615; *Maxwell v. Moore*, 22 How. 191, 16 U. S. (L. ed.) 251; *Kalloway v. Finley*, 12 Pet. 264, 9 U. S. (L. ed.) 1079; *Young v. Alexandria Bank*, 4 Cranch 397, 2 U. S. (L. ed.) 655; *U. S. v. Missouri, etc., R. Co.*, 213 Fed. 169; *U. S. v. Lumber Co.*, (C. C. A.) 202 Fed. 700; *Wabash R. Co. v. U. S.*, (C. C. A.) 178 Fed. 5; *Atlantic, etc., R. Co. v. U. S.*, (C. C. A.) 168 Fed. 175, *affirming* 153 Fed. 918; *U. S. v. Musgrave*, 160 Fed. 700; *U. S. v. Colorado, etc., R. Co.*, (C. C. A.) 157 Fed. 321; *Cella, etc., Co. v. Bohlinger*, (C. C. A.) 147 Fed. 419; *U. S. v. York*, 131 Fed. 323; *Southern R. Co. v. Machinists' Local Union No. 14*, 111 Fed. 57; *Hanifen v. Price*, 96 Fed. 435; *In re Baumann*, 96 Fed. 946; *Pearsall v. Great Northern R. Co.*, 73 Fed. 940; *Shreve v. Cheesman*, (C. C. A.) 69 Fed. 789, construing a state statute providing for the payment of all costs by a defeated party; *Superior v. Norton*, (C. C. A.) 63 Fed. 363; *U. S. v. Sullivan*, 43 Fed. 605, holding that "any vessel" in a penal statute included both foreign and domestic ves-

sels; *The Garden City*, 26 Fed. 774; *Farmers' L. & T. Co. v. Oregon, etc., R. Co.*, 24 Fed. 410; *Matter of Goldschmidt*, 3 Ben. 385, 10 Fed. Cas. No. 5,520, where the court said: "The whole includes all the parts and any one and every one of the parts;" *Rodgers v. U. S.*, 36 Ct. Cl. 280; *Byrnes's Case*, 3 Ct. Cl. 195, holding that an alien could avail himself of the remedy provided by the abandoned or captured property act which was therein given to "any person;" *Harrison v. U. S.* 20 Ct. Cl. 122, holding that Rev. Stat. U. S., § 4739, which authorized the Secretary of the Interior to strike from the pension roll "the name of any person" whenever it appears "that such name was put upon such roll through false or fraudulent representation," includes all pensioners. See also *Sturges v. Crowninshield*, 4 Wheat. 202, 4 U. S. (L. ed.) 529, where Chief Justice Marshall said: "It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide shall be exempted from its operation."

See §§ 19-21 as to departure from literal construction.

33. *Webber v. St. Paul City R. Co.* (C. C. A.) 97 Fed. 142.

34. *Amy v. Watertown*, 130 U. S. 320, 9 S. Ct. 537, 32 U. S. (L. ed.) 953; *Kendall v. U. S.*, 107 U. S. 123, 2 S. Ct. 277, 27 U. S. (L. ed.) 437; *Alabama State Bank v. Dalton*, 9 How. 629, 13 U. S. (L. ed.) 242; *M'Iver v. Ragan*, 2 Wheat. 29, 4 U. S. (L. ed.) 175; *Irvine v. Elliott*, 203 Fed. 82; *Schauble v. Schulz*, (C. C. A.) 137 Fed. 389; *In re Oliver*, 109 Fed. 784; *Murray v. Chicago, etc., R. Co.*, (C. C. A.) 92 Fed. 868; *Wrightman v. Boone County*, (C. C. A.) 88 Fed. 436; *U. S. v. American Lumber Co.*, 80 Fed. 309; *Muse v. Arlington Hotel Co.*, 68 Fed. 649; *Madden v. Lancaster County*, (C. C. A.) 65 Fed. 195; *Morgan v. Des Moines*, (C. C.

statute; the court cannot add to the penalties declared by the law.<sup>35</sup> The priority given by act of Congress to claims by the United States against the estates of insolvent debtors cannot be made by judicial legislation to yield to the claims of any other creditors, however high may be the dignity of their debts.<sup>36</sup> Quoting the language of the statute in such cases is usually the strongest argument that can be made against an illegitimate construction. Thus, where an act of Congress to prevent frauds upon the treasury declared void all transfers and assignments of claims against the United States except in certain cases, "or any part or any share of or interest therein," and it was held that the transfer of a portion of a claim by means of a bill of exchange was void, the court said: "The statute meets us at every turn with its inexorable announcement that every authority to receive any part of such a claim 'shall be absolutely null and void.'"<sup>37</sup> The court has no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision.<sup>38</sup> "No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."<sup>39</sup> "It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases because no good reason can be assigned why they were excluded from its provisions."<sup>40</sup> In a case where the Supreme Court was called upon to

A.) 60 Fed. 208; *Cross v. U. S.*, 4 Ct. Cl. 278; *U. S. v. Maillard*, 4 Ben. 459, 26 Fed. Cas. No. 15,709; *The Sam Slick*, 2 Curt. 480, 21 Fed. Cas. No. 12,282; *U. S. v. Brown*, 2 Lowell 267, 24 Fed. Cas. No. 14,665; *Meeks v. Vassault*, 3 Sawy. 217, 16 Fed. Cas. No. 9,393; *McComb v. Brodie*, 1 Woods 153, 15 Fed. Cas. No. 8,708.

But it was held that statutes of limitation did not run during the civil war against a party residing out of the insurgent states, so as to preclude his remedy for a debt against a person residing in one of them. *Hanger v. Abbott*, 6 Wall. 532, 18 U. S. (L. ed.) 939. Nor did they run against the right of a party to appeal, under similar circumstances, from an inferior federal court to the Supreme Court. *The Protector*, 9 Wall. 687, 19 U. S. (L. ed.) 812.

35. *De Wolf v. Johnson*, 10 Wheat. 392, 6 U. S. (L. ed.) 343; *Oates v. Montgomery First Nat. Bank*, 100 U. S. 250, 25 U. S. (L. ed.) 580; *National Exch. Bank v. Moore*, 2 Bond 170, 17 Fed. Cas. No. 10,041.

36. *U. S. v. Duncan*, 4 McLean, 607, 25 Fed. Cas. No. 15,003; *Lewis v. U. S.*, 92 U. S. 618, 23 U. S. (L. ed.) 513; *Theluss v. Smith*, 2 Wheat. 425, 4 U. S. (L. ed.) 271.

37. *Floyd Acceptance Case*, 1 Ct. Cl. 289.

38. *Petri v. F. E. Creelman Lumber Co.*, 199 U. S. 487, 26 S. Ct. 133, 50 U. S. (L. ed.) 281; *Folsom v. U. S.*, 160 U. S. 127, 16 S. Ct. 222, 40 U. S. (L. ed.) 363; *Thornley v. U. S.*, 113 U. S. 315, 5 S. Ct. 491, 28 U. S. (L. ed.) 999; *U. S. v. Temple*, 105 U. S. 99, 26 U. S. (L. ed.) 967; *International Bank v. Sherman*, 101 U. S.

406, 25 U. S. (L. ed.) 866; *U. S. v. Fox*, 95 U. S. 673, 24 U. S. (L. ed.) 538; *Leavenworth, etc., R. Co. v. U. S.*, 52 U. S. 751, 23 U. S. (L. ed.) 634; *U. S. v. Union Pac. R. Co.*, 91 U. S. 85, 23 U. S. (L. ed.) 224; *Doe v. Considine*, 6 Wall. 480, 18 U. S. (L. ed.) 869; *Minis v. U. S.*, 15 Pet. 447, 10 U. S. (L. ed.) 791; *Barnitz v. Casey*, 7 Cranch 468, 3 U. S. (L. ed.) 403; *Northern Pac. R. Co. v. U. S.*, (C. C. A.) 213 Fed. 162; *Peoples U. S. Bank v. Goodwin*, 162 Fed. 937; *U. S. v. Chicago, etc., R. Co.*, 151 Fed. 84; *U. S. v. Riggs*, (C. C. A.) 136 Fed. 583; *Guffey v. Alaska, etc., Co.*, (C. C. A.) 130 Fed. 271; *In re Scott*, 126 Fed. 981; *In re Guggenheim Smelting Co.*, (C. C. A.) 126 Fed. 728, *reversing* 121 Fed. 153; *Union, etc., Ins. Co. v. Champlin*, (C. C. A.) 116 Fed. 858; *U. S. v. Hewecker*, 79 Fed. 64; *National Mach. Co. v. Wheeler, etc., Mfg. Co.*, 72 Fed. 199; *Murphy v. U. S.*, 68 Fed. 911; *Northern Pac. R. Co. v. Sanders*, 46 Fed. 249, 47 Fed. 604; *Meyer v. Herrera*, 41 Fed. 67; *Schwerin v. North. Pac. R. Co.*, 36 Fed. 712; *Virginia Coupon Cases*, 25 Fed. 645; *U. S. v. Bassett*, 2 Story 403, 24 Fed. Cas. No. 14,539; *Griffin's Case*, 13 Ct. Cl. 258.

39. *U. S. v. Goldenberg*, 168 U. S. 103, 18 S. Ct. 3, 42 U. S. (L. ed.) 394; *Soliss v. General Electric Co.*, (C. C. A.) 213 Fed. 204; 23 Op. Atty-Gen. 421. See also *Rosencrans v. U. S.*, 165 U. S. 263, 17 S. Ct. 302, 41 U. S. (L. ed.) 708; *In re Wise*, 93 Fed. 445; *U. S. v. Starn*, 17 Fed. 438.

40. *Denn v. Reid*, 10 Pet. 527, 9 U. S. (L. ed.) 519; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 36, 15 S. Ct. 508, 39



construe a federal statute in which the words "lands claimed under any foreign grant or title" occurred, it was contended that the word "lawfully" should be placed before "claimed," but the court said there is no authority to import a word into a statute in order to change its meaning.<sup>41</sup>

27. "It would have been so easy to say so."—Where the charter of a railroad company exempted the capital stock from taxation "for ten years after the completion of said road," it was held that the benefit of the exemption began only with the completion of the road. "If the legislature had intended to limit the end only, and not the beginning, of the exemption," said the court, "its purpose could have been easily expressed by saying 'until' instead of 'for,' so as to read 'until ten years after completion,' leaving the exemption to begin immediately upon the granting of the charter."<sup>42</sup> And in a case where it was held that depositing in the mail an obscene letter, sealed and addressed, was not made criminal by a statute which prohibited the mailing, among other things, of an obscene "writing," the court said: "We do not think it a reasonable construction of the statute to say that the vast mass of postal matter known as 'letters' was intended by Congress to be expressed in a term so general and vague as the word 'writing,' when it would have been just as easy, and also in strict accordance with all its other postal laws and regulations, to say 'letters' when letters were meant."<sup>43</sup> Upon like reasoning, where a special act authorized the Court of Claims to investigate a claim for breach of an express contract, "and to ascertain and adjudge the amount equitably due, if any, for such loss and damage," it was held that interest, not having been stipulated for in the contract, could not be awarded.<sup>44</sup> And in numerous other cases a proposed construction which would unwarrantably contract or expand the meaning of the legislature has been rejected by the court upon the declared presumption that the legislature would have expressed what "it would have been easy to say" had there been such an intention.<sup>45</sup> But the facility with which the legislature might

U. S. (L. ed.) 601; *Merritt v. Welsh*, 104 U. S. 704, 26 U. S. (L. ed.) 896; *U. S. v. Shing Shun*, 173 Fed. 844; *U. S. v. Wood*, 127 Fed. 171; *Grace v. Collector of Customs, etc.*, (C. C. A.) 79 Fed. 318; *In re Dana*, 68 Fed. 904.

"In the construction of a statute words cannot be added thereto for the purpose of supplying an omission which, on merely conjectural grounds, it is thought to have been inadvertently made." 17 Op. Atty.-Gen. 65 (MacVeigh, 1881).

41. *Newhall v. Sanger*, 92 U. S. 765, 23 U. S. (L. ed.) 769. In a similar case Judge Brewer said: "Of course it is familiar learning that a word may be interpolated or suppressed if it be necessary to make the language harmonize with the obvious intent of the lawmaker. But I know of no rule of construction which permits us to beg the intent, and then to interpolate or suppress a word to carry out such intent. Rather it is to be presumed that the very language was used which expresses the intent." *Northern Pac. R. Co. v. U. S.*, 36 Fed. 287.

42. *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 669, 6 S. Ct. 625, 29 U. S. (L. ed.) 770.

43. *U. S. v. Chase*, 135 U. S. 259, 10 S. Ct. 756, 34 U. S. (L. ed.) 117.

44. *Tillson v. U. S.*, 100 U. S. 46, 25 U. S. (L. ed.) 543, where the court said: "We have no doubt it was the wish of those who procured the passage of the special statute under which the Court of Claims took jurisdiction of this suit, to obtain from Congress authority for that court, to give a judgment against the United States at least for interest in case it should be found that payments on the contracts held by the claimants had been unreasonably delayed. But if Congress had desired to grant such authority, it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power."

45. *Baltimore, etc., R. Co. v. Grant*, 98 U. S. 403, 25 U. S. (L. ed.) 231; *U. S. v. Detroit First Nat. Bank*, 234 U. S. 245,

have expressed itself more appropriately or more directly will not authorize a court to disregard the natural sense of the words actually used.<sup>46</sup>

**23. Government as impliedly within statute.**—It is a principle in English law that “where an act of Parliament is made for the public

34 S. Ct. 846, 58 U. S. (L. ed.) 1298; *Tiger v. Western Inv. Co.*, 221 U. S. 286, 31 S. Ct. 578, 55 U. S. (L. ed.) 738; *White v. U. S.*, 191 U. S. 545, 24 S. Ct. 171, 48 U. S. (L. ed.) 295; *U. S. v. New York*, 160 U. S. 612, 16 S. Ct. 402, 40 U. S. (L. ed.) 551; *Clough v. Curtis*, 134 U. S. 369, 10 S. Ct. 573, 33 U. S. (L. ed.) 945; *Burke v. Southern Pac. R. Co.*, 222 Fed. 97; *U. S. v. Shock*, 187 Fed. 862; *City Realty Co. v. S. R. H. Robinson Contracting Co.*, 183 Fed. 176; *Perkins Co. v. U. S.*, 180 Fed. 935; *Govin v. Chicago*, 132 Fed. 848. See also *U. S. v. Barringer*, 188 U. S. 583, 23 S. Ct. 405, 47 U. S. (L. ed.) 602, 20 Op. Atty-Gen. 503; *Allen v. Clarke*, (C. C. A.) 126 Fed. 738, *affirming* 114 Fed. 374; *Farrington v. Tennessee*, 95 U. S. 689, 24 U. S. (L. ed.) 558, where the court, construing in favor of a corporation, said: “If it was intended to make the exception claimed from the universality of the exemption as expressed, it would have been easy to say so, and it is fairly to be presumed this would have been done;” *St. Louis Nat. Bank v. Matthews*, 98 U. S. 627, 25 U. S. (L. ed.) 188, where the court said: “If Congress so meant, it would have been easy to say so, and it is hardly to be believed that this would not have been done;” *U. S. v. Koch*, 40 Fed. 252, where the court said that “if Congress had intended,” etc., “it was very easy to say so; its silence in this respect is cogent evidence that it did not understand or intend,” etc.; *Louisville Trust Co. v. Cincinnati*, 73 Fed. 726, where the court, holding that a certain right was not conferred in the charter of a railway company, said: “If such was the intention of the legislature, it would have been easy to express it;” *Parker v. U. S.*, 22 Ct. Cl. 104, where the court said: “Had Congress wished to repay, \* \* \* what more easy than to have said so?” 21 Op. Atty-Gen. 418, where Acting Attorney-General Whitney said: “Had they [members of Congress] so intended, it would have been easy to say so;” *In re Drake*, 114 Fed. 232, where the court said: “If the intent was to limit \* \* \* it could easily have been done;” *Turner v. Turner*, 108 Fed. 789, where the court said: “If Congress intended to include money decreed for the support of the wife and child, it would have been easy to have used the words ‘debts and duties,’ instead of ‘debts;’ and therefore a discharge in bankruptcy was held not to release the bankrupt from the obligation imposed by such decree;” *Harrington v. Herrick*, (C. C. A.) 64 Fed. 471, where the court said: “If this had been the

intention, surely it would have been clearly expressed;” *Moore v. American Transp. Co.*, 24 How. 38, 16 U. S. (L. ed.) 674, where the court said: “If Congress intended to have excluded them \* \* \* it would have been most natural and reasonable, and indeed almost a matter of course, to have referred to them by a more specific designation;” *Grace v. Collector of Customs, etc.*, (C. C. A.) 79 Fed. 319, where the court said: “If such was the intention of Congress, it is fair to presume the words would have been inserted in the appropriate place to accomplish such a result;” *Shaw v. Railroad Co.*, 101 U. S. 565, 25 U. S. (L. ed.) 892, where the court said: “If these were intended, surely the statute would have said something more,” etc.; *Austin v. U. S.*, 155 U. S. 432, 15 S. Ct. 167, 39 U. S. (L. ed.) 206, where the court said: “If such had been the intention of Congress, no reason suggests itself why Congress should not have unequivocally said so;” *In re Downing*, (C. C. A.) 56 Fed. 474, where the court said: “If Congress had not intended to place the duty on vermilion red of all kinds, that purpose could have been readily expressed; and we cannot doubt it would have been expressed by placing it upon ‘vermilion red containing quicksilver’ instead of upon ‘vermilion red, and all colors containing quicksilver;” *Strode v. Stafford Justices*, 1 Brock. 162, 23 Fed. Cas. No. 13,537, where Chief Justice Marshall said: “It is probable, had a more extended operation been intended, some terms would have been used indicative of that intention.” See also *Ryan v. Carter*, 93 U. S. 83, 23 U. S. (L. ed.) 807; *Tompkins v. Little Rock, etc., R. Co.*, 125 U. S. 127, 8 S. Ct. 762, 31 U. S. (L. ed.) 615; *U. S. v. Ryder*, 110 U. S. 739, 4 S. Ct. 196, 28 U. S. (L. ed.) 308; *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 744, 23 U. S. (L. ed.) 634; *Butz v. Muscatine*, 8 Wall. 580, 19 U. S. (L. ed.) 490; *The Cherokee Tobacco*, 11 Wall. 620, 20 U. S. (L. ed.) 227; *James v. Milwaukee*, 16 Wall. 161, 21 U. S. (L. ed.) 267; *U. S. v. Anderson*, 9 Wall. 66, 19 U. S. (L. ed.) 615; *Lawrence v. Allen*, 7 How. 796, 12 U. S. (L. ed.) 914; *Northern Pac. R. Co. v. Dudley*, 85 Fed. 86; *In re Baker*, 96 Fed. 957; *In re Baumann*, 96 Fed. 948; *Steele v. Buel*, (C. C. A.) 104 Fed. 970; *U. S. v. Slazenger*, 113 Fed. 525; *Ex p. Byers*, 32 Fed. 409; *Ullman v. Meyer*, 10 Fed. 243; *Hall's Case*, 17 Ct. Cl. 46.

<sup>46</sup> Thus, in *U. S. v. Fisher*, 2 Cranch 358, 2 U. S. (L. ed.) 304, the United States was held entitled to priority of payment out of the insolvent estate of

good, as for the advancement of religion and justice, or to prevent injury and wrong, the king is bound by such act, though not particularly named therein; but where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king is not bound, unless the statute is made to extend to him by express words."<sup>47</sup> And in this country, "where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature before a court of law would be authorized to put such an interpretation on any statute."<sup>48</sup> A construction whereby the government relinquishes any right, privilege, title, or interest is unwarranted unless demanded by this most explicit verbiage or by irresistible implication.<sup>49</sup> Thus, the government is not within the rule that where a statute creates a right and provides a remedy for its enforcement, such remedy is exclusive of all common-law remedies.<sup>50</sup> Where a bankruptcy act provided that a discharge should release the bankrupt "from all debts," etc., the United States were not barred by the debtor's discharge.<sup>51</sup> "The United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound."<sup>52</sup> But where an act of Congress provided that a suit by the United States should be tried and adjudicated as a suit between private parties, it was deemed that the lapse of time or the bar of the statute of limitations should have the same effect as in a suit between such parties.<sup>53</sup>

any debtor, although the statute provided for priority "where any revenue officer or other person hereafter becoming indebted to the United States by bond or otherwise shall become insolvent," and counsel argued that the natural mode of expressing an intent to include all debtors would have been "any person indebted to the United States." See § 18 as to awkward or inartistic language.

47. *Per Justice Clifford*, in *U. S. v. Herron*, 20 Wall. 255, 22 U. S. (L. ed.) 275, where the opinion continues as follows: "Acts of Parliament, says Chitty on Prerogative, 383, which would divest or abridge the king of his prerogatives, his interest, or his remedies, in the slightest degree, do not in general extend to or bind the king, unless there be express words to that effect. Therefore, says the same learned author, the statutes of limitation, bankruptcy, insolvency, set-off, etc., are irrelevant in the case of the king, nor does the statute of frauds relate to him, which last proposition is doubted by high authority. Exceptions exist to that rule undoubtedly, as where the statute is passed for the general advancement of learning, morality, and justice, or to prevent fraud, injury, and wrong, or where an act of Parliament gives a new estate or right to the king, as in that case it will bind him as to the manner of enjoying or using the estate or right as well as the subject."

48. *Per Justice Story*, in *U. S. v. Hoar*, 2 Mason 314, 26 Fed. Cas. No. 15,373; *Guaranty, etc., Co. v. Title, etc., Co.*, (C. C. A.) 174 Fed. 385.

49. *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 29 S. Ct. 458, 53 U. S. (L. ed.) 742; *Title, etc., Co. v. Guarantee, etc., Co.*, (C. C. A.) 174 Fed. 385.

See §§ 107-108 as to construction of grants; §§ 121-125 as to construction of exemptions; § 138 as to implied repeal, whereby the rights of the government would be prejudiced.

50. *U. S. v. Stevenson*, 215 U. S. 190, 30 S. Ct. 35, 54 U. S. (L. ed.) 153; *The Dollar Savings Bank v. U. S.*, 19 Wall. 227, 22 U. S. (L. ed.) 80.

51. *U. S. v. Herron*, 20 Wall. 251, 22 U. S. (L. ed.) 275; *U. S. v. King*, Wall. (C. C.) 13, 26 Fed. Cas. No. 15,536; *U. S. v. Rob Roy*, 1 Woods 42, 27 Fed. Cas. No. 16,179.

52. *U. S. v. Nashville, etc., R. Co.*, 118 U. S. 125, 6 S. Ct. 1006, 30 U. S. (L. ed.) 81; *U. S. v. Beebe*, 127 U. S. 338, 8 S. Ct. 1083, 32 U. S. (L. ed.) 121; *U. S. v. Davis*, 3 McLean 483, 25 Fed. Cas. No. 14,929; *U. S. v. Clinton Nat. Bank*, 28 Fed. 358. See also *U. S. v. Wallamet Valley, etc., Wagon-Road Co.*, 44 Fed. 241; *U. S. v. Spiel*, 8 Fed. 143; *U. S. v. Insley*, 130 U. S. 266, 9 S. Ct. 485, 32 U. S. (L. ed.) 968.

53. *U. S. v. Wallamet Valley, etc., Wagon-Road Co.*, 44 Fed. 241.

But the king can take the benefit of any particular act, though not named therein,<sup>54</sup> and the rule being equally applicable to the national government, when the United States became party defendants to an action brought by a private person, the bar of the statute of limitations was held to be a valid defense.<sup>55</sup> It was thought by Mr. Justice Story that the United States could sue in a federal court as indorsee of a bill of exchange although the maker and payee were citizens of the same state, the federal statute excepting jurisdiction of such suits by citizen indorsees not being intended to apply to suits brought by the United States.<sup>56</sup> The rule of construction that the government is not bound unless expressly named does not apply to acts of legislation which lay down general rules of procedure in civil actions.<sup>57</sup> Accordingly it was held that an act of Congress declaring that there shall be no exclusion of any witness in civil actions "because he is a party to or interested in the issue tried," applied to civil actions in which the United States were parties.<sup>58</sup> And the United States were held not entitled to a writ of error or appeal where the same remedy was not afforded under similar circumstances to a private party.<sup>59</sup> The United States as plaintiffs in an action were held bound by an act of Congress adopting the restrictions and regulations concerning imprisonment for debt then existing by the laws of the several states.<sup>60</sup> And the United States as plaintiffs in execution are bound by state homestead exemption laws.<sup>61</sup> If a statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former act upon that subject wherein the United States were specially favored.<sup>62</sup>

### *Statute Construed as a Whole.*

**29. Generally.**—In construing a statute, recourse must be had to the context, and all its provisions must be considered together.<sup>63</sup> "That a law is the best expositor of itself; that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent

<sup>54.</sup> *Per* Justice Strong, in *Dollar Sav. Bank v. U. S.*, 19 Wall. 239, 22 U. S. (L. ed.) 80.

<sup>55.</sup> *Stanley v. Schwalby*, 147 U. S. 508, 13 S. Ct. 418, 37 U. S. (L. ed.) 259.

<sup>56.</sup> *U. S. v. Greene*, 4 Mason 427, 26 Fed. Cas. No. 15,258.

<sup>57.</sup> *Green v. U. S.*, 9 Wall. 658, 19 U. S. (L. ed.) 806.

<sup>58.</sup> *Green v. U. S.*, 9 Wall. 657, 19 U. S. (L. ed.) 806.

It had been previously held in the Court of Claims that the act did not take away the statutory right of the government to examine a claimant in that court, and use or withhold his testimony at its option. *Jones's Case*, 1 Ct. Cl. 383, *Casey, C. J.*, dissenting. See also *Truitt v. U. S.*, 30 Ct. Cl. 19.

<sup>59.</sup> *U. S. v. Union Pac. R. Co.*, 105 U. S. 264, 26 U. S. (L. ed.) 1021; *U. S. v. Thompson*, 93 U. S. 588, 23 U. S. (L. ed.) 982.

<sup>60.</sup> *U. S. v. Tetlow*, 2 Lowell 159, 28

Fed. Cas. No. 16,456; *U. S. v. Knight*, 14 Pet. 301, 10 U. S. (L. ed.) 465.

<sup>61.</sup> *Fink v. O'Neil*, 106 U. S. 272, 1 S. Ct. 325, 27 U. S. (L. ed.) 196.

<sup>62.</sup> *Cook County Nat. Bank v. U. S.*, 107 U. S. 445, 2 S. Ct. 561, 27 U. S. (L. ed.) 537.

<sup>63.</sup> *Cumberland Glass Mfg. Co. v. De Witt*, 237 U. S. 447, 35 S. Ct. 636, 59 U. S. (L. ed.) 1042; *U. S. v. Goelet*, 232 U. S. 293, 34 S. Ct. 431, 58 U. S. (L. ed.) 610; *Cameron v. U. S.*, 231 U. S. 710, 34 S. Ct. 244, 58 U. S. (L. ed.) 448; *Omaha, etc., R. Co. v. Interstate Commerce Commission*, 230 U. S. 324, 33 S. Ct. 890, 57 U. S. (L. ed.) 1501, *reversing* 191 Fed. 40; *U. S. v. Chanez*, 228 U. S. 525, 33 S. Ct. 595, 57 U. S. (L. ed.) 950; *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 U. S. (L. ed.) 553; *Cherokee Inter-marriage Cases*, 203 U. S. 76, 27 S. Ct. 29, 51 U. S. (L. ed.) 96; *Petri v. F. E. Creelman Lumber Co.*, 199 U. S. 487, 26 S. Ct. 133, 50 U. S.

of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged."<sup>64</sup>

**30. Mistakes in body of act.**—"In construing an act of Congress if there be a plain mistake apparent upon the face of the act, which may be corrected by other language in the act itself, the mistake is not fatal."<sup>65</sup> A mere misnomer in the name of a person or corporation named in the act if the person really intended can be collected from the terms of the act is not a fatal mistake.<sup>66</sup> Where a private act designated a claimant by her maiden name when she was in fact married, the right conferred vested in the person irrespective of the name.<sup>67</sup> But the court cannot substitute other words and other dates, in order to maintain an act making erroneous reference to things *aliunde*, where the error is made in a matter which constitutes the very essence of the act.<sup>68</sup>

**31. Division into sections or titles.**—"What possible difference can it make in the construction of a statute that there is a subdivision into sections?" said Mr. Justice Story. "Statutes are construed by the import of the words," he continued, "and not by the mere division into sections, or periods, or sentences. The intention of the legislature does not break itself into sections. It is to be drawn from the entire corpus of the act, and not from single passages."<sup>69</sup> "If, then, a clause is found in one section which, in its general language and import, is equally as applicable to other sections and provisions of the same act as it is to the very section in which it is found; if the main objects of those sections and the true

(L. ed.) 281; *Holden v. Stratton*, 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018; *Carter v. Gear*, 197 U. S. 348, 25 S. Ct. 491, 49 U. S. (L. ed.) 787; *Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611, 25 S. Ct. 345, 49 U. S. (L. ed.) 619; *Vanderbilt v. Eidman*, 196 U. S. 480, 25 S. Ct. 331, 49 U. S. (L. ed.) 563; *U. S. v. St. Anthony R. Co.*, 192 U. S. 524, 24 S. Ct. 333, 48 U. S. (L. ed.) 548; *U. S. v. Michigan*, 190 U. S. 379, 23 S. Ct. 742, 47 U. S. (L. ed.) 1103; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 635, 18 S. Ct. 488, 42 U. S. (L. ed.) 878; *U. S. v. Burr*, 159 U. S. 84, 15 S. Ct. 1002, 40 U. S. (L. ed.) 82; *McBroom v. Scottish Mortg., etc., Co.*, 153 U. S. 323, 14 S. Ct. 852, 38 U. S. (L. ed.) 729; *The Delaware*, 161 U. S. 474, 16 S. Ct. 516, 40 U. S. (L. ed.) 771; *Postmaster-Gen. v. Early*, 12 Wheat. 152, 6 U. S. (L. ed.) 577; *U. S. v. Moore*, 95 U. S. 762, 24 U. S. (L. ed.) 588; *Silver v. Ladd*, 7 Wall. 227, 19 U. S. (L. ed.) 138; *Brown v. Duchesne*, 19 How. 194, 15 U. S. (L. ed.) 595; *U. S. v. Boisdore*, 8 How. 121, 12 U. S. (L. ed.) 1009; *Binney v. Chesapeake, etc., Canal Co.*, 8 Pet. 212, 8 U. S. (L. ed.) 917; *U. S. v. Fisher*, 2 Cranch 386, 2 U. S. (L. ed.) 304; *Rockefeller v. O'Brien*, 224 Fed. 541; *U. S. v. Atlantic Coast Line Co.*, 224 Fed. 160; *U. S. v. Osage County*, 193 Fed. 485; *U. S. v. Oregon, etc., R. Co.*, 186 Fed. 861; *Mannington v. Hocking Valley R. Co.*, 183 Fed. 133; *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A.) 150 Fed. 71; *U. S.*

*v. 99 Diamonds*, (C. C. A.) 139 Fed. 961; *Greenleaf v. National Ass'n of Ry. Postal Clerks*, 130 Fed. 209; *Moffitt v. U. S.*, (C. C. A.) 128 Fed. 375; *Wall v. Cox*, (C. C. A.) 101 Fed. 410; *Strong v. U. S.*, 93 Fed. 260; *Saltonstall v. Birtwell*, (C. C. A.) 66 Fed. 976; *U. S. v. Morton*, (C. C. A.) 65 Fed. 210; *Wechselberg v. Flour City Nat. Bank*, (C. C. A.) 64 Fed. 95; *Washington Tp. v. Coler*, (C. C. A.) 51 Fed. 366; *Powder River Cattle Co. v. Custer County*, 45 Fed. 326; *Ogden v. Strong*, 2 Paine 587, 18 Fed. Cas. No. 10,460; *In re Sutherland*, Deady 417, 23 Fed. Cas. No. 13,639; *Prentiss v. Elsworth*, 19 Fed. Cas. No. 11,386.

<sup>64.</sup> *Per* Chief Justice Marshall in *Pennington v. Coxe*, 2 Cranch 52, 2 U. S. (L. ed.) 199.

<sup>65.</sup> *Per* Justice Story in *Blanchard v. Sprague*, 3 Sumn. 282, 3 Fed. Cas. No. 1,517. See also *Wilson v. Spaulding*, 19 Fed. 304.

Thus for the purpose of effectuating the legislative intent, "or" has been construed as equivalent to "nor." *Lillis v. U. S.*, (C. C. A.) 190 Fed. 530.

<sup>66.</sup> *Blanchard v. Sprague*, 3 Sumn. 282, 3 Fed. Cas. No. 1,517, *citing* *Oxford University Case*, 10 Coke 57. See also *Mankel v. U. S.*, 19 Ct. Cl. 295.

<sup>67.</sup> *Duffy v. U. S.*, 24 Ct. Cl. 380.

<sup>68.</sup> *Blanchard v. Sprague*, 3 Sumn. 284, 3 Fed. Cas. No. 1,517.

<sup>69.</sup> *The Schooner Harriet*, 1 Story 256, 11 Fed. Cas. No. 6,099.

intent and policy of the act will be best promoted by reading it as applicable to all those sections; and if public mischiefs equally within the scope of the statute would be thereby prevented, and upon a different construction those mischiefs would be left without redress; there is very strong ground to say that the clause ought to be so construed as to suppress the mischiefs and not promote or protect them; and that, as its language is appropriate, so it shall be construed as intended to include them."<sup>70</sup> "It is a general rule in the construction of statutes that when in the early and declaratory sections the scope and extent of the power and privileges granted are once stated, the character of the grant as thus disclosed controls and interprets all subsequent sections, and it is unnecessary in each subsequent section to restate or use words and expressions which shall fully disclose the extent of those powers and privileges; but those subsequent sections will be understood (unless there be words of restriction and limitation therein) as coextensive with and applicable to the scope, and the full scope and extent, of the powers theretofore granted."<sup>71</sup> The occurrence of a provision in one section of a statute and its absence in another is, however, an argument against reading it as implied in that other section.<sup>72</sup> A proviso is usually confined to the section to which it is attached,<sup>73</sup> and special provisions in one section are ordinarily to be read as exceptions to apparently conflicting general provisions in another section.<sup>74</sup> Sections of a code must be pronounced, and to that end the letter of any section may sometimes be disregarded.<sup>75</sup> But where a subject is treated in the compiled laws of a state under a title clearly intended to be distinct and exclusive, the provisions should not be blended with general enactments elsewhere in the statutes which might otherwise affect them.<sup>76</sup>

**32. Effect to every word.**—It is a general rule, without exception, in construing statutes, that effect must be given to all their provisions, if such a construction is consistent with the general purpose of the act, and the provisions are not necessarily conflicting; and all acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it.<sup>77</sup> "We are not at liberty," said Mr. Justice Strong, "to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant;' this rule has been repeated innumerable times."<sup>78</sup> Where a statute speaks of

70. *Per* Justice Story, in *The Schooner Harriet*, 1 Story 255, 11 Fed. Cas. No. 6,099.

71. *Talbott v. Silver Bow County*, 139 U. S. 443, 11 S. Ct. 594, 35 U. S. (L. ed.) 210.

72. *U. S. v. Atchison, etc.*, R. Co., 220 U. S. 37, 31 S. Ct. 362, 55 U. S. (L. ed.) 361.

73. See §§ 129, 130, and 131.

74. *Rodgers v. U. S.*, 36 Ct. Cl. 266.

75. *Iglehart v. Iglehart*, 204 U. S. 478, 27 S. Ct. 329, 51 U. S. (L. ed.) 575.

See § 34 as to harmonizing separate parts of statute.

76. *Marine Ins. Co. v. St. Louis, etc.*, R. Co., 41 Fed. 654.

77. *Per* Justice Field, in *Bernier v. Bernier*, 147 U. S. 246, 37 U. S. (L. ed.) 152; *U. S. v. Baltimore, etc.*, R. Co., (C. C. A.) 159 Fed. 33.

78. *Washington Market Co. v. Hoffman*, 101 U. S. 115, 25 U. S. (L. ed.) 782, quoted with approval in *U. S. v. Lexington Mill, etc., Co.*, 232 U. S. 399, 34 S. Ct. 337, 58 U. S. (L. ed.) 658. To the same effect *Baltimore, etc.*, R. Co. *v. Interstate Commerce Commission*, 221 U. S. 612, 31 S. Ct. 621, 55 U. S. (L. ed.) 878; *Louisville, etc.*, R. Co. *v. Mottley*.

shares in national banks and "other moneyed capital," bank shares must be moneyed capital within the intention of the legislature, or else the word

219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297; *Blair v. Chicago*, 201 U. S. 400, 26 S. Ct. 427, 50 U. S. (L. ed.) 801; *U. S. v. United Verde Copper Co.*, 196 U. S. 207, 25 S. Ct. 222, 49 U. S. (L. ed.) 449; *Brunswick Terminal Co. v. Baltimore Nat. Bank*, 192 U. S. 386, 24 S. Ct. 314, 48 U. S. (L. ed.) 491; *U. S. v. Fisher*, 109 U. S. 145, 3 S. Ct. 154, 27 U. S. (L. ed.) 885 [affirming *Fisher's Case*, 15 Ct. Cl. 323]; *Lake Superior Ship Canal, etc., Co. v. Cunningham*, 155 U. S. 380, 15 S. Ct. 103, 39 U. S. (L. ed.) 183; *Rhodes v. Iowa*, 170 U. S. 423, 18 S. Ct. 664, 42 U. S. (L. ed.) 1088; *Park Bank v. Remsen*, 158 U. S. 346, 15 S. Ct. 891, 39 U. S. (L. ed.) 1008; *U. S. v. Oregon, etc., R. Co.*, 164 U. S. 540, 17 S. Ct. 165, 41 U. S. (L. ed.) 541; *Barrett v. U. S.*, 169 U. S. 228, 18 S. Ct. 327, 42 U. S. (L. ed.) 723; *Caha v. U. S.*, 152 U. S. 214, 14 S. Ct. 513, 38 U. S. (L. ed.) 415; *Petri v. Commercial Nat. Bank*, 142 U. S. 649, 12 S. Ct. 325, 35 U. S. (L. ed.) 1144; *Knight v. U. S. Land Assoc.*, 142 U. S. 177, 12 S. Ct. 258, 35 U. S. (L. ed.) 974; *Cook v. U. S.*, 138 U. S. 175, 11 S. Ct. 268, 34 U. S. (L. ed.) 906; *U. S. v. Stowell*, 133 U. S. 13, 10 S. Ct. 244, 33 U. S. (L. ed.) 555; *Andrews v. Hovey*, 123 U. S. 274, 8 S. Ct. 101, 31 U. S. (L. ed.) 160; *Hilton v. Merritt*, 110 U. S. 106, 3 S. Ct. 548, 28 U. S. (L. ed.) 83; *Montclair v. Ramsdell*, 107 U. S. 152, 2 S. Ct. 391, 27 U. S. (L. ed.) 431; *Allen v. Louisiana*, 103 U. S. 85, 26 U. S. (L. ed.) 318; *Wilmot v. Mudge*, 103 U. S. 221, 26 U. S. (L. ed.) 536; *U. S. v. Moore*, 95 U. S. 763, 24 U. S. (L. ed.) 588; *Heydenfeldt v. Daney Gold, etc., Min. Co.*, 93 U. S. 640, 23 U. S. (L. ed.) 995; *U. S. v. Howell*, 11 Wall. 436, 20 U. S. (L. ed.) 195; *Postmaster-Gen. v. Early*, 12 Wheat. 148, 6 U. S. (L. ed.) 577; *U. S. v. Wiltberger*, 5 Wheat. 99, 5 U. S. (L. ed.) 37; *Adams v. Woods*, 2 Cranch 341, 2 U. S. (L. ed.) 297; *In re Johnson*, 224 Fed. 180; *Northern Commercial Co. v. U. S.*, (C. C. A.) 217 Fed. 33; *U. S. v. Forty Barrels, etc., of Coca Cola*, (C. C. A.) 215 Fed. 535, affirming 191 Fed. 431; *Aarow v. U. S.*, (C. C. A.) 204 Fed. 943; *U. S. v. Oregon, etc., R. Co.*, 186 Fed. 861; *Mannington v. Hocking Valley R. Co.*, 183 Fed. 133; *U. S. v. 99 Diamonds*, (C. C. A.) 139 Fed. 961; *Govin v. Chicago*, 132 Fed. 848; *In re Drake*, 114 Fed. 232; *In re Matthews*, 109 Fed. 615; *In re Stein*, (C. C. A.) 105 Fed. 751; *Wrightman v. Boone County*, (C. C. A.) 88 Fed. 436, 82 Fed. 414; *Butler v. U. S.*, 87 Fed. 660; *Northwestern Mut. L. Ins. Co. v. Seaman*, 80 Fed. 358; *The Coquitlam*, (C. C. A.) 77 Fed. 751; *Knox County v. Morton*, (C. C. A.) 68 Fed. 790; *In re Gerdaun*, 54 Fed. 145; *Aspley v. Murphy*, (C. C. A.) 52 Fed. 573; *U. S. v. Bashaw*,

(C. C. A.) 50 Fed. 753; *Northern Pac. R. Co. v. Sanders*, 47 Fed. 610; *Grand Haven First Nat. Bank v. Forest*, 40 Fed. 706; *Whelan v. New York, etc., R. Co.*, 35 Fed. 855; *Fales v. Chicago, etc., R. Co.*, 32 Fed. 676; *Gwathmay v. Clisby*, 31 Fed. 223; *Mutual L. Ins. Co. v. Champlin*, 21 Fed. 87; *Metropolitan R. Co. v. Slack*, 1 Holmes 377, 17 Fed. Cas. No. 9,506; *The Schooner Harriet*, 1 Story 255, 11 Fed. Cas. No. 6,099; *The Ship Argo*, 1 Gall. 156, 1 Fed. Cas. No. 516; *Matter of Davis*, 3 Ben. 485, 7 Fed. Cas. No. 3,615; *Copeland v. Memphis, etc., R. Co.*, 3 Woods 664, 6 Fed. Cas. No. 3,209; *Prentiss v. Elsworth*, 19 Fed. Cas. No. 11,386; *Quackenbush v. U. S.*, 33 Ct. Cl. 355; *McMullen v. U. S.*, 24 Ct. Cl. 396.

In *Strode v. Stafford Justices*, 1 Brock. 165, 23 Fed. Cas. No. 13,537, Chief Justice Marshall said: "It is urged, that one sentence of a law cannot be affected by the context. I should as soon have expected the declaration, that one sentence of a will was not to be affected by other parts of the will. In each, the intention of the maker is to be affected, and, consequently, each instrument must be wholly inspected. Without reasoning upon this subject, the books abound with authorities, which seem to be conclusive. In 1 Inst. 381, Lord Coke says: 'It is the most natural and genuine exposition of a statute, to construe one part of a statute by another part of the same statute, for that best expresseth the meaning of the makers.' He afterwards adds: 'And this exposition is *ex visceribus actus*.' The instances which illustrate this axiom, in the construction of statutes, are numerous."

"Single sentences and single provisions are not to be selected and construed by themselves, but the whole must be taken together." *Pollard v. Bailey*, 20 Wall. 526, 22 U. S. (L. ed.) 376.

"It is not competent for this court to reject or disregard a material part of an act of Congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together." *Rice v. Minnesota, etc., R. Co.*, 1 Black 379, 17 U. S. (L. ed.) 147.

"Nothing less than imperative necessity will justify a court in rejecting words or clauses used in a statute." *Per Baker, I. J.*, in *McKean v. Archer*, 52 Fed. 793.

In *U. S. v. Gooding*, 12 Wheat. 460, 6 U. S. (L. ed.) 693, a criminal case, the court declined to read the words "such ship or vessel" in a statute as if the word "such" were struck out. See also *U. S. v. Bowen*, 100 U. S. 512, 25 U. S. (L. ed.) 631, where it was unsuccessfully contended that "all such pensioners" should be read "all pensioners."

In the phrase "sold or disposed of" the

"other" would be without significance.<sup>79</sup> Under a statute requiring publication of notice of a tax sale "once in each week for at least twelve successive weeks," a sale advertised for only eighty-two days was pronounced illegal, and no title was conveyed thereby; the effect of the words "for at least" demanding such construction.<sup>80</sup> Where an act of Congress appropriated a sum "in full compensation" for services of a public officer during the ensuing fiscal year the court said it had no right to eliminate the words "in full" by adjudging the officer entitled to a larger sum antecedently prescribed for him in the Revised Statutes.<sup>81</sup> "The purpose of an act is, undoubtedly," said Judge McKenna, "the light by which its provisions are to be construed, but we may not assume that any provision is idle. It may be an exception to the general purpose, and the first presumption is that it means something."<sup>82</sup> In applying the rule it frequently occurs that a particular construction of a provision which the court is urged to adopt cannot be sanctioned, because, according to the view suggested, certain other provisions would thereby be rendered unnecessary, and it should not be presumed that any provision is redundant or useless.<sup>83</sup> Thus, an act of Congress prohibiting the sale of "any spirituous liquors or wines" to any Indian was held not to include lager beer. "By the term 'spirituous liquors' used alone in a statute," said the court, "it may, with some plausibility, be contended that the legislature meant to signify all intoxicating drinks; but the case is quite different when 'wines' are added to the articles prohibited. In that case it is evident that the legislature did not think that all intoxicating drinks were included in the term 'spirituous liquors,' or they would not have named 'wines.' Under the construction put by the court below on the words 'spirituous liquors,' as including all liquors that are intoxicating, and

words "or disposed of" have some distinctive meaning, some meaning beyond the word "sold." *Platt v. Union Pac. R. Co.*, 99 U. S. 59, 25 U. S. (L. ed.) 424.

79. *Mercantile Bank v. New York*, 121 U. S. 155, 7 S. Ct. 826, 30 U. S. (L. ed.) 395. See also for a like construction of the word "other" in a similar connection, *Potts v. U. S.*, (C. C. A.) 114 Fed. 54; *U. S. v. Schuler*, 6 McLean 39, 27 Fed. Cas. No. 16,234; *U. S. v. Chase*, 135 U. S. 255, 10 S. Ct. 756, 34 U. S. (L. ed.) 117; *U. S. v. Clark*, 43 Fed. 574. But compare with the last cited case, *In re Wahll*, 42 Fed. 822.

80. *Early v. Doe*, 16 How. 616, 14 U. S. (L. ed.) 1079, where Mr. Justice Wayne said: "We do not doubt if the statute had been 'once in each week for twelve successive weeks,' a previous notice of the particular day of sale having been given to the owner of the property, that it might very well be concluded, that twelve notices in different successive weeks, though the last insertion of the notice for sale was on the day of sale, was sufficient. But when the legislator had used the words, for at least twelve successive weeks, we cannot doubt that the words, at least as they would do in common parlance, mean a duration of the time that there is in twelve successive weeks or eighty-four

days. Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning. Our construction of the statute under review gives to every word its meaning. The other leaves out of consideration the words 'for at least,' which mean a space of time comprehended within twelve successive weeks or eighty-four days. The preposition, for, means of itself duration when it is put in connection with time, and as all of us use it in that way, in our every-day conversation, it cannot be presumed that the legislator, in making this statute, did not mean to use it in the same way."

81. *U. S. v. Fisher*, 109 U. S. 143, 3 S. Ct. 154, 27 U. S. (L. ed.) 885.

82. *In re Schallenberger*, 72 Fed. 493.

83. *Cook County Nat. Bank v. U. S.*, 107 U. S. 451, 2 S. Ct. 561, 27 U. S. (L. ed.) 537; *In re McDonough*, 49 Fed. 361. See also *Caha v. U. S.*, 152 U. S. 214, 14 S. Ct. 513, 38 U. S. (L. ed.) 415; *Stephens v. Cherokee Nation*, 174 U. S. 480, 19 S. Ct. 722, 43 U. S. (L. ed.) 1041; *Wayman v. Southard*, 10 Wheat. 27, 6 U. S. (L. ed.) 253; *Stephens v. McCargo*, 9 Wheat. 508, 6 U. S. (L. ed.) 145; *The Saratoga*, 9 Fed. 329; *Park Bank v. Remsen*, 158 U. S. 346, 15 S. Ct. 891, 39 U. S. (L. ed.) 1008.



hence as including lager beer, the word 'wines' is useless in the statute."<sup>84</sup>

**33. Destructive and synonymous words.**—With respect to certain words disregarded as destructive, Mr. Chief Justice White, speaking for the court, said: "We may not in order to give effect to those words virtually destroy the meaning of the entire context, that is, give them a significance which would be clearly repugnant to the statute looked at as a whole and destructive of its obvious intent."<sup>85</sup> Separate significance need not be given synonymous words.<sup>86</sup> "There is nothing unusual in finding in a statute words which might have been omitted,"<sup>87</sup> and "tautology sometimes occurs."<sup>88</sup> But it was said in the construction of a tariff act: "It would not be safe for the court to draw any inference from the apparent tautology of those parts of a revenue law describing the subjects of duty. In most cases the terms used being addressed to merchants were to be understood in their mercantile sense, the ascertainment of which is matter of fact, depending on evidence, and that which may seem merely tautologous might turn out to be truly descriptive of different subjects."<sup>89</sup>

#### *Separate Parts Harmonized*

**34. Generally.**—The various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repug-

<sup>84.</sup> *Sarlls v. U. S.*, 152 U. S. 575, 14 S. Ct. 720, 38 U. S. (L. ed.) 556.

<sup>85.</sup> *Van Dyke v. Cordova Copper Co.*, 234 U. S. 188, 34 S. Ct. 884, 58 U. S. (L. ed.) 1273.

A superfluous negative may, therefore, be properly disregarded. *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 29 S. Ct. 270, 53 U. S. (L. ed.) 453.

<sup>86.</sup> *U. S. v. Debs*, 64 Fed. 748.

<sup>87.</sup> *Per Knowles, J.*, in *Northern Pac. R. Co. v. Sanders*, 47 Fed. 612.

<sup>88.</sup> In *U. S. v. Bassett*, 2 Story 404, 24 Fed. Cas. No. 14,539, Mr. Justice Story said: "As to the point of the objection, that otherwise the words above recited have no distinct and emphatic effect, and that the act will read just the same without them; what is the amount of the objection? It is nothing more than that the legislature has used superfluous language; that it has used words which might have been spared, and are either unnecessary or tautological. Now, I believe that there are very few acts of legislation in the statute book, either of the state or of the national government, or of the British Parliament, which do not fall within the same predicament, and are not open to the same objection, or, if you please, to the same reproach. The truth is, that it arises sometimes from loose and inaccurate habits of composition of the draftsman, sometimes from hasty and unrevised legislation, but more frequently from abundant, and, perhaps, over-anxious caution. Even our constitutions of government, if nicely scrutinized, cannot escape this reproach, if reproach it can properly deserve to be called. Mr. Madison has somewhere remarked, that the Constitution of the United States contains

numerous tautological expressions, which convey no additional or distinct meaning from the context. The very first power given to the Congress of the United States by the Constitution, the power 'to lay and collect taxes, duties, imposts and excises,' is open to this very suggestion. Are not duties, imposts and excises, in reality taxes? Are not these words sometimes used to express the same thing? Imposts are but external taxes or duties; excises are but internal taxes and duties. No one, however, can reasonably doubt, but these words were all used in the Constitution from abundant caution, to avoid a doubt or to prevent a cavil, as each of these words is sometimes used in a broad and general sense, and sometimes in a more narrow and restricted sense. The objection, therefore, is not of itself a just ground to alter the interpretation of any clause of an act, otherwise sensible and satisfactory, in order to escape the imputation of being unnecessary. Assuming it to be unnecessary, it by no means follows, that it is, therefore, to have some new meaning given to it, or that it may not justly be presumed to be used *ex majori cautela*. In the present case, I have no doubt, that the clause was introduced into the act, *ex majori cautela*."

<sup>89.</sup> *Per Mr. Justice McKenna*, in *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171, where manifest tautology was found in subdivision e of section 67 of the Bankruptcy Act of 1898, for which see the title *BANKRUPTCY* in the body of this work.

<sup>89.</sup> *Stuart v. Maxwell*, 16 How. 163, 14 U. S. (L. ed.) 883.

nancy or inconsistency.<sup>89a</sup> The sections of a code relative to any subject must be harmonized and to that end the letter of any section may sometimes be disregarded.<sup>90</sup> But where absolute harmony between parts of a statute is demonstrably non-existent, the court must reject that one which is least in accord with the general plan of the whole,<sup>91</sup> or if there be no such ground for choice between inharmonious sections, the later section being the last expression of the legislative mind must, in construction, vacate the former to the extent of the repugnancy.<sup>92</sup>

**35. General and particular provisions.**—"It is an old and familiar rule," said Mr. Justice Lamar, "that where there is in the same statute a particular enactment, and also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."<sup>93</sup> And the justice proceeded to apply that rule in the construction of a statute upon which there had been much ingenious argument and a decided conflict of authority in the inferior federal courts. The statute was an act of Congress of 1876, declaring non-mailable "every obscene \* \* \* book, pamphlet, paper, writing, print, or other publication of an indecent character," and other enumerated articles, and making it a misdemeanor to deposit any of them for mailing.<sup>94</sup> In a prosecution under the act, the Circuit Court certified to the Supreme

**89a.** *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 662, 23 U. S. (L. ed.) 336; *Patterson v. Winn*, 11 Wheat. 389, 6 U. S. (L. ed.) 500; *U. S. v. Newhall*, 91 Fed. 529, where the court rejected a proposed construction because "it would introduce confusion and inconsistency into a statute which is otherwise plain and intelligible." *U. S. v. N. Y. Steam Fitting Co.*, 235 U. S. 327, 35 S. Ct. 108, 59 U. S. (L. ed.) 253; *Wood v. A. Wilbert's Sons Shingle, etc., Co.*, 226 U. S. 384, 33 S. Ct. 125, 57 U. S. (L. ed.) 264; *U. S. v. Delaware, etc., R. Co.*, 213 U. S. 366, 29 S. Ct. 527, 53 U. S. (L. ed.) 836; *Great Northern R. Co. v. U. S.*, 208 U. S. 452, 28 S. Ct. 313, 52 U. S. (L. ed.) 567; *Iglehart v. Iglehart*, 204 U. S. 478, 27 S. Ct. 329, 51 U. S. (L. ed.) 575; *Blair v. Chicago*, 201 U. S. 400, 26 S. Ct. 427, 50 U. S. (L. ed.) 801; *Bird v. U. S.*, 187 U. S. 118, 23 S. Ct. 42, 47 U. S. (L. ed.) 100; *Studebaker v. Perry*, 184 U. S. 258, 22 S. Ct. 463, 46 U. S. (L. ed.) 528; *Sherman v. Buick*, 93 U. S. 215, 23 U. S. (L. ed.) 849; *Washington Market Co. v. Hoffman*, 101 U. S. 116, 25 U. S. (L. ed.) 782; *U. S. v. Osage County*, 193 Fed. 485; *U. S. v. Oregon, etc., R. Co.*, 186 Fed. 861; *U. S. v. Baltimore, etc., R. Co.*, (C. C. A.) 159 Fed. 33; *In re Cambridge Lumber Co.*, 136 Fed. 983; *U. S. v. Hammond*, (C. C. A.) 104 Fed. 864; *Jarman v. Knights Templar, etc., L. Indemnity Co.*, 95 Fed. 77; *In re Gutwillig*, (C. C. A.) 92 Fed. 339; *Scott v. Lattimer*, (C. C. A.) 89 Fed. 845; *Adams v. Bancroft*, 3 Sumn. 386, 1 Fed. Cas. No. 44.

"It is a settled rule of construction that

'one part of a statute must be so construed by another that the whole may, if possible, stand, *ut res magis valeat quam pereat*,' 1 Bl. Com. 89, or as otherwise expressed, that every clause in a statute should have effect, and one portion should not be placed in antagonism to another." *U. S. v. Landram*, 118 U. S. 84, 6 S. Ct. 954, 30 U. S. (L. ed.) 58.

Explicit words must be given effect, however, even though they empty the statute of all use. *U. S. v. Plowman*, 216 U. S. 372, 30 S. Ct. 299, 54 U. S. (L. ed.) 523, *reversing* (C. C. A.) 151 Fed. 1022.

**90.** *Iglehart v. Iglehart*, 204 U. S. 478, 27 S. Ct. 329, 51 U. S. (L. ed.) 575. See also *Guthrie v. Sparks*, (C. C. A.) 131 Fed. 443.

**91.** *U. S. v. Farrar*, (C. C. A.) 139 Fed. 260; *In re Hammond*, 98 Fed. 845.

**92.** *In re Richards*, (C. C. A.) 96 Fed. 935; *In re Rhoads*, 98 Fed. 399; *In re Tune*, 115 Fed. 906; *Merchants' Nat. Bank of New Haven v. U. S.*, (C. C. A.) 214 Fed. 200. See also *Fales v. Chicago, etc., R. Co.*, 32 Fed. 673.

**93.** *U. S. v. Chase*, 135 U. S. 260, 10 S. Ct. 756, 34 U. S. (L. ed.) 117, quoting, as in the text, the language of *Romilly, M. R.*, in *Pretty v. Solly*, 26 Beav. 610, and *citing* *State v. Taxation R. Com'rs*, 37 N. J. L. 228.

To the same effect *Rodgers v. U. S.*, 185 U. S. 83, 22 S. Ct. 582, 46 U. S. (L. ed.) 616; *Aaron v. U. S.*, (C. C. A.) 204 Fed. 943.

**94.** Act of July 12, 1876, 19 Stat. at L. 90, c. 186.

Court the following question: "Is the knowingly depositing in the mails of an obscene letter, inclosed in an envelope or wrapper upon which there is nothing but the name and address of the person to whom the letter is written, an offense within the act?" On behalf of the government it was contended that the word "writing" comprehended such a letter, but the Supreme Court held otherwise. In the course of his argument in support of the view of the court, Justice Lamar pointed out that the statute, after enumerating what articles shall be nonmailable, adds a separate and distinct clause declaring that "every letter *upon the envelope of which* \* \* \* indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed \* \* \* shall not be conveyed in the mails," and the person knowingly or wilfully depositing the same in the mails "shall be deemed guilty of a misdemeanor," etc. "This distinctly additional clause," continued the justice, "specifically designating and describing the particular class of letters which shall be nonmailable, clearly limits the inhibitions of the statute to that class of letters alone whose indecent matter is exposed on the envelope."<sup>95</sup> Another illustration of the general rule is the construction placed upon the Bankruptcy Act of 1898 which awards priority of payment out of the bankrupt's estate to "(4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed \$300 to each claimant. (5) Debts owing to any person who by the laws of the states or of the United States is entitled to priority." The Circuit Court of Appeals held that the limitation of three months applies to the specified wages claims, even though the law of the state gives priority without limitation; that the provision containing the limitation is special and the following provision general, and that what Congress has said specifically upon a subject "expresses the particular intent of the law-making power," and "is not to be tolled or enlarged by

95. U. S. v. Chase, 135 U. S. 260, 10 S. Ct. 756, 34 U. S. (L. ed.) 117, wherein the court quotes with approval the opinion of Judge Hammond, in U. S. v. Huggett, 40 Fed. 640, where the same construction of the act was adopted. In that case Judge Hammond invoked another rule of interpretation as follows: "Has this letter been excluded by the language of the act? A latitudinarian construction that shall include it because it is as hurtful to morals as other things that are excluded is denied to use by the Supreme Court, as already shown. The conclusive fact against including it is that from the beginning of the legislation to the recent acts, which do specifically include 'letters,' they have never been mentioned as such in the list of prohibited mail matter, nor referred to in the statute, except in a phrase which by fair implication shows that they were designedly left out of that list when Congress says that there shall be included 'every letter upon the envelope of which' — and it may be conceded that this means upon the outside surface of which — the obscene language, etc., appears. Now, from the earliest appearance in our civilization of postal carriage, whether by private or

public establishment, the 'letters' have been that class of 'mail matter' with which and about which there has been most concern, so much so, that the idea of 'a letter' and postal carriage are quite inseparable, when we have in mind the postal service and its regulation. It has become, in that relation, a technical word, a superior word, a word to represent a class of mail matter that is in every possible sense of so high a grade that all else becomes inferior in classification and in enumeration to it. It stands first in postal concerns, and nothing is even equal to it. Historically, in practical operation, and in popular knowledge and esteem, this is so, and the general rule of construction is that in legislative enumeration the inferior does not include the superior. End. Interp. St., § 412, p. 579. I have taken the trouble to examine with care the legislation concerning our postal affairs, and do not find a single instance where Congress has ever used any other word to include 'letters' than that word itself, except such expressions as 'the mail,' 'mail matter,' 'bag or mail of letters,' etc. It is sometimes used generically to describe mail matter of other classes than

any general prior or subsequent provision" in the act.<sup>96</sup> Where an act of Congress directed the Secretary of the Treasury to pay to the legal owner of such lands as were sold for taxes "in the parishes of St. Helena and St. Luke" a specified sum per acre, a further provision in the same act that "any sum or sums of money received into the treasury of the United States from the sale of lands bid in for taxes in any state \* \* \* in excess of the tax assessed thereon shall be paid to the owners of the land" was held not to extend to the parishes of St. Helena and St. Luke.<sup>97</sup> In a section of the Federal Judiciary Act of 1789 the jurisdiction of the Circuit Court was defined as extending to "all suits of a civil nature, at common law or in equity, where," etc., and after prescribing the criminal jurisdiction of the Circuit Court and providing that no person shall be arrested in one district for trial in another "in a civil action" before a circuit or district court, the paragraph concluded with the provision that "no civil suit shall be brought before either of said courts, against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found, at the time of serving the writ." It was held that the words "civil suit" in the last provision were confined to civil suits "at common law or in equity," as in the first provision, and did not extend to causes of admiralty jurisdiction. "The general language found in one place," said the court, "may be restricted in its effect to the particular expressions employed in another, if such, upon a careful examination of the subject, appears to have been the intent of the enactment."<sup>98</sup> Where general language in an act is followed by the words "that is to say," and particular cases are then specified, what follows the quoted phrase must govern what precedes it, because it is the more carefully chosen language.<sup>99</sup> The rule has a close affinity with the rule of *ejusdem generis*,<sup>1</sup> and the rule that where an

'letters,' as when the statutes speak of 'letter-carriers,' 'letter-boxes,' etc.; but whenever the legislation in hand requires specific classification or enumeration, I find no word ever substituted for 'letters,' to express that which is commonly known as letters in relation to the postal service. We have 'letter and newspaper envelopes,' 'letter correspondence,' 'registered letters,' 'unclaimed letters,' 'dead letters,' 'request letters,' 'non-delivered letters,' 'all letters and other mail matter,' 'foreign letters,' 'letters or packets,' 'letters and packets,' 'letter postage,' 'letter mail,' 'letter and other mail matter,' and such like, almost innumerable; and these I have taken quite at random from the Revised Statutes. Can it be possible that Congress then, wishing to include 'letters,' in any particular and accurate enumeration shall drop that word so imbedded in our postal laws and that of our ancestors beyond the sea, and adopt some unfamiliar, inferior, and in every sense ambiguous term to express the idea? It does violence to the intelligence of Congress to think so."

A provision in a statute conferring authority upon counties "to issue bonds in such amount as may be necessary to erect a suitable building for a court house" was

held to be limited by a subsequent section declaring that the county should not issue a larger amount of bonds than could be liquidated in a certain number of years by an annual tax of a stated amount. *Francis v. Howard County*, 50 Fed. 44.

For other cases where the rule discussed in the text, or arguments closely resembling that rule, were applied with a like result, see *In re Jayne*, 28 Fed. 419; *In re Lange*, 91 Fed. 362 [citing *Covington v. McNickle*, 18 B. Mon. (Ky.) 286]; *Littleton v. Oliver Ditson Co.*, 62 Fed. 597 [affirmed *Oliver Ditson Co. v. Littleton*, (C. C. A.) 67 Fed. 905]; *Boston Safe Deposit, etc., Co. v. Hudson*, (C. C. A.) 68 Fed. 760.

<sup>96</sup> *In re Rouse*, (C. C. A.) 91 Fed. 101; 23 Op. Atty-Gen. 609.

<sup>97</sup> *Sams v. U. S.*, 27 Ct. Cl. 266, approved in *McKee v. U. S.*, 164 U. S. 287, 17 S. Ct. 92, 41 U. S. (L. ed.) 437, where the court adopted the same construction of the act.

<sup>98</sup> *Atkins v. Fibre Disintegrating Co.*, 18 Wall. 272, 21 U. S. (L. ed.) 841, where the conclusion of the court was sustained by reference to other sections of the act *in pari materia*.

<sup>99</sup> *Jordan v. U. S.*, 19 Ct. Cl. 119.

1. See § 91.

act contains special provisions they must be read as exceptions to a general provision in a separate earlier or subsequent act.<sup>2</sup>

**36. Same—limitations on rule.**—We have seen that provisos and exceptions in a statute are strictly construed,<sup>3</sup> that courts are slow to discover qualifications of explicit general language where the legislature has made none,<sup>4</sup> that the natural import of the language is presumptively within the intent of the legislature,<sup>5</sup> that all the provisions of an act should be harmonized if possible,<sup>6</sup> and that manifest legislative intent is always of paramount consideration.<sup>7</sup> So the general rule stated in the preceding paragraph is no stronger than the declaration by Chief Justice Marshall that "positive and explicit provisions, comprehending in terms a whole class of cases, are not to be restrained by applying to those cases an implication drawn from subsequent words, unless that implication be very clear, necessary, and irresistible."<sup>8</sup> And when words of different signification are employed the scope of the statute is not necessarily to be confined within the limits of the narrower word.<sup>9</sup> Accordingly under the Sherman anti-trust law declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," etc.,<sup>10</sup> it was held that the word "conspiracy" was not confined to combinations of a contractual character, since such a construction "would be to make tautologous words which have distinctly different meanings."<sup>11</sup> So where an act of Congress provided that no person should "be prosecuted, tried, or punished for any offense not capital, nor for any fine or forfeiture under any penal statute unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offense, or incurring the fine or forfeiture aforesaid," and it was contended by the United States District Attorney that an action of debt to recover a pecuniary forfeiture was not barred by the limitation, "it is true," said Chief Justice Marshall, "that general expressions may be restrained by subsequent particular words, which show that in the intention of the legislature those general expressions are used in a particular sense, and the argument is a strong one which contends that the latter words describing the remedy imply a restriction on those which precede them. Most frequently they would do so. But in the statute under consideration a distinct member of the sentence describing one entire class of offenses would be rendered almost totally useless by the construction insisted on by the attorney for the United States. Almost every fine or forfeiture under a penal statute may be recovered by an action of debt as well as by information; and to declare that the information was barred while the action of debt was left without limitation would be to attribute a capriciousness on this subject to the legislature which could not be accounted for; and to declare that the law did not apply to cases on which an action of debt is maintainable would be to overrule express words, and to give the statute

2. See § 142 on repeal of special by general act or *vice versa*.

3. See *infra*, sections on provisions and exceptions.

See §§ 129-131 as to provisos; see § 132 as to exceptions.

4. See §§ 26 and 27 on judicial legislation.

5. See § 17.

6. See § 34.

7. See § 17.

8. *Faw v. Marsteller*, 2 Cranch 23, 2 U. S. (L. ed.) 191.

9. *U. S. v. Debs*, 64 Fed. 748.

10. Act of July 2, 1890, 26 Stat. at L. 209, § 1.

11. *U. S. v. Debs*, 64 Fed. 748, where the court said it was well held in *Reg. v.*

almost the same construction which it would receive if one distinct member of the sentence was expunged from it. In this particular case the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie. It would be singular if the one remedy should be barred and the other left unrestrained."<sup>12</sup>

### *Prospective Operation Preferred*

**37. General presumption.**—"It is a principle which has always been held sacred in the United States," said Chief Justice Marshall, "that laws by which human action is to be regulated look forwards, not backwards, and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable."<sup>13</sup> And Mr. Justice Harlan declared that "courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature."<sup>14</sup>

*McCulley*, 2 *Moody* 34, that "ram, ewe, sheep, and lamb" were all covered by the word "sheep."

See generally § 33 as to synonymous words.

12. *Adams v. Woods*, 2 *Cranch* 341, 2 U. S. (L. ed.) 297.

13. *Reynolds v. M'Arthur*, 2 *Pet.* 434, 7 U. S. (L. ed.) 470.

"All statutes are to be construed as operating prospectively unless a contrary intent appears beyond a doubt." *Per* Justice Strong in *U. S. v. Alexander*, 12 *Wall.* 179, 20 U. S. (L. ed.) 381.

"There is always a presumption that statutes are intended to operate prospectively only." *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 565, 17 S. Ct. 653, 41 U. S. (L. ed.) 1114. To the same effect see *Waugh v. Mississippi University*, 237 U. S. 589, 35 S. Ct. 720, 59 U. S. (L. ed.) 1131; *Union Pac. R. Co. v. Snow*, 231 U. S. 204, 34 S. Ct. 104, 58 U. S. (L. ed.) 184; *Cameron v. U. S.*, 231 U. S. 710, 34 S. Ct. 244, 58 U. S. (L. ed.) 448; *U. S. v. American Sugar Refining Co.*, 202 U. S. 563, 26 S. Ct. 717, 50 U. S. (L. ed.) 1149; *White v. U. S.*, 191 U. S. 545, 551, 24 S. Ct. 171, 48 U. S. (L. ed.) 295, *Post v. U. S.*, 161 U. S. 585, 16 S. Ct. 611, 40 U. S. (L. ed.) 816; *Caha v. U. S.*, 152 U. S. 214, 14 S. Ct. 513, 38 U. S. (L. ed.) 415; *Shreveport v. Cole*, 129 U. S. 39, 9 S. Ct. 210, 32 U. S. (L. ed.) 589; *U. S. v. Moore*, 95 U. S. 762, 24 U. S. (L. ed.) 588; *Harvey v. Tyler*, 2 *Wall.* 328, 17 U. S. (L. ed.) 871; *U. S. v. Louisville, etc., R. Co.*, 212 *Fed.* 486; *U. S. v. Tsuji Suckichi*, (C. C. A.) 199 *Fed.* 750; *U. S. v. North German Lloyd Steamship Co.*, 185 *Fed.* 158; *U. S. v. Atchison, etc., R. Co.*, 142 *Fed.* 176; *Sawyer Spindle Co. v. Carpenter*, 133 *Fed.* 238; *McBride v. Farrington*, 131 *Fed.* 797; *In re Scott*, 126 *Fed.* 981; *Dodge v. Nevada Nat. Bank*, (C. C. A.) 109 *Fed.* 726; *Ellis v. Connecticut Mut. L. Ins. Co.*, 8

*Fed.* 81; *In re Obear*, 3 *Dill.* 40, 18 *Fed. Cas. No.* 10,395; *U. S. v. Starr*, *Hempst.* 469, 27 *Fed. Cas. No.* 16,379; *Schenck v. Peay*, *Woolw.* 189, 21 *Fed. Cas. No.* 12,450; *Royce v. U. S.*, 36 *Ct. Cl.* 328; *Rich v. U. S.*, 33 *Ct. Cl.* 191; *The Circassian*, 11 *Blatchf.* 481, 5 *Fed. Cas. No.* 2,726; *Smith v. Draper*, 5 *Blatchf.* 241, 22 *Fed. Cas. No.* 13,037; *In re Chadwick*, 5 *Fed. Cas. No.* 2,569; *Ogden v. Witherspoon*, 2 *Hayw. N. C.* 227, 18 *Fed. Cas. No.* 10,461; *In re Montgomery*, 12 *Nat. Bankr. Reg.* 321, 17 *Fed. Cas. No.* 9,732; 5 *Op. Atty.-Gen.* 81 (Johnson, 1849); 15 *Op. Atty.-Gen.* 222 (Devens, 1877).

14. *Chew Heong v. U. S.*, 112 U. S. 559, 5 S. Ct. 255, 28 U. S. (L. ed.) 770, where he continued: "In *U. S. v. Heth*, 3 *Cranch* 413, 2 U. S. (L. ed.) 479, this court said that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied;' and such is the settled doctrine of this court. *Murray v. Gibson*, 15 *How.* 423, 14 U. S. (L. ed.) 755; *McEwen v. Den*, 24 *How.* 244, 16 U. S. (L. ed.) 672; *Harvey v. Tyler*, 2 *Wall.* 347, 17 U. S. (L. ed.) 871; *Sohn v. Waterson*, 17 *Wall.* 599, 21 U. S. (L. ed.) 737; *Twenty Per Cent. Cases*, 20 *Wall.* 187, 22 U. S. (L. ed.) 339." "A retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" *Union Pac. R. R. v. Laramie Stock Yards*, 231 U. S. 190, 34 S. Ct. 101, 58 U. S. (L. ed.) 179. To the same effect see *Southwestern Coal Co. v. McBride*, 185 U. S. 499, 22 S. Ct. 763, 46 U. S. (L. ed.) 1010; *U. S. v. Burr*, 159 U. S. 82, 15 S. Ct. 1002, 40 U. S. (L. ed.) 82; *Cook v. U. S.*, 138

Proceeding a step farther, "Even though the words of a statute are broad enough in their literal extent to comprehend existing cases," said Mr. Justice Clifford, "they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms."<sup>15</sup> Statutes are to have no further or greater retrospective operation than plainly appears to have been the legislative intention.<sup>16</sup> But a statute does not operate retrospectively when it is made to apply to future transactions, merely because those transactions have relation to and are founded upon antecedent events.<sup>17</sup> An act of Congress declaring that an earlier act allowing a drawback on certain imported articles "shall be construed to apply only to vessels of the United States" was held not to take away the right to the drawback on those articles which had previously been reshipped on vessels not of the United States.<sup>18</sup> Laws reducing the price of work done for the government have been uniformly construed as operating only upon work ordered

U. S. 181, 11 S. Ct. 268, 34 U. S. (L. ed.) 906; *Auffm'ordt v. Rasin*, 102 U. S. 622, 26 U. S. (L. ed.) 262; *U. S. v. Union Pac. R. Co.*, 98 U. S. 606, 25 U. S. (L. ed.) 143; *Ladiga v. Roland*, 2 How. 589, 11 U. S. (L. ed.) 387; *Doddridge v. Thompson*, 9 Wheat. 479, 6 U. S. (L. ed.) 137; *Law v. Stewart*, 3 Cranch 413, 2 U. S. (L. ed.) 479; *U. S. v. Schofield*, 182 Fed. 240; *In re Chavez*, (C. C. A.) 149 Fed. 73; *McDougald v. New York Life Ins. Co.*, (C. C. A.) 146 Fed. 674; *Schauble v. Schulz*, (C. C. A.) 137 Fed. 389; *St. Louis Southwestern R. Co. v. Purcell*, (C. C. A.) 135 Fed. 499; *Henderson County v. Travelers' Ins. Co.*, (C. C. A.) 128 Fed. 817; *Hathaway v. Mutual L. Ins. Co.*, 99 Fed. 537; *Strong v. U. S.*, 93 Fed. 259; *The Queen*, 93 Fed. 834; *Jaedicke v. U. S.*, (C. C. A.) 85 Fed. 372; *Wright v. Southern R. Co.*, 80 Fed. 263; *Northwestern Mut. L. Ins. Co. v. Seaman*, 80 Fed. 358; *McClellan v. Pyeatt*, (C. C. A.) 66 Fed. 845; *Sears v. Mahoney*, 66 Fed. 860; *Central Trust Co. v. Sheffield, etc., Coal, etc., Co.*, 60 Fed. 16; *U. S. v. National Exch. Bank*, (C. C. A.) 53 Fed. 9; *Fuller v. U. S.*, 48 Fed. 655; *Eastman v. Clackamas County*, 32 Fed. 32; *Folsom v. U. S.*, 21 Fed. 37; *Spitley v. Frost*, 15 Fed. 303; *Johnston v. Vandyke*, 6 McLean 428, 13 Fed. Cas. No. 7,426; *Warren Mfg. Co. v. Etna Ins. Co.*, 2 Paine 517, 29 Fed. Cas. No. 17,206; *Badische Anilin, etc., Fabrik v. Hamilton Mfg. Co.*, 3 B. & A. Pat. Cas. 235, 2 Fed. Cas. No. 721; *Brooke v. McCracken*, 10 Nat. Bankr. Reg. 461, 4 Fed. Cas. No. 1,932; *Home Mut. Ins. Co. v. Stockdale*, 12 Fed. Cas. No. 6,662; *Bassett's Case*, 2 Ct. Cl. 448; *Kennedy v. U. S.*, 23 Ct. Cl. 366; *Gardner v. U. S.*, 25 Ct. Cl. 24; *Lander's Case*, 9 Ct. Cl. 242; 16 Op. Atty.-Gen. 379 (Devens, 1879); 9 Op. Atty.-Gen. 437 (Black, 1860); 21 Op. Atty.-Gen. 21 (Olney, 1894); 17 Op. Atty.-Gen. 514 (Brewster, 1883).

15. *Twenty Per Cent. Cases*, 20 Wall. 187, 22 U. S. (L. ed.) 339; *Warren Mfg.*

*Co. v. Etna Ins. Co.*, 2 Paine 517, 29 Fed. Cas. No. 17,206.

In 9 Op. Atty.-Gen. 439, Attorney-General Black said: "Numerous cases are to be found in the books where the legislature has seemed to express very clearly the intent that their enactment should operate upon the past, and yet the courts have held the true construction to be otherwise. For instance, an act of Parliament was passed declaring that *no action should thereafter be brought* to charge any person upon any agreement made in consideration of marriage, unless such agreement be in writing. An action *was thereafter brought* upon an agreement without writing, but the agreement was made before the date of the law. The judges unanimously sustained the right of the plaintiff, because they could not presume that the act had a retrospect and because it would be great mischief so to explain it. *Gilmore v. Shooter*, 2 Mod. 310, 2 Show. 17. Although the statute of wills declared that all testamentary writing should be void without certain formalities of attestation, it was held not to apply to a case where the will had been executed without such formalities before the passage of the statute, though the testator died afterwards. *Harwood v. Goodright*, 1 Cowp. 90; *Mullock v. Souder*, 5 W. & S. (Pa.) 190. This, it will be observed, was a very strong case in favor of the general doctrine, because the will might have been made in pursuance of the act after it was passed, and because no right whatever was vested under it at the date of the act."

16. *In re Obear*, 3 Dill. 40, 18 Fed. Cas. No. 10,395.

17. *Johnston's Case*, 17 Ct. Cl. 171.

18. *Kennedy v. U. S.*, 23 Ct. Cl. 363, where the court suggested that the later act might mean that the earlier "shall be construed" in the future or from the date of the later act in the manner prescribed. See also *Cunard Steamship Co. v. U. S.*, 25 Ct. Cl. 428, construing the same act.

after their passage.<sup>19</sup> An act of Congress ordering a reduction in the rates allowed for mail transportation and directing that the reduction take effect from the beginning of the current fiscal year, was held not to operate retroactively as a notice to existing contractors.<sup>20</sup> In one case the court said that "the intention of the legislature must be expressed with irresistible clearness" to induce a court to believe that a law was intended to be retroactive upon wills then in existence and cause them to pass after-acquired lands without any evidence that the testators desired or thought they would do so.<sup>21</sup> Where a statute is amended by the substitution of words or so that it shall read "as follows," the new provisions are to be understood as enacted at the time the amended act takes effect; in other words, the amendment is not to be given a retroactive effect.<sup>22</sup> Statutes conferring appellate jurisdiction should not be construed to authorize the review of a judgment already rendered and not previously reviewable<sup>23</sup> unless such intent affirmatively appears.<sup>24</sup> Statutes of limitation are presumed to operate prospectively only.<sup>25</sup> Where the language of a remedial act clearly relating to past transactions is broad enough to extend to like cases in the future, it will be construed to operate prospectively if a contrary intent is not manifest.<sup>26</sup>

**38. Indications of intent.**—Where an act expressly declares that it shall take effect from the passage thereof it has been said to be decisive evidence of intent to confine its operation to the future.<sup>27</sup> The tense used is of

19. 9 Op. Atty-Gen. 437 (Black, 1860).

20. Chicago, etc., R. Case, 14 Ct. Cl. 143, where the court said: "We are all of opinion that when a contract for a term of time is made under due authority of law by duly authorized agents of the United States, the United States cannot by their own legislative act vary the terms of the contract in their own favor without the assent of the other party."

21. Carroll v. Carroll, 16 How. 281, 14 U. S. (L. ed.) 936.

22. Fuller v. U. S., 48 Fed. 655, quoting from Ely v. Holton, 15 N. Y. 595. See also McEwen v. Den, 24 How. 242, 16 U. S. (L. ed.) 672; United Mines Co. v. Hatcher, (C. C. A.) 79 Fed. 517; 15 Op. Atty-Gen. 222 (Devens, 1877), 15 Op. Atty-Gen. 259 (Devens, 1877); Eastman v. Clackamas County, 32 Fed. 32.

Whether the amendment of June 22, 1874, to the bankruptcy act of 1867 operated retrospectively, and, if so, to what extent, was considered in many cases and some contrariety of opinion resulted. Auffm'ordt v. Rasin, 102 U. S. 620, 26 U. S. (L. ed.) 262; Matter of Francke, 7 Ben. 420, 9 Fed. Cas. No. 5,046; Matter of Leland, 7 Ben. 436, 15 Fed. Cas. No. 8,231; In re Perkins, 6 Biss. 187, 19 Fed. Cas. No. 10,983; Hamlin v. Pettibone, 6 Biss. 167, 11 Fed. Cas. No. 5,995; In re Williams, 6 Biss. 233, 29 Fed. Cas. No. 17,700; In re Obear, 3 Dill. 37, 18 Fed. Cas. No. 10,395; In re King, 3 Dill. 3, 14 Fed. Cas. No. 7,781; In re Lowenstein, 3 Dill. 147, 15 Fed. Cas. No. 8,573; In re Kean, 2 Hughes 322, 14 Fed. Cas. No. 7,630; In re Wyllie, 2 Hughes 466, 30 Fed.

Cas. No. 18,112; In re Griffiths, 2 Lowell 340, 11 Fed. Cas. No. 5,825; In re Comstock, 3 Sawy. 128, 6 Fed. Cas. No. 3,077; Barnert v. Hightower, 10 Nat. Bankr. Reg. 157, 2 Fed. Cas. No. 1,009; In re Montgomery, 12 Nat. Bankr. Reg. 321, 17 Fed. Cas. No. 9,732; Singer v. Sloan, 11 Nat. Bankr. Reg. 433, 22 Fed. Cas. No. 12,899; Ex p. Hull, 12 Fed. Cas. No. 6,856; Brooke v. McCracken, 10 Nat. Bankr. Reg. 461, 4 Fed. Cas. No. 1,932; In re Pickering, 10 Nat. Bankr. Reg. 208, 19 Fed. Cas. No. 11,120.

23. U. S. v. National Exch. Bana, (C. C. A.) 53 Fed. 9.

24. Sampeyreac v. U. S., 7 Pet. 239, 8 U. S. (L. ed.) 665.

25. Union Pac. R. Co. v. Laramie Stock Yards Co., 231 U. S. 190, 34 S. Ct. 101, 58 U. S. (L. ed.) 179; Sohn v. Waterson, 17 Wall. 596, 21 U. S. (L. ed.) 737; McCormick v. Eliot, 43 Fed. 469; Vaughan v. East Tennessee, etc., R. Co., 1 Flip. 621, 28 Fed. Cas. No. 16,898. See also U. S. v. Wiley, 11 Wall. 508, 20 U. S. (L. ed.) 211; Ross v. Duval, 13 Pet. 45, 10 U. S. (L. ed.) 51; McKean v. Archer, 52 Fed. 791.

See § 101 for rule of construction applicable to statutes of limitation.

26. Boyd v. Thayer, 143 U. S. 135, 12 S. Ct. 375, 36 U. S. (L. ed.) 103; Beard v. Rowan, 9 Pet. 301, 9 U. S. (L. ed.) 135; Harven v. Tyler, 2 Wall. 328, 17 U. S. (L. ed.) 871.

See, generally, § 94 as to construction of remedial statutes.

27. 9 Op. Atty-Gen. 439 (Black, 1860).



weight in determining the scope of the operation of a statute.<sup>28</sup> The use of the word "hereafter" imports a prospective operation.<sup>29</sup> The fact that an act by its terms is not to take effect immediately upon its passage is a strong indication that it is not designed to operate retroactively.<sup>30</sup> When an amendatory law contains express provisions fixing the period of its retroaction in certain specified cases, the specification almost necessarily leads to the conclusion that in all other and unspecified cases the amendment is not to have a retroactive effect.<sup>31</sup> But "while the rule is that statutes should be so construed as to prevent them from operating retroactively, that principle is one of construction and not of reconstruction and therefore does not authorize a judicial re-enactment by interpretation of a statute to save it from producing a retroactive effect."<sup>32</sup> Accordingly a statute relating to any "judgment rendered or to be rendered" was held to operate retrospectively.<sup>33</sup> It has been said that an act in terms applicable to mortgages "heretofore executed," could not possibly be construed to have within its purview only those mortgages executed subsequent to its passage.<sup>34</sup> While tariff laws are prospective, an amended statute which places on the free list certain articles theretofore subject to duty is not limited in its application to those articles of that class which have been produced or manufactured since the passage of the amendatory act.<sup>35</sup> Congress may impose a tax retrospectively, and where it has clearly done so the legislation must be enforced.<sup>36</sup>

**39. Exceptions.**—Acts relieving individuals from obligations to the government or the public, in whole or in part, without affecting the vested rights of other persons, and similar acts mitigating the punishment for offenses, as well as acts relating to the administration of the government, and generally those affecting the proceedings of courts, apply with equal force to existing cases as to those which may arise in the future.<sup>37</sup> And the rule is said to be that when the enactment deals with procedure only, unless the contrary be expressed, the enactment applies to all actions, whether commenced before or after the passing of the act.<sup>38</sup> "This is only in accordance with the general rule that all remedial legislation shall

<sup>28</sup> *U. S. v. American Sugar Refining Co.*, 202 U. S. 563, 26 S. Ct. 717, 50 U. S. (L. ed.) 1149. In that case the court said: "We cannot suppose that if Congress intended to give retrospective operation to the act it would have used words that expressed the contrary. The day at which the treaty should operate was important, and would necessarily be ever present in mind, and it was easy of expression. Future time and past time are directly opposite, and by no inadvertence or intention can we believe or suppose that Congress, having in mind and purpose the distinction between the past and the future, should use language that expressed the one while it meant to provide for the other."

<sup>29</sup> *Perkins Co. v. U. S.*, 180 Fed. 935.

<sup>30</sup> *Osborne v. Detroit*, 32 Fed. 41. But see *Wrightman v. Boone County*, (C. C. A.) 88 Fed. 435, where, under peculiar circumstances, a provision postponing the operative effect of the statute almost con-

clusively showed an intent that it should have a retrospective effect.

<sup>31</sup> *Oxford Iron Co. v. Slafter*, 13 Blatchf. 456, 18 Fed. Cas. No. 10,637.

<sup>32</sup> *Billings v. U. S.*, 232 U. S. 261, 34 S. Ct. 421, 58 U. S. (L. ed.) 596.

<sup>33</sup> *Pauley Jail Bldg., etc., Co. v. Crawford County*, (C. C. A.) 84 Fed. 942. See also *Sampeyreac v. U. S.*, 7 Pet. 239, 8 U. S. (L. ed.) 671.

<sup>34</sup> *McFaddin v. Evans-Snyder-Buel Co.*, 185 U. S. 505, 22 S. Ct. 758, 46 U. S. (L. ed.) 1012, affirming (C. C. A.) 105 Fed. 293.

<sup>35</sup> 21 Op. Atty.-Gen. 161 (Conrad, Sol.-Gen., 1895).

<sup>36</sup> *Stockdale v. Atlantic Ins. Co.*, 20 Wall. 323, 22 U. S. (L. ed.) 348.

<sup>37</sup> *Per* Chief Justice Richardson in *Johnston's Case*, 17 Ct. Cl. 171.

<sup>38</sup> *Per* Hammond, J., in *Larkin v. Safarans*, 15 Fed. 150, quoting *Broom Leg. Max.* 35, and citing *Wright v. Hale*, 6 H. & N. 227, and *Kimbray v. Draper*, L. R.

be liberally construed, and particularly should this be so where new remedies are given, and with reference to the bestowal of jurisdiction on the courts." <sup>39</sup> But such a statute will not be construed as retrospective, even though it is in a large sense remedial, if it materially impairs existing rights. <sup>40</sup> And it has been held that a statute changing the common-law doctrine in regard to the negligence of fellow-servants and evidently intended to remedy the evils growing out of that doctrine did not operate retrospectively in the absence of a clearly expressed purpose to that end. <sup>41</sup>

### *Force of Legislative and Judicial Constructions*

**40. Legislative construction.**—A legislative body may prescribe a rule of construction binding on the judiciary. <sup>42</sup> It may likewise by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, <sup>43</sup> and may, in many cases, thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated. <sup>44</sup> But it cannot, under cover of giving a construction to an existing or an expired statute, invade private rights with which it could not interfere by a new and affirmative statute; <sup>45</sup> since "to declare

3 Q. B. 160. See also *In re King*, 3 Dill. 3, 14 Fed. Cas. No. 7,781; 1 N. Y. Leg. Obs. 1; *Sampreyreac v. U. S.*, 7 Pet. 239, 8 U. S. (L. ed.) 671; *Ex p. Hull*, 12 Fed. Cas. No. 6,856.

**39.** *Per Hammond, J.*, in *Larkin v. Saffarans*, 15 Fed. 150; *In re Farmers' Co-Op. Co.*, 202 Fed. 1008. See also, as to remedial statutes, *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. 459, 20 U. S. (L. ed.) 199; *U. S. v. Burchard*, 125 U. S. 176, 8 S. Ct. 832, 31 U. S. (L. ed.) 662; *Pugh v. McCormick*, 14 Wall. 361, 20 U. S. (L. ed.) 789; *Matter of Billing*, 3 Ben. 215, 3 Fed. Cas. No. 1,408; *McNamara v. U. S.*, 28 Ct. Cl. 416; *Untermeyer v. Freund*, (C. C. A.) 58 Fed. 205 [affirming 50 Fed. 771]. But compare *In re Kean*, 2 Hughes 329, 14 Fed. Cas. No. 7,630.

For cases where statutes affecting the jurisdiction and powers of courts were held to have been intended to operate retrospectively, see *Stephens v. Cherokee Nation*, 174 U. S. 445, 19 S. Ct. 722, 43 U. S. (L. ed.) 1041; *Cook v. U. S.*, 138 U. S. 157, 11 S. Ct. 268, 34 U. S. (L. ed.) 906; *McBurney v. Carson*, 99 U. S. 567, 25 U. S. (L. ed.) 378; *Larkin v. Saffarans*, 15 Fed. 147; *Harvey v. Lord*, 10 Fed. 238.

See generally § 94 as to construction of remedial statutes.

**40.** *Winfree v. Northern Pac. R. Co.*, 227 U. S. 296, 33 S. Ct. 273, 57 U. S. (L. ed.) 518.

**41.** *Wright v. Southern R. Co.*, 80 Fed. 260.

**42.** *Smith v. Smith*, 210 Fed. 947.

**43.** *Stockdale v. Atlantic Ins. Co.*, 20 Wall. 331, 22 U. S. (L. ed.) 348; *Murdock v. Memphis*, 20 Wall. 617, 22 U. S. (L. ed.) 438; *U. S. v. Early*, 12 Wheat. 148, 6 U. S. (L. ed.) 532; *Singer Mfg. Co. v.*

*McCollock*, 24 Fed. 669; *Stebbins v. Pueblo County*, 4 Fed. 282; *U. S. v. The Ohio*, 9 Phila. (Pa.) 448, 29 Leg. Int. 252, 27 Fed. Cas. No. 15,915; *Bassett's Case*, 2 Ct. Cl. 448. See also *Carpenter v. Pennsylvania*, 17 How. 456, 15 U. S. (L. ed.) 127; *Kennedy v. U. S.*, 23 Ct. Cl. 363; *Patton v. Easton*, 1 Wheat. 476, 4 U. S. (L. ed.) 139.

Where the legislature enacted that "it was and is the true intent and meaning of" certain sections in an earlier statute that they should have a given effect, it simply meant to assert, as well it might, that in future they should have that effect. *Singer Mfg. Co. v. McCollock*, 24 Fed. 660.

**44.** *Stockdale v. Atlantic Ins. Co.*, 20 Wall. 331, 22 U. S. (L. ed.) 351.

Where an act of Congress gives a construction to a prior act, such legislation, so far as it affects the liability of the United States and does not interfere with the vested rights of individuals and is not penal, it is within the constitutional power of Congress and is not open to the objections to retroactive laws, especially when such laws are remedial. *McNamara v. U. S.*, 28 Ct. Cl. 422. See also *Gilmore's Case*, 2 Ct. Cl. 364.

**45.** *Stockdale v. Atlantic Ins. Co.*, 20 Wall. 332, 22 U. S. (L. ed.) 351; *Koshkonong v. Burton*, 104 U. S. 678, 26 U. S. (L. ed.) 890; *Ogden v. Blackledge*, 2 Cranch 272, 2 U. S. (L. ed.) 276; *Home Mut. Ins. Co. v. Stockdale*, 16 Int. Rev. Rec. 30, 12 Fed. Cas. No. 6,662. See also article *Constitutional Law*, 6 Am. and Eng. Encyc. of Law (2d ed.), 1033.

"An act directing how a former act shall be construed is inoperative on the past though controlling in the future." *Per Justice Strong*, in *U. S. v. Claffin*, 97 U. S. 549, 24 U. S. (L. ed.) 1083. To the point

what the law is, or has been, is a judicial power; to declare what the law shall be is legislative.<sup>46</sup> Where, however, it can exercise a power by passing a new statute which may be retroactive in its effect, the form of words which it uses to put this power in operation cannot be material, if the purpose is clear and is within the power; and it may, by enacting that a subsisting statute shall be "construed" in a particular manner, effect the purpose designed.<sup>47</sup> In many instances the rule that statutes *in pari materia* must be construed together<sup>48</sup> requires the court to adopt a construction of a statute which has been sanctioned by a subsequent act upon the same subject.<sup>49</sup> And it is very common for a court, in construing a statute, to refer to subsequent legislation as impliedly confirming the view which the court has decided to adopt; and in some cases perhaps more weight has been given to this later action of the legislative body than correct rules of interpretation would authorize,<sup>50</sup> for Congress cannot, by mere expression of opinion, without a positive legislative act, bind the court on a question of construction.<sup>51</sup> "A mistaken opinion of the legislature concerning the law does not make the law," said Chief Justice

that a legislative construction is not retroactive, see also *U. S. v. Chong Sam*, 47 Fed. 886; *Union Iron Co. v. Pierce*, 4 Biss. 327, 24 Fed. Cas. No. 14,367; *Bassett's Case*, 2 Ct. Cl. 448; *Kennedy v. U. S.*, 23 Ct. Cl. 363.

46. *Ogden v. Blackledge*, 2 Cranch 277, 2 U. S. (L. ed.) 278. See also *Ogden v. Witherspoon*, 2 Hayw. (N. C.) 227, 18 Fed. Cas. No. 10,461.

47. *Stockdale v. Atlantic Ins. Co.*, 20 Wall. 332, 22 U. S. (L. ed.) 351. See also *Carpenter v. Pennsylvania*, 17 How. 456, 15 U. S. (L. ed.) 127.

48. See §§ 61-66.

49. *Rowan v. Ide*, (C. C. A.) 107 Fed. 165; *U. S. v. Morton*, (C. C. A.) 65 Fed. 204.

50. *Union Pac. R. Co. v. U. S.*, 99 U. S. 427, 25 U. S. (L. ed.) 285, where subsequent legislation construing an earlier act was cited merely to show "that we are justified in supposing that our conclusion is in harmony with the views of the legislature, as to the justice and right of the case;" *Barrett v. U. S.*, 169 U. S. 230, 18 S. Ct. 327, 42 U. S. (L. ed.) 727; *The Conqueror*, 166 U. S. 121, 17 S. Ct. 510, 41 U. S. (L. ed.) 943; *Sarlls v. U. S.*, 152 U. S. 577, 14 S. Ct. 720, 38 U. S. (L. ed.) 559; *Choctaw Nation v. U. S.*, 119 U. S. 34, 7 S. Ct. 75, 30 U. S. (L. ed.) 317; *Fussell v. Gregg*, 113 U. S. 561, 5 S. Ct. 631, 28 U. S. (L. ed.) 997; *Jarrold v. Moberly*, 103 U. S. 588, 26 U. S. (L. ed.) 494; *Pompton v. Cooper Union*, 101 U. S. 202, 25 U. S. (L. ed.) 805; *U. S. v. Farden*, 99 U. S. 19, 25 U. S. (L. ed.) 269; *Kohlmaat v. Murphy*, 96 U. S. 158, 24 U. S. (L. ed.) 846; *Bates v. Clark*, 95 U. S. 207, 24 U. S. (L. ed.) 471; *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 36, 23 U. S. (L. ed.) 200; *Matthews v. McStea*, 91 U. S. 13, 23 U. S. (L. ed.) 190; *Davis v. Gray*, 16 Wall. 223, 21 U. S. (L. ed.) 484; *U. S. v. Alexander*, 12 Wall. 179, 20 U. S.

(L. ed.) 382; *Furman v. Nichol*, 8 Wall. 61, 19 U. S. (L. ed.) 377; *U. S. v. Gilmore*, 8 Wall. 330, 19 U. S. (L. ed.) 396; *Doe v. Considine*, 6 Wall. 480, 18 U. S. (L. ed.) 876; *Stark v. Starr*, 6 Wall. 417, 18 U. S. (L. ed.) 929; *License Tax Cases*, 5 Wall. 473, 18 U. S. (L. ed.) 501; *Rankin v. Hoyt*, 4 How. 334, 11 U. S. (L. ed.) 999; *Minis v. U. S.*, 15 Pet. 447, 10 U. S. (L. ed.) 800; *U. S. v. Fisher*, 2 Cranch 393, 2 U. S. (L. ed.) 315; *Jarman v. Knights Templars', etc., L. Indemnity Co.*, 95 Fed. 74; *U. S. v. Fifty Boxes Lace*, 92 Fed. 603; *U. S. v. Barber*, (C. C. A.) 74 Fed. 488; *Barber Asphalt Paving Co. v. Denver*, (C. C. A.) 72 Fed. 345; *Denison v. Columbus*, 62 Fed. 776; *Newgass v. Atlantic, etc., R. Co.*, 56 Fed. 683; *Erwin v. U. S.*, 37 Fed. 474; *Metropolitan Trust Co. v. Pennsylvania, etc., R. Co.*, 25 Fed. 763; *Farmers' L. & T. Co. v. Oregon, etc., R. Co.*, 24 Fed. 410; *Ropes v. Clinch*, 8 Blatchf. 313, 20 Fed. Cas. No. 12,041; *Copeland v. Memphis, etc., R. Co.*, 3 Woods 665, 6 Fed. Cas. No. 3,209; *The Schooner Harriet, etc.*, 1 Story 257, 11 Fed. Cas. No. 6,099; *Deposit Sav. Assoc. v. Mayer*, 23 Int. Rev. Rec. 241, 7 Fed. Cas. No. 3,813; *Lynch v. U. S.*, 31 Ct. Cl. 65; *Crain v. U. S.*, 25 Ct. Cl. 204; *Harrison v. U. S.*, 20 Ct. Cl. 122; *Dainese v. U. S.*, 15 Ct. Cl. 78. See also *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. 748.

51. *U. S. v. Jordan*, 2 Lowell 543, 26 Fed. Cas. No. 15,498; *Peck v. Elliott*, (C. C. A.) 79 Fed. 18. See also *South Ottawa v. Perkins*, 94 U. S. 270, 24 U. S. (L. ed.) 158; *District of Columbia v. Hutton*, 143 U. S. 25, 12 S. Ct. 369, 36 U. S. (L. ed.) 62; *In re McDonough*, 49 Fed. 362.

"A later statute not declaratory in its terms cannot be relied upon for the purpose of giving a construction to a former act plain in its terms." *U. S. v. Gillis*, 95 U. S. 415, 24 U. S. (L. ed.) 505.

Marshall, unless "this mistake is manifested in words competent to make the law in the future."<sup>52</sup>

**41. Construction by local or foreign court.**—Federal courts, in construing a constitution or statute of any state,<sup>53</sup> or a foreign statute,<sup>54</sup> adopt the construction given to it by the courts of the state or country where it was enacted, if it has been judicially construed therein.<sup>55</sup>

### III. AIDS TO INTERPRETATION

#### *Circumstances Attendant on Enactment*

**42. Petition; message of President; report of special commission.**—In a case where Congress appropriated or directed a sum of money to be paid to the widow and children of a deceased person in compensation for certain damages sustained by him, and a question arose whether the money paid became assets of his estate, the petition to Congress upon which the act was based, and which was made a part of the pleadings, was examined in order to ascertain more clearly the consideration and inducement for the act.<sup>56</sup>

In like manner the Supreme Court has adverted to instructions of the President to the Philippine Commission for the purpose of ascertaining the true intent of a law addressed to the Philippine Islands.<sup>57</sup> In another instance the same court has alluded to the message of the President to Congress as corroborative of its interpretation of an act.<sup>58</sup>

<sup>52.</sup> U. S. v. Early, 12 Wheat. 148, 6 U. S. (L. ed.) 582, quoted and applied in *Millchrist v. U. S.*, 31 Ct. Cl. 416; *Smith v. U. S.*, 26 Ct. Cl. 576; *Ludington's Case*, 15 Ct. Cl. 453; *Baring v. Erdman*, 14 Haz. Reg. (Pa.) 129, 2 Fed. Cas. No. 981; *Bassett's Case*, 2 Ct. Cl. 450; 20 Op. Atty.-Gen. 532 (Miller, 1893). See also *U. S. v. The Ohio*, 9 Phila. (Pa.) 448, 29 Leg. Int. 252, 27 Fed. Cas. No. 15,915.

<sup>53.</sup> *Prentice v. Zane*, 11 Law Rep. 204, 19 Fed. Cas. No. 11,383; *Humphreyville Copper Co. v. Sterling*, Brun. Col. Cas. 3, 12 Fed. Cas. No. 6,872; *U. S. v. Sherebeck*, Hoff. Dec. 11, 27 Fed. Cas. No. 16,275.

The foregoing were cases where a statute of a state other than that wherein the federal court was sitting was under construction, the court adopting the construction placed upon it by the courts of the state where it was enacted. *A fortiori* the federal courts adopt the construction by the state courts in cases where the federal court is administering the laws of the state in its own territory. "The construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States," said Chief Justice Marshall, in *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 160, 6 U. S. (L. ed.) 292. That proposition has been reaffirmed in a vast multitude of authorities with various doctrines.

The federal courts in construing a state statute follow the rules of interpretation adopted by the state courts as applicable to that statute. *In re Wilde*, 133 Fed. 562.

<sup>54.</sup> *Bate Refrigerating Co. v. Gillett*, 20 Fed. 192. See also *Consolidated Roller-Mill Co. v. Walker*, 43 Fed. 581, and *Elmendorf v. Taylor*, 10 Wheat. 159, 6 U. S. (L. ed.) 292, where Chief Justice Marshall said: "No court in the universe which professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding."

<sup>55.</sup> See the cases cited in the preceding notes.

Where the statute has not been judicially construed, the courts will adopt the interpretation, if any, given to it by officials whose duty it was to apply and administer it. See *Consolidated Roller-Mill Co. v. Walker*, 43 Fed. 581, and *infra*, §§ 56, 57.

<sup>56.</sup> *Ogden v. Strong*, 2 Paine 588, 18 Fed. Cas. No. 10,460.

<sup>57.</sup> *Kepner v. U. S.*, 195 U. S. 100, 24 S. Ct. 797, 49 U. S. (L. ed.) 114.

<sup>58.</sup> *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363.

Reference has been made in the construction of a statute relating to the Indian Territory to the reports of a special committee empowered by Congress to enter negotiations with the Indians with a view to the ultimate creation of a state from the lands embraced in the territory. "So far as these reports antedate the legislation that is under inquiry," said Mr. Justice Pitney, "they may of course be resorted to as aids to interpretation, for the Commission was in a very real sense 'the eyes and the ears' of Congress in matters pertaining to affairs in the Indian Territory, and legislation was framed with a special regard to its recommendations."<sup>59</sup> But a communication from a party interested in a statute to the committee in charge thereof is utterly irrelevant.<sup>60</sup>

**43. History of times and condition of country.**—A court may recur to the public history of the times in order to ascertain the reason of the law as well as the meaning of particular provisions therein.<sup>61</sup> In construing the provisions of the Harter Act,<sup>62</sup> the Supreme Court remarked that the exigencies which led to the passage of the act were graphically set forth in a petition addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury and embodied in a report of the Committee on Interstate and Foreign Commerce to the House of Representatives, and that "as a part of the history of the times, this is a proper subject of consideration."<sup>63</sup> The condition of the country when the act was passed, and other circumstances surrounding its enactment, may properly be considered in construing it.<sup>64</sup>

59. *Woodward v. De Graffenried*, 238 U. S. 284, 35 S. Ct. 764.

60. *Thomas v. Vandegrift*, (C. C. A.) 162 Fed. 645.

61. *Lapina v. Williams*, 232 U. S. 78, 34 S. Ct. 196, 58 U. S. (L. ed.) 196, *affirming* *Ex p. Hoffman*, (C. C. A.) 179 Fed. 839; *Swigart v. Baker*, 229 U. S. 187, 33 S. Ct. 645, 57 U. S. (L. ed.) 1143; *Standard Oil Co. v. U. S.*, 221 U. S. 1, 31 S. Ct. 502, 55 U. S. (L. ed.) 619; *Louisville, etc., R. Co. v. Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297; *Aldridge v. Williams*, 3 How. 24, 11 U. S. (L. ed.) 476; *U. S. v. Union Pac. R. Co.*, 91 U. S. 79, 23 U. S. (L. ed.) 288; *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 319, 17 S. Ct. 541, 41 U. S. (L. ed.) 1020; *Smith v. Townsend*, 148 U. S. 494, 13 S. Ct. 634, 37 U. S. (L. ed.) 534; *McKee v. U. S.*, 164 U. S. 292, 17 S. Ct. 92, 41 U. S. (L. ed.) 439; *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 502, 14 S. Ct. 968, 38 U. S. (L. ed.) 799; *Preston v. Browder*, 1 Wheat. 121, 4 U. S. (L. ed.) 51; *Northern Commercial Co. v. U. S.*, (C. C. A.) 217 Fed. 33; *Mannington v. Hocking Valley R. Co.*, 183 Fed. 133; *Govin v. Chicago*, 132 Fed. 848; *Grace v. Collector of Customs, etc.*, (C. C. A.) 79 Fed. 320; *Aspley v. Murphy*, (C. C. A.) 52 Fed. 574; *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 43 Fed. 43; *Katzenberger v. Aberdeen*, 16 Fed. 747; *The Saratoga*, 2 Fed. 331; *Dunlap v. U. S.*, 33 Ct. Cl. 135; *Smith v. U. S.*, 32 Ct. Cl. 313; *Donnan's Case*, 15 Ct. Cl. 384.

See, generally, § 23.

62. Act of February 13, 1893, c. 105, 27 Stat. at L. 445.

63. *The Delaware*, 161 U. S. 472, 16 S. Ct. 516, 40 U. S. (L. ed.) 776.

64. *Wright v. Georgia R., etc., Co.*, 216 U. S. 420, 30 S. Ct. 245, 54 U. S. (L. ed.) 544; *U. S. v. Whitridge*, 197 U. S. 135, 25 S. Ct. 406, 49 U. S. (L. ed.) 696; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363; *U. S. v. Thomas*, 195 U. S. 418, 25 S. Ct. 102, 49 U. S. (L. ed.) 259; *Shaw v. Kellogg*, 170 U. S. 331, 18 S. Ct. 632, 42 U. S. (L. ed.) 1057; *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 502, 14 S. Ct. 968, 38 U. S. (L. ed.) 799; *U. S. v. Denver, etc., R. Co.*, 150 U. S. 14, 14 S. Ct. 11, 37 U. S. (L. ed.) 979; *Platt v. Union Pac. R. Co.*, 99 U. S. 60, 25 U. S. (L. ed.) 423; *Wolcott v. Des Moines Co.*, 5 Wall. 688, 18 U. S. (L. ed.) 692; *Ex p. Milligan*, 4 Wall. 114, 18 U. S. (L. ed.) 293; *Dubuque, etc., R. Co. v. Litchfield*, 23 How. 66, 16 U. S. (L. ed.) 500; *Tompkins v. Little Rock, etc., R. Co.*, 125 U. S. 126, 8 S. Ct. 762, 31 U. S. (L. ed.) 623; *Siemens v. Sellers*, 123 U. S. 285, 8 S. Ct. 117, 31 U. S. (L. ed.) 156; *Winona, etc., R. Co. v. Barney*, 113 U. S. 618, 5 S. Ct. 606, 28 U. S. (L. ed.) 1109; *Holy Trinity Church v. U. S.*, 143 U. S. 463, 12 S. Ct. 511, 36 U. S. (L. ed.) 229; *In re Ross*, 140 U. S. 475, 11 S. Ct. 897, 35 U. S. (L. ed.) 589; *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 55, 15 S. Ct. 1020, 40 U. S. (L. ed.) 74; *Heydenfeldt v. Daney Gold, etc., Min. Co.*, 93 U. S. 639, 23 U. S. (L. ed.) 996; *Jennison v. Kirk*, 98 U. S. 460, 25 U. S. (L. ed.) 243;

But these considerations cannot vary the clear meaning of the language used.<sup>65</sup>

**44. Debates and committee reports.**—In respect of the consideration due to debates in Congress, Chief Justice Taney said that in expounding a law “the judgment of the court cannot in any degree be influenced by the construction placed upon it by individual members of Congress in the debate which took place in its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.”<sup>66</sup> The reason of the rule was clearly explained by Mr. Justice Story. “At the threshold of the argument,” said he, “we are met with the suggestion that when the act was before Congress the opposite doctrine was then maintained in the House of Representatives, and it was confidently stated that no such jurisdiction was conferred by the act as is now insisted on. What passed in Congress upon the discussion of a bill can hardly become a matter of strict judicial inquiry; and if it were, it could scarcely be affirmed that the opinions of a few members, expressed either way, are to be considered as the judgment of the whole house, or even of a majority. But, in truth, little reliance can or ought to be placed upon such sources of interpretation of a statute. The questions can be, and rarely are, there debated upon strictly legal grounds, with a full mastery of the subject and of the just rules of interpretation. The arguments are generally of a mixed character, addressed by way of objection, or of support, rather with a view to carry or defeat a bill than with the strictness of a judicial decision. But if the House entertained one construction of the language of the bill, *non constat* that the same opinion was entertained either by the Senate or by the President; and their opinions are certainly, in a matter of the sanction of laws, entitled to as great weight as the other branch. But, in truth, courts of justice are not at liberty to look at considerations of this

Northern Com. Co. v. U. S., (C. C. A.) 217 Fed. 33; U. S. v. Onage County, 193 Fed. 485; Johnston v. Morris, (C. C. A.) 72 Fed. 896; *In re* Chase, 48 Fed. 631; U. S. v. Sioux City, etc., R. Co., 43 Fed. 620; Henderson v. Central Pass. R. Co., 21 Fed. 364; U. S. v. Collier, 3 Blatchf. 325, 25 Fed. Cas. 14,833; U. S. v. Anderson, 9 Wall. 65, 19 U. S. (L. ed.) 617, 20 Op. Atty-Gen. 189 (Miller, 1891).

“Courts may take notice of circumstances outside of an act which tend to show its meaning, such as public records and documents, general and local history, and matters of public notoriety.” *Pacific Coast Steamship Co. v. U. S.*, 33 Ct. Cl. 36.

**65.** U. S. v. Mosley, 238 U. S. 383, 35 S. Ct. 904; Omaha, etc., R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 33 S. Ct. 890, 57 U. S. (L. ed.) 1501; Binns v. U. S., 194 U. S. 486, 24 S. Ct. 816, 48 U. S. (L. ed.) 1087; Johnson v. U. S., 215 Fed. 679; Red C. Oil Mfg. Co. v. Board of Agriculture, 172 Fed. 695.

**66.** Aldridge v. Williams, 3 How. 23, 11 U. S. (L. ed.) 475. To the same effect

see U. S. v. Union Pac. R. Co., 91 U. S. 79, 23 U. S. (L. ed.) 228; Knowlton v. Moore, 178 U. S. 72, 20 S. Ct. 747, 44 U. S. (L. ed.) 982; Jennison v. Kirk, 98 U. S. 459, 25 U. S. (L. ed.) 243; American Net, etc., Co. v. Worthington, 141 U. S. 473, 12 S. Ct. 55, 35 U. S. (L. ed.) 824; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 42, 15 S. Ct. 508, 39 U. S. (L. ed.) 613; Dunlap v. U. S., 173 U. S. 75, 19 S. Ct. 319, 43 U. S. (L. ed.) 620; Merritt v. Welsh, 104 U. S. 702, 26 U. S. (L. ed.) 898; District of Columbia v. Washington Market Co., 108 U. S. 254, 2 S. Ct. 543, 27 U. S. (L. ed.) 717; Dodge v. Nevada Nat. Bank, (C. C. A.) 109 Fed. 730; Grace v. Collector of Customs, etc., (C. C. A.) 79 Fed. 320; Carter v. Hobbs, 92 Fed. 600; Knox County v. Morton, (C. C. A.) 68 Fed. 789; Pacific Coast Steamship Co. v. U. S., 33 Ct. Cl. 36; Smith v. U. S., 32 Ct. Cl. 313; 17 Op. Atty-Gen. 64 (MacVeigh, 1881); 9 Op. Atty-Gen. 57 (Black, 1857); 9 Op. Atty-Gen. 438 (Black, 1860); 15 Op. Atty-Gen. 625 (Phillips, 1877).

**Mistake in punctuation.**—In *In re*

sort. We are bound to interpret the act as we find it, and to make such an interpretation as its language and its apparent objects require. We must take it to be true that the legislature intend precisely what they say, and to the extent which the provisions of the act require for the purpose of securing their just opinion and effect. Any other course would deliver over the court to interminable doubts and difficulties; and we should be compelled to guess what was the law, from the loose commentaries of different debates, instead of the precise enactments of the statute. Nor have there been wanting illustrious instances of great minds which, after they had, as legislators or commentators, reposed upon a short and hasty opinion, have deliberately withdrawn from their first impressions when they came upon the judgment seat to re-examine the statute or law in its full bearings."<sup>67</sup> And where a claimant in the Court of Claims filed interrogatories to be propounded to a former member of Congress to show the object or intention of a certain enactment, the court was "not able to find in the text-books or reported decisions that such an effort was ever before made in a court of law."<sup>68</sup> But the court is at liberty to advert to the view expressed by individual members in debate<sup>69</sup> or by a committee in its report,<sup>70</sup> and gather therefrom, as it may from any other source, the history of the times or of the evil which the legislation was intended to remedy. Reference is frequently made to such debates or to opinions expressed in reports of committees for the purpose of confirming a construction adopted by the court,<sup>71</sup> and, though they should never be

Schilling, (C. C. A.) 53 Fed. 81, it appears that members of conference committees had officially stated that the clerks of the committees, in preparing the committee reports, had made a mistake by ending in the wrong place a parenthesis in a tariff bill. But it was held that these declarations of the members of the committees were not sufficient to authorize a court to change the manifest meaning of the statute as it passed the legislative body and received the approval of the President, and to construe it in accordance with the intention of the committee.

67. *Mitchell v. Great Works Milling, etc., Co.*, 2 Story 653, 17 Fed. Cas. No. 9,662. See also *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 318, 17 S. Ct. 540, 41 U. S. (L. ed.) 1020, where the court said: "Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other;" *Soon Hing v. Crowley*, 113 U. S. 710, 5 S. Ct. 730, 28 U. S. (L. ed.) 1145.

68. *Badeau v. U. S.*, 21 Ct. Cl. 48; *Partee v. Thomas*, 27 Fed. 432.

69. *Tap Line Cases*, 234 U. S. 1, 34 S. Ct. 741, 58 U. S. (L. ed.) 1185; *Baker v. Swigart*, (C. C. A.) 199 Fed. 865; *Roberts v. Southern Pac. Co.*, 186 Fed. 934; *U. S. v. Nakashima*, (C. C. A.) 160 Fed. 842; *Wadsworth v. Boysen*, (C. C. A.) 148 Fed. 771; *U. S. v. Patterson*, 35 Fed. 641; *U. S. v. Wilson*, 58 Fed. 768; *American Net, etc., Co. v. Worthington*, 141 U. S. 473, 12 S. Ct. 55, 35 U. S. (L. ed.) 824; *Holy*

*Trinity Church v. U. S.*, 143 U. S. 465, 12 S. Ct. 511, 36 U. S. (L. ed.) 230. See also *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 316, 17 S. Ct. 540, 41 U. S. (L. ed.) 1019; *In re Lewis*, 114 Fed. 966; *Jennison v. Kirk*, 98 U. S. 459, 25 U. S. (L. ed.) 243; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, 12 Fed. Cas. No. 6,546; *U. S. v. Collier*, 3 Blatchf. 325, 25 Fed. Cas. No. 14,833; 20 Op. Atty-Gen. 183 (Miller, 1891).

"Although debates may not be used as a means for interpreting a statute \* \* \* that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted." *Standard Oil Co. v. U. S.*, 221 U. S. 1, 31 S. Ct. 502, 55 U. S. (L. ed.) 619.

70. *Lapina v. Williams*, 232 U. S. 78, 34 S. Ct. 196, 58 U. S. (L. ed.) 515; *Northern Pac. R. Co. v. Washington*, 222 U. S. 370, 32 S. Ct. 160, 56 U. S. (L. ed.) 237; *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 29 S. Ct. 671, 53 U. S. (L. ed.) 1013; *Binns v. U. S.*, 194 U. S. 486, 24 S. Ct. 816, 48 U. S. (L. ed.) 1087; *U. S. v. Nakashima*, (C. C. A.) 160 Fed. 842; *U. S. v. Chicago, etc., R. Co.*, 157 Fed. 616, reversed on other grounds (C. C. A.) 168 Fed. 236; *Mosle v. Bidwell*, (C. C. A.) 130 Fed. 334.

71. See *McLean v. U. S.*, 226 U. S. 374, 33 S. Ct. 122, 57 U. S. (L. ed.) 260; *Hepburn v. Griswold*, 8 Wall. 610, 19 U. S.

resorted to where the intent of the statute is plain,<sup>72</sup> sometimes, perhaps, more weight is given to the opinions thus expressed than the prevailing authorities sanction.<sup>73</sup>

**45. Other proceedings in Congress.**—The actual proceedings in Congress, apart from opinions expressed in debates and committee reports, may assist in determining the construction of a statute of doubtful import.<sup>74</sup> "In these circumstances, we are entitled to avail ourselves of such light as the history of the steps taken in the enactment of the law, as disclosed by the legislative records, may afford."<sup>75</sup> The rejection by Congress of a specific provision contained in an act as originally reported, is most persuasive to the conclusion that the act should not be so construed as in effect to include that provision.<sup>76</sup> That there was powerful opposition in Congress to the passage of a certain act has been adverted to as a consideration requiring an exact and literal construction thereof.<sup>77</sup> The Supreme Court interpreted a badly expressed and contradictory enactment by a reference to the journals of Congress, where it appeared that the peculiar phraseology was the result of an amendment introduced without due regard to language in the original bill.<sup>78</sup> But the same court has characterized an argument sought to be founded upon the various phases assumed by the provisions of an act in its passage through the two houses of Congress as "very unsafe and unreliable."<sup>79</sup>

(L. ed.) 522; *Untermeyer v. Freund*, 50 Fed. 80; *Northern Pac. R. Co. v. U. S.*, 36 Fed. 285; *U. S. v. Union Pac. R. Co.*, 37 Fed. 554; *In re Secretary of Treasury*, 71 Fed. 513; *In re Muser*, 49 Fed. 832; *Wilson v. Spaulding*, 19 Fed. 307; *Ex p. Farley*, 40 Fed. 69; *Walton v. U. S.*, 24 Ct. Cl. 380; 16 Op. Atty-Gen. 379 (Devens, 1879).

**72.** *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 33 S. Ct. 893, 57 U. S. (L. ed.) 1446.

**73.** See *Lapina v. Williams*, 232 U. S. 78, 34 S. Ct. 196, 58 U. S. (L. ed.) 515; *In re Saito*, 62 Fed. 126; *Austin v. U. S.*, 25 Ct. Cl. 454, in which latter case the court said: "It seems to us, in view of all the authorities, that a report of a committee, of either house of Congress, unanimous in its character, submitting and accompanying an amendment to a bill, may be considered by the court in construing such amendment, in a case of doubtful interpretation."

**74.** See *Lewis Pub. Co. v. Morgan*, 229 U. S. 288, 33 S. Ct. 867, 57 U. S. (L. ed.) 1190; *Buttfield v. Stranahan*, 192 U. S. 470, 24 S. Ct. 349, 48 U. S. (L. ed.) 525; *U. S. v. Alexander*, 12 Wall. 180, 20 U. S. (L. ed.) 381; *Connole v. Norfolk, etc., R. Co.*, 216 Fed. 823; *In re Seaholm*, (C. C. A.) 136 Fed. 144; *Cooper v. Richmond, etc., R. Co.*, 42 Fed. 700; *In re Muser*, 49 Fed. 831; *In re Hammond*, 98 Fed. 848; *Littleton v. Oliver Ditson Co.*, 62 Fed. 598; *In re Richards*, (C. C. A.) 96 Fed. 940; *In re Tune*, 115 Fed. 911; *In re Jones*, 110 Fed. 738; *The Saratoga*, 9 Fed. 322; *Langston v. U. S.*, 21 Ct. Cl. 13; *Fisher v. U. S.*, 15 Ct. Cl. 323.

**75.** *Per* Chief Justice Fuller, in *U. S. v. Burr*, 159 U. S. 85, 15 S. Ct. 1002, 40 U. S. (L. ed.) 82; *Chesapeake, etc., Telephone Co. v. Manning*, 186 U. S. 238, 22 S. Ct. 881, 46 U. S. (L. ed.) 1144; *Goodrich Transit Co. v. Interstate Commerce Commission*, 190 Fed. 943; *U. S. v. Chicago, etc., R. Co.*, 157 Fed. 616; *Mosler v. Bidwell*, (C. C. A.) 130 Fed. 334; *U. S. v. Collier*, 3 Blatchf. 325, 25 Fed. Cas. No. 14,833; *Love v. U. S.*, 29 Ct. Cl. 339; *Reynold v. U. S.*, 8 Ct. Cl. 56.

**76.** *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 33 S. Ct. 893, 57 U. S. (L. ed.) 1446.

Similarly, the rejection by the legislature of an amendment limiting the scope of a statute is a cogent objection to any construction which would impose the limitation rejected. *McDonald v. Southern Express Co.*, 134 Fed. 282.

*Compare* *U. S. v. Allen*, (C. C. A.) 179 Fed. 13, wherein it was held that provisions plainly implied in a statute should not be denied effect merely because a bill expressing them in more direct language, though brought to the attention of the committee in charge of the statute to be construed, was not enacted into law. The court said: "Courts can find the intent of the legislature only in the acts which are in fact passed, and not in those which are never voted upon in Congress, but which are simply proposed in committee."

**77.** *Lincoln v. U. S.*, 202 U. S. 484, 26 S. Ct. 728, 50 U. S. (L. ed.) 1117.

**78.** *Blake v. National City Bank*, 23 Wall. 307, 23 U. S. (L. ed.) 119.

**79.** *Per* Justice Blatchford, in *Andrews*



*Title of Statute*

**46. In general.**—In the legislation of Parliament the title of a statute has been held to be no part of it, for the title is usually framed only by the clerk of the house in which the bill first passes, and is seldom read more than once.<sup>80</sup> But this rule has been modified, and it now seems that when the meaning of the body of the act is doubtful, the title may be relied on as an assumption in arriving at a conclusion.<sup>81</sup> "The title is worthy of more consideration in the case of American statutes, when the legislature passes on the whole statute, title, preamble, if any, and the body of the statute; in many American legislatures the title of the act is agreed to by a distinct vote of the body."<sup>82</sup> In respect of acts of Congress, however, it was observed by Mr. Justice Field that "the title of an act furnishes little aid in the construction of its provisions;" that "it is seldom the subject of special consideration by the legislature;" and that even when the meaning of provisions in the body of the act is doubtful the title "has little weight."<sup>83</sup> Very little significance is attached to headings in tariff acts; they are intended only for general suggestions as to the character of articles within the schedules.<sup>84</sup> Titles to legislative acts have, in some of the states, come to possess very great importance, by

*c. Hovey*, 124 U. S. 716, 8 S. Ct. 676, 31 U. S. (L. ed.) 557.

**80.** *Hahn v. Salmon*, 20 Fed. 809; *Ogden v. Strong*, 2 Paine 587, 18 Fed. Cas. No. 10,460; *Copeland v. Memphis, etc.*, R. Co., 3 Woods 660, 6 Fed. Cas. No. 3,209, *citing* *Mills v. Wilkins*, 6 Mod. 62, where Chief Justice Holt said: "It is true that the title of an act of Parliament is no part of the law or enacting part, no more than the title of a book is a part of the book, for the title is not the law, but the name or description given to it by the makers. Being, then, no part of the act, the title is seen to afford no legislative import."

**81.** *Hadden v. Collector*, 5 Wall. 110, 18 U. S. (L. ed.) 518; *Copeland v. Memphis, etc.*, R. Co., 3 Woods 660, 6 Fed. Cas. No. 3,209, *citing* *Rex v. Cartwright*, 4 T. R. 490.

**82.** *Per* Woods, C. J., in *Copeland v. Memphis, etc.*, R. Co., 3 Woods 661, 6 Fed. Cas. No. 3,209. See also *Hahn v. Salmon*, 20 Fed. 809.

**83.** *Hadden v. Collector*, 5 Wall. 110, 18 U. S. (L. ed.) 518, wherein Mr. Justice Field continued as follows: "These observations apply with special force to acts of Congress. Every one who has had occasion to examine them has found the most incongruous provisions, having no reference to matter specified in the title. Thus the law regulating appeals in Mexican land cases to the district courts of the United States from the board of commissioners created under the act of March 3d, 1851, is found in an act entitled, 'An act making appropriations for the civil and diplomatic expenses of the government for the year ending June 30th, 1853, and for other purposes.' The law declaring that in the courts of the United States

there shall be no exclusion of any witness on account of color, nor in civil actions when he is a party to or interested in the issue tried, is contained in a proviso to a section in the appropriation act of 1864, the section itself directing an appropriation for detecting and punishing the counterfeiting of the securities and coin of the United States. During the past session, whilst a bill was pending before Congress entitled, 'A bill granting the right of way to ditch and canal owners over the public lands and for other purposes,' all after the enacting clause was stricken out and provisions establishing a complete system for the possession and sale of interests in mines were substituted in its place. And thus the most important act in our legislation relating to the mining interests of the country stands on the statute book under a title purporting that the act grants a right of way to ditch and canal owners over the public lands, and for other purposes. The words 'for other purposes,' frequently added to the title in acts of Congress, are considered as covering every possible subject of legislation." See further to the point that the title of an act of Congress does not often give material aid in the construction of it. U. S. v. *Distillery No. Twenty-Eight*, 6 Biss. 486, 25 Fed. Cas. No. 14,966; U. S. v. *Union Pac. R. Co.*, 91 U. S. 81, 23 U. S. (L. ed.) 224; *Goodlett v. Louisville, etc.*, R. Co., 122 U. S. 408, 7 S. Ct. 1254, 30 U. S. (L. ed.) 1230; *Patterson v. The Endora*, 190 U. S. 169, 23 S. Ct. 821, 47 U. S. (L. ed.) 1002; *Cornell v. Coyne*, 192 U. S. 418, 24 S. Ct. 383, 48 U. S. (L. ed.) 504.

**84.** 21 Op. Atty.-Gen. 66; *Hollender v. Magone*, 149 U. S. 586, 13 S. Ct. 932, 37

reason of constitutional provisions which not only require that they shall correctly indicate the purpose of the law, but which absolutely make the title to control and exclude from effect and operation as law everything which is incorporated in the body of the act but is not within the purpose indicated by the title.<sup>85</sup> When the title of an act corresponds with the intention deduced from the body of the act or is not antagonistic thereto it is a common practice of courts to refer to the title as emphasizing that intention or not detracting from it, as the case may be.<sup>86</sup>

**47. Ambiguous provisions.**—In an early case Chief Justice Marshall said: "On the influence which the title ought to have in construing the enacting clauses, much has been said, and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute, and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such

U. S. (L. ed.) 860; and *Seeberger v. Schlesinger*, 152 U. S. 581, 14 S. Ct. 729, 38 U. S. (L. ed.) 560; *Murphy v. U. S.*, 68 Fed. 910.

**85.** *Cooley Const. Lim.* (6th ed.) 169, quoted in *Chicago, etc., R. Co. v. Smyth*, 103 Fed. 380; *U. S. v. Jackson*, (C. C. A.) 143 Fed. 783, reversing 140 Fed. 266. See also *Malcomson v. Wappoo Mills*, 86 Fed. 192, 85 Fed. 911, and *Myer v. Western Car Co.*, 102 U. S. 1, 26 U. S. (L. ed.) 59, where, for the reason stated in the text, the title was decisive in the construction of state statutes; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 12 S. Ct. 689, 36 U. S. (L. ed.) 537; *New England Mortg. Security Co. v. Vader*, 28 Fed. 266.

**86.** See *U. S. v. New York*, 160 U. S. 610, 16 S. Ct. 402, 40 U. S. (L. ed.) 551; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 41, 15 S. Ct. 508, 39 U. S. (L. ed.) 601; *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 327, 17 S. Ct. 540, 41 U. S. (L. ed.) 1007; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 12 S. Ct. 689, 36 U. S. (L. ed.) 537; *The Delaware*, 161 U. S. 471, 16 S. Ct. 516, 40 U. S. (L. ed.) 771; *McKinley v. Wheeler*, 130 U. S. 632, 9 S. Ct. 638, 32 U. S. (L. ed.) 1048; *U. S. v. Union Pac. R. Co.*, 91 U. S. 72, 23 U. S. (L. ed.) 224; *U. S. v. Union Pac. R. Co.*, 148 U. S. 571, 13 S. Ct. 724, 37 U. S. (L. ed.) 560; *Eckoff v. District of Columbia*, 135 U. S. 240, 10 S. Ct. 752, 34 U. S. (L. ed.) 120; *Kelley v. Milan*, 127 U. S. 154, 8 S. Ct. 1101, 32 U. S. (L. ed.) 77; *U. S. v. Irwin*, 127 U. S. 129, 8 S. Ct. 1033, 32 U. S. (L. ed.) 99; *U. S. v. Auffmordt*, 122 U. S. 210, 7 S. Ct. 1182, 30 U. S. (L. ed.) 1182; *Baldwin v. Franks*, 120 U. S. 690, 7 S. Ct. 656, 763, 30 U. S. (L. ed.) 766; *U. S. v. Central Pac. R. Co.*, 118 U. S. 239, 6 S. Ct. 1038, 30 U. S. (L. ed.) 173; *Calloway County v. Foster*, 93 U. S. 571,

23 U. S. (L. ed.) 911; *U. S. v. Norton*, 91 U. S. 566, 23 U. S. (L. ed.) 454; *Davidson v. Lanier*, 4 Wall. 454, 18 U. S. (L. ed.) 377; *U. S. v. Forty Barrels, etc., of Coca Cola*, (C. C. A.) 215 Fed. 535, affirming 191 Fed. 431; *Saunders v. U. S.*, (C. C. A.) 114 Fed. 42; *In re Lewis*, 114 Fed. 963; *Reilly v. U. S.*, (C. C. A.) 106 Fed. 899; *U. S. v. Coal Dealers Assoc.*, 85 Fed. 252; *Pierce v. Van Dusen*, (C. C. A.) 78 Fed. 696; *Louisville Trust Co. v. Louisville, etc., R. Co.*, (C. C. A.) 75 Fed. 444; *U. S. v. Barber*, (C. C. A.) 74 Fed. 483; *Dueber Watch-Case Mfg. Co. v. Howard Watch, etc., Co.*, (C. C. A.) 66 Fed. 637; *U. S. v. Union Pac. R. Co.*, 37 Fed. 554; *Strong v. U. S.*, 34 Fed. 19; *U. S. v. Lawrence*, 13 Blatchf. 213, 26 Fed. Cas. No. 15,572; *Kahn v. Salmon*, 10 Sawy. 195, 20 Fed. 801; *U. S. v. Leathers*, 6 Sawy. 22, 26 Fed. Cas. No. 15,581; *U. S. v. McArdle*, 2 Sawy. 367, 26 Fed. Cas. No. 15,553; 23 Op. Atty.-Gen. 379; 20 Op. Atty.-Gen. 89; 8 Op. Atty.-Gen. 221 (Cushing); 7 Op. Atty.-Gen. 303; *Webb & Co. v. U. S.*, 20 Ct. Cl. 495; *Bowen's Case*, 14 Ct. Cl. 174; *Reynolds's Case*, 15 Ct. Cl. 321; *Bailey v. U. S.*, 109 U. S. 439, 3 S. Ct. 272, 27 U. S. (L. ed.) 988; *Smythe v. Fiske*, 23 Wall. 380, 23 U. S. (L. ed.) 47; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 211, 16 S. Ct. 666, 40 U. S. (L. ed.) 940, where the court said: "The scope or purpose of the act is, as declared in its title, to regulate commerce. It would, therefore, in advance of an examination of the text of the act, be reasonable to anticipate that the legislation would cover or have regard to the entire field of foreign and interstate commerce, and that its scheme of regulation would not be restricted to a partial treatment of the subject. So, too, it could not be readily supposed that Congress intended, when regulating such commerce,

case the title claims a degree of notice and will have its due share of consideration.<sup>87</sup> "Among other things," said Mr. Justice Brewer," which may be considered in determining the intent of the legislature, is the title of the act. We do not mean that it may be used to add to or to take from the body of the statute,<sup>88</sup> but it may help to interpret its meaning."<sup>89</sup> An act the purpose of which, as avowed in its title, is "to extend the jurisdiction of" certain courts "certainly cannot be so construed as to limit and abridge an existing jurisdiction."<sup>90</sup> Where a statute was intended, as declared in its title, to "amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce," the court said: "It cannot therefore apply to seamen, even if they are American by birth or naturalization, that have regularly shipped upon a British vessel, and have thereby become British seamen for the time being."<sup>91</sup> Where the title of an act was "An act for the punishment of certain crimes against the United States," Chief Justice Marshall said: "It would seem that offenses against the United States, not offenses against the human race, were the crimes which the legislature intended by this law to punish;" and it was held under all the circumstances that piracy was not punishable under the act.<sup>92</sup> An act directing moneys to be paid out of the treasury was expressed in its title to be "for relief of the widow and children" of a person named, and the title was regarded as fortifying the conclusion that the money was not to constitute a part of his estate for the payment of his debts.<sup>93</sup> Where an act entitled "An act to correct an error in section twenty-five hundred and four of the Revised Statutes" proceeded to correct a supposed error in "section 25," and by reference

to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interest of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation."

87. *U. S. v. Fisher*, 2 Cranch 386, 2 U. S. (L. ed.) 304; *Petri v. F. E. Creelman Lumber Co.*, 199 U. S. 487, 26 S. Ct. 133, 50 U. S. (L. ed.) 281; *White v. U. S.*, 191 U. S. 545, 24 S. Ct. 171, 48 U. S. (L. ed.) 295; *Patterson v. The Eudora*, 190 U. S. 169, 23 S. Ct. 821, 47 U. S. (L. ed.) 1002; *Casey v. Barber Asphalt Paving Co.*, 192 Fed. 432; *St. Louis, etc., R. Co. v. Delk*, (C. C. A.) 158 Fed. 931, rehearing denied, (C. C. A.) 162 Fed. 145; *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.*, (C. C. A.) 155 Fed. 842, affirming 148 Fed. 31; *Rogers v. U. S.*, (C. C. A.) 152 Fed. 346; *Johnson v. U. S.*, 37 Ct. Cl. 323. See also *Copeland v. Memphis, etc., R. Co.*, 3 Woods 651, 6 Fed. Cas. No. 3,209; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 562, 12 S. Ct. 689, 36 U. S. (L. ed.) 537.

The titles of the acts are the best brief summary of their purposes. *Millard v. Roberts*, 202 U. S. 429, 26 S. Ct. 674, 50 U. S. (L. ed.) 1090.

88. *Citing Hadden v. Collector*, 5 Wall. 107, 18 U. S. (L. ed.) 518.

89. *Holy Trinity Church v. U. S.*, 143 U. S. 462, 12 S. Ct. 511, 36 U. S. (L. ed.) 226; *U. S. v. Nakashima*, (U. C. A.) 160 Fed. 842. See also *Myer v. Western Car Co.*, 102 U. S. 1, 26 U. S. (L. ed.) 59; *Brooks v. Southern Pac. R. Co.*, 148 Fed. 986, affirmed 207 U. S. 463, 28 S. Ct. 141, 52 U. S. (L. ed.) 297; *Wilson v. Spaulding*, 19 Fed. 305.

In *Price v. Forrest*, 173 U. S. 427, 19 S. Ct. 434, 43 U. S. (L. ed.) 749, Mr. Justice Harlan evidently, as appears by the context, speaking of the "title" instead of the "preamble," said: "We must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute. We mean only to hold that the preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions."

90. *Revenue Cutter No. 1, Brown Adm.* 94, 20 Fed. Cas. No. 11,713.

91. *Per McPherson, D. J.*, in *The Eudora*, 110 Fed. 430.

92. *U. S. v. Palmer*, 3 Wheat. 610, 4 U. S. (L. ed.) 471.

93. *Ogden v. Strong*, 2 Paine 584, 18 Fed. Cas. No. 10,460.

to the two sections it was evident that the act was aimed at an error in the section mentioned in the title, the latter was, of course, given conclusive effect in support of the act.<sup>94</sup> Under an act of Congress granting money to the "legal representatives" of a person, the money was awarded to his heirs, and not to his administrator as assets, partly on the ground that the act was described in its title to be "for the relief of the heirs" of the person named.<sup>95</sup> Where the question was whether the act under examination created a new railroad corporation or whether it merely conferred upon a foreign corporation franchises to be enjoyed within the territory of the state, the purpose declared in the title "to incorporate" was accorded "more than ordinary weight" in favor of the court's conclusion that a new corporation was formed.<sup>96</sup> Where an act was entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to labor," etc., the court was of opinion that Congress clearly had no thought of excluding persons whose toil is that of the brain, and, partly in view of the title, a minister of the gospel was adjudged not to be within the prohibition of the act.<sup>97</sup>

**48. Explicit provisions.**—It is only when the meaning of provisions in the body of the act is doubtful that resort may be had to the title,<sup>98</sup> and the ambiguity which justifies a resort to the title must arise in the body of the act; ambiguity in the title alone creates no embarrassment.<sup>99</sup> "The title of an act of Congress, when at variance with its provisions, deserves no consideration."<sup>1</sup> A section in "an act to amend the custom revenue laws" was applied to cases arising under the internal revenue laws, these

<sup>94</sup> *Wilson v. Spaulding*, 19 Fed. 304.

<sup>95</sup> *Emerson v. Hall*, 13 Pet. 409, 10 U. S. (L. ed.) 223.

The foregoing case distinguished.—On the other hand, an act of a similar character entitled "An act for the relief of" a former navy officer in respect of the settlement of his accounts and directing payment to him "or his heirs" of any balance found due was held not to be a gift to his heirs so as to exclude his creditors from all interest in the balance, and the word "heirs" was held necessarily to mean the same thing as personal representatives. *Price v. Forrest*, 173 U. S. 410, 19 S. Ct. 434, 43 U. S. (L. ed.) 749, *distinguishing* *Emerson v. Hall*, 13 Pet. 409, 10 U. S. (L. ed.) 223, above cited.

And where an act entitled "An act for the relief of the estate of" a deceased person conferred jurisdiction upon the Court of Claims to hear and determine a claim of his "legal representatives," the court, looking at the body of the act, found that its manifest purpose was not to confer a bounty or gratuity upon any one, but to ascertain and provide for the payment of a debt due from the United States for property of the decedent taken by the United States, and consequently the money recovered by his executor was held to constitute assets of the estate subject to the debts and liabilities of the testator. *Briggs v. Walker*, 171 U. S. 466, 19 S. Ct. 1, 43 U. S. (L. ed.) 243.

<sup>96</sup> *Copeland v. Memphis, etc., R. Co.*,

3 Woods 651, 6 Fed. Cas. No. 3,209. But see *Goodlett v. Louisville, etc., R. Co.*, 122 U. S. 391, 7 S. Ct. 1254, 30 U. S. (L. ed.) 1230, where a contrary conclusion was reached under similar, but perhaps not identical, circumstances.

<sup>97</sup> *Holy Trinity Church v. U. S.*, 143 U. S. 457, 12 S. Ct. 511, 36 U. S. (L. ed.) 226.

<sup>98</sup> *Lapina v. Williams*, 232 U. S. 78, 34 S. Ct. 196, 58 U. S. (L. ed.) 515; *Cornell v. Coyne*, 192 U. S. 418, 24 S. Ct. 383, 48 U. S. (L. ed.) 504; *In re Johnson*, 224 Fed. 180; *U. S. v. McCrory*, (C. C. A.) 119 Fed. 861; *Hadden v. Collector*, 5 Wall. 110, 18 U. S. (L. ed.) 518.

<sup>99</sup> *Cornell v. Coyne*, 192 U. S. 418, 24 S. Ct. 383, 48 U. S. (L. ed.) 504; *U. S. v. Oregon, etc., R. Co.*, 164 U. S. 526, 17 S. Ct. 165, 41 U. S. (L. ed.) 541; *U. S. v. McCrory*, (C. C. A.) 119 Fed. 861.

<sup>1</sup> *Per Irwin, J.*, in *U. S. v. Randolph*, 1 Pittsb. (Pa.) 24, 27 Fed. Cas. No. 16,120; *Rider v. U. S.*, (C. C. A.) 149 Fed. 164.

"The title neither extends nor restrains provisions contained in the body of the act." *U. S. v. Distillery No. Twenty-Eight*, 6 Biss. 483, 25 Fed. Cas. No. 14,966. See also *Hadden v. Collector*, 5 Wall. 110, 18 U. S. (L. ed.) 518.

"Being, however, in the nature of things a mere brief epitome or short description of the act, the title is very liable to be incorrect or incomplete, and therefore it can never be used to control the

being covered by the plain language of the section.<sup>2</sup> Although the title of an act giving priority to claims by the United States against bankrupt debtors' estates was limited to "receivers of public money," and several sections of the act were confined to debtors of that class, the explicit and comprehensive language of the enacting clause of another section was held to constitute the United States a preferred creditor against the bankrupt estate of an indorser of a bill of exchange in the ordinary course of business.<sup>3</sup> Explicit provisions of an act making important additions to pre-existing naturalization laws were enforced notwithstanding the title was "An act for the regulation of seamen on board the public and private vessels of the United States."<sup>4</sup> Where the punctuation in the body of the act conforms to the intent otherwise disclosed therein a different punctuation of corresponding language in the title is of no consequence.<sup>5</sup> Nor is the use of the singular number in a title persuasive against application of the plural to the same subject-matter in accordance with the words of the act.<sup>6</sup>

### *Formal Parts of Statute*

**49. Preamble.**—The preamble usually contains the motives and inducements to the making of the act, and resort to the preamble may therefore be useful in ascertaining the causes which led to the passage of the act or the mischiefs intended to be remedied by it.<sup>7</sup> "The preamble in the act may be resorted to, to aid in the construction of the enacting clause, when

operation of any plain provision of the body of the act." *Per* Deady, J., in *Hahn v. Salmon*, 20 Fed. 809. See also *Postmaster-Gen. v. Early*, 12 Wheat. 148, 6 U. S. (L. ed.) 577.

In *The New York*, (C. C. A.) 108 Fed. 109, Lurton, C. J., enunciated and applied the rule that "the title of an act cannot be used to extend the provisions of an act so as to include within its scope that which without such aid would plainly not be included."

"The title is no part of a statute, and cannot be used to set at naught its obvious meaning." *Patterson v. The Eudora*, 190 U. S. 169, 23 S. Ct. 821, 47 U. S. (L. ed.) 1002.

"Or" conflicting with "and."—In *The Saratoga*, 9 Fed. 322, the words "seizure and forfeiture" in the title of an act were not allowed to overcome the effect of the disjunctive clause "seizure or forfeiture" in the body of the act.

2. U. S. v. *Distillery No. Twenty-Eight*, 6 Biss. 483, 25 Fed. Cas. No. 14,966.

3. U. S. v. *Fisher*, 2 Cranch 358, 2 U. S. (L. ed.) 304.

4. U. S. v. *Randolph*, 1 Pittsb. (Pa.) 24, 27 Fed. Cas. No. 16,120.

5. U. S. v. *Oregon, etc.*, R. Co., 164 U. S. 526, 17 S. Ct. 165, 41 U. S. (L. ed.) 541 [*reversing Oregon, etc.*, R. Co. v. U. S., (C. C. A.) 67 Fed. 650], where a land grant was described in the title of the act as in aid of the construction of a railroad and telegraph line "from Portland to Astoria and McLinnville in the state of Oregon," but the court found enough in the

body of the act to warrant an interpretation that two roads were in contemplation, one to Astoria and another to McLinnville.

See § 50 for general discussion of weight given punctuation.

6. U. S. v. *Oregon, etc.*, R. Co., 164 U. S. 526, 17 S. Ct. 165, 41 U. S. (L. ed.) 541.

7. *Royer v. Schultz Belting Co.*, 28 Fed. 850; *Hahn v. Salmon*, 20 Fed. 809; *Copeland v. Memphis, etc.*, R. Co., 3 Woods 660, 6 Fed. Cas. No. 3,209; *Hahn v. Salmon*, 10 Sawy. 196. See also *Beaty v. Knowler*, 4 Pet. 170, 7 U. S. (L. ed.) 813; 20 Op. Atty.-Gen. 89.

**Preamble to corporation charter.**—In *The Binghamton Bridge*, 3 Wall. 51, 18 U. S. (L. ed.) 137, where it was held that certain provisions in the charter of a toll-bridge company constituted a contract by the state not to authorize the erection of a competing bridge, the court quoted the preamble to the charter in order to show that the legislature thought the enterprise did not promise present remuneration, and that large powers and exclusive privileges must be given to get the stock taken and the bridge built.

"In the legislative practice of Parliament all private bills are prefaced by a preamble in which the petitioner is required to set forth the nature of his claim, and the preamble restrains the construction of the act, and aids in the interpretation of its terms. In this country no such legislative practice exists." *Per* Nott, J., in *Braden's Case*, 16 Ct. Cl. 404.

any ambiguity exists,"<sup>8</sup> and it is especially helpful when the ambiguity "is not simply that arising from the meaning of particular words, but such as may arise in respect to the general scope and meaning of a statute."<sup>9</sup> But it cannot enlarge or confer powers,<sup>10</sup> nor control the words of the act unless they are doubtful or ambiguous.<sup>11</sup> Hence the necessity of resorting to it in order to ascertain the true intent and meaning of the legislature is fatal to any claim which by ordinary rules of interpretation can be sustained only by clear and unambiguous language.<sup>12</sup>

**50. Punctuation.**—It is commonly stated that "punctuation is no part of the statute,"<sup>13</sup> and that "for the purpose of arriving at the true meaning of a statute courts read with such stops as are manifestly required."<sup>14</sup> "In the construction of laws," said Mr. Justice Baldwin, "punctuation is no criterion of the sense of the legislature, unless it is in conformity with their intention as expressed in the words they use. Punctuation is generally the act of the clerk or printer, which the court will disregard, if taking the instrument by its four corners and looking at all its provisions a judicial construction points to an intention different

8. *Per Thompson, J.*, in *Beard v. Rowan*, 9 Pet. 317, 9 U. S. (L. ed.) 135. See also *Garrison v. U. S.*, 30 Ct. Cl. 282; *Dean v. Harnden*, 1 Paine 55, 9 Fed. Cas. No. 4,819.

In *Price v. Forrest*, 173 U. S. 410, 19 S. Ct. 434, 43 U. S. (L. ed.) 749, Mr. Justice Harlan said that "the preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions." But the cases cited and the context of the opinion show clearly that the learned justice was speaking of the title, not the preamble, of the act.

9. *Coosaw Min. Co. v. South Carolina*, 144 U. S. 563, 12 S. Ct. 724, 36 U. S. (L. ed.) 537.

10. *Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 188, 10 S. Ct. 68, 33 U. S. (L. ed.) 302; *Copeland v. Memphis, etc., R. Co.*, 3 Woods 660, 6 Fed. Cas. No. 3,209, where the court said the true office of a preamble "is to expound powers conferred, not substantially to create them. A preamble is not only not essential, and is often omitted, but it is strictly speaking, without force in a legislative sense, being but a guide to and not the intent of the statute. And to what is it properly a guide? To the meaning of the enactment? No, but the intentions of the framer, which is only the first stage on the road in the construction of statutes."

11. *Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 188, 10 S. Ct. 68, 33 U. S. (L. ed.) 302.

12. *Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 188, 10 S. Ct. 68, 33 U. S. (L. ed.) 302, where, applying the rule stated in the text, the court, finding no plain words in the act which would uphold the statutory exemption from taxation to the extent claimed by the railroad company, de-

clined to be influenced by the preamble to the charter of the company declaring that the work was one of "great public importance," and "to be encouraged by legislative sanction and liberality," etc.

13. *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 84, 26 U. S. (L. ed.) 1111, where Mr. Justice Harlan said: "Lord Kenyon, C. J., in *Doe v. Martin*, 4 T. R. 65, said that courts in construing acts of Parliament or deeds should read them with such stops as will give effect to the whole. \* \* \* The general rule is well illustrated in *Barrington's Statutes* (4th ed.), 438, note x; *Price v. Price*, 10 Ohio St. 316; *Cushing v. Worrick*, 9 Gray (Mass.) 382; *Gyger's Estate*, 65 Pa. St. 311; and *Hamilton v. The R. B. Hamilton*, 16 Ohio St. 428. In the last case it was said: 'But for the punctuation, as it stands, there could be little doubt but that this was the meaning of the legislature. Courts will, however, in the construction of statutes, for the purpose of arriving at the real meaning and intention of the lawmakers, disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute.'"

See § 48 as to weight given punctuation of title.

14. *U. S. v. Lacher*, 134 U. S. 628, 10 S. Ct. 625, 33 U. S. (L. ed.) 1080; *Stephens v. Cherokee Nation*, 174 U. S. 480, 19 S. Ct. 722, 43 U. S. (L. ed.) 1041; *U. S. v. Oregon, etc., R. Co.*, 164 U. S. 541, 17 S. Ct. 165, 41 U. S. (L. ed.) 541; *Crawford v. Burke*, 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; *Gwathmay v. Clisby*, 31 Fed. 221; *Chicago, etc., R. Co. v. Voelker*, (C. C. A.) 129 Fed. 522, reversing 116 Fed. 867. See also *Ford v. Delta, etc., Land Co.*, 164 U. S. 674, 17 S. Ct. 230, 41 U. S. (L. ed.) 590.

from what the mere punctuation indicates."<sup>15</sup> Questions of punctuation usually cause no considerable embarrassment, as a satisfactory construction will generally be obtained by applying established canons of construction; for example, by reference to earlier acts *in pari materia*,<sup>16</sup> by giving effect to every word and suffering none to be rejected as superfluous,<sup>17</sup> or by

15. *In re Irwine*, 1 Pa. L. J. Rep. 82, 1 Pa. L. J. 291, 13 Fed. Cas. No. 7,086. See also, to the point that "punctuation is a most fallible standard by which to interpret a writing," *Ewing v. Burnet*, 11 Pet. 54, 9 U. S. (L. ed.) 624.

In *Durousseau v. U. S.*, 6 Cranch 307, 3 U. S. (L. ed.) 232, an action of debt for the penalty of an embargo bond under a statute providing that "in every such suit judgment shall be given against the defendant or defendants, unless proof shall be produced of such relanding, or of loss by sea, or other unavoidable accident," Chief Justice Marshall held that the words "loss by sea or other unavoidable accident" meant loss by sea, or loss by other unavoidable accident. But Johnson and Livingston, JJ., were of opinion that "loss by sea is one excuse; unavoidable accident, whether followed by loss or not, is another." The case went off on another point.

16. In *Gwathmay v. Clisby*, 31 Fed. 220, the punctuation concededly favored the view that bills of exchange and promissory notes were both governed by the restrictive terms in the following section of the Alabama Revised Statutes: "Bills of exchange and promissory notes, payable in money at a bank or private banking-house, or a certain place of payment therein designated, are governed by the commercial law." But the court held that bills of exchange were not qualified by the words "payable in money at a bank," because the original act, to which a resort was justified, and which was eventually reproduced in the section above quoted, read as follows: "The remedy on bills of exchange, foreign and inland, and on promissory notes payable in bank, shall be governed," etc.

In *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77, 26 U. S. (L. ed.) 1111, it appeared that the Illinois Revised Statutes conferred upon the judges of certain courts "power, in vacation, to hear and determine motions, to dissolve injunctions, stay or quash executions," etc., and it was contended that a judge had power to appoint a receiver in vacation, because the comma after the word "motions" indicated that he was authorized to determine motions of every kind, not simply those relating to matters specially defined. But the contention was overruled by recurring to the original enactment in the session laws, wherein there was no comma after the word "motions."

See, generally, §§ 61-66 as to statutes *in pari materia*.

17. In *U. S. v. Three Railroad Cars*, 1 Abb. 196, 28 Fed. Cas. No. 16,513, an information for forfeiture by reason of an unlawful removal of a custom-house seal from certain cars in course of transportation, the question was raised whether the words "as aforesaid" qualifying and immediately following the word "attached" without any point between could be extended to the word "removed" in a preceding part of the sentence. The court conceded that the punctuation *prima facie* confined the words "as aforesaid" to the word "attached," but decided in favor of the broader application on the ground that by the other construction some of the words in the sentence would have no effect. See also *Lees v. U. S.*, 150 U. S. 479, 14 S. Ct. 163, 37 U. S. (L. ed.) 1150.

In *In re Irwine*, 1 Pa. L. J. Rep. 82, 1 Pa. L. J. 291, 13 Fed. Cas. No. 7,086, a bankrupt had applied for a discharge under the Bankruptcy Act of 1841, which contained the following provision: "In case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignments or otherwise, given or secured any preference," etc., "he shall not receive a discharge," etc. *Irvine* having given a preference "subsequent to the first day of January last," though not "in contemplation of the passage of a bankrupt law," it was held that he was not entitled to a discharge, and that the same meaning should be given to the statute as if it read, as suggested by counsel opposing the discharge, "subsequent to the first day of January last (or at any other time in contemplation of the passage of a bankrupt law)," etc. Mr. Justice Baldwin, writing the opinion, pointed out that the construction for which the bankrupt contended would render the words "subsequent to the first day of January last" utterly useless, since Congress might better have said "has at any time in contemplation," etc., if such had been its intention; and that the ordinary rule of construction requires that effect shall be given to every word of a statute when no repugnancy will be caused thereby.

See also *Stephens v. Cherokee Nation*, 174 U. S. 480, 19 S. Ct. 722, 43 U. S. (L. ed.) 1041, where the court suggested the insertion or omission of a comma in order to give full effect to the words of

adopting a reading which will make the entire provision harmonious and sensible.<sup>18</sup> But while punctuation is a fallible standard by which to measure the meaning of a statute, it is in case of ambiguity entitled to consideration.<sup>19</sup> "In a criminal case, where much is to be allowed in favor of liberty, it is unsafe to rely on a mere matter of punctuation" for condemnation of the accused.<sup>20</sup> And a court will not repunctuate a penal

the statute and avoid an unreasonable construction.

See § 32 as to giving effect to every word.

18. In *Bates v. Clark*, 95 U. S. 204, 24 U. S. (L. ed.) 471, it was held that the definition of Indian country in the following provision in an Act of Congress of 1834 should be read with a comma after the words "not within any state" or that without the insertion of any point there it should be read so as to apply the words "to which the Indian title has not been extinguished" to all the region mentioned in the section: "All that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States, east of the Mississippi river, and not within any state to which the Indian title has not been extinguished," etc. One consideration which influenced the decision was that omission of the comma would imply "that Indians had title to some state then in existence and that there were other states to which their title had been extinguished," and this meaning was "too absurd to be considered."

**Substitution of hyphen for comma.**—In the schedule of instruments required by an Act of Congress of 1864 to be stamped, the words "memorandum check" were printed with a comma between them. Construing this provision the court said: "There is probably an error in the punctuation of the statute in regard to the item which reads, 'memorandum, check, receipt, or other written or printed evidence of an amount of money to be paid.' It should read 'memorandum-check (with a hyphen between the words), receipt, or other written or printed evidence.' A 'check' was specifically provided for already in the schedule, and it is not to be assumed that Congress would, in the same schedule, make two provisions, differing from each other, for the same subject. A memorandum-check, however, is an instrument well known in the commercial law, which, it might be claimed, did not come under the general term of a check, and which, therefore, had not been specifically provided for. \* \* \* This reading makes the statute harmonious and sensible, providing the bank-checks, drafts, inland bills, promissory notes, memorandum-checks, receipts, and assigning to each its proper position." *U. S. v. Isham*, 17 Wall. 502, 21 U. S. (L. ed.) 728.

See, generally, § 34 as to harmonizing provisions of statute.

19. *Northern Pac. R. Co. v. U. S.*, 227 U. S. 355, 33 S. Ct. 368, 57 U. S. (L. ed.) 544; *Joy v. St. Louis*, 138 U. S. 1, 11 S. Ct. 243, 34 U. S. (L. ed.) 843; *Fithian v. St. Louis, etc., R. Co.*, 188 Fed. 842. See also *Crawford v. Burke*, 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147.

20. *U. S. v. Voorhees*, 9 Fed. 143, a prosecution for violation of U. S. Rev. Stat., § 5209, which provides: "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten." The indictment charged that the defendant, president of a national bank, did embezzle, abstract, and wilfully misapply certain funds and credits of the bank, but there was no allegation of any intent. It was held that a motion to quash the indictment must be sustained. *McKenna*, C. J., said: "Congress may provide that acts of this character may be punished without allegation or proof of criminal intent, and if such provision is clear the courts must enforce them; but if the provision is repugnant to the sense of justice, and the offense is made very highly penal, as in this case, courts are disposed to give effect to any fair doubt as to the intention. If it were not for the punctuation, on which the district attorney has laid so much stress, there would be no doubt that the intent mentioned would apply to all the offenses mentioned; but in a criminal case, where much is to be allowed in favor of liberty, it is unsafe



statute so as to make it embrace offenses not properly within its scope.<sup>21</sup> On the other hand, even in a criminal case the court would not be likely to adhere strictly to a rule of punctuation where it would nullify a large part of the statute and enable a person guilty of acts carefully described entirely to escape punishment clearly denounced on him.<sup>22</sup> While it is said that inclosing a portion of a sentence in brackets or marks of parenthesis is simply punctuation, there is much difficulty in applying to such a case the ordinary rule that punctuation is of slight importance.<sup>23</sup>

**51. Grammar and collocation.**—Statutes are not to be construed by strict and critical adherence to grammatical rules.<sup>24</sup> Thus, "courts should never indulge in nice grammatical criticism of prepositions or conjunctions,

to rely on a mere matter of punctuation. If these offenses were separated only by commas there would be no doubt that the intent with which the section closes would apply to all its divisions. But we think that, as it stands, the fair construction of the act, and the latter part of the section which provides that any one who aids or abets an officer in doing any of the acts with like intent shall be similarly punished, must be to make it necessary to allege and prove the intent as to all. It cannot be supposed that the legislature intended to require more proof against the abettor than was required against the principal; and this part of the statute makes it necessary to construe the preceding part in such a way as to apply the intent to all of the offenses, notwithstanding the punctuation of the sentences."

21. *U. S. v. York*, 131 Fed. 323.

22. See *U. S. v. Lacher*, 134 U. S. 624, 10 S. Ct. 625, 33 U. S. (L. ed.) 1080; *U. S. v. Falkenhainer*, 21 Fed. 624; *U. S. v. Pelletreau*, 14 Blatchf. 126, 27 Fed. Cas. No. 16,023.

23. Thus, in *In re Schilling*, (C. C. A.) 53 Fed. 81, it was unsuccessfully contended that a paragraph in the tariff act of 1890 which read "Chocolate (other than chocolate confectionery, and chocolate commercially known as 'sweetened chocolate') two cents per pound" should be read with the parenthesis ending at the word "confectionery." Circuit Judge Shipman, writing the opinion of the court, said: "As reported to the two houses by the conference committees, and as passed by Congress, the paragraph was in the form in which it is now printed. It was subsequently officially, and, no doubt, truthfully, stated by members of each branch of the committees on conference that the clerks of the two committees, in preparing the report, made a mistake by ending the parenthesis in the wrong place. The error has not been corrected by Congress, although the subject has received its attention. It is truly said that punctuation is no part of a statute, and that, therefore, punctuation can be changed in accordance with the obvious intent of the legislature; and it is also said that the

inclosing a portion of a sentence in brackets is simply punctuation. A 'parenthesis' is defined to be 'an explanatory or qualifying clause, sentence, or paragraph inserted in another sentence, or in the course of a longer passage, without being grammatically connected with it.' Cent. Dict. It is used to limit, qualify, or restrict the meaning of the sentence with which it is connected, and it may be designated by the use of commas, or by a dash, or by curved lines or brackets; but the use of curves or of brackets unmistakably shows that the clause thus included was supposed by the author or by the scrivener to limit or restrict a general meaning of the language with which it is connected or to be of importance in explaining the meaning. The curved lines or brackets are, it is true, punctuation, but they are made with forethought, and for the purpose of clearness and definiteness. They designate much more distinctly than by the use of commas the character of the clause which is included. Apart from the declarations of the members of the conference committees upon the floor of Congress, it could hardly be claimed that the intent of the statute plainly required a change in the punctuation. An inference could be drawn from the history of the statute before it reached the committees of conference, but, in view of the manifest limitation by the parenthesis, such an inference would not be controlling. Are, then, the declarations of the members of the committees sufficient to authorize a court to change the manifest meaning of a statute as it passed the legislative body and received the approval of the President, and to construe it in accordance with the intention of the committees? I think that, such a judicial construction of a statute is akin to judicial legislation, which, as Congress has refused to act upon the subject, it is well to avoid."

24. *Sullivan v. Robertson*, 37 Fed. 779, where the court said that "of course" a tariff act is not to be construed "according to the very strictest rules of grammar." See also *Heydenfeldt v. Daney* (Gold, etc., Min. Co.), 93 U. S. 638, 23 U. S. (L. ed.) 995.

in order to destroy rights honestly acquired."<sup>25</sup> The true meaning, if clearly ascertained, must prevail, though contrary to the apparent grammatical construction,<sup>26</sup> and the same rule applies in respect of faulty collocation of words or clauses.<sup>27</sup> There is, however, some presumption that the grammatical reading of a statute gives its correct sense.<sup>28</sup> The lawmaker "is presumed to know the meaning of words and the rules of grammar."<sup>29</sup> Relative words should ordinarily be referred to the word or clause with which they are grammatically connected,<sup>30</sup> but "this rule is not controlling, and has often been disregarded."<sup>31</sup> Where the same statute is printed in more than one language, resort may be had to the one version for the purpose of determining the antecedent of a relative used in the other. Thus "it" was held to refer to "company" rather than "railroad" where a statute was printed in both French and English, and "elle" was used for "it" in the French version, the conclusion being logical that since "compagnie" was feminine, "elle" referred thereto rather than to "chemin de fer," a masculine noun.<sup>32</sup>

### *Policy; Usage or Custom; Practical Construction*

**52. Policy; public or governmental.**—Where it was contended that the imposition by Congress of penalties for carrying on any business prohibited by state laws, without payment of the license or special tax required by Congress, was contrary to public policy, since it was an attempt to draw revenue by law from taxes on crimes, Chief Justice Chase said: "This court can know nothing of public policy except from the Constitution and the laws, and the due course of administration and decision. It has no legislative powers. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here."<sup>33</sup>

25. Griffith v. Bogert, 18 How. 163, 15 U. S. (L. ed.) 307.

26. U. S. v. Lacher, 134 U. S. 626, 10 S. Ct. 625, 33 U. S. (L. ed.) 1080.

27. U. S. v. Falkenhainer, 21 Fed. 624; U. S. v. Pelletreau, 14 Blatchf. 126, 27 Fed. Cas. No. 16,023; U. S. v. Lacher, 134 U. S. 624, 10 S. Ct. 625, 33 U. S. (L. ed.) 1080. See also Caha v. U. S., 152 U. S. 214, 14 S. Ct. 513, 38 U. S. (L. ed.) 415.

28. Home Ins. Co. v. Dunn, 19 Wall. 224, 22 U. S. (L. ed.) 68; Minis v. U. S., 15 Pet. 446, 10 U. S. (L. ed.) 791; Denn v. Reid, 10 Pet. 526, 9 U. S. (L. ed.) 519; Woodruff v. Barney, 1 Bond 528, 30 Fed. Cas. No. 17,986; Reilly v. U. S., (C. C. A.) 106 Fed. 900; Heller v. Magone, 38 Fed. 911; U. S. v. Seventy-Six Thousand One Hundred and Twenty-Five Cigars, 18 Fed. 149. See also Lake County v. Rollins, 130 U. S. 670, 9 S. Ct. 651, 32 U. S. (L. ed.) 1060; Farmers', etc., Nat. Bank v. Dearing, 91 U. S. 33, 23 U. S. (L. ed.) 196; The Saratoga, 9 Fed. 326; Gwathmay v. Clisby, 31 Fed. 222.

29. U. S. v. Goldenberg, 168 U. S. 103, 18 S. Ct. 3, 42 U. S. (L. ed.) 394.

30. Carondelet Canal, etc., Co. v. Louisi-

ana, 233 U. S. 362, 34 S. Ct. 627, 58 U. S. (L. ed.) 1001; McClurg v. Kingsland, 1 How. 209, 11 U. S. (L. ed.) 102; U. S. v. Three Railroad Cars, 1 Abb. 209, 28 Fed. Cas. No. 16,513. See also Gwathmay v. Clisby, 31 Fed. 221.

31. Gwathmay v. Clisby, 31 Fed. 221.

"Such" is not necessarily to be referred to the very next antecedent; that construction may be controlled by the context. 15 Op. Atty-Gen. 409 (Devens, 1877).

See also as to the term "the same," Sixty Pipes of Brandy, 10 Wheat. 423, 6 U. S. (L. ed.) 356.

32. Carondelet Canal, etc., Co. v. Louisiana, 233 U. S. 362, 34 S. Ct. 627, 58 U. S. (L. ed.) 1001.

33. License Tax Cases, 5 Wall. 469, 18 U. S. (L. ed.) 497. See also St. Paul, etc., R. Co. v. Phelps, 137 U. S. 536, 11 S. Ct. 168, 34 U. S. (L. ed.) 767; U. S. v. Matthews, 173 U. S. 384, 19 S. Ct. 413, 43 U. S. (L. ed.) 738; Sarlls v. U. S., 152 U. S. 575, 14 S. Ct. 720, 38 U. S. (L. ed.) 556; Southern R. Co. v. Machinists' Local Union No. 14, 111 Fed. 57; Minor v. Mechanics' Bank, 1 Pet. 64, 7 U. S. (L. ed.) 47.

"What is termed the 'policy of the government' with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each varying from the other, may be found by different persons. It is a ground too unstable upon which to rest the judgment of the court in the interpretation of statutes." This was the language of Mr. Justice Field, speaking for the Supreme Court, in the construction of a tariff act, and in response to an argument that the policy of the government was to encourage manufactures by imposing restrictions on goods manufactured in whole or in part abroad, and hence that it was against such policy to impose duties on the raw material.<sup>34</sup>

**53. Legislative policy.**—Legislative policy clearly deducible from the consistent legislation of Congress is a legitimate factor in determining the meaning of subsequent acts open to construction.<sup>35</sup> Thus, in construing a federal statute as operating prospectively only, the court referred to other acts which strikingly illustrated the policy of Congress to abstain from retroactive enactments on the particular subject.<sup>36</sup> The policy of Congress to encourage immigration of the better and more intelligent classes,<sup>37</sup> to insist upon the right to have the mails carried over subsidized railroads at reasonable charges,<sup>38</sup> to have the legal rights of the United States settled in its own courts,<sup>39</sup> to give the government priority of payment in the distribution of the estates of insolvent debtors, whether individuals or corporations,<sup>40</sup> to give to federal revenue officers the right to remove from state to federal courts cases against them arising out of their official acts,<sup>41</sup> to confine the Supreme Court, in the exercise of its appellate jurisdiction over judgments of state courts, to the examination of questions of a federal character,<sup>42</sup> to administer in the federal courts the same rules of property

Compare *Waltham Watch Co. v. Keene*, 202 Fed. 225.

**34.** *Hadden v. Collector*, 5 Wall. 111, 18 U. S. (L. ed.) 518, *quoted* with approval in *Dewey v. U. S.*, 178 U. S. 521, 20 S. Ct. 981, 44 U. S. (L. ed.) 1170. To the same effect see *U. S. v. Detroit First Nat. Bank*, 234 U. S. 245, 34 S. Ct. 846, 58 U. S. (L. ed.) 1298. See also *U. S. v. Chong Sam*, 47 Fed. 884; *Love v. U. S.*, 29 Ct. Cl. 332.

**35.** *U. S. v. Golet*, 232 U. S. 293, 34 S. Ct. 431, 58 U. S. (L. ed.) 610; *Richardson v. Harmon*, 222 U. S. 96, 32 S. Ct. 27, 56 U. S. (L. ed.) 110; *Blair v. Chicago*, 201 U. S. 400, 26 S. Ct. 427, 50 U. S. (L. ed.) 801; *Holden v. Stratton*, 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018; *Minnesota v. Hitchcock*, 185 U. S. 373, 22 S. Ct. 650, 46 U. S. (L. ed.) 954; *Rodgers v. U. S.*, 185 U. S. 83, 22 S. Ct. 582, 46 U. S. (L. ed.) 816. See also *Tap Line Cases*, 234 U. S. 1, 34 S. Ct. 741, 58 U. S. (L. ed.) 1185; *Rice v. U. S.*, 122 U. S. 619, 7 S. Ct. 1377, 30 U. S. (L. ed.) 793, *affirming* 21 Ct. Cl. 413.

The policy of one house acting separately should not be considered. *Webb v. U. S.*, 20 Ct. Cl. 500.

See, generally, statutes *in pari materia*, §§ 61-66.

**36.** *Jaedicke v. U. S.*, (C. C. A.) 85 Fed. 372, construing an act of Congress regu-

lating the settlement of accounts of postmasters.

**37.** *U. S. v. Gay*, (C. C. A.) 95 Fed. 231, construing the Act of 1885 prohibiting the importation of foreign contract laborers. See also 19 Op. Atty-Gen. 26 (*Garland*, 1887).

**38.** *Wisconsin Cent. R. Co. v. U. S.*, 164 U. S. 204, 17 S. Ct. 45, 41 U. S. (L. ed.) 399, where the court said that "although there may have been departures from that policy in a few instances, under exceptional circumstances, none of them justify the contention that such departure was intended here."

**39.** *U. S. v. Shaw*, 39 Fed. 433, where in the syllabus by the court it was said: "When, under one of two possible constructions, a statute would divest the public of a right, violate a principle of settled policy, and avoid the methods of procedure which have been clearly indicated by many acts of previous legislation, in such case, if there is doubt about the proper interpretation, the doubt should be resolved in favor of the government."

**40.** *U. S. v. Cook County Nat. Bank*, 9 Biss. 61, 25 Fed. Cas. No. 14,853.

**41.** *Venable v. Richards*, 105 U. S. 638, 26 U. S. (L. ed.) 1196.

**42.** *Murdock v. Memphis*, 20 Wall. 590, 22 U. S. (L. ed.) 429.

that obtain in the state courts,<sup>43</sup> to encourage settlement of lands along the line of railroads aided by land grants,<sup>44</sup> to favor actual settlers on public lands instead of speculators,<sup>45</sup> to prevent the monopolization of public coal lands,<sup>46</sup> to reserve from sale salt springs in territories eventually to be organized into states,<sup>47</sup> to limit the benefit of the copyright laws to resident authors or artists,<sup>48</sup> to require protests in writing where provision is made for payment of duties under protest,<sup>49</sup> to require importers of goods deposited in public warehouses to pay the duties thereon within a definite time and to pay an additional duty for the privilege of withdrawing the same after a great length of time,<sup>50</sup> to exclude from the category of provable debts in bankruptcy claims for damages for personal wrongs,<sup>51</sup> to require accounts of every public officer to be settled at the treasury,<sup>52</sup> to secure to Indians the peaceful occupancy of Indian reservations,<sup>53</sup> to prevent the introduction of intoxicating liquors into the Indian country,<sup>54</sup> to exempt tribal Indians from the operation of general penal enactments affecting white persons,<sup>55</sup> to encourage the shipbuilding industry,<sup>56</sup> and to limit appeals in admiralty cases and thus to protect the small claims of seamen for wages,<sup>57</sup> has been noticed in cases where the court held that such policy is not to be regarded as abandoned further than the terms and objects of the new legislation unmistakably require, especially where it is a long-established policy in regard to a matter of transcendent importance.<sup>58</sup>

**54. Usage or custom.**—"A general law may be expounded when its words are doubtful, by reference to any general usage with reference to which the law may be supposed to have been enacted."<sup>59</sup> But when a

43. *Stewart v. Kahn*, 11 Wall. 505, 20 U. S. (L. ed.) 176.

44. *U. S. v. Healey*, 160 U. S. 146, 16 S. Ct. 247, 40 U. S. (L. ed.) 369.

45. *Morton v. Nebraska*, 21 Wall. 671, 22 U. S. (L. ed.) 639.

46. *U. S. v. Munday*, 222 U. S. 175, 32 S. Ct. 53, 56 U. S. (L. ed.) 149.

47. *Morton v. Nebraska*, 21 Wall. 671, 22 U. S. (L. ed.) 639.

48. *Yuengling v. Schile*, 12 Fed. 106.

49. *Saltonstall v. Birtwell*, (C. C. A.) 66 Fed. 977.

50. *Fabbri v. Murphy*, 95 U. S. 191, 24 U. S. (L. ed.) 468.

51. *In re Hirschman*, 104 Fed. 70.

52. *Dennison v. U. S.*, 25 Cl. Ct. 304, holding that under the acts then in force accounts of chief supervisors of elections must be settled at the treasury in the same mode as accounts of Circuit Court commissioners.

53. 16 Op. Atty.-Gen. 556 (Devens, 1880).

54. *U. S. v. Forty-Three Gallons Whiskey*, 108 U. S. 496, 2 S. Ct. 906, 27 U. S. (L. ed.) 803.

55. *Ex p. Crow Dog*, 109 U. S. 556, 3 S. Ct. 396, 27 U. S. (L. ed.) 1030.

56. *Richardson v. Harmon*, 222 U. S. 96, 32 S. Ct. 27, 56 U. S. (L. ed.) 110.

57. *North American Trading, etc., Co. v. Smith*, (C. C. A.) 93 Fed. 9.

58. *Murdock v. Memphis*, 20 Wall. 619, 22 U. S. (L. ed.) 429.

59. *Per Betts, J.*, in *Love v. Hinckley*, Abb. Adm. 440, 15 Fed. Cas. No. 8,548, where a libellant claimed extra pilotage fees on the ground of an alleged usage of the port, which, however, was not established. The court said: "'Where the words of the act are doubtful,' says Grose, J., in *Rex v. Hogg*, 1 T. R. 728, 'usage may be called in to explain them.' In that case, which involved the construction of an act of Parliament applicable to the whole kingdom, it was very properly held that, as a universal law could not receive different constructions in different towns, therefore a statute of general application could not be explained by the usage of this or that particular place. And the cases of *Rex v. Saltrem*, Bott. 3, and *Rex v. Harman*, cited in *Rex v. Hogg*, 1 T. R. 724, were cited from the early reports, as showing that it is only by a universal usage, and not by the usage of a particular place, that an act of general application could be expounded. But I should think it entirely consistent with this principle to hold that a statute may be construed by the usage of a particular place or pursuit, when the act has relation to that place or special business. So, had a long uninterrupted practice been shown under the state laws to charge pilotage for every crippled vessel as for a vessel in distress, such practice would be good evidence of the true meaning of the act.

custom or usage is offered as an aid in the construction of a statute and with a view of altering the ordinary meaning of ordinary words or phrases, the evidence concerning the usage ought to show that it was universal in all sections where it prevailed, so as to leave no room for doubt that the usage was known to the lawmaker, and that the statute which it serves to modify was enacted with reference thereto.<sup>60</sup> And an alleged custom which is in fact only a toleration and as such extended by government officials cannot modify the terms of a statute.<sup>61</sup>

**55. Practical construction.**—The practical construction which has been given to an ambiguous act of Congress by the government or the courts and by individuals for a long time since its enactment has much weight when the question of its construction is brought before a court, especially if a new construction will cause serious mischief.<sup>62</sup> It was held by the Court of Claims, however, that when an administrative officer and a claimant under a statute containing the elements of a contract with the government had given a practical construction to the act, the court could not be influenced by that construction as it might by cases of contracts between individuals. "In cases resting upon statute," said the court, "there is no mutuality of agreement to be sought out. The only will is that of the legislative power."<sup>63</sup> "A contemporaneous construction of a local act by those immediately interested will have no slight weight in turning the scale in favor of that construction which will validate the acts of those who are called upon to execute the statute, and who have induced innocent third persons to part with value on the faith of the validity of their acts."<sup>64</sup> But this rule has no application unless the construction is a doubtful one and the ambiguity which arises from the language is so great as to compel the court to seize upon extraneous circumstances to aid in reaching a conclusion.<sup>65</sup>

*M'Keen v. Delancy*, 5 Cranch 22, 3 U. S. (L. ed.) 25."

**60.** *U. S. v. Pine River Logging, etc., Co.*, (C. C. A.) 89 Fed. 915.

**61.** *U. S. v. Steamboat Forrester*, Newb. Adm. 94, 25 Fed. Cas. No. 15,132.

**62.** *Truskett v. Closser*, 236 U. S. 223, 35 S. Ct. 385, 59 U. S. (L. ed.) 549; *Wright v. R. Co.*, 216 U. S. 420, 30 S. Ct. 242, 54 U. S. (L. ed.) 544; *U. S. v. North Carolina State Bank*, 6 Pet. 39, 8 U. S. (L. ed.) 308; *U. S. Bank v. Halstead*, 10 Wheat. 62, 6 U. S. (L. ed.) 264; *U. S. v. The Recorder*, 1 Blatchf. 223, 27 Fed. Cas. No. 16,129; *U. S. v. Nat. Security Co.*, (C. C. A.) 22 Fed. 904; *Tsai Sim v. U. S.*, (C. C. A.) 116 Fed. 920. See also *Wade v. U. S.*, 21 Ct. Cl. 147; *Garlinger v. U. S.*, 30 Ct. Cl. 477; *U. S. v. Richardson*, 28 Fed. 71; *Love v. Hineley*, Abb. Adm. 441; *M'Keen v. Delancy*, 5 Cranch 22, 3 U. S. (L. ed.) 25; *Newton v. Com'rs*, 100 U. S. 548, 25 U. S. (L. ed.) 710.

**63.** *Per Nott, J.*, in *Union Pac. R. Case*, 10 Ct. Cl. 548. But compare *Mahony's Case*, 3 Ct. Cl. 159; *Market Co. v. Hoffman*, 101 U. S. 118, 25 U. S. (L. ed.) 784; *U. S. v. Oregon, etc.*, R. Co., 164 U. S. 544, 17 S. Ct. 165, 41 U. S. (L. ed.) 541, and *Lake Superior Ship Canal, etc., Co. v.*

*Cunningham*, 155 U. S. 376, 15 S. Ct. 103, 39 U. S. (L. ed.) 183, which lend some countenance to a contrary doctrine.

**64.** *Per Taft, C. J.*, in *Manhattan Co. v. Ironwood*, (C. C. A.) 74 Fed. 543, where the validity of municipal bonds was in dispute, citing *Van Hostrup v. Madison*, 1 Wall. 291, 17 U. S. (L. ed.) 538; *Meyer v. Muscatine*, 1 Wall. 384, 17 U. S. (L. ed.) 564; *James v. Milwaukee*, 16 Wall. 159, 21 U. S. (L. ed.) 267; *Savannah v. Kelly*, 108 U. S. 184, 2 S. Ct. 468, 27 U. S. (L. ed.) 696; *Kirkbride v. Lafayette County*, 108 U. S. 208, 2 S. Ct. 501, 27 U. S. (L. ed.) 705, and *U. S. v. Moore*, 95 U. S. 760, 24 U. S. (L. ed.) 588. See also *Corning v. Meade County*, (C. C. A.) 102 Fed. 61; *Barber Asphalt Paving Co. v. Denver*, (C. C. A.) 72 Fed. 336.

The practical construction placed on a statute by one interested therein is peculiarly persuasive when approved by some branch of the government. *Pennell v. Philadelphia, etc., R. Co.*, 231 U. S. 675, 34 S. Ct. 220, 58 U. S. (L. ed.) 430.

**65.** *Manhattan Co. v. Ironwood*, (C. C. A.) 74 Fed. 543; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 690, 16 S. Ct. 714, 40 U. S. (L. ed.) 849.

*Departmental Construction*

**56. Acts of Congress; statement and force of rule.**—It is a well-settled rule "that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."<sup>66</sup> "When an act of Congress has, by actual decision, or by continued usage and practice, received a construction at the proper department, and that construction has been acted on for a succession of years, it

66. *Per* Justice Harlan, in *U. S. v. Johnston*, 124 U. S. 236, 8 S. Ct. 446, 31 U. S. (L. ed.) 389. To the same effect see *Logan v. Davis*, 233 U. S. 613, 34 S. Ct. 685, 58 U. S. (L. ed.) 1121; *Boston, etc., R. Co. v. Hooker*, 233 U. S. 97, 34 S. Ct. 526, 58 U. S. (L. ed.) 868; *U. S. v. Mason*, 227 U. S. 486, 33 St. Ct. 374, 57 U. S. (L. ed.) 607; *Jacobs v. Prichard*, 223 U. S. 200, 32 S. Ct. 289, 56 U. S. (L. ed.) 405; *U. S. v. Baruch*, 223 U. S. 191, 32 S. Ct. 306, 56 U. S. (L. ed.) 399; *U. S. v. Hammers*, 221 U. S. 220, 31 S. Ct. 593, 55 U. S. (L. ed.) 710; *Komada v. U. S.*, 215 U. S. 392, 30 S. Ct. 136, 54 U. S. (L. ed.) 249; *U. S. v. Cerecedo, Hermanos Y. Co.*, 209 U. S. 337, 28 S. Ct. 532, 52 U. S. (L. ed.) 821; *East Central Eureka Min. Co. v. Central Eureka Min. Co.*, 204 U. S. 266, 27 S. Ct. 258, 51 U. S. (L. ed.) 476; *McMichael v. Murphy*, 197 U. S. 304, 25 S. Ct. 460, 49 U. S. (L. ed.) 766; *U. S. v. Sweet*, 189 U. S. 471, 23 S. Ct. 638, 47 U. S. (L. ed.) 907; *U. S. v. Finnell*, 185 U. S. 236, 22 S. Ct. 633, 46 U. S. (L. ed.) 890; *U. S. v. Eaton*, 169 U. S. 343, 18 S. Ct. 374, 42 U. S. (L. ed.) 772; *U. S. v. McMillan*, 165 U. S. 515, 17 S. Ct. 395, 41 U. S. (L. ed.) 805; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 15 S. Ct. 508, 39 U. S. (L. ed.) 601; *Orchard v. Alexander*, 157 U. S. 383, 15 S. Ct. 635, 39 U. S. (L. ed.) 741; *Knight v. U. S. Land Assoc.*, 142 U. S. 182, 12 S. Ct. 258, 35 U. S. (L. ed.) 981; *U. S. v. Alabama G. S. R. Co.*, 142 U. S. 615, 12 S. Ct. 306, 35 U. S. (L. ed.) 1134; *U. S. v. McDermott*, 140 U. S. 154, 11 S. Ct. 746, 35 U. S. (L. ed.) 393; *Heath v. Wallace*, 138 U. S. 582, 11 S. Ct. 380, 34 U. S. (L. ed.) 1068; *Schell v. Fauché*, 138 U. S. 572, 11 S. Ct. 376, 34 U. S. (L. ed.) 1043; *Sturr v. Beck*, 133 U. S. 541, 10 S. Ct. 350, 33 U. S. (L. ed.) 761; *Hastings, etc., R. Co. v. Whitney*, 132 U. S. 366, 10 S. Ct. 112, 33 U. S. (L. ed.) 367; *Robertson v. Bradbury*, 132 U. S. 493, 10 S. Ct. 158, 33 U. S. (L. ed.) 406; *Robertson v. Downing*, 127 U. S. 613, 8 S. Ct. 1328, 32 U. S. (L. ed.) 271; *U. S. v. Johnston*, 124 U. S. 236, 8 S. Ct. 663, 31 U. S. (L. ed.) 389; *U. S. v. Hill*, 120 U. S. 169, 7 S. Ct. 510, 30 U. S. (L. ed.) 627; *U. S. v. Philbrick*, 120 U. S. 52, 7 S. Ct. 413, 30 U. S. (L. ed.) 559; *Brown v. U. S.*, 113 U. S. 568, 5 S. Ct. 648, 28 U. S. (L. ed.) 1079; *Butterworth v. Hoe*, 112 U. S. 67,

5 S. Ct. 25, 28 U. S. (L. ed.) 662; *Five Per Cent. Cases*, 110 U. S. 484, 4 S. Ct. 210, 28 U. S. (L. ed.) 202; *Hahn v. U. S.*, 107 U. S. 406, 2 S. Ct. 494, 27 U. S. (L. ed.) 529; *U. S. v. Pugh*, 99 U. S. 269, 25 U. S. (L. ed.) 323; *U. S. v. Burlington, etc., R. Co.*, 98 U. S. 341, 25 U. S. (L. ed.) 200; *U. S. v. Moore*, 95 U. S. 760, 24 U. S. (L. ed.) 588; *Dainese v. Hale*, 91 U. S. 13, 23 U. S. (L. ed.) 190; *Blake v. National Banks*, 23 Wall. 321, 23 U. S. (L. ed.) 119; *Peabody v. Stark*, 16 Wall. 240, 21 U. S. (L. ed.) 311; *U. S. v. Gilmore*, 8 Wall. 330, 19 U. S. (L. ed.) 396; *Harrison v. Vose*, 9 How. 384, 13 U. S. (L. ed.) 179; *Grant v. Raymond*, 6 Pet. 244, 8 U. S. (L. ed.) 376; *Edwards v. Darby*, 12 Wheat. 210, 6 U. S. (L. ed.) 603; *Illinois Surety Co. v. U. S.*, (C. C. A.) 215 Fed. 334, writ of error granted, 215 Fed. 1007; *Toggart v. Great Northern Ry. Co.*, 208 Fed. 455; *First Nat. Bank of Anamoose v. U. S.*, (C. C. A.) 206 Fed. 374, *reversing* 190 Fed. 336; *U. S. v. Military Const. Co.*, 204 Fed. 153; *Baker v. Swigart*, (C. C. A.) 199 Fed. 865; *U. S. v. Hemmer*, 195 Fed. 790; *Cheney v. Weinreb*, 185 Fed. 531; *U. S. v. Twitchell Co.*, 184 Fed. 525; *U. S. v. Bellm*, 182 Fed. 161; *U. S. v. Anderson*, (C. C. A.) 175 Fed. 961; *Burditt, etc., Co. v. U. S.*, (C. C. A.) 153 Fed. 67, *reversing* 147 Fed. 892; *U. S. v. Burkett*, 150 Fed. 208; *Brennan v. U. S.*, (C. C. A.) 136 Fed. 743, *reversing* 129 Fed. 743; *U. S. v. Dean Linseed Oil Co.*, (C. C. A.) 87 Fed. 456 [*reversing* *Dean Linseed Oil Co. v. U. S.*, 78 Fed. 467]; *Grossett v. Townsend*, (C. C. A.) 86 Fed. 912; *Anglo-California Bank v. Secretary of Treasury*, (C. C. A.) 76 Fed. 750; *U. S. v. Barber*, (C. C. A.) 74 Fed. 488; *Johnston v. Morris*, (C. C. A.) 72 Fed. 896; *U. S. v. Mayer*, (C. C. A.) 71 Fed. 503; *Doe v. Waterloo Min. Co.*, (C. C. A.) 70 Fed. 463; *Merrill v. Chicago, etc., R. Co.*, (C. C. A.) 70 Fed. 467; *Michigan v. Jackson, etc., R. Co.*, (C. C. A.) 69 Fed. 120; *In re Myers*, 69 Fed. 239; *Michigan Land, etc., Co. v. Rust*, (C. C. A.) 68 Fed. 168; *The Eclipse*, 53 Fed. 273; *U. S. v. Wotten*, 50 Fed. 694; *Ex p. McCabe*, 46 Fed. 377; *Montana Co. v. Clark*, 42 Fed. 629; *Rand v. U. S.*, 38 Fed. 665; *U. S. v. Union Pac. R. Co.*, 37 Fed. 551; *Erwin v. U. S.*, 37 Fed. 474; *Northern Pac. R. Co. v. U. S.*, 36 Fed. 285; *Fish v. U. S.*, 36 Fed. 677;

must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given to it."<sup>67</sup>

In one of the first cases on departmental construction Mr. Justice Trimble said that in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law and were appointed to carry its provisions into effect "is entitled to very great respect."<sup>68</sup> After the lapse of sixty years Judge Brewer, tracing "the growth of this principle in our law," observed that "from the time Justice Trimble announced it so cautiously in 1827 it has gained strength every time it was again considered by the court. Impelled by the force of its inherent justice, every judge who has taken it up has stated it more strongly than it was stated before."<sup>69</sup> "The

U. S. *v.* Jones, 31 Fed. 727; *In re Jayne*, 28 Fed. 423; U. S. *v.* Richardson, 28 Fed. 71; U. S. *v.* Hill, 25 Fed. 379; Castro *v.* De Uriarte, 16 Fed. 93; U. S. *v.* Lytle, 5 McLean 9, 26 Fed. Cas. No. 15,652; Clark *v.* Peaslee, 1 Cliff. 545, 5 Fed. Cas. No. 2,831; Badische Anilin, etc., Fabrik *v.* Hamilton Mfg. Co., 3 B. & A. Pat. Cas. 235, 2 Fed. Cas. No. 721; Sells *v.* U. S., 36 Ct. Cl. 94, 34 Ct. Cl. 387; Waters *v.* U. S., 32 Ct. Cl. 277; McNamara *v.* U. S., 28 Ct. Cl. 421; Hotchkin *v.* U. S., 24 Ct. Cl. 18; Harrison *v.* U. S., 20 Ct. Cl. 122; Bowen's Case, 14 Ct. Cl. 162; Frerichs *v.* U. S., 21 Ct. Cl. 16; Brown *v.* U. S., 18 Ct. Cl. 544; Donnan's Case, 15 Ct. Cl. 382; Hahn's Case, 14 Ct. Cl. 305; 23 Op. Atty.-Gen. 613; 21 Op. Atty.-Gen. 408; 21 Op. Atty.-Gen. 352; 21 Op. Atty.-Gen. 413; 16 Op. Atty.-Gen. 522; 2 Op. Atty.-Gen. 558. See also U. S. *v.* Union Pac. R. Co., 148 U. S. 572, 13 S. Ct. 724, 37 U. S. (L. ed.) 564; Frost *v.* Wenie, 157 U. S. 60, 15 S. Ct. 532, 39 U. S. (L. ed.) 620; Kansas City, etc., R. Co. *v.* Atty.-Gen., 118 U. S. 695, 7 S. Ct. 66, 30 U. S. (L. ed.) 284; St. Paul, etc., R. Co. *v.* Sage, (C. C. A.) 71 Fed. 52; Gear *v.* Grosvenor, 1 Holmes 218, 10 Fed. Cas. No. 5,291; Patterson *v.* Tatum, 3 Sawy. 170, 18 Fed. Cas. No. 10,830; Wisconsin Cent. R. Co. *v.* U. S., 27 Ct. Cl. 468; 20 Op. Atty.-Gen. 747.

**Qualifications of the rule.**—"While the contemporaneous and continuous construction of a statute or other writing by heads of departments and accounting officers is undoubtedly entitled to weight in a doubtful case, the doctrine is a somewhat dangerous one to import into actions for money lawfully withheld by officers of the government, since defalcations of this kind are frequently rendered possible only by the connivance or loose practice of government agents." *Per Brown, J.*, in U. S. *v.* Saylor, 31 Fed. 548.

"Whatever the conclusiveness of executive acts so far as executive departments are concerned, as a rule of administration, it has long been settled that the action of executive officers in matters of account and payment cannot be regarded as a conclusive determination when brought in ques-

tion in a court of justice." Wisconsin Cent. R. Co. *v.* U. S., 164 U. S. 205, 17 S. Ct. 45, 41 U. S. (L. ed.) 404.

See § 117 as to departmental construction of words in tariff acts.

<sup>67</sup> *Per Atty.-Gen. Taney*, in 2 Op. Atty.-Gen. 558.

<sup>68</sup> *Edwards v. Darby*, 12 Wheat. 210, 6 U. S. (L. ed.) 603.

<sup>69</sup> U. S. *v.* Union Pac. R. Co., 37 Fed. 551 [*affirmed* 148 U. S. 562], adopting the language of counsel in the case in hand.

Uniform interpretation by the executive department is "entitled to very great respect." U. S. *v.* North Carolina State Bank, 6 Pet. 39, 8 U. S. (L. ed.) 312.

"Would of itself furnish strong grounds for a liberal construction." Peabody *v.* Stark, 16 Wall. 243, 21 U. S. (L. ed.) 313.

"The court would have respected the uniform construction." U. S. *v.* Vowell, 5 Cranch 372, 3 U. S. (L. ed.) 129.

"In the absence of a clear conviction on the part of the members of the court on either side of the proposition in which all can freely unite, we incline to adopt the uniform ruling of the office of the internal revenue commissioner." U. S. *v.* Moore, 95 U. S. 760, 24 U. S. (L. ed.) 588.

"It ought not to be overruled without cogent reasons." U. S. *v.* Pugh, 99 U. S. 269, 25 U. S. (L. ed.) 323. For substantially the same language, see *Robertson v. Downing*, 127 U. S. 613, 8 S. Ct. 1328, 32 S. Ct. (L. ed.) 271; *Merritt v. Cameron*, 137 U. S. 552, 11 S. Ct. 174, 34 U. S. (L. ed.) 776; U. S. *v.* Johnston, 124 U. S. 236, 8 S. Ct. 446, 31 U. S. (L. ed.) 389; *Heath v. Wallace*, 138 U. S. 582, 11 S. Ct. 380, 34 U. S. (L. ed.) 1068.

"In the highest degree persuasive, if not absolutely controlling in its effect." U. S. *v.* Graham, 110 U. S. 221, 3 S. Ct. 582, 28 U. S. (L. ed.) 127.

"In a case of doubt ought to turn the scale." *Brown v. U. S.*, 113 U. S. 571, 5 S. Ct. 648, 28 U. S. (L. ed.) 1080.

"It ought not now to be overturned." U. S. *v.* Philbrick, 120 U. S. 59, 7 S. Ct. 413, 30 U. S. (L. ed.) 561.

"Would have very great force and generally a controlling one in the formation

officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."<sup>70</sup> Invariable construction given by an executive department is not to be condemned merely because it has been from time to time disputed in one of the houses of Congress without any legislation attempting to control it.<sup>71</sup>

The weight to be given to departmental practice is increased when Congress, in re-enacting the law or another law *in pari materia*, fails to indicate in any way its disapproval of the settled construction of the department,<sup>72</sup> "The re-enactment by Congress, without change, of a statute, which had previously received long continued executive construction," said Mr. Justice McKenna, "is an adoption by Congress of such construction."<sup>73</sup> The force of a departmental construction is also enhanced where an implied approval of the departmental construction may otherwise be deduced from subsequent legislation<sup>74</sup> or failure to alter the practice by legislation.<sup>75</sup> On the other hand, nothing can be inferred from subsequent legislation where the construction in question was made under such circumstances that Congress could not be presumed to have knowledge of it,<sup>76</sup> nor will the court apply a departmental construction which has been prohibited in subsequent legislation relating to matters of the same nature,<sup>77</sup> and a departmental construction in plain conflict with the statute cannot be adopted upon the extravagant

of the judgment of this court." *St. Paul, etc., R. Co. v. Phelps*, 137 U. S. 536, 11 S. Ct. 168, 34 U. S. (L. ed.) 770.

"Is universally held to be controlling." *Schell v. Fauché*, 138 U. S. 572, 11 S. Ct. 376, 34 U. S. (L. ed.) 1043.

"Should ordinarily control the construction of the statute by the courts." *Pennoyer v. McConaughy*, 140 U. S. 22, 11 S. Ct. 699, 35 U. S. (L. ed.) 370.

70. *U. S. v. Moore*, 95 U. S. 763, 24 U. S. (L. ed.) 589, quoted in *Brown v. U. S.*, 113 U. S. 571, 5 S. Ct. 648, 28 U. S. (L. ed.) 1080, and *Heath v. Wallace*, 138 U. S. 582, 11 S. Ct. 380, 34 U. S. (L. ed.) 1068; *U. S. v. Hammers*, 221 U. S. 220, 31 S. Ct. 593, 55 U. S. (L. ed.) 710.

71. 16 Op. Atty.-Gen. 531 (*Devens*, 1880).

72. *Swigart v. Baker*, 229 U. S. 187, 33 S. Ct. 645, 57 U. S. (L. ed.) 1143; 21 Op. Atty.-Gen. 410 (*Harmon*, 1896); 21 Op. Atty.-Gen. 339 (*Harmon*, 1896); 21 Op. Atty.-Gen. 352 (*Conrad*, 1896); 18 Op. Atty.-Gen. 532 (*Garland*, 1887). See also *Dollar Sav. Bank v. U. S.*, 19 Wall. 239, 22 U. S. (L. ed.) 82; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 45, 15 S. Ct. 508, 39 U. S. (L. ed.) 614; *U. S. v. Wotten*, 50 Fed. 694; *Harrison v. U. S.*, 20 Ct. Cl. 122; *Johnson v. U. S.*, 29 Ct. Cl. 5; *Valk v. U. S.*, 28 Ct. Cl. 241; *Schuetze v. U. S.*, 24 Ct. Cl. 299; *Brown v. U. S.*, 18 Ct. Cl. 544; *Swift, etc., Co.'s Case*, 14 Ct. Cl. 481.

"A construction made by the body charged with the enforcement of a statute, which construction has long obtained in

practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute." *New York, N. H., etc., R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 S. Ct. 272, 50 U. S. (L. ed.) 515.

73. *U. S. v. Cerecedo Hermanos y Compañia*, 209 U. S. 337, 28 S. Ct. 532, 52 U. S. (L. ed.) 821. To the same effect *Swigart v. Baker*, 229 U. S. 187, 33 S. Ct. 645, 57 U. S. (L. ed.) 1143; *U. S. v. Falk*, 204 U. S. 143, 27 S. Ct. 191, 51 U. S. (L. ed.) 411.

74. *U. S. v. Alexander*, 12 Wall. 179, 20 U. S. (L. ed.) 382; *U. S. v. Burlington, etc., R. Co.*, 98 U. S. 341, 25 U. S. (L. ed.) 200; *U. S. v. Johnston*, 124 U. S. 236, 8 S. Ct. 446, 31 U. S. (L. ed.) 389; *U. S. v. Townsend, (C. C. A.)* 113 Fed. 443; *U. S. v. Buffalo Natural Gas Fuel Co., (C. C. A.)* 78 Fed. 112; *U. S. v. Lytle*, 5 McLean 9, 26 Fed. Cas. No. 15,652; *U. S. v. Crawford*, 47 Fed. 570; *U. S. v. Hill*, 25 Fed. 379; *Garlinger v. U. S.*, 30 Ct. Cl. 477; *Mahony's Case*, 3 Ct. Cl. 152; 16 Op. Atty.-Gen. 531. See also *Valk v. U. S.*, 28 Ct. Cl. 242.

75. *Robertson v. Downing*, 127 U. S. 612, 8 S. Ct. 1328, 32 U. S. (L. ed.) 271; *U. S. v. Hill*, 25 Fed. 379.

76. *Dollar Sav. Bank v. U. S.*, 19 Wall. 237, 22 U. S. (L. ed.) 82. See *Love v. U. S.*, 29 Ct. Cl. 344.

77. *U. S. v. Gilmore*, 8 Wall. 330, 19 U. S. (L. ed.) 396.



assumption that Congress must have known that its will was overruled by the department and assented by neglecting to re-enact the statute as a renewed expression of legislative intent.<sup>78</sup>

The courts are especially reluctant to overturn a long-standing departmental construction where great interests have grown up under it and will be disturbed or destroyed by the announcement of a new rule,<sup>79</sup> or where parties who have contracted with the government upon the faith of such construction will be prejudiced.<sup>80</sup>

**57. Limitations of rule.**—Where the terms and meaning of an act of Congress are plain, and a court is convinced upon reason and authority that a correct determination of the question before it requires a decision contrary to the construction and practice of the officers of an executive department of the government, that determination must prevail and that decision must be rendered. The courts cannot lawfully renounce their judicial powers in favor of opinions of officers of other departments.<sup>81</sup> And “a custom of the department, however long continued by successive

78. *Graham v. U. S.*, 18 Ct. Cl. 91.

79. *Kindred v. Union Pac. R. Co.*, 225 U. S. 582, 32 S. Ct. 780, 56 U. S. (L. ed.) 1216; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 15 S. Ct. 508, 39 U. S. (L. ed.) 601. See also *Logan v. Davis*, 233 U. S. 613, 34 S. Ct. 685, 58 U. S. (L. ed.) 1121. See also *Louisiana v. Garfield*, 211 U. S. 70, 29 S. Ct. 31, 53 U. S. (L. ed.) 92.

80. *U. S. v. Alabama G. S. R. Co.*, 142 U. S. 621, 12 S. Ct. 306, 35 U. S. (L. ed.) 1136, where the court further said: “It is especially objectionable that a construction of a statute, favorable to the individual citizen, should be changed in such a manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government.” *U. S. v. Hill*, 120 U. S. 182, 7 S. Ct. 510, 30 U. S. (L. ed.) 632; *Surgett v. Lapice*, 8 How. 71, 12 U. S. (L. ed.) 992. See also *Wisconsin Cent. R. Co. v. U. S.*, 27 Ct. Cl. 468; *U. S. v. Burlington, etc., R. Co.*, 98 U. S. 341, 25 U. S. (L. ed.) 200; *Orchard v. Alexander*, 157 U. S. 383, 15 S. Ct. 635, 39 U. S. (L. ed.) 741; *Schell v. Fauché*, 138 U. S. 572, 11 S. Ct. 376, 34 U. S. (L. ed.) 1043; *U. S. v. Wotten*, 50 Fed. 694; *U. S. v. Union Pac. R. Co.*, 37 Fed. 551; *Michigan v. Jackson, etc., R. Co.*, (C. C. A.) 69 Fed. 120; *Michigan Land, etc., Co. v. Rust*, (C. C. A.) 68 Fed. 168; *U. S. v. Winona, etc., R. Co.*, (C. C. A.) 67 Fed. 948.

81. *Per Sanborn, C. J.*, in *Deweese v. Smith*, (C. C. A.) 106 Fed. 445. For other authorities declaring that departmental construction or practice is not controlling where the statute is clear and explicit in its language and its meaning is not doubtful see *Robinson v. Lundrigan*, 227 U. S. 173, 33 S. Ct. 255, 57 U. S. (L. ed.) 468, *affirming* (C. C. A.) 178 Fed. 230; *United States v. Allen*, 192 U. S. 543, 24 S. Ct.

416, 48 U. S. (L. ed.) 555; *U. S. v. Finnell*, 185 U. S. 236, 22 S. Ct. 633, 46 U. S. (L. ed.) 890; *Studebaker v. Perry*, 184 U. S. 258, 22 S. Ct. 463, 46 U. S. (L. ed.) 528; *U. S. v. Johnson*, 173 U. S. 363, 19 S. Ct. 427, 43 U. S. (L. ed.) 731; *Wisconsin Cent. R. Co. v. U. S.*, 164 U. S. 205, 17 S. Ct. 45, 41 U. S. (L. ed.) 404; *U. S. v. Alger*, 152 U. S. 397, 14 S. Ct. 635, 38 U. S. (L. ed.) 488; *U. S. v. Tanner*, 147 U. S. 663, 13 S. Ct. 436, 37 U. S. (L. ed.) 322; *St. Paul, etc., R. Co. v. Phelps*, 137 U. S. 536, 11 S. Ct. 168, 34 U. S. (L. ed.) 770; *Merritt v. Cameron*, 137 U. S. 552, 11 S. Ct. 174, 34 U. S. (L. ed.) 776; *U. S. v. Graham*, 110 U. S. 219, 3 S. Ct. 582, 28 U. S. (L. ed.) 126; *U. S. v. Temple*, 105 U. S. 99, 26 U. S. (L. ed.) 967; *Swift Co. v. U. S.*, 105 U. S. 691, 26 U. S. (L. ed.) 1108; *Solomon v. Arthur*, 102 U. S. 213, 26 U. S. (L. ed.) 147; *Lawrence v. Caswell*, 13 How. 497, 14 U. S. (L. ed.) 240; *Greely v. Thompson*, 10 How. 234, 13 U. S. (L. ed.) 402; *U. S. v. Freeman*, 3 How. 564, 11 U. S. (L. ed.) 728; *U. S. v. Vowell*, 5 Cranch 372, 3 U. S. (L. ed.) 129; *Hemmer v. U. S.*, (C. C. A.) 204 Fed. 898; *Baker v. Swigart*, (C. C. A.) 199 Fed. 865, *reversing* 196 Fed. 569; *U. S. v. Bellm*, 182 Fed. 161; *U. S. v. Anderson*, (C. C. A.) 175 Fed. 961; *Knight v. Shelton*, 134 Fed. 423; *McFadden v. Mountain View Min., etc., Co.*, 87 Fed. 156; *The J. D. Peters*, 78 Fed. 376; *Hartman v. Warren*, (C. C. A.) 76 Fed. 157; *Hallett v. U. S.*, 63 Fed. 823; *Northern Pac. R. Co. v. Sanders*, 47 Fed. 604; *U. S. v. Murphy*, 32 Fed. 376; *Hedden v. Iselin*, 31 Fed. 268; *Smith v. U. S.*, 26 Ct. Cl. 576; *Leighton v. U. S.*, 29 Ct. Cl. 288; *Graham v. U. S.*, 18 Ct. Cl. 91; 20 Op. Atty.-Gen. 592. See further, in the same direction, *Dollar Sav. Bank v. U. S.*, 19 Wall. 227, 22 U. S. (L. ed.) 80; *U. S. v. Black*, 128 U. S. 47, 9 S. Ct. 12, 32 U. S. (L. ed.) 357; *Haynes v. Brewster*, 46 Fed. 471; *U. S. v. The Steamboat*

officers, must yield to the positive language of the statute."<sup>82</sup> But ambiguity on the face of a statute "is abundantly established by the fact that courts of eminent learning and ability have arrived at different results in the interpretation of the phraseology, which being so, it opens the field of controversy for the consideration of executive construction and usage."<sup>83</sup>

Departmental construction which has not been uniform is of no force as such<sup>84</sup> and is of value only as showing the interpretation given a statute by competent men having to do with its enforcement.<sup>85</sup> "Merely recent or occasional practice" does not constitute that departmental construction to which weight is given as hereinbefore stated.<sup>86</sup>

Since departmental construction "can only be resorted to in aid of interpretation,"<sup>87</sup> that is, in cases of ambiguity or doubt, it would seem that the question whether a statute has been repealed by implication cannot be resolved in the affirmative by the assistance of departmental construction,<sup>88</sup> and, likewise, that a departmental construction can have no influence in the interpretation of substantive penal enactments in favor of the government.<sup>89</sup>

**58. Construction by attorney-general.**—Opinions of the United States attorney-general upon questions of statutory construction formally submitted to him by heads of departments are usually regarded as decisive by the officials seeking his advice.<sup>90</sup> But such opinions are not, apparently,

Forrester, Newb. Adm. 81; Chicago, etc., R. Co. v. Sioux City, etc., R. Co., 3 McCrary, (U. S.) 280, 10 Fed. 435.

<sup>82.</sup> Houghton v. Payne, 194 U. S. 88, 24 S. Ct. 590, 48 U. S. (L. ed.) 888.

<sup>83.</sup> *Per* Weldon, J., in Waters v. U. S., 32 Ct. Cl. 282.

<sup>84.</sup> U. S. v. Healey, 160 U. S. 145, 16 S. Ct. 247, 40 U. S. (L. ed.) 373; 21 Op. Atty.-Gen. 364; Wing Sing Lung v. U. S., (C. C. A.) 180 Fed. 392; 21 Op. Atty.-Gen. 669. See also North American Commercial Co. v. U. S., 171 U. S. 131, 18 S. Ct. 817, 43 U. S. (L. ed.) 106; Marriott v. Brune, 9 How. 635, 13 U. S. (L. ed.) 289; Knowlton v. Moore, 178 U. S. 75, 20 S. Ct. 747, 44 U. S. (L. ed.) 983; Davies v. Miller, 130 U. S. 284, 9 S. Ct. 560, 32 U. S. (L. ed.) 932.

<sup>85.</sup> U. S. v. Detroit First Nat. Bank, 234 U. S. 245, 34 S. Ct. 846, 58 U. S. (L. ed.) 1298.

<sup>86.</sup> *Per* Attorney-General Olney, in 20 Op. Atty.-Gen. 747, where he intimated that a practice should be "long continued, uniform, and familiar" to entitle it to be regarded as departmental. See also U. S. v. Johnson, 173 U. S. 377, 19 S. Ct. 427, 43 U. S. (L. ed.) 736; Orchard v. Alexander, 157 U. S. 383, 15 S. Ct. 635, 39 U. S. (L. ed.) 741; Merritt v. Cameron, 137 U. S. 551, 11 S. Ct. 174, 34 U. S. (L. ed.) 775, where Mr. Justice Lamar said: "Neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time. The cases cited go to that extent and no

further." U. S. v. Erie R. Co., 236 U. S. 259, 35 S. Ct. 396, 59 U. S. (L. ed.) 567; Title Guaranty, etc., Co. v. Crane, 219 U. S. 24, 31 S. Ct. 140, 55 U. S. (L. ed.) 72.

<sup>87.</sup> U. S. v. Graham, 110 U. S. 221, 3 S. Ct. 582, 28 U. S. (L. ed.) 127.

<sup>88.</sup> The conclusion that a statute has been repealed by implication cannot be based upon uncertain inference. See *infra*, §§ 137-147.

<sup>89.</sup> Punishments cannot be inflicted under a statute which is not clear beyond doubt. See *infra*, § 105. But compare U. S. v. Jones, 31 Fed. 727, and see, as to long-continued practice in construction of a statute regulating criminal procedure, U. S. v. Richardson, 28 Fed. 61.

<sup>90.</sup> In 20 Op. Atty.-Gen. 722, Atty.-Gen. Olney, in 1894, discussing the question of the legal force of the rulings of his department, said: "The Act of 1870, section 4, establishing the department of justice, provided that written opinions prepared by a subordinate in the department may be approved by the attorney-general, and that 'such approval so indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the attorney-general.' This provision is embraced in substantially the same language in section 358 of the Revised Statutes. Evidently, therefore, Congress contemplates that the official opinions signed or indorsed in writing by the attorney-general shall have some actual and practical force. Congress's intention cannot be doubted that administrative officers should regard them as law until withdrawn by the attorney-general or overruled by the

given greater weight by courts than is conceded to departmental constructions in general.<sup>91</sup>

**59. Treaties.**—Where the department of state has uniformly given a particular construction to a treaty, such construction, if not repugnant to the letter or obvious intent of the instrument, should receive great weight when the treaty is sought to be practically construed.<sup>92</sup>

**60. State or foreign statutes.**—The principle that the contemporaneous and uniform construction of an act of Congress by the executive officers who are called upon to administer it is ordinarily adopted by the courts in cases of doubt<sup>93</sup> applies in the construction of state or foreign statutes; in the absence of judicial decisions construing them, a construction by the local executive officers is entitled to the same consideration as would be accorded to a construction of acts of Congress by corresponding officers of the national government.<sup>94</sup> And “when, for a considerable time, a statute

courts, thus confirming the view which generally prevailed, though sometimes hesitatingly expressed, previous to the establishment of the department of justice. 5 Op. Atty.-Gen. 97; 6 Op. Atty.-Gen. 334; 7 Op. Atty.-Gen. 699, 700; 9 Op. Atty.-Gen. 36.”

In 9 Op. Atty.-Gen. 36, Attorney-General Black, advising the secretary of the navy, in 1857, said that “the duty of the attorney-general is to advise, not to decide. A thing is not to be considered as done by the head of a department merely because the attorney-general has advised him to do it. You may disregard his opinion if you are sure it is wrong. He aids you in forming a judgment on questions of law; but still the judgment is yours, not his. You are not bound to see with his eyes, but only to use the light which he furnishes, in order to see the better with your own. But though opinions from this office have technically no binding effect, it is generally safer and better to adopt them. Uniformity of decision in the different departments, on similar subjects, is necessary, and cannot be secured otherwise.”

In 7 Op. Atty.-Gen. 699, in 1856, Attorney-General Cushing said: “I suppose it must be conceded that an opinion of the attorney-general is not conclusive—that is, it is not compulsory on the President, or even on a head of a department. It is inconvenient, however, to have conflict of opinion between the attorney-general and a head of department; and that inconvenience is placed in the strongest light by the facts of this case, where the affirmative opinion of one attorney-general went disregarded by one secretary, and a negative opinion of another attorney-general by the succeeding secretary. There could be no more flagrant example of confusion of opinion and action. A secretary, undoubtedly, is entitled to have and to act upon his conscientious opinion of a question, even after he has taken the opinion of the attorney-general; but the interest of parties and the credit of the government require decision; and it would seem

that any such conflict of opinion between the secretary asking, and the attorney-general giving, official advice should be referred at once to their common superior, the President, in order that the particular question of administration itself may receive the authoritative decision of the executive government.” Similar opinions were expressed by the same attorney-general in 6 Op. Atty.-Gen. 334.

In 5 Op. Atty.-Gen. 97, in 1840, Attorney-General Johnson said: “The duties of the attorney-general are prescribed by the Judiciary Act of 1789, and are ‘to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.’ The act does not declare what effect shall be given to such advice and opinion, but it is believed that the practice of the government has invariably been to follow it. This has been done from the great advantage and almost absolute necessity of having uniform rules of decision in all questions of law in analogous cases—a result much more certain under the guidance and decision of a single department, constituted for the very purpose of advising upon all questions, and with supposed special qualifications for such a duty. In my opinion this practice should be considered as law.”

91. See *Lewis Pub. Co. v. Morgan*, 229 U. S. 288, 33 S. Ct. 867, 57 U. S. (L. ed.) 1190; *U. S. v. Falk*, 204 U. S. 143, 27 S. Ct. 191, 51 U. S. (L. ed.) 411; *Erwin v. U. S.*, 37 Fed. 474; *Surgett v. Lapice*, 8 How. 48, 12 U. S. (L. ed.) 982; *Harrison v. Vose*, 9 How. 384, 13 U. S. (L. ed.) 179. And as to departmental construction generally, see *supra*, § 56.

92. *Ex p. McCabe*, 46 Fed. 377. See also *In re Ross*, 140 U. S. 479, 11 S. Ct. 897, 35 U. S. (L. ed.) 581.

“It should be adopted without hesitation.” *Castro v. De Uriarte*, 16 Fed. 98.

93. See *infra*, § 56.

94. *Citizens' Tel. Co. v. Fuller*, 229 U. S.

notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed." <sup>95</sup>

### *Statutes in Pari Materia*

**61. Rule stated.**—"In the exposition of statutes the established rule is that the intention of the lawmaker is to be deduced from a view of the whole statute, and every material part of the same; and where there are several statutes relating to the same subject, they are all to be taken together, and one part compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object, and as pertaining to the same system. Resort may be had to every part of a statute, or, where there is more than one *in pari materia*, to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent." <sup>96</sup> Penal statutes are not excluded from the operation of

322, 33 S. Ct. 833, 57 U. S. (L. ed.) 1206; Copper Queen Consol. Min. Co. v. Board of Equalization, 206 U. S. 474, 27 S. Ct. 695, 51 U. S. (L. ed.) 1143; Edwards v. Darby, 12 Wheat. 210, 6 U. S. (L. ed.) 603; Union Ins. Co. v. Hoge, 21 How. 66, 16 U. S. (L. ed.) 61; Pennoyer v. McConaughy, 140 U. S. 21, 11 S. Ct. 699, 35 U. S. (L. ed.) 363; U. S. v. Sherebeck, 27 Fed. Cas. No. 16,275; Corning v. Meade County, (C. C. A.) 102 Fed. 60.

As to adoption of local judicial construction of state or foreign statutes see *infra*, §§ 127-128.

**95.** *Per* Justice Holmes, Copper Queen Consol. Min. Co. v. Board of Equalization, 206 U. S. 474, 27 S. Ct. 695, 51 U. S. (L. ed.) 1143.

Apparently, too, this presumption prevails over the rule that when a state adopts a statute from another state, it adopts therewith the construction given the statute in the state from which it came.

**96.** *Per* Justice Clifford, in Kohlsaat v. Murphy, 96 U. S. 160, 24 U. S. (L. ed.) 844; U. S. v. Ewing, 237 U. S. 197, 35 S. Ct. 571, 59 U. S. (L. ed.) 913; Richardson v. Harmon, 222 U. S. 96, 32 S. Ct. 27, 56 U. S. (L. ed.) 110; U. S. v. Press Pub. Co., 219 U. S. 1, 31 S. Ct. 212, 55 U. S. (L. ed.) 65; Blair v. Chicago, 201 U. S. 400, 26 S. Ct. 427, 50 U. S. (L. ed.) 801; White v. U. S., 191 U. S. 545, 24 S. Ct. 171, 48 U. S. (L. ed.) 295; McChord v. Louisville, etc., R. Co., 183 U. S. 483, 22 S. Ct. 165, 46 U. S. (L. ed.) 289; Converse v. U. S., 21 How. 467, 16 U. S. (L. ed.) 192; Rockefeller v. O'Brien, 224 Fed. 541; Toledo Traction, etc., Co. v. Smith, 205 Fed. 643; Hemmer v. U. S., (C. C. A.) 204 Fed. 898; U. S. v. Colorado, etc., R.

Co., (C. C. A.) 157 Fed. 321; Rodgers v. U. S., (C. C. A.) 152 Fed. 346; Christie-Street Commission Co. v. U. S., (C. C. A.) 136 Fed. 326; U. S. v. Oregon, etc., R. Co., 133 Fed. 953; Miller v. U. S., (C. C. A.) 133 Fed. 337; U. S. v. Ridenour, 119 Fed. 411; Hedden v. Iselin, 31 Fed. 266. See also Vane v. Newcombe, 132 U. S. 235, 10 S. Ct. 60, 33 U. S. (L. ed.) 310; U. S. v. Central Pac. R. Co., 118 U. S. 239, 6 S. Ct. 1038, 30 U. S. (L. ed.) 173; Butterworth v. U. S., 112 U. S. 58, 5 S. Ct. 25, 28 U. S. (L. ed.) 656; U. S. v. Taylor, 104 U. S. 219, 26 U. S. (L. ed.) 721; Wells v. Pontotoc County, 102 U. S. 632, 26 U. S. (L. ed.) 122; New Lamp Chimney Co. v. Ansonia Brass, etc., Co., 91 U. S. 662, 23 U. S. (L. ed.) 336; Bennett v. Hunter, 9 Wall. 326, 19 U. S. (L. ed.) 672; Confiscation Cases, 7 Wall. 459, 19 U. S. (L. ed.) 196; U. S. v. Babbit, 1 Black 60, 17 U. S. (L. ed.) 94; U. S. v. Walker, 22 How. 312, 16 U. S. (L. ed.) 382; Harrison v. Vose, 9 How. 384, 13 U. S. (L. ed.) 179; U. S. v. Freeman, 3 How. 564, 11 U. S. (L. ed.) 724; U. S. v. Morris, 10 Wheat. 295, 6 U. S. (L. ed.) 314; Seward County v. Aetna Ins. Co., (C. C. A.) 90 Fed. 227; Stryker v. Grand County, (C. C. A.) 77 Fed. 576; Chappell v. U. S., (C. C. A.) 81 Fed. 764; Massachusetts L. & T. Co. v. Hamilton, (C. C. A.) 88 Fed. 591; *In re* Moore, 66 Fed. 950; Cokey v. Fort, 44 Fed. 365; Banks v. West Pub. Co., 27 Fed. 59; U. S. v. White, 19 Fed. 724; U. S. v. Jessup, 15 Fed. 790; U. S. v. Kellar, 13 Fed. 83; Le Roy v. Chabolla, 2 Abb. 448, 15 Fed. Cas. No. 8,267; Dubois v. McLean, 4 McLean 489, 7 Fed. Cas. No. 4,107; Donnelly's Case, 17 Ct. Cl. 105; Moore's Case, 10 Ct. Cl. 379; 21 Op. Atty-Gen. 124 (Olney, 1895); 16 Op. Atty-Gen. 430 (Dev-

the general rule,<sup>97</sup> but it is probably applied to such statutes with considerable caution.<sup>98</sup> To arrive at the true construction of an act of Congress reference may be had, if necessary, to treaties in force at and previous to its passage dealing with the same subject.<sup>99</sup>

**62. Prior statutes: construction of provisions.**—Statutes *in pari materia* to which reference may be made in aid of construction are not only contemporaneous statutes, but include previous enactments *in pari materia*.<sup>1</sup> The rule of construction which requires courts to look into former acts upon the same subject, in order to ascertain the meaning of doubtful phrases or provisions, is a wise and salutary one. In this manner courts often ascertain the words used in a statute to be analogous to the use of the same words in previous statutes, and when so used in such connection and surroundings as to limit their meaning beyond question to a certain interpretation, that interpretation should be followed."<sup>2</sup> Expired or repealed acts *in pari materia* with the act to be construed may be considered by the court in seeking the correct meaning of words and terms employed in the enactment to be construed.<sup>3</sup> If a special meaning

ens, 1880); East Tennessee, etc., R. Co. v. Atlanta, etc., R. Co., 49 Fed. 615; Prentiss v. Elsworth, 19 Fed. Cas. No. 11,386.

"In construing a statute all existing statutes should be taken into consideration *in pari materia*, whether referred to or not, and by this rule the true intent of the legislature or lawmaking department of the government is arrived at." *Per* Judge Purnell, in *MacDaniel v. U. S.*, (C. C. A.) 87 Fed. 327.

"It is the duty of a court, in construing a written law, in doubtful cases, to compare all its parts, in order to discover the intention of the legislature; and however broad some of its expressions may be, yet if, on such examination, it shall clearly appear that they are and were intended to be limited by other provisions of the same or other acts on the same subject, it cannot be improper to restrain them accordingly." *The Sloop Elizabeth*, 1 Paine 11, 8 Fed. Cas. No. 4,352, where the provisions of an act were given a particular meaning in view of an act *in pari materia* passed at the same session.

See also § 53 as to weight of legislative policy.

<sup>97.</sup> See *MacDaniel v. U. S.*, (C. C. A.) 87 Fed. 324; *In re Moore*, 66 Fed. 950; *U. S. v. Jessup*, 15 Fed. 790.

<sup>98.</sup> See *U. S. v. Starn*, 17 Fed. 435; *U. S. v. Stocking*, 87 Fed. 859.

<sup>99.</sup> *U. S. v. Douglas*, 17 Fed. 635.

1. *In re Sanborn*, 148 U. S. 222, 13 S. Ct. 577, 37 U. S. (L. ed.) 429; *U. S. v. Stevenson*, 215 U. S. 190, 30 S. Ct. 35, 54 U. S. (L. ed.) 153; *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 25 S. Ct. 443, 49 U. S. (L. ed.) 790; *U. S. v. Thomas*, 195 U. S. 418, 25 S. Ct. 102, 49 U. S. (L. ed.) 259; *Crawford v. Burke*, 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; *Russell v. Gregg*, 113 U. S. 550, 5 S. Ct. 621, 28 U. S. (L. ed.) 993; *Reiche v. Smythe*, 13

Wall. 165, 20 U. S. (L. ed.) 566; *Converse v. U. S.*, 21 How. 467, 16 U. S. (L. ed.) 192; *Marriott v. Brune*, 9 How. 636, 13 U. S. (L. ed.) 282; 21 Op. Atty.-Gen. 117; 3 Op. Atty.-Gen. 253. See also *Hamilton v. Rathbone*, 175 U. S. 419, 20 S. Ct. 155, 44 U. S. (L. ed.) 219; *Stephens v. Cherokee Nation*, 174 U. S. 481, 19 S. Ct. 722, 43 U. S. (L. ed.) 1041; *U. S. v. Wong Kim Ark*, 169 U. S. 653, 18 S. Ct. 456, 42 U. S. (L. ed.) 890; *Bend v. Hoyt*, 13 Pet. 273, 10 U. S. (L. ed.) 154; *U. S. v. Heth*, 3 Cranch 410, 2 U. S. (L. ed.) 479; *In re Gutwillig*, (C. C. A.) 92 Fed. 339; *In re District Attorney*, 23 Fed. 26; *Rich v. U. S.*, 33 Ct. Cl. 191.

2. *U. S. v. Union Supply Co.*, 215 U. S. 50, 30 S. Ct. 15, 54 U. S. (L. ed.) 87; *Grace v. Collector of Customs, etc.*, (C. C. A.) 79 Fed. 318; *Watson v. U. S.*, 25 Ct. Cl. 116.

Recurrence has been made to previous acts for the purpose of determining the antecedent of a pronoun ambiguously used. *Carondelet Canal, etc., Co. v. Louisiana*, 233 U. S. 362, 34 S. Ct. 627, 58 U. S. (L. ed.) 1001.

3. *In re Hohorst*, 150 U. S. 660, 14 S. Ct. 221, 37 U. S. (L. ed.) 1211; *U. S. v. Le Bris*, 121 U. S. 278, 7 S. Ct. 894, 30 U. S. (L. ed.) 946; *Ex p. Crow Dog*, 109 U. S. 556, 3 S. Ct. 396, 27 U. S. (L. ed.) 1030; *Northern Commercial Co. v. U. S.*, (C. C. A.) 217 Fed. 33; *Southern R. Co. v. McNeill*, 155 Fed. 756. See also *Lewis v. U. S.*, 92 U. S. 622, 23 U. S. (L. ed.) 513; *In re Southern Pac. Co.*, 82 Fed. 313; 16 Op. Atty.-Gen. 271 (Devens, 1879).

"It is a familiar canon of interpretation that all former statutes on the same subject, whether repealed or unrepealed, may be considered in construing the provisions that remain in force." *Viterbo v. Friedlander*, 120 U. S. 725, 7 S. Ct. 962, 30 U. S. (L. ed.) 776.

was attached to certain words in a prior tariff act, for example, there is a presumption of some force that Congress intended that they should have the same signification when used in a subsequent act in relation to the same subject-matter.<sup>4</sup> The same observation applies where words used in a new bankruptcy act had an obvious meaning in a prior bankruptcy act.<sup>5</sup> Where inadvertent changes have been made by incorporating different statutes together, it has been held not to change their original construction.<sup>6</sup> But where the words of the statute to be construed differ from the words of a former act on the same subject, it is an intimation, at least, that they are to have a different construction.<sup>7</sup> "A change of language is some evidence of a change of purpose."<sup>8</sup> Especially in the construction of a penal statute should the court give effect to words of a restrictive sense defining the crime where such words omitted in earlier acts were seemingly introduced into the later act *ex industria*.<sup>9</sup> "When the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose."<sup>10</sup> When a codification

4. *Latimer v. U. S.*, 223 U. S. 501, 32 S. Ct. 242, 56 U. S. (L. ed.) 526; *Lawder v. Stone*, 187 U. S. 281, 23 S. Ct. 79, 47 U. S. (L. ed.) 178; *Maddock v. Magone*, 152 U. S. 368, 14 S. Ct. 588, 38 U. S. (L. ed.) 482; *Reiche v. Smythe*, 13 Wall. 162, 20 U. S. (L. ed.) 566; *Dunham v. U. S.*, (C. C. A.) 150 Fed. 562; *Murphy v. U. S.*, 68 Fed. 910; *Roosevelt v. Maxwell*, 3 Blatchf. 391, 20 Fed. Cas. No. 12,034; 21 Op. Atty.-Gen. 543 (McKenna, 1897).

Illustration.—An act of Congress of 1861 exempted from duty "animals of all kinds; birds, singing and other, and land and water fowls," and a later act levied a duty of twenty per cent. "on all horses, mules, cattle, sheep, hogs, and other live animals." It was held that birds were not included in the term "other live animals." The court said it was quite manifest that Congress, in the Act of 1861, "adopting the popular signification of the word 'animals,' applied it to quadrupeds, and placed birds and fowls in a different classification. Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are *in pari materia*, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the later act, in the absence of anything to show a contrary intention." *Reiche v. Smythe*, 13 Wall. 162, 20 U. S. (L. ed.) 566.

If a certain meaning has been consistently accorded a word in successive tariffs, it is presumed that the same signification should be given that word when used in other revenue acts. *Taylor v. Treat*, 153 Fed. 656.

See, generally, §§ 115-118 as to meaning of words in Tariff Act.

5. *In re Barber*, 97 Fed. 551.

6. *McDonald v. Hovey*, 110 U. S. 628, 4 S. Ct. 142, 28 U. S. (L. ed.) 269, citing *Matter of Murphy*, 23 N. J. L. 180, in which case several statutes had been consolidated, and a proviso in one of them broad enough in its terms to affect the whole consolidated law was held to affect only those sections with which it had been originally connected.

7. *Louisville, etc., R. Co. v. Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297; *U. S. v. Stevenson*, 215 U. S. 190, 30 S. Ct. 35, 54 U. S. (L. ed.) 153; *Crawford v. Burke*, 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; *Wilson v. Nelson*, 183 U. S. 198, 22 S. Ct. 74, 46 U. S. (L. ed.) 147; *U. S. v. Woodruff*, (C. C. A.) 175 Fed. 776; *Horrox v. U. S.*, (C. C. A.) 167 Fed. 526; *In re U. S. Hotel Co.*, (C. C. A.) 134 Fed. 225; *Grace v. Collector of Customs, etc.*, (C. C. A.) 79 Fed. 319; *U. S. v. Gooding*, 12 Wheat. 477, 6 U. S. (L. ed.) 693; *In re Saito*, 62 Fed. 126. See also *Lapina v. Williams*, 232 U. S. 78, 34 S. Ct. 196, 58 U. S. (L. ed.) 515; *U. S. v. Morris*, 18 Fed. 901.

8. *Johnson v. U. S.*, 225 U. S. 405, 32 S. Ct. 748, 56 U. S. (L. ed.) 1142.

9. *U. S. v. Gooding*, 12 Wheat. 460, 6 U. S. (L. ed.) 693.

10. *Pirle v. Chicago Title, etc., Co.*, 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171, where the court, discussing the true construction of section 60a of the Bankruptcy Act of 1898 (*post*, title BANKRUPTCY in the body of this volume), said: "Section 5084, Rev. Stat., provided that 'any person who \* \* \* has accepted any preference having reasonable cause to believe that the same was made or given by the debtor contrary to any provisions of the act of March 2, 1869, c. 176, \* \* \* shall not prove

or revision of laws contains provisions which are substantially reproduced from previous acts of the legislature, and doubts arise from the ambiguity of the language employed, a safe rule by which to ascertain the meaning is to resort to the original sources for the purpose of ascertaining the legislative intent.<sup>11</sup> The application of this rule in the construction of the United States Revised Statutes is discussed in another place;<sup>12</sup> the cases herein cited pertain to state legislation. The title of the original act<sup>13</sup> or its punctuation<sup>14</sup> may be material in construing the provisions in the subsequent compilation. The general rule in the construction of revisions is that the new law should be held to mean what the prior law meant, unless a purpose to change or alter is manifested by clear, unambiguous language.<sup>15</sup> "Upon a revision of statutes a different interpretation is not to be given them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law."<sup>16</sup>

**63. Subsequent statutes.**—In one of the early cases Chief Justice Marshall said that "if in a subsequent clause of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding

the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference. The words in italics are omitted from the act of 1898. Was the omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition. Was it left out in words to be put back by construction? Taken from the certainty given by prior use and prior decisions, and committed to doubt and controversy? There is a presumption against it." The court then laid down the rule stated in the text and proceeded as follows: "This rule we lately applied in *Bardes v. Hawarden First Nat. Bank*, 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175. In that case, in determining whether the jurisdiction of the Circuit and District courts of the United States was concurrent with the state courts in certain suits at law and equity between the assignee in bankruptcy and the adverse claimant of property of the bankrupt, the statutes of 1841 and 1867 were compared with that of 1898, and from the omission from the latter of certain provisions of the former statutes it was decided that such jurisdiction did not exist. It was said by the court, speaking by Mr. Justice Gray: 'We find it impossible to infer that when Congress, in framing the act of 1898, entirely

omitted any similar provision, and substituted the restricted provisions of section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provisions of the earlier acts.'" To the same effect see *Meyer v. Herrera*, 41 Fed. 67, construing a statute prescribing the jurisdiction of federal courts. *U. S. v. Wong You*, 223 U. S. 67, 32 S. Ct. 195, 56 U. S. (L. ed.) 354; *In re Harper*, 133 Fed. 970; *U. S. v. One Bay Horse, etc.*, 128 Fed. 207; *In re Hilborn*, 104 Fed. 868; *McDaniel v. Stroud*, (C. C. A.) 106 Fed. 488; *Swarts v. Siegel*, 114 Fed. 1007; *In re Roche*, (C. C. A.) 101 Fed. 958.

11. *Gwathmay v. Clisby*, 31 Fed. 221.

12. See § 167.

13. *Myer v. Western Car Co.*, 102 U. S. 1, 26 U. S. (L. ed.) 59. See also §§ 46-48.

14. *Gwathmay v. Clisby*, 31 Fed. 220; *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77, 26 U. S. (L. ed.) 1111. See also § 50.

15. *Rice v. Sharpleigh Hardware Co.*, 85 Fed. 568. See also *In re Dana*, 68 Fed. 899, citing *Yates's Case*, 4 Johns. (N. Y.) 359, where Kent, J., said: "Mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change."

16. *Per Justice Bradley*, in *McDonald v. Hovey*, 110 U. S. 628, 4 S. Ct. 142, 28 U. S. (L. ed.) 269.

the provisions of the law.”<sup>17</sup> The doctrine was reaffirmed by Mr. Justice Wayne, speaking for the Supreme Court: “If it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.”<sup>18</sup> Where a right is created by one statute, and a penalty for the infringement is inflicted by a later statute, they are to be considered as one statute.<sup>19</sup> And a remedy provided by one statute may extend to cases arising on the same subject-matter under a subsequent statute.<sup>20</sup> But the construction of statutes is a function which ordinarily belongs to the judiciary alone,<sup>21</sup> and “where Congress has expressly legislated in respect to a given matter, that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation.”<sup>22</sup>

**64. When in *pari materia*.**—Acts are *in pari materia* when they have a common purpose which they are the means of carrying into effect.<sup>23</sup> The revenue or tariff laws of the United States are regarded as constituting practically one system;<sup>24</sup> all that have not been repealed must be harmonized, if possible, so as to make a consistent whole.<sup>25</sup> “It would be an unsound and unsafe rule of construction which would separate from the tariff revenue system, consisting of numerous and diverse enactments, each new act altering it in any of its details, or prescribing new duties in lieu of existing ones on particular articles. The whole system must be regarded in each alteration and no disturbance allowed of existing rules

17. *Alexander v. Alexandria*, 5 Cranch 8, 3 U. S. (L. ed.) 19; *Priestman v. U. S.*, 4 Dall. 34, 1 U. S. (L. ed.) 727.

18. *U. S. v. Freeman*, 3 How. 565, 11 U. S. (L. ed.) 724, citing *Morris v. Melin*, 6 B. & C. 454, 13 E. C. L. 233; *Sandiman v. Breach*, 7 B. & C. 99, 14 E. C. L. 22.

For other authorities recognizing the same doctrine, see *Swigart v. Baker*, 229 U. S. 187, 33 S. Ct. 645, 57 U. S. (L. ed.) 1143; *U. S. v. Anderson*, 228 U. S. 52, 33 S. Ct. 500, 57 U. S. (L. ed.) 727; *Tiger v. Western Invest. Co.*, 221 U. S. 286, 31 S. Ct. 578, 55 U. S. (L. ed.) 738; *Petri v. F. E. Creelman Lumber Co.*, 199 U. S. 487, 26 S. Ct. 133, 50 U. S. (L. ed.) 281; *Vanderbilt v. Eidman*, 196 U. S. 480, 25 S. Ct. 331, 49 U. S. (L. ed.) 563; *Wetmore v. Markoe*, 196 U. S. 68, 25 S. Ct. 172, 49 U. S. (L. ed.) 390; *Lawder v. Stone*, 187 U. S. 281, 23 S. Ct. 79, 47 U. S. (L. ed.) 178; *U. S. v. Woodruff*, (C. C. A.) 175 Fed. 776, affirming 168 Fed. 452; *Harrison v. Vose*, 9 How. 383, 13 U. S. (L. ed.) 179; *Harris v. Runnels*, 12 How. 87, 13 U. S. (L. ed.) 901; *Schooner Paulina's Cargo v. U. S.*, 7 Cranch 63, 3 U. S. (L. ed.) 266; *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 36, 23 U. S. (L. ed.) 196; *Patterson v. Winn*, 11 Wheat. 389, 6 U. S. (L. ed.) 500; *Alden v. Easton*, (C. C. A.) 113 Fed. 65; *Mutual L. Ins. Co. v. Kelly*, (C. C. A.) 114 Fed. 272; *U. S. v. Morton*, (C. C. A.) 65 Fed. 209, where *Jenkins, J.*, said: “It does not

matter about their date, when the object of the court is to get at any provision, because a consistent, harmonious, single spirit and policy are presumed to govern statutes relating to one subject-matter.” See also *Schmid v. U. S.*, 66 Fed. 745.

19. *U. S. v. Koch*, 40 Fed. 250, holding that where the first was declared unconstitutional the other was thereby blotted out and could not be regarded as suspended so as to operate in connection with a subsequent constitutional statute enacted in the place of the first.

20. *Moore's Case*, 10 Ct. Cl. 379, citing *Rogers v. Bradshaw*, 20 Johns. (N. Y.) 744.

21. See § 40, *Legislative Construction*.

22. *Per Justice Brewer*, in *Rosencrans v. U. S.*, 165 U. S. 262, 17 S. Ct. 302, 41 U. S. (L. ed.) 708. See also *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363.

23. *Pargoud's Case*, 4 Ct. Cl. 337.

24. *U. S. v. Taylor*, 104 U. S. 219, 26 U. S. (L. ed.) 721; *The Distilled Spirits*, 11 Wall. 365, 20 U. S. (L. ed.) 167; *Bennett v. Hunter*, 9 Wall. 326, 19 U. S. (L. ed.) 672; *Stuart v. Maxwell*, 16 How. 160, 14 U. S. (L. ed.) 883; *In re Southern Pac. Co.*, 82 Fed. 313; *U. S. v. Collier*, 3 Blatchf. 325, 25 Fed. Cas. No. 14,833.

See, generally, § 113 as to construction of revenue laws; §§ 114-120 as to construction of tariff acts.

25. *Anglo-California Bank v. Secretary of Treasury*, (C. C. A.) 76 Fed. 756.



of general application beyond the clear intention of Congress."<sup>26</sup> The public-land laws are all *in pari materia*; no particular law should be construed as an insulated act upon its own letter, but as having relation to the general system.<sup>27</sup> The statutes in relation to letters patent for inventions constitute legislation *in pari materia*.<sup>28</sup> A special act of Congress in favor of a patentee must be considered as engrafted on the general patent law then in force, and must be construed in connection with the latter.<sup>29</sup> The act of Congress of 1888, giving jurisdiction to federal Circuit and District Courts of proceedings instituted by any officer of the government to condemn land for public purposes,<sup>30</sup> and the act of 1890 authorizing the secretary of war to proceed for the condemnation of land for military purposes "in any court having jurisdiction of such proceedings,"<sup>31</sup> are *in pari materia*, and consequently a federal District Court has jurisdiction of proceedings brought under the act of 1890.<sup>32</sup> An act of 1878, commonly called the Thurman Act, providing for retention by the government of compensation for services performed by certain trans-continental railroad companies,<sup>33</sup> was interpreted by means of provisions in divers earlier acts granting government aid in the construction of those railroads.<sup>34</sup>

**65. Statutes not in *pari materia*.**—Where two statutes have no common purpose,<sup>35</sup> or where the language of two statutes relating to kindred subjects and having similar objects is not alike and the state of facts to which they apply is different,<sup>36</sup> each must be construed according to its own terms. Thus, statutes providing for the admission of separate states are not *in pari materia*, neither relating to identical subjects nor constituting parts of a homogeneous whole.<sup>37</sup> Two acts have no necessary connection with each other because they happened to be approved on the same day.<sup>38</sup> The Supreme Court held that the Captured and Abandoned Property Act of 1863<sup>39</sup> was not *in pari materia* with the Confiscation Law of 1862,<sup>40</sup> and that the two acts could not be construed together so as to

<sup>26</sup> *Saxonville Mills v. Russell*, 116 U. S. 21, 6 S. Ct. 237, 20 U. S. (L. ed.) 554.

<sup>27</sup> *Reynolds v. M'Arthur*, 2 Pet. 430, 7 U. S. (L. ed.) 470; *Patterson v. Winn*, 11 Wheat. 386, 6 U. S. (L. ed.) 500; *Preston v. Browder*, 1 Wheat. 124, 4 U. S. (L. ed.) 50; 2 Op. Atty-Gen. 44 (Wirt, 1826). See also 16 Op. Atty-Gen. 430 (Devens, 1880).

<sup>28</sup> *Butterworth v. U. S.*, 112 U. S. 58, 5 S. Ct. 25, 28 U. S. (L. ed.) 656.

<sup>29</sup> *Bloomer v. McQuewan*, 14 How. 539, 14 U. S. (L. ed.) 532; *Evans v. Eaton*, 3 Wheat. 518, 4 U. S. (L. ed.) 433.

<sup>30</sup> Act of Aug. 1, 1888, 25 Stat. at L. 357.

<sup>31</sup> Act of Aug. 18, 1890, 26 Stat. at L. 316.

<sup>32</sup> *Chappell v. U. S.*, (C. C. A.) 81 Fed. 764.

<sup>33</sup> Act of March 7, 1878, 20 Stat. at L. 56.

<sup>34</sup> *U. S. v. Central Pac. R. Co.*, 118 U. S. 239, 6 S. Ct. 1038, 30 U. S. (L. ed.) 173, where the court said that the acts all related to the same subject, etc., and "are therefore to be construed together as one act, and one part to be interpreted

by another," citing *U. S. v. Freeman*, 3 How. 556, 11 U. S. (L. ed.) 724; *Crespigny v. Wittenoom*, 4 T. R. 790, and *Com. v. Slack*, 19 Pick. (Mass.) 304.

<sup>35</sup> *Pargoud's Appeal*, 4 Ct. Cl. 357; *Bryan v. U. S.*, 6 Ct. Cl. 134.

<sup>36</sup> *Warner v. Boyer*, 74 Fed. 873, holding that the act of Congress of June 26, 1884, limiting the liability of owners of vessels on certain contracts for the benefit of the vessels is not *in pari materia* with the act of 1851 (Rev. Stat. U. S., §§ 4233, 4285). *Contra*, *Gokey v. Fort*, 44 Fed. 364.

<sup>37</sup> *Louisiana v. Mississippi*, 202 U. S. 1, 26 S. Ct. 408, 50 U. S. (L. ed.) 913.

<sup>38</sup> *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 745, 23 U. S. (L. ed.) 634, where the railroad company unsuccessfully contended that a land-grant act in its favor should be construed in connection with an appropriation act approved on the same day which contained provisions for negotiations towards the extinction of the title to certain lands of Indian tribes.

<sup>39</sup> Act of March 12, 1863, 12 Stat. at L. 820.

<sup>40</sup> Act of July 17, 1862.

import from the last-mentioned act into the former a disability not contained therein.<sup>41</sup> So where an act of Congress of 1812 granted to soldiers a bounty of lands in Arkansas territory but forbade their alienation before issuance of a patent, and, much of the land being found unfit for cultivation, an act of 1826 provided in favor of soldiers actually removing to Arkansas the right to substitute other lands for those patented, the two acts were declared to have no single purpose, and the prohibition against alienation in the act of 1812 was not carried by construction into the act of 1826.<sup>42</sup>

**66. Limitation of rule.**—"Where the language of the statute to be construed is clear, plain, and explicit, it should not be controlled by the rule *in pari materia*."<sup>43</sup> Speaking on the same point with special reference to prior legislation, Mr. Justice Clifford said: "Where a section or clause of a statute is ambiguous, much aid, it is admitted, may be derived in ascertaining its meaning by comparing the section or clause in question with prior statutes *in pari materia*, but it cannot be admitted that such a resort is a proper one when the language employed by the legislature is plain and free of all uncertainty, as the true rule in such a case is to hold that the statute speaks its own construction."<sup>44</sup> "When the meaning of a statute is clear, arguments drawn from the history of the legislation it embodies and the construction given to ambiguous statutes on the same or similar subjects serve only to create doubt where none should exist, and to confuse the judgment when it would otherwise be sound and clear."<sup>45</sup>

#### IV. OBJECTIONABLE CONSEQUENCES, AS AFFECTING INTERPRETATION

##### *In General*

**67. Inconvenience.**—"Where great inconvenience will result from a particular construction," said Chief Justice Marshall, "that construction is to be avoided, unless the meaning of the legislature be plain."<sup>46</sup>

41. *U. S. v. Anderson*, 9 Wall. 56, 19 U. S. (L. ed.) 615, a case of a claim made under the Captured and Abandoned Property Act, where the court said that the purpose which Congress had in view in passing the Confiscation Law "was very different from that which induced it, in the Captured and Abandoned Property Act, to extend a privilege to the loyal owner. The Confiscation Law concerns rebels and their property; was intended as a measure to cripple their resources; and in so far as it claims the right to seize and condemn their property, as a punishment for their crimes, recognizes that certain legal proceedings are necessary to do so. But by the act in question the government yielded its right to seize and condemn the property which it took in the enemy's country if it belonged to a faithful citizen, and substantially said to him: 'We are obliged to take the property of friend and foe alike, which we will sell and deposit the proceeds of in the treasury; and if, at any time within two

years after the suppression of the rebellion, you prove satisfactorily that of the property thus taken you owned a part, we will pay you the net amount received from the sale.' The two acts cannot be construed *in pari materia*. The one is penal, the other remedial; the one claims a right, the other concedes a privilege."

42. *Maxwell v. Moore*, 22 How. 185, 16 U. S. (L. ed.) 251.

43. *Grace v. Collector of Customs, etc.*, (C. C. A.) 79 Fed. 318. See also *Hamilton v. Rathbone*, 175 U. S. 419, 20 S. Ct. 155, 44 U. S. (L. ed.) 219; *Yerke v. U. S.*, 173 U. S. 442, 19 S. Ct. 441, 43 U. S. (L. ed.) 760; *French v. Spencer*, 21 How. 238, 16 U. S. (L. ed.) 97; *Maxwell v. Moore*, 22 How. 191, 16 U. S. (L. ed.) 251.

44. *Barnes v. Philadelphia, etc., R. Co.*, 17 Wall. 302, 21 U. S. (L. ed.) 544.

45. *Per Sanborn, C. J.*, in *Shreve v. Cheesman*, (C. C. A.) 69 Fed. 789; *Knox County v. Morton*, (C. C. A.) 68 Fed. 789.

46. *U. S. v. Fisher*, 2 Crauch 396, 2 U. S. (L. ed.) 304, quoted in *In re Wong*

Where a statute authorized municipal aid to a railroad corporation only on the assent of "a majority of the legal voters of a township," the court presumed that all qualified voters who absented themselves from a meeting duly called, assented to the expressed will of a majority of those voting, since "any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed."<sup>47</sup> An act of Congress requiring masters of vessels to deposit their ships' papers with the consuls on their "arrival" at a foreign port was construed not to apply where a vessel merely touched at a port, without making an entry or transacting any business; the inconvenience of any other construction of the word "arrival" had great influence with the court.<sup>48</sup> Arguments of inconvenience will prevail against a literal construction of the statute which would be too narrow and technical for practical and business methods that should obtain in the administration of law.<sup>49</sup> But "if the intention of the legislature be expressed

Fock, 81 Fed. 561, where Judge Morrow said: "In statutory construction, arguments of convenience often address themselves strongly to the court." To the same effect see *Bird v. U. S.*, 187 U. S. 118, 23 S. Ct. 42, 47 U. S. (L. ed.) 100; *Studebaker v. Perry*, 184 U. S. 258, 22 S. Ct. 463, 46 U. S. (L. ed.) 528; *Connole v. Norfolk*, etc., R. Co., 216 Fed. 823; *In re Halsey Electric Generator Co.*, 175 Fed. 825, affirmed (C. C. A.) 179 Fed. 321; *U. S. v. Oregon*, etc., R. Co., 133 Fed. 953. See also *Prentiss v. Elsworth*, 19 Fed. Cas. No. 11,386; *U. S. v. George*, 3 Dill. 431, 25 Fed. Cas. No. 15,199; *Knowlton v. Moore*, 178 U. S. 77, 20 S. Ct. 747, 44 U. S. (L. ed.) 969; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 37, 15 S. Ct. 508, 39 U. S. (L. ed.) 601.

In *U. S. v. Wong Sing*, 51 Fed. 79, the Chinese Exclusion Act of 1892 was held not to require criminal prosecutions and jury trials in all cases before deportation, but that summary proceedings as under prior acts were still authorized. "These people have, since the date of the first law enacted to restrict their immigration, demanded jury trials," said Judge Hanford, "and now if, by the new law, this government has, in effect, acceded to such demand, they may easily defeat the law by coming, in such numbers as to paralyze the courts." See also *In re Wong Fock*, 81 Fed. 558, and *U. S. v. Chong Sam*, 47 Fed. 884.

In *Minnick v. Union Ins. Co.*, 40 Fed. 371, where it was held that the provision for removal of causes from state to federal courts upon affidavit of local prejudice or influence did not authorize a general affidavit without statement of the facts, the court remarked that "if the allegation is not controvertible, it makes it all the more necessary to attend to the argument from inconvenience in allowing such great facility in bringing cases into the federal courts under this clause of the statute. This argument from inconvenience

could not prevail against plain language; but when the statute is open to construction, it is of considerable weight. *Broom Leg. Max.* 184."

In *U. S. v. Burr*, 159 U. S. 78, 15 S. Ct. 1002, 40 U. S. (L. ed.) 82, certain provisions in the Tariff Act of 1894 were held not to operate upon imported goods where the entry thereof was liquidated at the custom house on the day when the act was signed by the President, partly because the act ought not to be construed "so as to turn what was intended to secure a period of time to enable business men to act understandingly under the new law into a source of confusion and mischief to the contrary."

In *Central Trust Co. v. Sheffield*, etc., Coal, etc., Co., 60 Fed. 9, the court declined to give a retrospective operation to an act regulating sales under orders and decrees, for the reason that certain provisions in the act "would impose a necessity of again applying to the court in the case of every unexecuted decree rendered prior to the passage of the act."

The argument *ab inconvenienti* had weight in determining the construction in *In re Newberry*, 97 Fed. 24; *Wilson v. Mason*, 1 Cranch 101, 2 U. S. (L. ed.) 30.

<sup>47</sup> *Cass County v. Johnston*, 95 U. S. 369, 24 U. S. (L. ed.) 416.

<sup>48</sup> *Toler v. White*, 1 Ware 277, 24 Fed. Cas. No. 14,079.

<sup>49</sup> In *People's Sav. Bank*, etc., Co. v. *Batchelder Egg Case Co.*, (C. C. A.) 51 Fed. 130, it was held that the *Arkansas* statute declaring that no provisional remedy shall be issued by the clerk of the County Court in any action before the complaint or petition "is filed in his office" did not render void a writ of attachment issued by the clerk, outside of his office and at the office of an attorney, the writ being duly stamped "filed" by the clerk and duly signed and attested by him with his official seal. "It not infrequently occurs," said Caldwell, C. J.,

in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a strained interpretation must be put upon them to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce."<sup>50</sup> "It is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words and seeks to spell out, or guess at, the supposed intent of the legislature, contrary or supplementary to that which is clearly embodied in the words it has used."<sup>51</sup> "When a statute is clear and imperative, reasoning *ab inconvenienti* is of no avail. It is the duty of the court to execute it."<sup>52</sup> The argument *ab inconvenienti* does not address itself to the court with much force where it amounts merely to an assertion that an act "is defective in some of its details, and does not reach all the cases which ought to be provided for."<sup>53</sup> And, of course, considerations of inconvenience are of no importance where they operate equally against each of two opposite constructions.<sup>54</sup>

**68. Unreasonableness.**—It is one of the primary canons of construction that all statutes should receive a reasonable interpretation, if the meaning of the statute is at all doubtful,<sup>55</sup> and "that certainly is not a reasonable

in that case, "that the court room and the clerk's office are in different buildings more or less distant from each other. Must the clerk in such cases, before issuing process upon petitions filed with him in the court house, leave his desk in the court room, and go to his office for the sole purpose of placing therein the petitions?"

**50.** *Per* Chief Justice Marshall, in *U. S. v. Fisher*, 2 Cranch 390, 2 U. S. (L. ed.) 304.

**51.** *Per* Justice Bradley, in *Merritt v. Welsh*, 104 U. S. 702, 26 U. S. (L. ed.) 896.

**52.** *Per* Justice Swayne, in *The Cherokee Tobacco*, 11 Wall. 620, 20 U. S. (L. ed.) 227; *American R. Co. v. Birch*, 224 U. S. 547, 32 S. Ct. 603, 56 U. S. (L. ed.) 879. See also *Amy v. Watertown*, 130 U. S. 320, 9 S. Ct. 537, 32 U. S. (L. ed.) 953; *U. S. v. Rider*, 163 U. S. 140, 16 S. Ct. 983, 41 U. S. (L. ed.) 101; *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 93, 3 S. Ct. 507, 28 U. S. (L. ed.) 76; *In re Jones*, 110 Fed. 738; *Newgass v. Atlantic, etc., R. Co.*, 56 Fed. 683; *In re Fixen*, (C. C. A.) 102 Fed. 298.

**53.** *U. S. v. Dickson*, 15 Pet. 164, 10 U. S. (L. ed.) 689.

**54.** *U. S. v. Dickson*, 15 Pet. 164, 10 U. S. (L. ed.) 689.

**55.** *Van Dyke v. Cordova Copper Co.*, 234 U. S. 188, 34 S. Ct. 884, 58 U. S. (L. ed.) 1273; *U. S. v. Goelet*, 232 U. S. 293, 34 S. Ct. 431, 58 U. S. (L. ed.) 610; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 33 S. Ct. 148, 57 U. S. (L. ed.) 314; *Ex p. Webb*, 225 U. S. 663, 32 S. Ct. 769, 56 U. S. (L. ed.) 1248; *U. S. v. Corbett*, 215 U. S. 233, 30 S. Ct. 81, 54

U. S. (L. ed.) 173; *U. S. v. A. Graf Distilling Co.*, 208 U. S. 198, 28 S. Ct. 264, 52 U. S. (L. ed.) 452; *Goudy v. Meath*, 203 U. S. 146, 27 S. Ct. 48, 51 U. S. (L. ed.) 130; *U. S. v. Cadarr*, 197 U. S. 475, 25 S. Ct. 487, 49 U. S. (L. ed.) 842; *Ford v. U. S.*, 116 U. S. 213, 6 S. Ct. 360, 29 U. S. (L. ed.) 608; *Spokane Valley Land, etc., Co. v. Kootenai County*, 199 Fed. 481; *Shallus v. U. S.*, (C. C. A.) 162 Fed. 653, *reversing* 155 Fed. 213; *St. Louis, etc., R. Co. v. Delk*, (C. C. A.) 158 Fed. 931; *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A.) 150 Fed. 71; *U. S. v. Standard Oil Co.*, 148 Fed. 719; *Harts v. U. S.*, (C. C. A.) 140 Fed. 843, *affirming* 139 Fed. 1008; *McNally v. Field*, 119 Fed. 445; *Stephens v. Cherokee Nation*, 174 U. S. 480, 19 S. Ct. 722, 43 U. S. (L. ed.) 1041; *Beley v. Naphtaly*, 169 U. S. 359, 18 S. Ct. 354, 42 U. S. (L. ed.) 775; *Reagan v. U. S.*, 182 U. S. 425, 21 S. Ct. 842, 45 U. S. (L. ed.) 1162 [*affirming* 35 Ct. Cl. 90]; *Kansas City, etc., R. Co. v. Atty.-Gen.*, 118 U. S. 694, 7 S. Ct. 66, 30 U. S. (L. ed.) 281; *U. S. v. Wallace*, 116 U. S. 400, 6 S. Ct. 408, 29 U. S. (L. ed.) 675; *Scipio v. Wright*, 101 U. S. 671, 25 U. S. (L. ed.) 1037; *Kohl-saat v. Murphy*, 96 U. S. 158, 24 U. S. (L. ed.) 844; *Blake v. National City Banks*, 23 Wall. 320, 23 U. S. (L. ed.) 119; *Corbett v. Nutt*, 10 Wall. 480, 18 U. S. (L. ed.) 976; *U. S. v. Hartwell*, 6 Wall. 395, 18 U. S. (L. ed.) 830; *Bronson v. Rodes*, 7 Wall. 254, 19 U. S. (L. ed.) 141; *Meredith v. U. S.*, 13 Pet. 495, 10 U. S. (L. ed.) 258; *U. S. v. Arredondo*, 6 Pet. 715, 8 U. S. (L. ed.) 547; *Sundry Goods, etc. v. U. S.*, 2 Pet. 367, 7 U. S. (L. ed.) 450;

interpretation for which no sufficient reason can be assigned."<sup>56</sup> The Supreme Court has attributed to Congress a "tacit purpose" to preserve a long-established distinction between offenses essentially different.<sup>57</sup> When either of two constructions can be given to a statute, and one of

Cohen v. Virginia, 6 Wheat. 443, 5 U. S. (L. ed.) 257; *Durousseau v. U. S.*, 6 Cranch 323, 3 U. S. (L. ed.) 232; *Gans v. Ellison*, (C. C. A.) 114 Fed. 736; *In re Dickson*, (C. C. A.) 111 Fed. 728; *In re Stevenson*, 94 Fed. 118; *In re Collier*, 93 Fed. 194; *In re Sievers*, 91 Fed. 369; *Ex p. Kyle*, 67 Fed. 307; *Northern Pac. R. Co. v. Sanders*, 46 Fed. 249; *Aloe v. Churchill*, 44 Fed. 52; *Powder River Cattle Co. v. Custer County*, 45 Fed. 326; *Montana Co. v. Clark*, 42 Fed. 629; *Strong v. U. S.*, 34 Fed. 19; *U. S. v. Bassett*, 2 Story 403, 24 Fed. Cas. No. 14,539; *Labadie v. U. S.*, 32 Ct. Cl. 379; 20 Op. Atty.-Gen. 660 (Olney, 1893); 21 Op. Atty.-Gen. 184 (Olney, 1895). See also *Davids Co. v. Davids Mfg. Co.*, 233 U. S. 461, 34 S. Ct. 648, 58 U. S. (L. ed.) 1046; *McLean v. Hager*, 31 Fed. 606; *U. S. v. De Visser*, 10 Fed. 642.

56. *Per Justice Matthews*, in *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 187, 5 S. Ct. 813, 29 U. S. (L. ed.) 121.

**Examples of unreasonable construction.**—In *Venice v. Murdock*, 92 U. S. 497, 23 U. S. (L. ed.) 583, an action upon municipal bonds, their validity being upheld, the court said: "It is very obvious that if the act of the legislature which authorized an issue of bonds in aid of the construction of the railroad, on the written assent of two-thirds of the resident taxpayers of the town, intended that the holder of the bonds should be under obligation to prove by parol evidence that each of the two hundred and fifty-nine names signed to the written assent was a genuine signature of the person who bore the name, the proffered aid to the railroad company was a delusion. No sane person would have bought a bond with such an obligation resting upon him whenever he called for payment of principal or interest. If such was the duty of the holder, it was always his duty. It could not be performed once for all. The bonds retained in the hands of the company would have been no help in the construction of the road. It was only because they could be sold that they were valuable. Only thus could they be applied to the construction. Yet it is not to be doubted that the legislature had in view, and intended to give, substantial aid to the railroad company, if a sufficient number of the taxpayers assented. They must have contemplated that the bonds would be offered for sale; and it is not to be believed that they intended to impose such a clog upon their salableness as would rest upon it if every person proposing to purchase was required to inquire of each

one whose name appeared to the assent whether he had in fact signed it."

In *U. S. v. Saunders*, 22 Wall. 496, 22 U. S. (L. ed.) 736, the court said: "It is not reasonable to suppose that Congress intended to single out this particular employee from all the government employees as alone entitled to a double addition of twenty per cent. to his compensation, which he certainly would receive for the year named, if his construction of the act \* \* \* is the correct one."

The building of vessels in the United States for sale to neutrals during war between other nations is a profitable business which Congress cannot be intended to have prohibited unless that intent be manifested by express words or a very plain and necessary implication. *Murray v. Schooner Charming Betsy*, 2 Cranch 118, 2 U. S. (L. ed.) 208.

"To so construe this statute as to make a mere vendor of materials the agent of his vendee's vendee, with authority to charge the property of the latter with a lien in favor of his vendor, would be extremely unreasonable." *Per Hanford, A. J.*, in *Pacific Rolling-Mill Co. v. Hamilton*, 61 Fed. 478.

"Of what profit can it be to a city in Kansas to injure a city in Missouri, and what will justify an imputation of an intent on the part of the legislature of Kansas to empower any of its cities to do such an injury?" *Per Brewer, J.*, in *National Waterworks Co. v. Kansas City*, 65 Fed. 698.

An act of Congress regulating the manner of bidding for supplies for the executive department designated two o'clock P. M. "for the opening of all such proposals in each department." The attorney-general advised that a reasonable construction authorized the opening of bids received after two o'clock, all those received before that time not having been opened when the belated bid arrived. 21 Op. Atty.-Gen. 546 (McKenna, 1897).

"It cannot be supposed that Congress intended to limit wages directly by one statute and increase them in a roundabout way by another. It would be disrespectful to Congress for a court to ascribe such childlike vacillation to the national legislature. The law of industry is that the more a man works the more he shall receive; but the construction suggested would reverse the natural law *pro hac vice*, and declare that the more he is idle the more he should be paid." *Per Nott, J.*, in *Harrison v. U. S.*, 26 Ct. Cl. 268.

57. *U. S. v. Rabinowich*, 238 U. S. 78, 35 S. Ct. 682, 59 U. S. (L. ed.) 1211.

them involves a forfeiture, the other is to be preferred.<sup>58</sup> It would be unreasonable to construe an act of Congress in such a manner as would enable individuals to hamper the commerce of the country with foreign nations, or embarrass the treaty-making power in its negotiations with foreign governments.<sup>59</sup> "It could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States, for this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another."<sup>60</sup> Where a state statute prohibited corporations from doing business therein except upon condition of filing a certificate designating their principal place of business, etc., "to require such a certificate as a prerequisite to the doing of a single act of business when there was no purpose to do any other business or have a place of business in the state would be unreasonable and incongruous."<sup>61</sup> "A statute of the United States should not be so interpreted as to require the aid of the officers of a state for its administration, unless its language is plain that state officers were intended to be employed in administering it."<sup>62</sup> It would be unreasonable to give to an act of Congress, considered as a revenue measure, a construction which would defeat the right of an owner to pay a tax assessed on his land and relieve his lands from the lien thereof.<sup>63</sup> "In order to justify a court in holding that Congress has by an act narrowed the rights of the United States in any particular as to any remedy, that intention ought clearly to appear."<sup>64</sup> A construction of an act of Congress which would indirectly defeat the policy of a state in respect of divorce regulations will not be adopted if any other construction can be discerned.<sup>65</sup> "We cannot impute to Congress," said the Supreme Court in a suit to cancel a patent for an invention, "the intention of narrowing the appellate jurisdiction of this court in a suit brought by the United States as a sovereign in respect of alleged miscarriage in the exercise of one of its functions as such, deeply concerning the public interests."<sup>66</sup> In an act regulating commerce express language must be used in order to justify a conclusion that Congress intended to destroy an existing branch of commerce, of value to common carriers and to consumers within the United States.<sup>67</sup> A statute will not be interpreted to dissimilate the pay of army and navy officers.<sup>68</sup> Reasonable construction of an act of Congress providing for compensation of clerks of Circuit Courts of Appeals would not award to them more than is received by the clerk of the Supreme Court and nearly

58. *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 35, 23 U. S. (L. ed.) 196, construing an act of Congress prohibiting usurious charges by national banks.

59. *Brown v. Duchesne*, 19 How. 196, 15 U. S. (L. ed.) 595, interpreting the patent laws with respect to the extent of exclusive rights granted therein to a patentee.

60. *Per Taney, C. J.*, in *U. S. v. Reid*, 12 How. 363, 13 U. S. (L. ed.) 1023.

61. *Per Woods, J.*, in *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 735, 5 S. Ct. 739, 28 U. S. (L. ed.) 1137.

62. *Per Atty.-Gen. Hoar*, in 13 Op. Atty.-Gen. 247.

63. *Bennett v. Hunter*, 9 Wall. 335, 19 U. S. (L. ed.) 672.

64. *U. S. v. Stocking*, 87 Fed. 862.

65. *Turner v. Turner*, 108 Fed. 785, holding that a release in bankruptcy will not discharge the bankrupt's liability for money decreed by a state court for the support of his wife and child.

66. *U. S. v. American Bell Telephone Co.*, 159 U. S. 555, 16 S. Ct. 69, 40 U. S. (L. ed.) 255.

67. *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 218, 16 S. Ct. 666, 40 U. S. (L. ed.) 940.

68. *U. S. v. Thomas*, 195 U. S. 418, 25 S. Ct. 102, 49 U. S. (L. ed.) 259.

twice as much as the amount received by clerks of the Circuit Courts.<sup>69</sup> The rule of strict construction of penal statutes "does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity which the legislature ought not to be presumed to have intended."<sup>70</sup> If the language employed in a statute necessarily forbids any other construction than one leading to an unreasonable result, it is the duty of the court to adopt and enforce that construction.<sup>71</sup> For example, it is not within the province of the court to decide upon the reasonableness or unreasonableness of a tariff clearly imposed by Congress.<sup>72</sup> And an act of Congress prohibiting further suspension, without thirty days' notice, of payments of pensions theretofore ordered to be suspended necessarily required the pension office to continue payment of a pension to one who had been convicted on his own confession and sentenced for the offense of fraudulently procuring his pension.<sup>73</sup> Unreasonableness of one construction may, of course, be balanced by unreasonableness of an opposite construction.<sup>74</sup>

**69. Unequal operation.**— Nothing but clear and unmistakable language will warrant a court in a construction which will produce injustice by the unequal operation of the statutes.<sup>75</sup> Tax laws should not be construed as requiring any one to contribute more than his just share of the public burdens in the absence of an express declaration to that effect.<sup>76</sup> And in construing an act of Congress providing for removal to federal courts of separable controversies in suits in state courts, the court avoided a construction which would enable an alien defendant to remove his separate controversy as against a citizen while the citizen would not have the same privilege against him.<sup>77</sup>

**70. Mischievous or disastrous results.**— "Doubtful words and phrases are to be construed, if possible, so as not to produce mischievous results."<sup>78</sup> A court should be astute in avoiding a construction which may be productive of much litigation and insecurity of a multitude of titles.<sup>79</sup> In

69. *Morton v. U. S.*, 59 Fed. 350.

70. *U. S. v. Hartwell* 6 Wall. 396, 18 U. S. (L. ed.) 830, where the court sustained a conviction as against a construction which would have involved more or less absurdity. See also *In re Coy*, 31 Fed. 801; *U. S. v. Sullivan*, 43 Fed. 605.

71. *Denn v. Harnden*, 1 Paine 61, 9 Fed. Cas. No. 4,819. See also *The Garden City*, 26 Fed. 766; *In re Howard*, 63 Fed. 265.

72. *Lawrence v. Caswell*, 13 How. 497, 14 U. S. (L. ed.) 235.

73. 20 Op. Atty.-Gen. 736 (Olney, 1894).

74. *U. S. v. Hamilton*, 8 Rep. 166, 26 Fed. Cas. No. 15,289.

75. *Lionberger v. Rouse*, 9 Wall. 476, 19 U. S. (L. ed.) 721; *Smith v. Townsend*, 148 U. S. 500, 13 S. Ct. 634, 37 U. S. (L. ed.) 533, construing certain provisions in the United States public land laws; *Hertz v. Woodman*, 218 U. S. 205, 30 S. Ct. 621, 54 U. S. (L. ed.) 1001; *Hills v. F. D. McKinniss Co.*, 188 Fed. 1012; *In re Guggenheim Smelting Co.*, (C. C. A.) 126 Fed. 728. See also *Bloomer v. McQuewan*, 14 How. 553, 14 U. S. (L. ed.) 532.

76. *Wells v. Shook*, 8 Blatchf. 258, 29 Fed. Cas. No. 17,406; *Lionberger v. Rouse*, 9 Wall. 476, 19 U. S. (L. ed.) 721.

77. *King v. Cornell*, 106 U. S. 398, 1 S. Ct. 312, 27 U. S. (L. ed.) 60.

78. *Per Wilson, J.*, in *The Samuel E. Spring*, 27 Fed. 766. To the same effect, see *Pennington v. U. S.*, 231 U. S. 631, 34 S. Ct. 269, 58 U. S. (L. ed.) 410; *Citizens' Telephone Co. v. Fuller*, 229 U. S. 322, 33 S. Ct. 833, 57 U. S. (L. ed.) 1206; *Yates v. Jones Nat. Bank*, 206 U. S. 158, 27 S. Ct. 638, 51 U. S. (L. ed.) 1002; *In re Bogen*, 134 Fed. 1019; *Pooler v. U. S.*, (C. C. A.) 127 Fed. 509. See also *In re Ft. Wayne Electric Corp.*, (C. C. A.) 99 Fed. 403; *St. Louis Third Nat. Bank v. Harrison*, 3 McCrary 164; *Wilder's Steamship Co. v. Low*, (C. C. A.) 112 Fed. 164; *St. Louis Third Nat. Bank v. Harrison*, 8 Fed. 722; *U. S. v. Mooney*, 11 Fed. 477.

79. *Doolittle v. Bryan*, 14 How. 563, 14 U. S. (L. ed.) 543; *Surgett v. Lapice*, 8 How. 70, 12 U. S. (L. ed.) 982. See also § 56.

one case the Supreme Court declared it impossible to adopt a construction of an act of Congress which would lead to the result that no court of the country, national or state, would have jurisdiction of patent suits involving a less sum or value than five hundred dollars.<sup>80</sup> An act of Congress regulating the jurisdiction of territorial courts was so construed as not to make an unreasonable and unaccountable disruption of the judicial system of the territory.<sup>81</sup> Congress is not presumed to destroy inchoate rights on language which is susceptible of other interpretation.<sup>82</sup> A statute will not be construed to allow unlimited and unrestrained gambling.<sup>83</sup> But when the words are plain and unambiguous, nothing is left for the court but to give them their full effect.<sup>84</sup> Thus, in refusing to limit the plain and ordinary meaning of the Sherman Anti-trust Law of 1890 so as to except from its prohibition a certain agreement relating only to traffic rates entered into by the defendants, competing common carriers by railroad, the Supreme Court said: "It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads and a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are, however, not for us. If the act ought to read as contended for by defendants, Congress is the body to amend it, and not this court, by a process of judicial legislation wholly unjustifiable."<sup>85</sup> And when it was urged in the Court of Claims that a construction of an eight-hour law of Congress which the court adopted might operate as a bounty on tardiness and unnecessary delay in the executive departments in Washington, the court replied that "these are evils to be corrected by statutes and regulations; they cannot be prevented by a strained construction of the law."<sup>86</sup> An act directly and positively prohibiting the payment of advance wages to seamen before leaving port was enforced as against a complaint by shipowners that a literal compliance with the act would make it practically impossible to ship crews in our ports.<sup>87</sup>

### Absurdity

**71. Generally.**—If the words of a statute are susceptible of more than one meaning, the absurdity of the result of one construction is a strong argument against its adoption.<sup>88</sup> An ancient and oft-quoted instance of

<sup>80.</sup> *In re Hohorst*, 150 U. S. 661, 14 S. Ct. 221, 37 U. S. (L. ed.) 1211.

<sup>81.</sup> *In re Blair*, (C. C. A.) 106 Fed. 666.

<sup>82.</sup> *Lincoln v. U. S.*, 202 U. S. 484, 26 S. Ct. 728, 50 U. S. (L. ed.) 1117.

<sup>83.</sup> *Aicardi v. Alabama*, 19 Wall. 635, 22 U. S. (L. ed.) 215.

<sup>84.</sup> *U. S. v. Detroit First Nat. Bank*, 234 U. S. 245, 34 S. Ct. 846, 58 U. S. (L. ed.) 1298; *Thompson v. Thompson*, 218 U. S. 611, 31 S. Ct. 111, 54 U. S. (L. ed.) 1180; *Garzot v. Rios De Rubio*, 209 U. S. 283, 28 S. Ct. 548, 52 U. S. (L. ed.) 794; *U. S. v. Rossi*, (C. C. A.) 133 Fed. 380; *Haymes v. Brown*, 132 Fed. 525; *In re Fixen*, (C. C. A.) 102 Fed. 298; *The Samuel E. Spring*, 27 Fed. 766.

<sup>85.</sup> *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 340, 17 S. Ct. 540, 41 U. S. (L. ed.) 1007.

<sup>86.</sup> *Letter Carrier Cases*, 27 Ct. Cl. 259.

<sup>87.</sup> *The Samuel E. Spring*, 27 Fed. 766.

<sup>88.</sup> *Harless v. U. S.*, (C. C. A.) 88 Fed. 102; *Glover v. U. S.*, 164 U. S. 298, 17 S. Ct. 95, 41 U. S. (L. ed.) 440, where the court said: "We cannot adopt a theory of construction which substantially asserts that the half is equal to the whole;" *Sioux City, etc., R. Co. v. U. S.*, 159 U. S. 360, 16 S. Ct. 17, 40 U. S. (L. ed.) 177, where the court, construing a railroad land grant, said: "We cannot suppose that Congress intended that the railroad company should have the benefit of more land than it earned;" *Murdock v. Memphis*, 20 Wall. 628, 22 U. S. (L. ed.) 429, where Justice Miller declared it "impossible to believe that Congress intended \* \* \* that every case tried in any state court, from that of a justice



absurdity avoided by construction is the judgment mentioned by Puffendorf that the Bolognian law which exacted that "whoever drew blood in the streets should be punished with the utmost severity" did not extend

of the peace to the highest court of the state, may be brought to this court for final decision on all the points involved in it;" *Fleckner v. U. S. Bank*, 8 Wheat. 351, 5 U. S. (L. ed.) 631, where the court said: "It would be absurd to suppose that it [Congress] meant to create a bank without any powers to carry on the usual business of a bank;" *Schooner Paulina's Cargo v. U. S.*, 7 Cranch 68, 3 U. S. (L. ed.) 266, where the court said: "The legislature can scarcely be suspected of making a solemn regulation which, in terms, forbids its officers to grant a clearance to a vessel, which vessel is by the same sentence confiscated;" *U. S. v. Hogg*, (C. C. A.) 112 Fed. 912, where the court said: "To impute to the revisers an intent to prevent a sale under a levy made by virtue of a live execution, simply because the levy was made upon the last day when it could be lawfully made, would be to assume that they entertained a most unreasonable and absurd purpose. Such consequences should not be regarded as within the legislative intention, if any more reasonable view can be taken of the provision;" *In re Baudouine*, 96 Fed. 540, where, construing a provision of the Bankruptcy Act of 1898, the court said: "It would be absurd for the law to deny a discharge for concealment of assets, and then refuse to take them when made known;" *Badaracco v. Cerf*, (C. C. A.) 53 Fed. 172, where the court said that unless its construction therein of the Circuit Court of Appeals Act of 1891 were adopted "we would, following the contention of counsel for the plaintiff in error, have the absurd result that the judgments of the Supreme Courts of the territories could be appealed to the Circuit Courts of Appeals in all cases wherein the amount in controversy does not exceed one thousand dollars, but in all cases wherein the amount in controversy exceeds that sum, no appeal could be taken. The absurdity of the result is the strongest possible argument against the correctness of such a construction of the statute;" *U. S. v. Voorhees*, 9 Fed. 144, a criminal case, where the court said: "It cannot be supposed that the legislature intended to require more proof against the abettor than was required against the principal;" *Belloco, etc., Co.'s Case*, 13 Ct. Cl. 198, where a statute authorized the government to move for a new trial in the Court of Claims "within two years next after the final disposition of a claim, and it was held that the court acquired jurisdiction of a motion filed within the two years, and could hear and determine it after the lapse of that period, the court

saying: "To impose on the court an obligation to hear and determine a motion, and, at the same time, allow the motion to be filed on a day or at an hour when it would be clearly impossible to hear and determine it within the two years, would be too patent an inconsistency to be imputed to the legislative authority;" *Converse v. U. S.*, 26 Ct. Cl. 10, where the court said: "The literal import of the language of the statute is that although a court be not opened and no judge be present, nevertheless it may proceed to the transaction of judicial business, and that if it does so, the clerk will be entitled to his *per diem*. This proposition is, on its face, an absurdity so palpable that it cannot be ascribed to the legislative intent." To the same effect see *In re Chapman*, 166 U. S. 667, 17 S. Ct. 677, 41 U. S. (L. ed.) 1154; *U. S. v. Oregon, etc., R. Co.*, 164 U. S. 540, 17 S. Ct. 165, 41 U. S. (L. ed.) 541; *Oates v. Montgomery First Nat. Bank*, 100 U. S. 244, 25 U. S. (L. ed.) 580; *Kohlsaat v. Murphy*, 96 U. S. 160, 24 U. S. (L. ed.) 844; *Heydenfeldt v. Daney Gold, etc., Min. Co.*, 93 U. S. 638, 23 U. S. (L. ed.) 995; *Butz v. Muscatine*, 8 Wall. 581, 19 U. S. (L. ed.) 490; *U. S. v. Hartwell*, 6 Wall. 396, 18 U. S. (L. ed.) 830; *U. S. v. Walker*, 22 How. 314, 16 U. S. (L. ed.) 382; *Wilson v. Mason*, 1 Cranch 102, 2 U. S. (L. ed.) 30; *Wells v. Jersey City*, 207 Fed. 871; *Mitchell v. U. S.*, (C. C. A.) 196 Fed. 874; *Hills v. F. D. McKinniss Co.*, 188 Fed. 1012; *U. S. v. Oregon, etc., R. Co.*, 186 Fed. 861; *John J. Seamon Co. v. U. S.*, (C. C. A.) 182 Fed. 573; *U. S. v. Dillin*, (C. C. A.) 168 Fed. 813; *Cumberland, etc., Tel. Co. v. Kelly*, (C. C. A.) 160 Fed. 316; *In re Neely*, 134 Fed. 667; *U. S. v. Blendaur*, (C. C. A.) 128 Fed. 910; *Pabst Brewing Co. v. Crenshaw*, 120 Fed. 144, *affirmed* 198 U. S. 17, 25 S. Ct. 552, 49 U. S. (L. ed.) 925; *Rigney v. Plaster*, 88 Fed. 688; *U. S. v. Hogg*, 111 Fed. 294; *In re Moore*, 111 Fed. 149; *Scott v. Latimer*, (C. C. A.) 89 Fed. 843; *U. S. v. Gay*, (C. C. A.) 95 Fed. 231; *Henderson v. U. S.*, (C. C. A.) 66 Fed. 56; *Davis v. Bohle*, (C. C. A.) 92 Fed. 328; *Budd v. Budd*, 59 Fed. 738; *In re Sievers*, 91 Fed. 369; *U. S. v. Kentucky River Mills*, 45 Fed. 275; *U. S. v. Sapinkow*, 90 Fed. 659; *Lee Kan v. U. S.*, (C. C. A.) 62 Fed. 919; *Thurber v. Miller*, (C. C. A.) 67 Fed. 378; *Chinese Merchant Case*, 13 Fed. 610; *Chinese Laborers' Case*, 13 Fed. 294; *In re Ah Kee*, 22 Fed. 519; *U. S. v. Scroggins, Hempst.* 480, 27 Fed. Cas. No. 16,243; *In re Stover*, 1 Curt. 93, 23 Fed. Cas. No. 13,506; 20 Op. Atty.-Gen. 89; 21 Op. Atty.-Gen. 23.

to the surgeon who opened the vein of a person that fell down in the street in a fit. Another is a ruling cited by Plowden that the statute of 1 Edward II. which enacted that a prisoner who broke prison should be guilty of felony did not extend to a prisoner who broke out when the prison was on fire, "for he is not to be hanged because he would not stay to be burnt." Those instances were cited in what is perhaps the leading American case exemplifying the rule that "all laws should receive a sensible construction," where in a federal statute punishing any person who "shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same," was held inapplicable to an officer who temporarily detained the mail by the arrest of its carrier upon a bench warrant issued by a state court of competent jurisdiction upon an indictment found therein for murder.<sup>89</sup> In another case to which the courts frequently refer, it was held, in construction of the Chinese Restriction Act of 1882, as amended by an act of 1884, that the act did not apply to Chinese merchants already domiciled in the United States who, having left the country for temporary purposes, *animo revertendi*, sought to re-enter it on their return to their business and their homes, and that a sensible construction of the statute removed such merchants from the predicament of persons who, in the language of the act, "shall be about to come to the United States."<sup>90</sup> Where a statute authorized municipal aid to a railroad company upon the approval of the "inhabitants" of a town and a majority vote at an election, to require a vote of the "inhabitants" in the broadest sense of the word, including all sexes, ages, and conditions, "would be an absurdity," said the court; and the act was construed as requiring the approval of the inhabitants to be indicated by the vote of a majority of the legal voters.<sup>91</sup> In one case "impeachment of legislative wisdom" was something from which the court shrank with horror and declined to "assume that the legislature would be guilty of the monstrous absurdity of requiring the application of the complicated machinery of equitable remedies when a simple remedy at law would suffice."<sup>92</sup> A construction which would deny to the United States Circuit Court of Appeals appellate jurisdiction of judgments of conviction for infamous crimes in the Indian Territory Court of Appeals, but authorize such jurisdiction to be exercised in cases of conviction of crimes not infamous, was avoided because it savored of absurdity.<sup>93</sup> "Any construction which implies that the legis-

89. *U. S. v. Kirby*, 7 Wall. 482, 19 U. S. (L. ed.) 278.

"It would have been absurd to hold that in order to secure the speedy transportation of the mails, immunity from punishment for a crime was given to the mail carrier," said Justice Field, speaking of the case above cited. *Chinese Merchant Case*, 13 Fed. 610.

90. *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 S. Ct. 517, 36 U. S. (L. ed.) 340, the court holding that "the general terms used should be limited to those persons to whom Congress manifestly intended to apply them, and they would evidently be those who are about to come to the United States for the first time," etc. See also *Tsoi Sim v. U. S.*, (C. C. A.) 116 Fed. 920.

91. *Walnut v. Wade*, 103 U. S. 683, 26 U. S. (L. ed.) 526.

92. *Flour City Nat. Bank v. Wechselberg*, 45 Fed. 547, where the court was construing a Wisconsin statute regulating the enforcement of personal liability of stockholders of corporations, and it was held that, under the circumstances, an action at law would lie. See also *U. S. v. Hopkins*, 199 Fed. 649.

93. *Harless v. U. S.*, (C. C. A.) 88 Fed. 97, holding that the Circuit Court of Appeals had jurisdiction to review a judgment of conviction for an infamous crime. The case was decided under the provisions of the act of March 1, 1895, creating a Court of Appeals for the Indian territory, and is to be distinguished from *Folsom*

lature was ignorant of the meaning of the language it employed " also belongs to the category of constructions to be avoided, " if it may be." <sup>94</sup>

**72. *Lex non intendit aliquid impossibile.***—*Lex non intendit aliquid impossibile* is a familiar maxim which was applied in several cases construing the provisions of the Chinese Exclusion Act of 1882, and it was held that the requirement of a certificate, as prescribed therein, to be produced by Chinese laborers as a condition to their right to re-enter this country did not apply to certain Chinese laborers whose rights in that behalf were saved by a prior treaty, since it was physically impossible for them to perform such condition, and the avowed intention of Congress was faithfully to execute the treaty. <sup>95</sup> A statute making bills of lading negotiable by indorsement and delivery " in the same manner as bills of exchange and promissory notes " was not regarded as charging the negotiation with all the consequences which usually attend or follow the negotiation of bills and notes. " Some of these consequences," said the court, " would be very strange, if not impossible; such as the liability of indorsers, the duty of demand *ad diem*, notice of nondelivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement." <sup>96</sup>

**73. *Clear intention controlling.***—Few cases have arisen where courts have been unable, by employing accepted canons of interpretation, especially by closely scrutinizing the context of the statute, to escape from a construction approximating absurdity. It is, however, an adamant rule of interpretation that the intention of the legislature is to be gathered from the words of the statute; <sup>97</sup> and where the phraseology admits of no doubt, the definitely expressed meaning must be recognized, notwithstanding the statute as thus construed may be deemed irrational legislation. <sup>98</sup> For example, it was held by a bare majority of the United States Supreme Court that under the provisions of the Bankruptcy Act of 1898, payments in money made by an insolvent debtor to a creditor, the debtor not intending to give a preference, and the creditor not having reasonable cause to believe a preference was intended, did nevertheless constitute a preference within the meaning of the act and were required to be surrendered as a condition of proving the balance of the debt or other claims of the creditor; although it was vigorously contended on behalf of the creditor that such

v. U. S., 160 U. S. 127, 16 S. Ct. 222, 40 U. S. (L. ed.) 363, cited *infra*, § 73, which was based upon the Circuit Court of Appeals Act of 1891.

<sup>94.</sup> *Montclair v. Ramsdell*, 107 U. S. 147, 2 S. Ct. 391, 27 U. S. (L. ed.) 431, where the authority of the township of Montclair to issue certain bonds was upheld, the court saying: " We should assume that the legislature was aware when the act . . . was passed that a previous statute had expressly excepted Bloomfield township from all of its provisions. When, therefore, they declared that the new township [Montclair] should come under the operation of any act from which Bloomfield had been specially excepted by any proviso thereof, the established canons of statutory construction

require us to presume that the legislature understood the full legal effect of such a declaration. The purpose manifestly was to relieve the new township from the disabilities imposed by the bonding act upon the township of Bloomfield as then established." To the same effect see U. S. v. Forty Barrels, etc., of Coca Cola, (C. C. A.) 215 Fed. 535, affirming 191 Fed. 431.

<sup>95.</sup> *Chew Heong v. U. S.*, 112 U. S. 536, 5 S. Ct. 255, 28 U. S. (L. ed.) 770; *In re Leong Yick Dew*, 19 Fed. 490; *In re Ah Kee*, 22 Fed. 519.

<sup>96.</sup> *Shaw v. North Pennsylvania Co.*, 101 U. S. 557, 25 U. S. (L. ed.) 892.

<sup>97.</sup> See §§ 26 and 27.

<sup>98.</sup> See U. S. v. 1,960 Bags Coffee, 8 Cranch 404, 3 U. S. (L. ed.) 602; *Horraz v. U. S.*, 167 Fed. 526.

a construction was manifestly absurd.<sup>99</sup> The same court also held that the act of Congress of 1891 creating the Circuit Courts of Appeals conferred no jurisdiction upon the Circuit Court of Appeals for the Eighth Circuit over judgments of the Supreme Court of the Territory of New Mexico in capital cases or in cases of infamous crimes, although by construction of the same act it was conceded that such appellate jurisdiction was conferred in cases of minor offenses.<sup>1</sup> The case was one where the court considered that it was "not justified in refusing to follow the plain meaning of the statute by reason of the apparently absurd result caused thereby."<sup>2</sup>

99. *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 451, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171, where Mr. Justice McKenna, speaking for the majority of the court, said: "It is but one rule of construction that the consequences of a statute may be considered in construing its meaning. The rule may be counterpoised by other rules; it may be prevailed over by that one which requires the intent of the statute to be looked for in its words. Where they are clear and involve no absurdity, they are its only expositors. It is not contended that the provisions which we are considering are not clearly expressed and adequate to convey a definite meaning. It is true, it is urged that the word 'preference' imports the conscious participation of the creditor and debtor in the same intent. We cannot concur in that view, and we are brought to the consequences of the construction which we have put upon section 60. It is denominated absurd by appellants. What is the test of absurdity? The contradiction of reason, it may be said, and to make an immediate application to legislation, the contradiction of the reason which grows out of the subject-matter of the legislation and the purpose of the legislators. But all legislation is not simple nor its consequences obvious or to be controlled, even if obvious. Whether there should be any legislation at all and its extent and form may be matters of dispute. Its consequences may be viewed with favor or with alarm; some regretted but accepted as inevitable — accepted as the shadow side of the good. In such situation it is for the legislature to determine, and it is very certain that the judiciary should not refuse to execute that determination from its view of some consequence which (to use the thought and nearly the words of Chief Justice Marshall) may have been contemplated and appreciated when the act was passed, and considered as over-balanced by the particular advantages the act was calculated to produce. *U. S. v. Fisher*, 2 Cranch 389, 2 U. S. (L. ed.) 304. Therefore the sound rule expressed in *Sturges v. Crowninshield*, 4 Wheat. 202, 4 U. S. (L. ed.) 529: 'It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an in-

strument expressly provide shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.'" See also *In re Fixen*, (C. C. A.) 102 Fed. 295.

1. *Folsom v. U. S.*, 160 U. S. 127, 16 S. Ct. 222, 40 U. S. (L. ed.) 363, where the court said: "It is said that this involves the absurdity that convictions for minor offenses are reviewable on a second appeal, while convictions for capital and infamous crimes are not. Doubtless in some cases where the language of a statute leads to an absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it modifying the meaning of the words so as to carry out the real intention, but where the intention is plain it is the duty of the court to expound the statute as it stands. As far as Congress went in conferring this right to a second appeal, the intention is clear and the language used unambiguous. The objection really is that Congress should have gone farther and given by this act a second review in this court in cases of convictions of capital and infamous crimes in the territories. It may be that there was an oversight in that particular, but if there were, we certainly cannot supply it."

2. *Harless v. U. S.*, (C. C. A.) 88 Fed. 102, where the court used the language quoted in the text in speaking of *Folsom v. U. S.*, 160 U. S. 127, 16 S. Ct. 222, 40 U. S. (L. ed.) 363, cited in the preceding note. The foregoing case of *Harless v. U. S.*, (C. C. A.) 88 Fed. 102, is described *supra*, § 71, and should be consulted in this connection.

*Hardship or Injustice*

**74. Language susceptible of interpretation.**—When endeavoring to ascertain the intention of the legislature courts are justified, under some circumstances, in giving weight to considerations of injustice or hardship that may arise from a particular construction of a statute.<sup>3</sup> The terms employed by the legislature are not to receive an interpretation which conflicts with acknowledged principles of justice if another sense, consonant with those principles, can be given to them.<sup>4</sup> "It is a universal rule in the exposition of statutes," said Mr. Justice Davis, "that the intent of the law, if it can be clearly ascertained, shall prevail over the letter, and

**3.** *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 37, 15 S. Ct. 508, 39 U. S. (L. ed.) 601; *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 S. Ct. 517, 36 U. S. (L. ed.) 340; *Chew Heong v. U. S.*, 112 U. S. 555, 5 S. Ct. 255, 28 U. S. (L. ed.) 770; *Heydenfeldt v. Daney Gold, etc., Min. Co.*, 93 U. S. 638, 23 U. S. (L. ed.) 995; *Ryan v. Carter*, 93 U. S. 83, 23 U. S. (L. ed.) 807; *Broughton v. Pensacola*, 93 U. S. 270, 23 U. S. (L. ed.) 896; *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 35, 23 U. S. (L. ed.) 196; *Carlisle v. U. S.*, 16 Wall. 153, 21 U. S. (L. ed.) 426; *Butz v. Muscatine*, 8 Wall. 581, 19 U. S. (L. ed.) 490; *Pacific Ins. Co. v. Soule*, 7 Wall. 442, 19 U. S. (L. ed.) 95; *Marriott v. Brune*, 9 How. 634, 13 U. S. (L. ed.) 282; *Carroll v. Carroll*, 16 How. 282, 14 U. S. (L. ed.) 936; *Wilson v. Rousseau*, 4 How. 680, 11 U. S. (L. ed.) 1141; *Binney v. Chesapeake, etc., Canal Co.*, 8 Pet. 212, 8 U. S. (L. ed.) 917; *U. S. v. Heth*, 3 Cranch 399, 2 U. S. (L. ed.) 479; *Adams v. Woods*, 2 Cranch 342, 2 U. S. (L. ed.) 297; *In re Halsey Electric Generator Co.*, 175 Fed. 825; *Cumberland, etc., Tel. Co. v. Kelly*, (C. C. A.) 160 Fed. 316; *U. S. v. Twenty Boxes of Corn Liquor*, 123 Fed. 135, *affirmed* (C. C. A.) 133 Fed. 910; *U. S. v. Lee Yung*, 63 Fed. 522; *Lee Kan v. U. S.*, (C. C. A.) 62 Fed. 914; *Campbellsville Lumber Co. v. Hubbert*, (C. C. A.) 112 Fed. 723; *McClellan v. Pyeatt*, (C. C. A.) 66 Fed. 845; *Durousseau v. U. S.*, 6 Cranch 323, 3 U. S. (L. ed.) 232; *Partee v. Thomas*, 27 Fed. 429. See also *Folsom v. U. S.*, 160 U. S. 127, 16 S. Ct. 222, 40 U. S. (L. ed.) 363; *Knowlton v. Moore*, 178 U. S. 65, 20 S. Ct. 747, 44 U. S. (L. ed.) 969; *In re Chapman*, 166 U. S. 667, 17 S. Ct. 677, 41 U. S. (L. ed.) 1154.

**4.** *Hepburn v. Griswold*, 8 Wall. 607, 19 U. S. (L. ed.) 513; *Chinese Laborers' Case*, 13 Fed. 294; *U. S. v. Stever*, 222 U. S. 167, 32 S. Ct. 51, 56 U. S. (L. ed.) 145; *Louisville, etc., R. Co. v. Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297; *Jacobson v. Massachusetts*, 197 U. S. 11, 25 S. Ct. 358, 49 U. S. (L. ed.) 643; *U. S. v. Atlantic Coast Line Co.*, 224 Fed. 160; *Northern Pac. R. Co. v. U. S.*, (C. C. A.) 213 Fed. 162; *In re T. H.*

*Bunch Co.*, 180 Fed. 519; *Rodgers v. U. S.*, (C. C. A.) 152 Fed. 346; *Cunard Steamship Co. v. Stranahan*, 134 Fed. 318; *Wolff v. Choctaw, etc., R. Co.*, 133 Fed. 601; *Hedden v. Iselin*, 31 Fed. 266.

"The statute must be clear and unequivocal which imposes upon a court the duty of punishing one man for the fault of another." *U. S. v. Two Barrels Whisky*, (C. C. A.) 96 Fed. 481.

"We cannot suppose the legislature intended to compel the payment of taxes twice," said the court in *McHenry v. Alford*, 168 U. S. 672, 18 S. Ct. 242, 42 U. S. (L. ed.) 614, where it was held that a state statute providing for the payment by a corporation of all taxes in arrear under a prior act as a condition for the acceptance of the act under construction, implied that such a payment should also be in full for all other claims for taxes assessed for the same years.

A construction of an act of Congress providing compensation for clerks of courts which "results in reducing compensation as labor increases" was avoided in *Butler v. U. S.*, 23 Ct. Cl. 162.

"It is not in matters of doubt to be admitted that the legislature requires duties and services from a public officer, and yet intends to take from him the compensation which it has itself deemed a fit compensation therefor under like circumstances." *Per Justice Story*, in *U. S. v. Bassett*, 2 Story 402, 24 Fed. Cas. No. 14,539.

"A law that would require the citizen to appear in his own proper person to pay the tax on his land, and that denied to his agents and his creditors the right to pay such tax, would be such a departure from the known purpose and object of revenue laws, such an infringement upon the well-established rights of the citizen, and so opposed to the plain and obvious dictates of reason and justice, that nothing but the most irresistible language, affirming the one proposition and expressly excluding the other, would induce a court of justice to suppose a design on the part of the law-making power to effect such objects." *Schenck v. Peay*, 21 Fed. Cas. No. 12,451.

this is especially true where the precise words, if construed in their ordinary sense, would lead to manifest injustice." <sup>5</sup> And "where it can be shown that a government has once adopted a certain rule of justice for its conduct, it is fair to infer that in legislating afterwards upon the same subject, it intended to pursue the same rule, unless the contrary shall be clearly expressed." <sup>6</sup> A state statute providing for the levy of a privilege tax upon sleeping-cars run wholly within the state was limited by construction to a single privilege tax for the state, since if each county through which the cars ran were permitted to levy such a tax, according to the construction contended for, it would be "so preposterous, unjust, and oppressive" that the court could not sanction the construction "unless forced to it by a necessity that knows no denial." <sup>7</sup> An act of Congress literally authorizing certain suits to be brought "in any court of the United States," thereby requiring a defendant to leave his home and travel thousands of miles, it may be, to defend the suit, was construed, in view of other statutory provisions, not to confer jurisdiction except on courts of the district of which the defendant was an inhabitant. <sup>8</sup> In the construction of a highly penal statute courts are disposed to give effect to any fair doubt as to the intention to punish an act without allegation or proof of criminal intent, where such a provision would be repugnant to the sense of justice. <sup>9</sup>

**75. Language plain.**—But where the language of the statute is clear and unambiguous and the intention plain, it is the duty of the court to expound the statute as it stands, even if the consequence is a hardship or injustice. <sup>10</sup> "With the hardship of the law," in a plain case, "the court has nothing to do." <sup>11</sup> The act of dumping mud into the tidal waters

5. *Lionberger v. Rouse*, 9 Wall. 475, 19 U. S. (L. ed.) 721.

"Exceptions may be presumed, or words omitted or supplied when it is necessary to accomplish the obvious intent of the lawmaker and to prevent injustice or oppression." *Davis v. Bohle*, (C. C. A.) 92 Fed. 328.

6. *U. S. v. Heth*, 3 Cranch 409, 2 U. S. (L. ed.) 479.

7. *Gibson County v. Pullman Southern Car Co.*, 42 Fed. 578.

8. *U. S. v. Crawford*, 47 Fed. 561, construing Rev. Stat. U. S., § 2103.

9. *U. S. v. Voorhees*, 9 Fed. 328.

10. *Ladew v. Tennessee Copper Co.*, 179 Fed. 245; *U. S. v. Voorhees*, 9 Fed. 144; *Folsom v. U. S.*, 160 U. S. 127, 16 S. Ct. 222, 40 U. S. (L. ed.) 363; *U. S. v. Alger*, 152 U. S. 397, 14 S. Ct. 635, 38 U. S. (L. ed.) 488; *Thornley v. U. S.*, 113 U. S. 315, 5 S. Ct. 491, 28 U. S. (L. ed.) 999; *U. S. v. 1,960 Bags Coffee*, 8 Cranch 405, 3 U. S. (L. ed.) 602; *Priestman v. U. S.*, 4 Dall. 30, 1 U. S. (L. ed.) 727, note; *Gray v. U. S.*, (C. C. A.) 113 Fed. 216; *In re Rouse*, (C. C. A.) 91 Fed. 101; *In re Fixen*, (C. C. A.) 102 Fed. 298; *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 35 Fed. 138; *U. S. v. Webber*, 1 Gall. 396, 28 Fed. Cas. No. 16,656; 21 Op. Atty.-Gen. 292; 20 Op. Atty.-Gen. 672; 21 Op. Atty.-418.

"It is not for the courts to tamper with the words of a statute, or by a strained construction of legislative enactments, the language of which is clear and explicit, to accomplish results not contemplated by Congress." *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 37, 15 S. Ct. 508, 39 U. S. (L. ed.) 601.

"The statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law." *St. Louis, etc., R. Co. v. Taylor*, 210 U. S. 281, 28 S. Ct. 616, 52 U. S. (L. ed.) 1061.

11. *U. S. v. The Cuba*, 2 Hughes 490, 25 Fed. Cas. No. 14,898.

"Except in the scarcely supposable case where a statute sets at naught the plainest precepts of morality and social obligation, courts must give effect to the clearly ascertained legislative intent, if not repugnant to the fundamental law ordained in the Constitution." *Hepburn v. Griswold*, 8 Wall. 607, 19 U. S. (L. ed.) 513.

"We are not at liberty to reject words which are sensible in the place where they

of the Hudson river at a point sixty miles above New York was held to be embraced in the condemnation of a federal statute prohibiting the discharge of mud "in the tidal waters of the harbor of New York, or its adjacent tributary waters," despite an argument as to the harshness of a statute containing so comprehensive a condemnation of acts the doing of which could, it was urged, work no harm to the harbor. The court said it might well be that Congress was satisfied that the only way to preserve the harbor and waterways was by legislation of a drastic character.<sup>12</sup> And in another case where it was urged in vain that explicit provisions of a statute should be controlled by the apparent injustice of a literal construction the court said: "Different minds may entertain different views of the policy of the same statute and of the equity or hardship of its application to a given case coming within its terms. In the opinion of one judge the hardship which would result from the operation of the law in a certain case might be so great as to lead him to the conclusion that the legislature could not have intended the law to apply to that case; while another judge might hold that a precisely similar case came clearly within the operation of the law, either on account of his failure to recognize any such hardship, or because, recognizing the hardship, he might still be of opinion that the legislature intended the law to be uniform in its operation."<sup>13</sup> If a statute of limitations operates with apparent hardship on a creditor in some cases, courts cannot add to the statute an exception in his favor which the legislature has not seen fit to provide.<sup>14</sup>

### *Distinction without Difference*

**76. In general.**—When the legislature has clearly laid down a rule for one class of cases, it is not readily to be supposed that in its choice of words and phrases, or in the enactment of various provisions in the same act, it has prescribed a different rule for another class of cases within the same reason as the first; a construction which will avoid such senseless discrimination should be adopted where the meaning of the statute as evidenced by its language is debatable. This is simply the general principle that all statutes should receive a reasonable construction stated in more concrete form, and it is applied with great persuasiveness in very many cases.<sup>15</sup> Courts should strive to avoid imputation of a design to distinguish between

occur, merely because they may be thought in some cases to impose a hardship." *Per* Justice Story, in *Pennock v. Dialogue*, 2 Pet. 21, 7 U. S. (L. ed.) 327.

In *U. S. v. Clark*, 46 Fed. 637, where it was held that the federal statute punishing the crime of murder, and not the *Oregon* statute, was in force in *Alaska*, the court said: "However harsh it may seem to apply to *Alaska*, with its large population of uncivilized natives, the law of 1790 making murder under all circumstances a capital crime; however strongly the punishments for crime, such as murder, rape, arson, piracy, and the like, contrast with the more humane punitive legislation of states and territories—it is difficult to see wherein the United States law is locally inapplicable to this district."

"If the true construction" of a statute "has been followed with harsh conse-

quences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with Congress, and it is the province of the courts to enforce, not to make, the laws." *U. S. v. Detroit First Nat. Bank*, 234 U. S. 245, 34 S. Ct. 846, 58 U. S. (L. ed.) 1298.

12. *U. S. v. The Sadie*, 41 Fed. 396.

13. *In re Stevenson*, 94 Fed. 118.

14. *Amy v. Watertown*, 130 U. S. 320, 9 S. Ct. 537, 32 U. S. (L. ed.) 953, where a creditor's claim was held barred by the statute although the debtor had evaded service of process for the express purpose of securing the benefit of the statute.

15. *Plummer v. U. S.*, 224 U. S. 137, 32 S. Ct. 467, 56 U. S. (L. ed.) 697; *Hertz v. Woodman*, 218 U. S. 205, 30 S. Ct. 621, 54 U. S. (L. ed.) 1001; *Reagan v. U. S.*, 182 U. S. 425, 21 S. Ct. 842, 45 U. S. (L.

cases upon "a course of reasoning too unsubstantial and too finely drawn for the regulation of human action."<sup>16</sup> Thus, Chief Justice Marshall found insuperable difficulty in attributing to Congress an intention to confer on the Supreme Court appellate jurisdiction over judgments rendered by a district court sitting as a district court, and over judgments rendered by a circuit court, as it had clearly done, and at the same time to deny such jurisdiction over judgments rendered by a district court exercising circuit court powers, it being demonstrated that Congress made no distinction in the judgments from their nature and character.<sup>17</sup> The court refused to believe that Congress intended to deny to federal revenue officers when sued in state courts for amounts exceeding five hundred dollars the benefit of provisions for removal of such cases to the federal courts, where the right of removal was confessedly accorded to them when sued for less than that sum.<sup>18</sup> And where a fine or forfeiture under a penal statute may be recovered by an action of debt as well as by information, to declare that an information was barred while an action of debt was left without limitation would convict the legislature of unaccountable capriciousness on the subject, not to be presumed.<sup>19</sup> So it was deemed inconceivable that the legislature intended a distinction in a remedial statute whereby an unacknowledged deed or one improperly acknowledged, if recorded the required length of time, should be admissible in evidence by a certified copy of the record, without proof of the execution of the original instrument, while an original deed properly acknowledged and recorded for the same time should not be admissible without proof of its execution.<sup>20</sup>

ed.) 1162; *Blagge v. Balch*, 162 U. S. 461, 16 S. Ct. 853, 40 U. S. (L. ed.) 1032; *Talbott v. Silver Bow County*, 139 U. S. 443, 11 S. Ct. 594, 35 U. S. (L. ed.) 210; *Rice v. U. S.*, 122 U. S. 611, 7 S. Ct. 1377, 30 U. S. (L. ed.) 793, *affirming* 21 Ct. Cl. 413; *Ryan v. Carter*, 93 U. S. 83, 23 U. S. (L. ed.) 807; *U. S. v. Anderson*, 9 Wall. 71, 19 U. S. (L. ed.) 615; *Moore v. American Transp. Co.*, 24 How. 36, 16 U. S. (L. ed.) 674; *U. S. v. Gear*, 3 How. 130, 11 U. S. (L. ed.) 523; *Carroll v. Carroll*, 16 How. 275, 14 U. S. (L. ed.) 936; *U. S. v. Babbitt*, 1 Black 55, 17 U. S. (L. ed.) 94; *U. S. v. North Carolina State Bank*, 6 Pet. 38, 8 U. S. (L. ed.) 308; *Wayman v. Southard*, 10 Wheat. 29, 6 U. S. (L. ed.) 253; *Faw v. Marsteller*, 2 Cranch 25, 2 U. S. (L. ed.) 191; *Wilson v. Mason*, 1 Cranch 102, 2 U. S. (L. ed.) 30; *Thurber v. Miller*, (C. C. A.) 67 Fed. 378; *Partee v. Thomas*, 27 Fed. 429.

In the Interstate Commerce Act of 1887, 24 Stat. at L. 379, c. 104, § 22, provided that nothing in the act should apply to "the issuance of mileage, excursion or commutation tickets," thus allowing a carrier to make reduced rates on such tickets. In construing that provision Judge Jackson said: "Section 22 should be regarded as a legislative declaration that not merely mileage and excursion, but passenger tickets generally, based upon the commutation principle of conceding a reasonable deduction from regular local rates in consideration of the frequency or quantity of

the traffic, if reasonable and just in their charges, did not come within the evils so to be remedied. To contend that a 'party-rate' ticket to ten or more persons traveling together on a single ticket at reduced rates per mile does not come within the reason or principle of commutation tickets, which are generally issued for only one way, because generally needed for only one direction, while admitting, as counsel for complainant does, that a roundtrip ticket for ten or more persons, traveling together at the same reduced rate, would be considered as coming within the meaning of a commutation ticket as explained by complainant's expert witnesses, is drawing a distinction without any substantial difference. It rests upon no reasoning, involves no public policy or convenience, and is altogether too narrow and refined, to suppose that Congress intended to make any such nice discriminations in the language employed to express, in a general way, what the law was intended not to prevent." *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 43 Fed. 45.

16. *Per* Chief Justice Marshall, in *Faw v. Marsteller*, 2 Cranch 25, 2 U. S. (L. ed.) 191.

17. *Durousseau v. U. S.*, 6 Cranch 307, 3 U. S. (L. ed.) 232.

18. *Venable v. Richards*, 105 U. S. 636, 26 U. S. (L. ed.) 1196.

19. *Adams v. Woods*, 2 Cranch 341, 2 U. S. (L. ed.) 297.

20. *Rigney v. Plaster*, 88 Fed. 686.



**77. Criminal case.**—The presumption that the lawmaker has not drawn distinctions where there is no rational difference may be applied, but perhaps with caution, in criminal cases. The words “high seas” in an act of Congress providing for the punishment of certain assaults committed on board any vessel “upon the high seas” or “in any river, haven, basin, or bay within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular state” were applied to the open unclosed waters of the Great Lakes between which the Detroit river is a connecting stream. “If they be considered as not thus applying,” said Mr. Justice Field, “it is difficult to give any force to the rest of the statute without supposing that Congress intended to provide against violence on board of vessels in navigable rivers, havens, creeks, basins, and bays, without the jurisdiction of any particular state, and intentionally omitted the much more important provision for like violence and disturbance on vessels upon the Great Lakes. All vessels in any navigable river, haven, creek, basin, or bay of the lakes, whether within or without the jurisdiction of any particular state, would sometimes find their way upon the waters of the lakes, and it is not a reasonable inference that Congress intended that the law should apply to offenses only on a limited portion of the route over which the vessels were expected to pass, and that no provision should be made for such offenses over a greater distance on the lakes.”<sup>21</sup> On the other hand, an act of Congress punishing any person who should “commit manslaughter on the high seas” was held not to extend to the tidal waters of a river about half a mile wide, and in the interior of a foreign country; and replying to the suggestion of “the extreme improbability that Congress could have intended to make those differences with respect to place which their words import” Chief Justice Marshall said: “We admit that it is extremely improbable. But probability is not a guide which a court, in construing a penal statute, can safely make. We can conceive no reason why other crimes which are not comprehended in this act should not be punished. But Congress has not made them punishable, and this court cannot enlarge the statute.”<sup>22</sup>

**78. Statute unambiguous.**—Where by language perfectly clear the legislature has distinguished between two classes of cases, without any apparent reason, “it is sufficient to say that it has clearly done so.”<sup>23</sup> And “it is not for the courts to vindicate the wisdom of laws which it is their duty to administer” by departing from the plain language of the statute and speculating on probabilities of intention.<sup>24</sup> Thus, in construing a tariff act, Chief Justice Marshall said: “Where the legislature distinguishes between different objects, and in imposing a duty on them evidences a will to charge them in different situations, it is not for the court to beat down these distinctions on the allegation that they are capriciously made, and therefore to be disregarded. It is the duty of the court to discover the intention of the legislature, and to respect that intention.”<sup>25</sup> Though an act of Congress allowed longevity pay to retired officers of the army, retired officers

21. *U. S. v. Rodgers*, 150 U. S. 261, 14 S. Ct. 109, 37 U. S. (L. ed.) 1071, Justices Gray and Brown dissenting. To the same effect see *U. S. v. Salem*, 235 U. S. 237, 35 S. Ct. 51, 59 U. S. (L. ed.) 210.

22. *U. S. v. Wiltberger*, 5 Wheat. 105, 5 U. S. (L. ed.) 37.

23. *Thornley v. U. S.*, 113 U. S. 315, 5 S. Ct. 491, 28 U. S. (L. ed.) 999.

24. *In re Drake*, 114 Fed. 232; *Merchants' Ins. Co. v. Ritchie*, 5 Wall. 545, 18 U. S. (L. ed.) 540.

25. *Pennington v. Cox*, 2 Cranch 59, 2 U. S. (L. ed.) 199.

of the navy could not claim longevity pay under an act omitting them from the class entitled to it. "We are not called on to explain," said the court, "why Congress should apply one rule to the officers of the army and another to the officers of the navy."<sup>26</sup> And in a case where a state statute required all contracts made by cities "of the second class," so called, to be countersigned by the comptroller, while contracts made by cities "of the first class" were so to be countersigned only when made by the board of public works, it was held that an uncountersigned contract of a city of the second class, though not made by its board of public works, was invalid. While confessing its inability to understand why the legislature made the distinction in respect of the necessity of countersigning, "it is not our duty," said the court, "because we cannot perceive the reason, to say that the legislature had no reason."<sup>27</sup> Even a curative act, entitled on general principles to a liberal construction, which validated certain deeds proved "by one or more of the subscribing witnesses thereto, in any court of record, or before any judge of the superior courts of the state," was held not to impart validity to a deed proved only by the acknowledgment of the grantor; although it was conceded that the legislature probably intended otherwise.<sup>28</sup>

#### *Ultra Vires Operation*

**79. Extraterritorial effect.**—However general and comprehensive the phrases used in a statute may be, they should always be restricted in construction to places and persons within the authority and jurisdiction of the legislature.<sup>29</sup> "It is so unusual," said Chief Justice Marshall, "for a legislature to employ itself in framing rules which are to operate only on contracts made without their jurisdiction that courts can never be justified in putting such a construction on their words, if they admit of any other interpretation which is rational and not too much strained;" and accordingly an exception in a state statute of limitations in favor of transactions between parties "which are not residents within this province" was applied to dealings between a nonresident creditor and a resident debtor.<sup>30</sup> General words used in the patent laws are not construed to extend the

<sup>26</sup>. *Thornley v. U. S.*, 113 U. S. 315, 5 S. Ct. 491, 28 U. S. (L. ed.) 999.

<sup>27</sup>. *Superior v. Norton*, (C. C. A.) 63 Fed. 365, where the court continued: "The power was lodged with the legislature to make the distinction, and it is not within our province to give to the language employed a restricted meaning in the case of cities of the second class because the legislature failed to give the same power and impose the same restriction upon its exercise in the case of cities of the first class. We have no more right to restrict the language employed in the other case. We can only say, '*Ita scripta est*,' and give to the language employed its natural meaning."

<sup>28</sup>. *Denn v. Reid*, 10 Pet. 527, 9 U. S. (L. ed.) 519, where Justice McLean said: "We are unable to say why the benefits of this statute were given to those who held under deeds proved by the subscribing witnesses, and withheld from those whose deeds were proved by the acknowl-

edgment of the grantor. In most cases, if not in all, proof of acknowledgment would be deemed more satisfactory than by witnesses; but the legislature having made a distinction between the cases, whether it was intentional or not, reasonable or unreasonable, the court are bound by the clearly expressed language of the act."

<sup>29</sup>. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 29 S. Ct. 511, 53 U. S. (L. ed.) 826; *The Apollon*, 9 Wheat. 370, 6 U. S. (L. ed.) 111. See also *Young v. Alexandria Bank*, 4 Cranch 397, 2 U. S. (L. ed.) 655; *Suydam v. Broadnax*, 14 Pet. 67, 10 U. S. (L. ed.) 357.

<sup>30</sup>. *Bond v. Jay*, 7 Cranch 350, 3 U. S. (L. ed.) 367, where the court said: "The words 'which are not residents' refer, it is said, to both parties, plaintiff and defendant. They comprehend all the persons previously enumerated. Let this be conceded. Then read the exception as if the

patentee's right of property and exclusive use beyond the limits of the United States.<sup>31</sup> An act of Congress forbidding advances of wages to seamen is not applicable to the shipment of seamen in foreign ports.<sup>32</sup> The act of Congress which subjected to the operation of state laws original packages of intoxicating liquors transported into the state<sup>33</sup> was limited by construction to such goods as had been delivered to the consignee, since a contrary construction would give to the laws of the state extraterritorial operation.<sup>34</sup> And a state statute imposing personal liability on directors of a corporation who fail to perform certain acts must be presumed to require the acts to be done within the state, unless it is otherwise clearly provided.<sup>35</sup>

**80. Unconstitutionality.**—"No canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within and the other beyond the constitutional power of the lawmaking body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the legislature intended to act within the scope of its authority."<sup>36</sup> Accordingly a state statute must be interpreted so as, if possible, to make it consistent with the state and federal constitutions and with valid acts of Congress.<sup>37</sup> The principle has more than ordinary influence in cases where the federal courts are asked to overthrow revenue laws of a state.<sup>38</sup> And a state statute may be presumed to have been enacted in view of prior decisions of the United States Supreme Court prescribing constitutional limits for legislation on the precise subject of the statute.<sup>39</sup> Mr. Justice Story, speaking for the Supreme Court in an early case, said that if an act of Congress "admits of two interpretations, one of which brings it within and the other

word 'both' or 'all' were inserted, yet it will bear the same construction without as with either of those words, and the subject-matter of the law so clearly requires this interpretation that the court think it may be made."

31. *Brown v. Duchesne*, 19 How. 183, 15 U. S. (L. ed.) 595.

32. *The State of Maine*, 22 Fed. 734.

33. Act of August 8, 1890, 26 Stat. at L. 313, c. 728.

34. *Rhodes v. Iowa*, 170 U. S. 412, 18 S. Ct. 664, 42 U. S. (L. ed.) 1088.

35. *Tabor v. Commercial Nat. Bank*, (C. C. A.) 62 Fed. 383.

36. *Per* Mr. Justice Pitney, delivering the opinion of the court in *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 35 S. Ct. 99, 59 U. S. (L. ed.) 265.

"We must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, federal or state, unconstitutional and void, unless it be manifestly so." *Halter v. Nebraska*, 205 U. S. 34, 27 S. Ct. 419, 51 U. S. (L. ed.) 696.

See § 146 as to implied repeal of statute by constitution.

37. *Gray v. Taylor*, 227 U. S. 51, 33 S. Ct. 199, 57 U. S. (L. ed.) 413; *Knights Templars*, etc., *Life Indemnity Co. v. Jar-*

*man*, 187 U. S. 197, 23 S. Ct. 108, 47 U. S. (L. ed.) 139; *Presser v. Illinois*, 116 U. S. 269, 6 S. Ct. 580, 29 U. S. (L. ed.) 615; *Grenada County v. Brogden*, 112 U. S. 268, 5 S. Ct. 125, 28 U. S. (L. ed.) 704; *St. Louis Nat. Bank v. Papin*, 4 Dill. 32, 21 Fed. Cas. No. 12,239. See also *Callaway County v. Foster*, 93 U. S. 571, 23 U. S. (L. ed.) 911; *Loeb v. Columbia Tp.*, 179 U. S. 489, 21 S. Ct. 174, 45 U. S. (L. ed.) 280; *Murray v. Gibson*, 15 How. 423, 14 U. S. (L. ed.) 755; *Pabst Brewing Co. v. Crenshaw*, 120 Fed. 144, *affirmed* 198 U. S. 17, 25 S. Ct. 552, 49 U. S. (L. ed.) 925; *Crowther v. Fidelity Ins., etc., Co.*, (C. C. A.) 85 Fed. 41; *Baltimore, etc., R. Co. v. Jefferson County*, 29 Fed. 308; *Sohn v. Waterson*, 17 Wall. 599, 21 U. S. (L. ed.) 737; *The Queen*, 93 Fed. 834; *United Mines Co. v. Hatcher*, (C. C. A.) 79 Fed. 517; *National Bank of Commerce v. Riethmann*, (C. C. A.) 79 Fed. 582; *Banks v. Manchester*, 23 Fed. 145.

"The courts of the United States are very reluctant to place upon a state statute any construction which will bring it into conflict with a statute of the United States and therefore render it void." *Per* McCrary, J., in *Davenport Nat. Bank v. Mittelbuscher*, 15 Fed. 227.

38. *St. Louis Nat. Bank v. Papin*, 4 Dill. 32, 21 Fed. Cas. No. 12,239.

39. *Banks v. Manchester*, 23 Fed. 145.

presses it beyond the constitutional authority of Congress, it will become our duty to adopt the former construction, because a presumption never ought to be indulged that Congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous."<sup>40</sup> Especially should this rule be observed in the interpretation of a penal statute enacted by Congress relating to offenses upon the border line of the national jurisdiction.<sup>41</sup> But where the language of a statute is plain and unambiguous, courts are not at liberty to look outside of it for some specious meaning or import that may impart validity to it when assailed for palpable violation of the Constitution.<sup>42</sup>

### *Imputation of Bad Faith to State or United States*

**81. Generally; violation of international law.**—A state statute or an act of Congress will, if possible, be construed so as not to convict the state or the United States of a breach of good faith.<sup>43</sup> In construing the act of Congress of 1800, providing for suspension of intercourse between the United States and France, Chief Justice Marshall said that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently can never be con-

40. *U. S. v. Coombs*, 12 Pet. 76, 9 U. S. (L. ed.) 1004. To the same effect *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U. S. 190, 34 S. Ct. 101, 58 U. S. (L. ed.) 179; *El Paso, etc., R. Co. v. Gutierrez*, 215 U. S. 87, 30 S. Ct. 21, 54 U. S. (L. ed.) 106; *Martin v. District of Columbia*, 205 U. S. 135, 27 S. Ct. 440, 51 U. S. (L. ed.) 743; *The Japanese Immigrant Case*, 189 U. S. 86, 23 S. Ct. 611, 47 U. S. (L. ed.) 721; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235, 6 S. Ct. 1038, 30 U. S. (L. ed.) 173; *Austin v. U. S.*, 155 U. S. 425, 15 S. Ct. 167, 39 U. S. (L. ed.) 206; *Carlisle v. U. S.*, 16 Wall. 153, 21 U. S. (L. ed.) 426; *Sewing Mach. Companies' Case*, 18 Wall. 586, 21 U. S. (L. ed.) 914; *Plummer v. Northern Pac. R. Co.*, 152 Fed. 206; *McNally v. Field*, 119 Fed. 445; *Connecticut v. Gould*, 34 Fed. 319; *U. S. v. Barnaby*, 51 Fed. 23; *Dows v. Elmwood*, 34 Fed. 116; *Singer Mfg. Co. v. McCollock*, 24 Fed. 668.

"It is but a decent respect to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proven beyond all reasonable doubt. This has always been the language of this court, when that subject has called for its decision; and I know that it expresses the honest sentiments of each and every member of this bench." *Per* Justice Washington in *Ogden v. Saunders*, 12 Wheat. 270, 6 U. S. (L. ed.) 606.

Explaining this maxim, Mr. Justice White in *U. S. v. Delaware, etc., Co.*, 213 U. S. 366, 29 S. Ct. 527, 53 U. S. (L. ed.) 836, said: "Unless this rule be considered

as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

And Congress is presumed to legislate on a subject with full knowledge of the United States Supreme Court decisions marking out the constitutional limitations on its power to legislate with reference to that subject. *Lincoln v. U. S.*, 202 U. S. 484, 26 S. Ct. 728, 50 U. S. (L. ed.) 1117.

41. *U. S. v. Seaman*, 23 Fed. 884; *U. S. v. Campbell*, 16 Fed. 233.

42. *McDonald v. Southern Express Co.*, 134 Fed. 282; *Fay v. Springfield*, 94 Fed. 421. See also *Minnesota v. Barber*, 136 U. S. 319, 10 S. Ct. 862, 34 U. S. (L. ed.) 455; *Trade-Mark Cases*, 100 U. S. 98, 25 U. S. (L. ed.) 550.

43. *Missouri, etc., R. Co. v. U. S.*, 235 U. S. 37, 35 S. Ct. 6, 59 U. S. (L. ed.) 116; *Red Rock v. Henry*, 106 U. S. 604, 1 S. Ct. 434, 27 U. S. (L. ed.) 251; *Ketchum v. St. Louis*, 101 U. S. 315, 25 U. S. (L. ed.) 999; *Milner v. Pensacola*, 2 Woods 632, 17 Fed. Cas. No. 9,619; *U. S. v. Taylor*, 104 U. S. 221, 26 U. S. (L. ed.) 721; *U. S. v. Central Pac. R. Co.*, 118 U. S. 240, 6 S. Ct. 1038, 30 U. S. (L. ed.) 173; *U. S. v. Hosmer*, 9 Wall. 435, 19 U. S. (L. ed.) 662; *Pepin Tp. v. Sage*, (C. C. A.) 129 Fed. 657.

strued to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country." <sup>44</sup>

**82. Violation of treaty.**—Before the court will impute to Congress an intention to violate the provisions of a treaty with a foreign power,<sup>45</sup> or with an Indian tribe,<sup>46</sup> that intention must be clearly and unequivocally manifested, and the language of the law which is supposed to constitute the violation must admit of no other reasonable construction.<sup>47</sup> This rule operates with special force where a conflict would lead to the abrogation of a stipulation in a treaty making a valuable cession to the United States <sup>48</sup> or where the alleged violation of a treaty is found in an act of Congress declared in its title to be an act to execute certain stipulations in that treaty.<sup>49</sup> Stipulations and obligations in treaties will not be deemed annulled by acts of mere general legislation which can reasonably be construed otherwise.<sup>50</sup> However, if the statute is clear and unambiguous, the prior treaty must yield to the extent of any repugnancy between them.<sup>51</sup> But in such a case the statute should, if possible, be so construed as to produce the least possible conflict.<sup>52</sup>

## V. MEANING OF WORDS AND PHRASES

**83. Ordinary words.**—"The popular and received import of words furnishes the general rule for the interpretation of public laws," said Mr. Justice Daniel.<sup>53</sup> "The legislature must be presumed to use words in their known and ordinary signification," said Mr. Justice Story, "unless that sense be repelled by the context."<sup>54</sup> The same doctrine is declared or applied in a multitude of cases.<sup>55</sup> The word "person" in its ordinary

<sup>44</sup> *Murray v. Schooner Charming Betsy*, 2 Cranch 118, 2 U. S. (L. ed.) 208.

<sup>45</sup> *In re Chin A On*, 18 Fed. 507; *Ropes v. Clinch*, 8 Blatchf. 309, 20 Fed. Cas. No. 12,041; *In re Ah Lung*, 18 Fed. 29; *In re Leong Yick Dew*, 19 Fed. 495; *Chinese Merchants Case*, 13 Fed. 608. See also *Waltham Watch Co. v. Keene*, 202 Fed. 225.

See § 146 as to implied repeal of statute by treaty.

<sup>46</sup> *Frost v. Wanie*, 157 U. S. 46, 15 S. Ct. 532, 39 U. S. (L. ed.) 614; *U. S. v. Forty-three Gallons Whiskey*, 108 U. S. 496, 2 S. Ct. 906, 27 U. S. (L. ed.) 805; *Wadsworth v. Boysen*, (C. C. A.) 48 Fed. 771; *In re Race Horse*, 70 Fed. 611, reversed 163 U. S. 504; 16 Op. Atty-Gen. 556 (Devens, 1880).

<sup>47</sup> *In re Chin A On*, 18 Fed. 507, and the cases cited in the last two notes.

<sup>48</sup> *U. S. v. Forty-three Gallons Whiskey*, 108 U. S. 496, 2 S. Ct. 906, 27 U. S. (L. ed.) 805.

<sup>49</sup> *In re Chin A On*, 18 Fed. 507; *Chew Heong v. U. S.*, 112 U. S. 536 5 S. Ct. 255, 28 U. S. (L. ed.) 770.

<sup>50</sup> *Castro v. De Uriarte*, 16 Fed. 97.

<sup>51</sup> *Rainey v. U. S.*, 232 U. S. 310, 34 S. Ct. 429, 58 U. S. (L. ed.) 617; *Ex p. Webb*, 225 U. S. 663, 32 S. Ct. 769, 56 U. S. (L. ed.) 1248; *The Cherokee Tobacco*, 11 Wall. 620, 20 U. S. (L. ed.) 229; *Fong Yue Ting v. U. S.*, 149 U. S. 720, 13 S. Ct.

1016, 37 U. S. (L. ed.) 915; *Wadsworth v. Boysen*, (C. C. A.) 148 Fed. 771; *In re Ah Lung*, 18 Fed. 29; *In re Race Horse*, 70 Fed. 611, reversed 163 U. S. 504; *Love v. U. S.*, 29 Ct. Cl. 332.

<sup>52</sup> 21 Op. Atty-Gen. 23 (Olney, 1894).

<sup>53</sup> *Maillard v. Lawrence*, 16 How. 251, 14 U. S. (L. ed.) 115.

"Baron Pollock said, and his statement will not brook denial, that the term 'popular sense,' in the rule on which counsel here rely, means 'that sense which people conversant with the subject matter with which the statute is dealing would attribute to it.'" *Westerlund v. Black Bear Mining Co.*, (C. C. A.) 203 Fed. 599.

See §§ 115-120 for interpretation of words in tariff acts; § 106 for words in penal statutes; § 62 as to reference to statutes *in pari materia* to determine meaning of words.

<sup>54</sup> *Levy v. McCarree*, 6 Pet. 110, 8 U. S. (L. ed.) 337.

"I think I may say that unless there be something in the context which deflects the word from its ordinary meaning, and shows a clear intention to use it in a more general or a more limited sense, the former ought to prevail." *Per Justice Story in Parsons v. Hunter*, 2 Sumn. 422, 18 Fed. Cas. No. 10,778.

<sup>55</sup> *U. S. v. Detroit First Nat. Bank*, 234 U. S. 245, 34 S. Ct. 846, 58 U. S. (L. ed.) 1298; *Boston, etc., R. Co. v. Hooker*, 233

sense "includes an Indian, whether he be uncivilized, under the charge of an Indian agent, in the Indian country, or otherwise."<sup>56</sup> A person of half white and half Indian parentage<sup>57</sup> cannot be naturalized as a "white person." A watchman is not a laborer within the meaning of the federal eight-hour law "for all laborers, workmen, and mechanics."<sup>58</sup> An act of

U. S. 97, 34 S. Ct. 526, 58 U. S. (L. ed.) 888; U. S. v. Garbish, 222 U. S. 257, 32 S. Ct. 77, 56 U. S. (L. ed.) 190; U. S. v. Keitel, 211 U. S. 370, 29 S. Ct. 123, 53 U. S. (L. ed.) 230; U. S. v. American Sugar Refining Co., 202 U. S. 563, 26 S. Ct. 717, 50 U. S. (L. ed.) 1149; Blair v. Chicago, 201 U. S. 400, 26 S. Ct. 427, 50 U. S. (L. ed.) 801; Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539, 49 U. S. (L. ed.) 937; U. S. v. Nichols, 186 U. S. 298, 22 S. Ct. 918, 46 U. S. (L. ed.) 1173; Dewey v. U. S., 178 U. S. 520, 20 S. Ct. 981, 44 U. S. (L. ed.) 1174; U. S. v. Goldenberg, 168 U. S. 102, 18 S. Ct. 3, 42 U. S. (L. ed.) 398; U. S. v. Oregon, etc., R. Co., 164 U. S. 540, 17 S. Ct. 165, 41 U. S. (L. ed.) 545; Glover v. U. S., 164 U. S. 297, 17 S. Ct. 95, 41 U. S. (L. ed.) 441; McBroom v. Scottish Mortg., etc., Co., 153 U. S. 323, 14 S. Ct. 852, 38 U. S. (L. ed.) 731; Martin v. Baltimore, etc., R. Co., 151 U. S. 687, 14 S. Ct. 533, 38 U. S. (L. ed.) 316; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 36, 15 S. Ct. 508, 39 U. S. (L. ed.) 611; Holy Trinity Church v. U. S., 143 U. S. 463, 12 S. Ct. 511, 36 U. S. (L. ed.) 229; Thaw v. Ritchie, 136 U. S. 541, 10 S. Ct. 1037, 34 U. S. (L. ed.) 536; Lake County v. Rollins, 130 U. S. 670, 9 S. Ct. 651, 32 U. S. (L. ed.) 1063; U. S. v. Temple, 105 U. S. 99, 26 U. S. (L. ed.) 967; Tleson v. U. S., 100 U. S. 46, 25 U. S. (L. ed.) 543; Cass County v. Shores, 95 U. S. 379, 24 U. S. (L. ed.) 420; Newhall v. Sanger, 92 U. S. 763, 23 U. S. (L. ed.) 770; U. S. v. Union Pac. R. Co., 91 U. S. 85, 23 U. S. (L. ed.) 231; U. S. v. Isham, 17 Wall. 496, 21 U. S. (L. ed.) 728; Collector v. Hubbard, 12 Wall. 15, 20 U. S. (L. ed.) 278; Lane County v. Oregon, 7 Wall. 81, 19 U. S. (L. ed.) 106; Early v. Doe, 16 How. 617, 14 U. S. (L. ed.) 1082; Mills v. Stoddard, 8 How. 366, 12 U. S. (L. ed.) 1115; U. S. v. Dickson, 15 Pet. 163, 10 U. S. (L. ed.) 698; U. S. v. Coombs, 12 Pet. 79, 9 U. S. (L. ed.) 1007; M'Niel v. Holbrook, 12 Pet. 90, 9 U. S. (L. ed.) 1012; Gardner v. Collins, 2 Pet. 87, 7 U. S. (L. ed.) 357; Fleckner v. U. S. Bank, 8 Wheat. (U. S.) 351, 5 U. S. (L. ed.) 634; U. S. v. Atlantic Coast Line Co., 224 Fed. 160; Arthur v. G. N. Parsons Co., (C. C. A.) 224 Fed. 47; U. S. v. Sweet Valley Wine Co., 208 Fed. 85; First Nat. Bank of Anamoose v. U. S., (C. C. A.) 206 Fed. 374, reversing 190 Fed. 336; *In re Ellis*, 179 Fed. 1002; Shulthis v. McDougal, 162 Fed. 331, affirmed 170 Fed. 529; U. S. v. Jackson, (C. C. A.) 143 Fed. 783, reversing 140 Fed. 266; *In re Oliver*,

109 Fed. 787; *In re Plotke*, (C. C. A.) 104 Fed. 966; Corning v. Meade County, (C. C. A.) 102 Fed. 57; Webber v. St. Paul City R. Co., (C. C. A.) 97 Fed. 144; *In re Baudouine*, 96 Fed. 540; U. S. v. Pine River Logging, etc., Co., (C. C. A.) 89 Fed. 915; Harless v. U. S., (C. C. A.) 88 Fed. 102; Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank, etc., Co., (C. C. A.) 73 Fed. 654; Dueber Watch-Case Mfg. Co. v. Howard Watch, etc., Co., (C. C. A.) 66 Fed. 643; *In re Saito*, 62 Fed. 127; U. S. v. Two Hundred and Fifty Kegs Nails, (C. C. A.) 61 Fed. 411; *In re Appointment of Supervisors*, 52 Fed. 256; *In re McDonough*, 49 Fed. 360; Heller v. Magone, 38 Fed. 911; Whelan v. New York, etc., R. Co., 35 Fed. 855; Forbes Lithograph Mfg. Co. v. Worthington, 25 Fed. 900; Bate Refrigerating Co. v. Gillett, 13 Fed. 556; The Saratoga, 9 Fed. 325; Schrieffer v. Wood, 5 Blatchf. 218, 21 Fed. Cas. No. 12,481; U. S. v. Collier, 3 Blatchf. 332, 25 Fed. Cas. No. 14,833; Fashion v. Wards, 6 McLean 152, 29 Fed. Cas. No. 17,154-17,155; Equitable Trust Co. v. Seldon, 8 Fed. Cas. No. 4,508; Reagan v. U. S., 35 Ct. Cl. 104; Gordon v. U. S., 31 Ct. Cl. 260; Chaplin v. U. S., 19 Ct. Cl. 424; Malone's Case, 5 Ct. Cl. 436; 21 Op. Atty.-Gen. 180 (Olney, 1895); 21 Op. Atty.-Gen. 420 (Harmon, 1896); 19 Op. Atty.-Gen. 620 (Miller, 1890); 8 Op. Atty.-Gen. 569 (Cushing, 1856); 1 Op. Atty.-Gen. 672 (Wirt, 1824).

"Where the enactment is neither ambiguous nor obscure, the plain, natural, usual import of the words and phrases presents the surest and safest mode of the will of the legislature." *Per Casey*, C. J., in *Gross's Case*, 5 Ct. Cl. 91.

"It is not only the safer course to adhere to the words of a statute, construed in their ordinary import, instead of entering into any inquiry as to the supposed intention of Congress, but it is the imperative duty of the court to do so." *Per Wallace, J.*, in *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 35 Fed. 138.  
56. *Per Deady, J.*, in *U. S. v. Shaw-Mux*, 2 Sawy. 366, 27 Fed. Cas. No. 16,268, followed in *U. S. v. Miller*, 105 Fed. 944.

57. *In re Camille*, 6 Fed. 257, where Judge Deady said: "As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words 'white person' would intend a person of the Caucasian race," not a native of Japan, of the Mongolian race. *In re Saito*, 62 Fed. 126.

58. *Gordon v. U. S.*, 31 Ct. Cl. 254, where the court said: "The terms laborer and

Congress making United States notes a legal tender for "debts" was construed not to include taxes imposed by a state, as these were not "debts" within the ordinary sense of the word.<sup>59</sup> The term "corporation" does not include stockholders, and a statute imposing a liability upon the corporation does not thereby impose the same upon the stockholders.<sup>60</sup> Where one section of an act of Congress provided that "this section shall not apply to" certain matters, the court found no reason to suppose that Congress intended that any part of that section should so apply.<sup>61</sup> But there are innumerable instances, cited in other parts of this article, where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature.<sup>62</sup>

**84. Words of more than one meaning.**—It sometimes happens that a word has more than one natural and ordinary meaning, in which case the court must ascertain from the context, or from acts *in pari materia*, or by the application of some rule of construction, which meaning the word was intended to convey.<sup>63</sup> Thus, when it appears that the word "street" is uniformly prefixed to the word "railway" or "railroads" in acts intended to apply to street railroads, there is a strong inference that other acts passed at the same session using the word "railroad" are intended to apply only to the railroads of commerce.<sup>64</sup> Reference to the context of a statute has determined the meaning of the word "domestic," as used in the statute, to be "local" rather than "household."<sup>65</sup>

**85. Words of technical or other special meaning.**—Technical words or phrases in a statute are presumed to be used in a technical sense.<sup>66</sup> In legislating upon the subject of "depositions" Congress was presumed to use the word in its legal sense as testimony in writing.<sup>67</sup> "Enlistment" was treated as a technical word in an act of Congress relating to army

watchmen are well understood in popular parlance, and are clearly distinguished from each other in popular acceptance."

59. *Lane County v. Oregon*, 7 Wall. 81, 19 U. S. (L. ed.) 106.

60. *Park Bank of New York v. Remsen*, 158 U. S. 346, 15 S. Ct. 891, 39 U. S. (L. ed.) 1048.

61. *U. S. v. Healey*, 160 U. S. 149, 16 S. Ct. 247, 40 U. S. (L. ed.) 374.

62. See *infra*, §§ 94, 96.

See §§ 19 and 20 as to departure from literal construction; §§ 67-82, as to objectionable consequences as affecting interpretation; § 94, as to remedial statutes; §§ 97 and 98, as to statutes derogatory of common law and common right.

63. *In re Philadelphia*, etc., *Transp. Co.*, 114 Fed. 403. See also *In re Sutherland*, *Deady* 417, 23 Fed. Cas. No. 13,640.

64. *Massachusetts L. & T. Co. v. Hamilton*, (C. C. A.) 88 Fed. 588. See also *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 68 Fed. 82, holding that an *Iowa* statute which declared that "a judgment against any railway corporation for any injury to any person or property shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed exe-

cuted since the 4th day of July, A. D. 1862," did not apply to street railroad corporations.

65. *U. S. v. United Verde Copper Co.*, 196 U. S. 207, 25 S. Ct. 222, 49 U. S. (L. ed.) 449.

66. *Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 33 S. Ct. 867, 57 U. S. (L. ed.) 1190; *U. S. v. Fidelity Trust Co.*, 222 U. S. 158, 32 S. Ct. 59, 56 U. S. (L. ed.) 137 (legal terms); *U. S. v. Patterson*, 150 U. S. 68, 14 S. Ct. 20, 37 U. S. (L. ed.) 1000; *Westerlund v. Black Bear Mining Co.*, (C. C. A.) 203 Fed. 599; *U. S. v. Cardish*, 143 Fed. 640; *U. S. v. Green*, 136 Fed. 618; *In re Harper*, 133 Fed. 970. See also *New Mexico v. U. S. Trust Co.*, 172 U. S. 186, 19 S. Ct. 128, 43 U. S. (L. ed.) 413; *Mailard v. Lawrence*, 16 How. 261, 14 U. S. (L. ed.) 930; *Fashion v. Wards*, 6 McLean 152, 29 Fed. Cas. No. 17,154.

In a statute addressed to business men, the word "duplicate" was given its business significance. *Wright v. Michigan*, etc., *R. Co.*, (C. C. A.) 130 Fed. 843.

See §§ 115-116 for meaning of commercial or scientific words in tariff acts.

See § 106 for meaning of words of fixed significance at common law.

67. *U. S. v. Clark*, 1 Gall. 501, 25 Fed. Cas. No. 14,804.

pay, the court holding that a cadet was not an enlisted man.<sup>68</sup> In the absence of anything to the contrary in the context the term "legal representative" in a statute means an executor or administrator.<sup>69</sup> In the acts of Congress forbidding money appropriated for contingent, incidental, or miscellaneous purposes to be used for official or clerical compensation<sup>70</sup> the adjectives "contingent," "incidental," and "miscellaneous" have a technical and well understood meaning; and where a specific appropriation is made for specific objects, such as clerks, messengers, light, or fuel, no disbursement can be made therefor from the appropriation for "miscellaneous expenses."<sup>71</sup> The words "contingent expenses" as used in appropriation acts mean such incidental, casual expenses as are necessary or at least appropriate and convenient for the performance of the duties required by law of the department or the office for which the appropriation is made.<sup>72</sup> But the presumption that technical words have a technical meaning must yield to a contrary intention indicated by the context or otherwise.<sup>73</sup> Thus an act of Congress exempting from taxation the "right of way" of a railroad, in view of the context, was construed to exempt not merely the right of passage, but all structures erected on the land.<sup>74</sup> And the words "null and void" in a statute declaring bonds sold in violation of the statute to be null and void were interpreted in the sense of "voidable" in view of the objects of the statute.<sup>75</sup> In construing an act of Congress conferring on the Court of Claims jurisdiction of claims against the District of Columbia consisting of "sewer certificates," it became a question whether a certain class of securities was included in that term, and Chief Justice Richardson said: "The court cannot avoid taking judicial notice of passing events of great public interest and widespread notoriety, well known and familiar alike to suitors, counsel, and judges, and of the commonly understood meaning of words and phrases specially applied to particular subjects and things in the community and among business people, when such words and phrases are introduced into states legislating upon those subjects;" and he ascertained the meaning of the words "sewer certificates" by referring to congressional investigations

68. *Babbitt's Case*, 16 Ct. Cl. 202.

69. *Briggs v. Walker*, 171 U. S. 471, 19 S. Ct. 1, 43 U. S. (L. ed.) 245; *Thompson v. U. S.*, 20 Ct. Cl. 276.

70. Rev. Stat. U. S., § 3682.

71. *Dunwoody v. U. S.*, 22 Ct. Cl. 269.

72. 16 Op. Atty-Gen. 412 (*Devens*, 1879), holding that the contingent fund of the War Department could not be applied to meet the expense attending the employment of a detective to discover, and furnish evidence necessary to convict, the parties concerned in setting fire to certain buildings which were rented for the Quartermaster's Department at Atlanta, Ga.

73. *U. S. v. Chavez*, 228 U. S. 525, 33 S. Ct. 595, 57 U. S. (L. ed.) 950; *Kindred v. Union Pacific R. Co.*, 225 U. S. 582, 32 S. Ct. 780, 56 U. S. (L. ed.) 1216; *U. S. v. Keitel*, 211 U. S. 370, 29 S. Ct. 123, 53 U. S. (L. ed.) 230; *Mason City R. Co. v. Boynton*, 204 U. S. 570, 27 S. Ct. 321, 51 U. S. (L. ed.) 629; *East Central Eureka Mining Co. v. Central Eureka Mining Co.*, 204 U. S. 266, 27 S. Ct. 258, 51 U. S. (L.

ed.) 476; *Knight Templars and Masons Life Indemnity Co. v. Jarman*, 187 U. S. 197, 23 S. Ct. 108, 47 U. S. (L. ed.) 139; *New Mexico v. U. S. Trust Co.*, 172 U. S. 181, 19 S. Ct. 128, 43 U. S. (L. ed.) 411; *Alfrey v. Colbert*, (C. C. A.) 168 Fed. 231; *McInerney v. U. S.*, (C. C. A.) 143 Fed. 729. See also *Glover v. U. S.*, 164 U. S. 294, 17 S. Ct. 95, 41 U. S. (L. ed.) 440, where the context of an act made it manifest that the word "legal" prefixed to the word "owner" was not intended to give to the latter a purely artificial meaning.

In recognition of this rule it has been held that the word "use" in a statute did not have the significance of the "right to use" incident to ownership. *Billings v. U. S.*, 232 U. S. 261, 34 S. Ct. 421, 58 U. S. (L. ed.) 596.

74. *New Mexico v. U. S. Trust Co.*, 172 U. S. 171, 19 S. Ct. 128, 43 U. S. (L. ed.) 407.

75. *Toledo, etc., R. Co. v. Continental Trust Co.*, (C. C. A.) 95 Fed. 526.



reported and commented upon in the public press, discussions in Congress, and sundry acts of Congress following thereon.<sup>76</sup>

**86. Similar expressions in same statute; inferior and superior words; terms defined in statute.**—It is a well settled general rule that if the same words occur in different parts of a statute they must be taken to have been everywhere used in the same sense when applied to the same subject-matter.<sup>77</sup> "Where a term is used and defined in the opening part of a statute," said Mr. Justice Brewer, "the use of that term thereafter in the statute is with the same meaning and the same definition."<sup>78</sup> But words and phrases may be used with different significations and with different shades of meaning in different connections. In such cases, for example in the United States Revised Statutes, similar words are not to be interpreted invariably as expressing precisely the same idea.<sup>79</sup> It is a general rule of construction that in legislative enumeration the inferior does not include the superior. Federal cases applying that precise rule are extremely rare. One, however, has been fully noticed in a preceding part of this article.<sup>80</sup> The legislature may properly define the meaning of terms used by it in a statute, and where this has been done, the definitions prescribed are binding for the purposes of that statute.<sup>81</sup>

**87. "Or" construed as "and" and vice versa.**—The word "or" in a statute should be taken conjunctively where, as was said in one case, the court "cannot help seeing" that the obvious intent was to use it in that sense;<sup>82</sup> or where, for example, the word "or" must be a clerical error for the word "and" by reason of utter absurdity if the literal import of the language be adopted.<sup>83</sup> But "the intention of Congress must be very clearly contrary to the language of the act to authorize so important a change in the signification of the words employed."<sup>84</sup>

"It is right to interpret the word 'and' with a disjunctive meaning when such meaning entirely coincides with the rest of the statute and with the evident intention of the legislature. If there is evidence that a disjunctive meaning does not harmonize with the whole statute, and does not represent the intention of the legislature, then such meaning is not admissible."<sup>85</sup> Where a statute made a sheriff liable to an execution creditor if he should wilfully "and" negligently suffer the escape of a prisoner in custody on an execution, the court substituted "or" for "and," as an

76. *Fendall's Case*, 16 Ct. Cl. 121.

77. *Babbitt's Case*, 16 Ct. Cl. 212. See also *U. S. v. Hill*, 123 U. S. 686, 8 S. Ct. 308, 31 U. S. (L. ed.) 277.

78. *In re Jackson*, 40 Fed. 374. To same effect *Anderson v. Pacific Coast Steamship Co.*, 225 U. S. 187, 32 S. Ct. 626, 56 U. S. (L. ed.) 1047.

79. *Beckwith's Case*, 16 Ct. Cl. 250. See also *Farden's Case*, 13 Ct. Cl. 347.

80. See *U. S. v. Huggett*, 40 Fed. 640.

81. *Van Dyke v. Geary*, 218 Fed. 111, wherein it was held that a private person was necessarily a "water corporation" within a statute applying thereto and defining such a corporation as "every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, op-

erating, or managing any water system for compensation."

82. *Union Ins. Co. v. U. S.*, 6 Wall. 763, 18 U. S. (L. ed.) 881, where an act of Congress granting jurisdiction in certain cases "to any District Circuit Court having jurisdiction of the amount, or in admiralty," etc., was construed as conferring jurisdiction on both the circuit and district courts according to the amount, and in admiralty. *Northern Commercial Co. v. U. S.*, (C. C. A.) 217 Fed. 33. See also *Weld v. U. S.*, 23 Ct. Cl. 130.

83. *Converse v. U. S.*, 26 Ct. Cl. 6.

84. *U. S. v. Haun*, 8 Am. L. Reg. 663, 26 Fed. Cas. No. 15,329. See also *Hopper v. Denver, etc., R. Co.*, (C. C. A.) 155 Fed. 273.

85. *Per Attorney-General Garland*, in 18 Op. Atty.-Gen. 540. See also 14 Op. Atty.-Gen. 459.

obviously necessary construction.<sup>86</sup> A clause in a tariff act imposing a duty on "printing paper suitable for books and newspapers" was construed to impose the duty on printing paper suitable either for books or newspapers.<sup>87</sup> "Undoubtedly 'and' is not always to be taken conjunctively. It is sometimes read as if it were 'or' and taken disjunctively and distributively, but this is only done where that reading is necessary to give effect to the intention of the legislature, as plainly expressed in other parts of the act, or deducible therefrom. In a case of doubtful construction 'and' would probably be used disjunctively, to prevent the imposition of fines and penalties, but it would not be so used for the purpose of imposing them;<sup>88</sup> and so in a doubtful case it will not be used disjunctively for the purpose of imposing a tax or charge upon the citizen."<sup>89</sup>

**88. Interpretation declared by statute.**—The first five sections of the United States Revised Statutes extend the meaning of various words and phrases for the purposes of construction.<sup>90</sup>

**89. Terms judicially construed.**—Where the terms used in a statute have acquired a settled meaning through judicial interpretation, and the same terms are used in a subsequent statute upon the same subject, they are to be understood in the same sense, unless by qualifying or explanatory additions the contrary intention of the legislature is made clear.<sup>91</sup> "Such a construction in the supposed case becomes a part of the law, as it is presumed that the legislature, in passing the latter law, knew what the judicial construction was which had been given to the words of the prior enactment."<sup>92</sup> A federal statute enacted in 1862 and providing that "the laws of the state in which the court shall be held shall be the rules of decision as to the competency of witnesses in trials at common law, in equity, and in

<sup>86</sup> *Long v. Palmer*, 16 Pet. 69, 10 U. S. (L. ed.) 890.

<sup>87</sup> *Hensel, etc. v. U. S.*, 126 Fed. 576.

<sup>88</sup> It was said in *U. S. v. Ten Cases Shawls*, 2 Paine 166, 28 Fed. Cas. No. 16,448, that "and" cannot be construed as "or" in a penal statute.

<sup>89</sup> *Per Caldwell, C. J.*, in *Rice v. U. S.*, (C. C. A.) 53 Fed. 912, where the court declined to read "and" as "or" in a tariff act so as to favor the government.

<sup>90</sup> Rev. Stat. U. S., §§ 1-5. For cases construing and applying those sections, see the annotation to those sections under the title STATUTES in this work.

<sup>91</sup> *Clairmont v. U. S.*, 225 U. S. 551, 32 S. Ct. 787, 56 U. S. (L. ed.) 1201; *Latimer v. U. S.*, 223 U. S. 501, 32 S. Ct. 242, 56 U. S. (L. ed.) 526; *Standard Oil Co. of New Jersey v. U. S.*, 221 U. S. 1, 31 S. Ct. 502, 55 U. S. (L. ed.) 619; *Kepner v. U. S.*, 195 U. S. 100, 24 S. Ct. 797, 49 U. S. (L. ed.) 114; *In re United States*, 194 U. S. 194, 24 S. Ct. 629, 48 U. S. (L. ed.) 931; *Lawder v. Stone*, 187 U. S. 281, 23 S. Ct. 79, 47 U. S. (L. ed.) 178; *Keck v. U. S.*, 172 U. S. 457, 19 S. Ct. 254, 43 U. S. (L. ed.) 515; *Rhodes v. Iowa*, 170 U. S. 423, 18 S. Ct. 664, 42 U. S. (L. ed.) 1095; *Fisk v. Henarie*, 142 U. S. 467, 12 S. Ct. 207, 35 U. S. (L. ed.) 1082; *Sessions v. Romadka*, 145 U. S. 41, 12 S. Ct. 799, 36 U. S. (L. ed.) 614; *Crenshaw v. U. S.*,

134 U. S. 108, 10 S. Ct. 431, 33 U. S. (L. ed.) 829; *Smith v. Lyon*, 133 U. S. 320, 10 S. Ct. 303, 33 U. S. (L. ed.) 637; *U. S. v. Central Pac. R. Co.*, 118 U. S. 240, 6 S. Ct. 1038, 30 U. S. (L. ed.) 175; *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81, 3 S. Ct. 507, 28 U. S. (L. ed.) 76; *The Abbotsford*, 98 U. S. 444, 25 U. S. (L. ed.) 170; *Sewing Mach. Co.'s Case*, 18 Wall. 553, 21 U. S. (L. ed.) 914; *Mason v. Fearson*, 9 How. 258, 13 U. S. (L. ed.) 129; *In re American Lime Co.*, 201 Fed. 433; *U. S. v. Colorado, etc., R. Co.*, (C. C. A.) 157 Fed. 321; *Rodgers v. U. S.*, (C. C. A.) 152 Fed. 346; *Hempstead v. Thomas*, (C. C. A.) 122 Fed. 538; *Wilder's Steamship Co. v. Low*, (C. C. A.) 112 Fed. 164; *In re Woodbury*, 98 Fed. 834; *Doe v. Waterloo Min. Co.*, (C. C. A.) 70 Fed. 463; *Stokes v. U. S.*, (C. C. A.) 60 Fed. 598; *U. S. v. Trans-Missouri Freight Assoc.*, (C. C. A.) 58 Fed. 67; *U. S. v. Barnaby*, 51 Fed. 23; *Davis v. Chicago, etc., R. Co.*, 46 Fed. 309; *Anderson v. Bowers*, 43 Fed. 322; *North Carolina v. Vanderford*, 35 Fed. 287; *The Devonshire*, 13 Fed. 39; *Goodall v. Tuttle*, 3 Biss. (U. S.) 219, 10 Fed. Cas. No. 5,533. See also *Greenleaf v. Goodrich*, 101 U. S. 281, 25 U. S. (L. ed.) 846; *U. S. v. Barnaby*, 51 Fed. 20.

See § 106 as to words judicially construed in penal statute.

<sup>92</sup> *Per Justice Clifford*, in *Sewing Mach.*

admiralty,"<sup>93</sup> was declared inapplicable to criminal trials, since the words "trials at common law" in a section of the Judiciary Act of 1789 relating to the same subject<sup>94</sup> had, by judicial construction, been limited to civil cases.<sup>95</sup> Ordinarily, a question of federal law cannot be regarded as settled until it has been determined by the Supreme Court,<sup>96</sup> and almost invariably the decisions of that tribunal alone are those which have been treated as incorporated by construction into subsequent statutes.<sup>97</sup>

Thus a construction given by one inferior court but doubted by another and by the attorney-general is not to be regarded as incorporated into an act.<sup>98</sup> The doctrine was applied, however, to provisions affecting the jurisdiction of the Court of Claims which had been re-enacted after that court had construed them in several cases, the Supreme Court construing the later enactment likewise, although other decisions of the Court of Claims had, in the meanwhile, given the original act a contrary construction; these later decisions not having been reported, it seems, at the time of the re-enactment, and being unknown to Congress, or probably not as well known as the earlier.<sup>99</sup> A judicial determination of the meaning of an expression in a statute is, however, overruled by a subsequent statutory construction of that expression both as to the original statutes and as to later acts dealing with the same subject.<sup>1</sup> In another part of this article it has been shown that departmental constructions of acts of Congress resemble judicial constructions in this behalf.<sup>2</sup>

**90. Noscitur a sociis.**—"It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used."<sup>3</sup> In the section of the Bankruptcy Act of 1867 which set forth the classes of debts exempt from the operation of a discharge, debts created by "fraud" were associated directly with debts created by "embezzlement," and this association was held to justify, if not imperatively to require, the conclusion that the "fraud" referred to in that section meant

Co.'s Case, 18 Wall. 584, 21 U. S. (L. ed.) 921. See also *Hilborn v. U. S.*, 28 Ct. Cl. 240, 29 Ct. Cl. 340.

93. 12 Stat. at L. 588, now Rev. Stat. U. S., § 838.

94. Act Sept. 24, 1789, c. 20, § 34; 1 Stat. at L. 92, now Rev. Stat. U. S., § 721, which provides that "the laws of the several states—except where the constitution, treaties or statutes of the United States otherwise require or provide—shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

95. *Logan v. U. S.*, 144 U. S. 301, 12 S. Ct. 617, 36 U. S. (L. ed.) 442.

96. *Andrews v. Hovey*, 124 U. S. 716, 8 S. Ct. 676, 31 U. S. (L. ed.) 563.

97. See the cases cited in the preceding notes.

In case of conflicting constructions, that of the Supreme Court is, of course, re-

garded as adopted by Congress. *Von Bremen, etc., Co. v. U. S.*, (C. C. A.) 168 Fed. 889.

98. *Hackfeld v. U. S.*, 197 U. S. 442, 25 S. Ct. 456, 49 U. S. (L. ed.) 826.

99. *U. S. v. Gillis*, 95 U. S. 416, 24 U. S. (L. ed.) 506.

1. *Plummer v. U. S.*, 224 U. S. 137, 32 S. Ct. 467, 56 U. S. (L. ed.) 697.

2. See §§ 56-60.

3. *Per* Justice Field in *Virginia v. Tennessee*, 148 U. S. 519, 13 S. Ct. 728, 37 U. S. (L. ed.) 543; *In re Crook*, 219 Fed. 979; *Martin v. U. S.*, (C. C. A.) 168 Fed. 198; *U. S. v. Scruggs, etc.*, *Dry Goods Co.*, (C. C. A.) 156 Fed. 940. See also *Broom's Legal Maxims* 450 [quoted in *Neal v. Clark*, 95 U. S. 708, 24 U. S. (L. ed.) 587]; *U. S. v. Atchison, etc.*, R. Co., 142 Fed. 176; *In re Sievers*, 91 Fed. 373; *In re Philadelphia, etc.*, *Transp. Co.*, 114 Fed. 403; 21 Op. Atty.-Gen. 124 (Olney, 1895).

positive fraud, or fraud in fact, involving moral turpitude or intentional wrong as does embezzlement, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.<sup>4</sup> The association of "mistake" and "accident" in a statute furnishes strong ground to presume that the legislature had in mind mistakes of fact, not mistakes in the construction of a law.<sup>5</sup> Under a mechanics' lien statute providing that "every contractor, subcontractor, architect, builder, or person having charge," etc., shall be the agent of the owner for certain purposes, a subcontractor, to be an agent of the owner, must be one "having charge," etc.<sup>6</sup> The rule of *noscitur a sociis* is frequently applied in the construction of revenue laws.<sup>7</sup>

**91. Ejusdem generis.**—While unqualified general terms are usually to be given their natural and full signification,<sup>8</sup> yet when general words follow in a statute words of particular and special meaning, if there be not a clear manifestation of different legislative intent, they are construed as applicable to persons and things, or cases of like kind, as are designated by the particular words.<sup>9</sup> This rule, which is sometimes called Lord Tenterden's rule, has been stated as to the word "other" thus: Where a statute enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces "other" persons or things, the word "other" will generally be read as "other such like," so that persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to or different from, those specifically enumerated.<sup>10</sup> The words "or other purposes" in an act of Congress relating to "land of the United States \* \* \* reserved or purchased for military or other purposes," are confined to governmental

4. *Neal v. Clark*, 95 U. S. 709, 24 U. S. (L. ed.) 587.

5. *Barlow v. U. S.*, 7 Pet. 411, 8 U. S. (L. ed.) 731. See also 9 Ct. Cl. 273.

6. *Pacific Rolling-Mill Co. v. Hamilton*, 61 Fed. 478.

7. *Adams v. Bancroft*, 3 Sumn. 386, 1 Fed. Cas. No. 44; *U. S. v. Sixty-five Terra Cotta Vases, etc.*, 18 Fed. 510; *Marsching v. U. S.*, 113 Fed. 1006; *Patton v. U. S.*, 159 U. S. 509, 16 S. Ct. 89, 40 U. S. (L. ed.) 237.

The rule should not be unreasonably extended, however. *Strohmeyer, etc., Co. v. U. S.*, (C. C. A.) 178 Fed. 268; *Jaekel v. U. S.*, (C. C. A.) 178 Fed. 260.

8. See § 25.

9. *U. S. v. Stever*, 222 U. S. 167, 32 S. Ct. 51, 56 U. S. (L. ed.) 145; *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 26 S. Ct. 66, 50 U. S. (L. ed.) 246; *U. S. v. Nicholls*, 186 U. S. 298, 22 S. Ct. 918, 46 U. S. (L. ed.) 1173; *First National Bank of Anamoose v. U. S.*, (C. C. A.) 206 Fed. 374; *Westerlund v. Black Bear Mining Co.*, (C. C. A.) 203 Fed. 599; *U. S. v. Atchison, etc., R. Co.*, 142 Fed. 176; *U. S. v. Garretson*, 42 Fed. 23; *U. S. v. Irwin*, 5 McLean 178, 26 Fed. Cas. No. 15,445. See further for applications of the rule, *Swayne v. Hager*, 37 Fed. 782; 16 Op. Atty-Gen. 353 (Devens).

But the words "horses, mules or cattle" in a statute prohibiting the pasturing of those animals on Indian lands were held to include sheep, in view of the mischief to be remedied. *U. S. v. Mattock*, 2 Sawy. 148, 26 Fed. Cas. No. 15,744.

A statute declaring void certain agreements to pay attorneys' fees "made part of a bill of exchange, acceptance, draft, promissory note or any other written evidence of indebtedness," was held not to apply to a mortgage containing such an agreement in case of foreclosure, since the mortgage did not belong to the class of instruments catalogued in the statute. *Barry v. Snowden*, 106 Fed. 572.

"Words which standing alone might have a wide and comprehensive import will, when joined with those defining specific acts, be interpreted in their narrower sense and understood to refer to things of the same nature as those described in the associated list, enumeration or class." *U. S. v. Salen*, 235 U. S. 237, 35 S. Ct. 51, 59 U. S. (L. ed.) 210.

10. For federal cases applying the rule, see *Chapman v. Forsyth*, 2 How. 208, 11 U. S. (L. ed.) 87; *U. S. v. Bevans*, 3 Wheat. 390, 4 U. S. (L. ed.) 417; *U. S. v. 1,150½ Pounds Celluloid*, (C. C. A.) 82 Fed. 627; *Crowther v. Fidelity Ins., etc., Co.*, (C. C. A.) 85 Fed. 41.

or public purposes.<sup>11</sup> In a state statute subjecting to taxation "all real estate, to wit," enumerating various kinds of private property under the *videlicet*, "and all other real estate not exempt by law," the quoted clause was held to mean only real estate *ejusdem generis* of that specified, and did not include real estate belonging to the United States.<sup>12</sup> Birds were held not to be included in an act of Congress levying a duty upon imported "horses, mules, cattle, sheep, hogs, and other live animals."<sup>13</sup> In construing a federal statute forbidding confinement of animals by interstate carriers for more than a specified number of consecutive hours unless prevented from unloading them "by storm or other accidental cause," the court observed that "a storm is unavoidable in the sense that it cannot be prevented," and the expression "other accidental causes" was taken to mean other unavoidable accidental causes.<sup>14</sup> The word "other" also marks the words preceding it as of common quality with those following it.<sup>15</sup> Thus, the expression "John and James and other men" is one in which by a necessary implication it is asserted that John and James are men.<sup>16</sup> While the maxim *ejusdem generis* "is usually applied to instances where the general words follow several of a limited or restricted character, yet it is applicable where but one of the species is mentioned."<sup>17</sup>

But *ejusdem generis* "is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument."<sup>18</sup>

**92. Reddenda singula singulis.**—Words or clauses in a statute, where the sense requires it, and in furtherance of the legislative intention, are to

11. U. S. v. Garretson, 42 Fed. 23.

12. U. S. v. Weise, 2 Wall. Jr. 72, 28 Fed. Cas. No. 16,659, where the court found it unnecessary to discuss the constitutional question involved.

13. Reiche v. Smythe, 13 Wall. 162, 20 U. S. (L. ed.) 566, where, however, the conclusion of the court was influenced to some extent by the language of acts *in pari materia*.

14. Newport News, etc., Co. v. U. S., (C. C. A.) 61 Fed. 488; 18 Op. Atty.-Gen. 520.

15. Where a statute enumerated a group of articles, viz., "book, pamphlet," etc., as nonmailable, followed by the words "or other publication" this general phrase denoted that the statute contemplated as specified articles only such as were "publications." U. S. v. Chase, 135 U. S. 255, 10 S. Ct. 756, 34 U. S. (L. ed.) 117; U. S. v. Loftis, 12 Fed. 673; U. S. v. Wilson, 58 Fed. 768. See also Pacific Rolling-Mill Co. v. Hamilton, 61 Fed. 476.

So where an act of Congress forbade obstruction of access to certain lands by "fencing" or "inclosing," or "any other unlawful means," the word "unlawful" was read as qualifying the words "fencing" and "inclosing." Potts v. U. S., (C. C. A.) 114 Fed. 52.

For similar instances of the effect of

the word "other" see cases cited *supra*, § 32, note 79.

16. Per Deady, J., in U. S. v. Loftis, 12 Fed. 673.

17. Wells Fargo & Co. v. Jersey City, 207 Fed. 871.

18. Per Brewer, J., in U. S. v. Mesall, 215 U. S. 26, 30 S. Ct. 19, 54 U. S. (L. ed.) 77, quoting from National Bank of Commerce v. Ripley, 161 Mo. 126, 61 S. W. 587; U. S. v. Lawrence, 13 Blatchf. 212, 28 Fed. Cas. No. 15,572; Arthur v. G. W. Parsons Co., (C. C. A.) 224 Fed. 47; *In re* Crook, 219 Fed. 979; Cumberland Telephone, etc., Co. v. Memphis, (C. C. A.) 200 Fed. 657; U. S. v. Burton, 131 Fed. 552. See also *In re* Stege, (C. C. A.) 116 Fed. 344.

"Counsel for defendant invokes the rule of *ejusdem generis*, and says that the words 'any other person' are confined by the earlier specifications of the section to those who are engaged in the carriage of the liquors either as principal or employee. The rule invoked is not much in favor at the present time. Stroud's Judicial Dictionary, after a full review of the English authorities on the subject, says: 'It may be doubted whether the rule is of much practical value at the present day.'" U. S. v. First Nat. Bank of Anamoose, 190 Fed. 336.

be taken distributively, *reddenda singula singulis*.<sup>19</sup> Thus, an act of Congress provided that all fines, penalties, and forfeitures accruing under the laws of the states of Maryland and Virginia which by adoption had become laws of the District of Columbia should be recovered with costs, by indictment or information in the name of the United States, or by action of debt in the name of the United States and of the informer. It was held that the act must be construed *reddenda singula singulis*; that is, where the mode of prosecution under the state laws was by indictment or information in the name of the commonwealth, it would in future be by indictment or information in the name of the United States; and where by the state laws the mode of prosecution was an action *qui tam*, or an action of debt in the name of the informer, it should, in future, be an action *qui tam* in the name of the United States and of the informer, or an action of debt in the name of the informer alone.<sup>20</sup>

**93. Expressio unius est exclusio alterius.**—It is a general principle of interpretation that the mention of one thing implies the exclusion of another thing.<sup>21</sup> "*Expressio unius est exclusio alterius*," said Mr. Justice Baldwin, "is a universal maxim in the construction of statutes."<sup>22</sup> According to this rule of interpretation the enumeration of the objects to which money specified in an appropriation act of Congress is to be applied manifests a purpose to exclude all other objects.<sup>23</sup> Where an act makes substantive provisions and then expressly repeals specified acts, the rule *expressio unius*, etc., strongly repels any presumption that acts not specified are impliedly repealed.<sup>24</sup> Enumeration in a charter of incorporation of the purposes for which the corporation may acquire title to real estate is necessarily exclusive of all other purposes.<sup>25</sup> Acts of Congress conferring appellate jurisdiction on the Supreme Court operate as a negation or exception of such jurisdiction in other cases.<sup>26</sup> When a statute directs that a thing shall be done in a given manner, it ordinarily excludes all other modes of doing it.<sup>27</sup> Thus, an act providing a mode by which a

19. 23 AM. AND ENG. ENCYC. OF LAW (1st ed.) 444.

20. U. S. v. Simma, 1 Cranch 253, 2 U. S. (L. ed.) 98; Columb v. Webster Mfg. Co., 76 Fed. 200; Hooper v. Fifty-One Casks of Brandy, 2 Ware 371, 12 Fed. Cas. No. 6,674. For other examples of the rule *reddenda singula singulis* see U. S. v. Hartwell, 6 Wall. 394, 18 U. S. (L. ed.) 832; Meredith v. U. S., 13 Pet. 495, 10 U. S. (L. ed.) 263; Huidekoper v. Douglass, 3 Cranch 67, 2 U. S. (L. ed.) 368; Peck v. Elliott, (C. C. A.) 79 Fed. 17; *In re Boston Book Co.*, 50 Fed. 914; U. S. v. Bassett, 2 Story 406, 24 Fed. Cas. No. 14,539.

21. Walla Walla v. Walla Walla Water Co., 172 U. S. 22, 19 S. Ct. 77, 43 U. S. (L. ed.) 350; *In re Johnson*, 224 Fed. 180; U. S. v. First National Bank of Anamoose, 190 Fed. 336; Ladew v. Tennessee Copper Co., 179 Fed. 245; People, U. S. Bank v. Goodwin, 162 Fed. 937; Field v. U. S., (C. C. A.) 137 Fed. 6; *Ex p. Van Vranken*, 47 Fed. 888; Gwathmay v. Clisby, 31 Fed. 220. See also Washington Home for Incurables v. American Secu-

rity, etc., Co., 224 U. S. 486, 32 S. Ct. 554, 56 U. S. (L. ed.) 854.

22. U. S. v. Arredondo, 6 Pet. 725, 8 U. S. (L. ed.) 560; Glynn v. U. S., 32 Ct. Cl. 100. See also Arthur v. Cumming, 91 U. S. 364, 23 U. S. (L. ed.) 439, where in construing a tariff act, the maxim was applied "with cogent effect;" *Sturges v. Collector*, 12 Wall. 27, 20 U. S. (L. ed.) 257.

23. 18 Op. Atty.-Gen. 147 (Garland, 1885).

24. Wood v. U. S., 16 Pet. 364, 10 U. S. (L. ed.) 995.

25. Case v. Kelly, 133 U. S. 26, 10 S. Ct. 216, 33 U. S. (L. ed.) 515.

26. *Durousseau v. U. S.*, 6 Cranch 314, 3 U. S. (L. ed.) 234; *Ex p. McCordle*, 7 Wall. 506, 19 U. S. (L. ed.) 296; *National Exch. Bank v. Peters*, 144 U. S. 573, 12 S. Ct. 767, 36 U. S. (L. ed.) 546; *In re Heath*, 144 U. S. 93, 12 S. Ct. 615, 36 U. S. (L. ed.) 359.

27. U. S. v. O'Connor, 31 Fed. 452, where the court said: "According to that rule of interpretation, when a statute directs that a public record shall be kept for a

county could incur liability on subscription to the stock of a railroad company and a mode of discharging that liability was held to exclude all other modes.<sup>28</sup> Where, however, a statute lays down a general rule, expressly or by proper construction, and proceeds to specify instances, the latter may be regarded as illustrative rather than exhaustive.<sup>29</sup> And other cases may occur where the maxim above stated is overruled by a clearly manifested legislative intent that it shall not apply.<sup>30</sup>

## VI. CONSTRUCTION OF PARTICULAR CLASSES OF STATUTES

### *Remedial and Declaratory Statutes; Indian Legislation*

**94. Remedial.**—A remedial statute must be construed liberally so as to afford all the relief within the power of the court which the language of the act indicates that the legislature intended to grant.<sup>31</sup> The intention in remedial statutes is more liberally inferred and to a greater extent dominates the letter than is admissible in dealing with those which must be strictly construed.<sup>32</sup> It is not unusual to extend the enacting words of a remedial statute beyond their literal import and effect in order to include cases within the same mischief.<sup>33</sup>

Among those statutes which have been declared remedial are statutes exempting property of a debtor from execution,<sup>34</sup> and from seizure in bankruptcy proceedings,<sup>35</sup> laws allowing liens to mechanics<sup>36</sup> and

certain purpose, and that entries shall be made therein in a certain way, it seems obvious that it is unlawful to make entries in such record in any manner other than has been prescribed."

28. *Wells v. Pontotoc County*, 102 U. S. 632, 26 U. S. (L. ed.) 122.

29. *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 43 Fed. 59.

30. *In re Baudouine*, 96 Fed. 540.

"But the maxim *expressio unius*, like other canons of construction, is a 'rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest. In such instances it is of deciding importance; in others, not.'" *U. S. v. Barnes*, 222 U. S. 513, 32 S. Ct. 117, 56 U. S. (L. ed.) 291.

31. *Logan v. Davis*, 233 U. S. 613, 34 S. Ct. 685, 58 U. S. (L. ed.) 1121; *U. S. v. Colorado Anthracite Co.*, 225 U. S. 219, 32 S. Ct. 617, 56 U. S. (L. ed.) 1063; *New York, etc., R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 S. Ct. 272, 50 U. S. (L. ed.) 515; *U. S. v. American Surety Co.*, 200 U. S. 197, 26 S. Ct. 168, 50 U. S. (L. ed.) 437; *Guardian Trust, etc., Co. v. Fisher*, 200 U. S. 57, 26 S. Ct. 186, 50 U. S. (L. ed.) 367; *Gertgens v. O'Connor*, 191 U. S. 237, 24 S. Ct. 94, 48 U. S. (L. ed.) 163; *U. S. v. Southern Pac. R. Co.*, 184 U. S. 40, 22 S. Ct. 285, 46 U. S. (L. ed.) 425; *Beley v. Naphtaly*, 169 U. S. 359, 18 S. Ct. 354, 42 U. S. (L. ed.) 777; *Jones v. Guaranty, etc., Co.*, 101 U. S. 626, 25 U. S. (L. ed.)

1034; *Twenty Per Cent. Cases*, 13 Wall. 575, 20 U. S. (L. ed.) 708; *Ross v. Doe*, 1 Pet. 667, 7 U. S. (L. ed.) 307; *In re Crook*, 219 Fed. 979; *U. S. v. Atlantic Coast Line R. Co.*, (C. C. A.) 211 Fed. 897; *Chase v. Erhardt*, 198 Fed. 305; *U. S. v. Kansas City Southern R. Co.*, 189 Fed. 471; *U. S. v. McClellan*, 127 Fed. 97; *In re Emslie*, (C. C. A.) 102 Fed. 292; *Virginia Coupon Cases*, 25 Fed. 668; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.*, (C. C. A.) 72 Fed. 553; *Johnston's Case*, 17 Ct. Cl. 171. See also *Ramsey v. Tacoma Land Co.*, 196 U. S. 360, 25 S. Ct. 286, 49 U. S. (L. ed.) 513; *Commercial Bank v. Sandford*, 103 Fed. 100.

See § 37 as to prospective operation of a remedial act.

32. *In re Matthews*, 109 Fed. 617.

33. *Dubois v. Hepburn*, 10 Pet. 1, 9 U. S. (L. ed.) 325; *U. S. v. Hogg*, 111 Fed. 294; *Beley v. Naphtaly*, (C. C. A.) 73 Fed. 125 [citing *St. Peter v. Middleburgh*, 2 Y. & J. 196]; *Singer Mfg. Co. v. McCulloch*, 24 Fed. 668; *The Industry*, 1 Gall. 118, 13 Fed. Cas. No. 7,028. See also *Reed v. Pennsylvania Co.*, 111 Fed. 714; *Columb v. Webster Mfg. Co.*, 76 Fed. 200.

34. *In re Falconer*, (C. C. A.) 110 Fed. 115; *In re Hindman*, (C. C. A.) 104 Fed. 333; *In re Friederick*, 95 Fed. 282.

35. *In re Cook*, 219 Fed. 979.

36. *Title Guaranty, etc., Co. v. Crane Co.*, 219 U. S. 24, 31 S. Ct. 140, 55 U. S. (L. ed.) 72; *Springer Land Assoc. v. Ford*, 168 U. S. 524, 18 S. Ct. 170, 42 U. S. (L. ed.) 565; *Flagstaff Silver Min. Co. v.*

materialmen,<sup>37</sup> statutes for suppression of fraud where they operate on the offense by setting aside the fraudulent transaction,<sup>38</sup> acts authorizing recovery of damages in cases of death by wrongful act,<sup>39</sup> statutes tending to effect an object of great public utility,<sup>40</sup> statutes removing the disqualification of witnesses on the ground of interest,<sup>41</sup> statutes authorizing the redemption of lands sold for taxes,<sup>42</sup> an act giving the mortgagee a right to redeem after foreclosure decree and sale,<sup>43</sup> an employers' liability act,<sup>44</sup> statutes making a railroad company absolutely liable in damages for fire communicated by its locomotives and giving an insurable interest in property along its route,<sup>45</sup> state insolvency laws,<sup>46</sup> curative acts clearly in the interests of justice,<sup>47</sup> statutes promoting the safety of the traveling public,<sup>48</sup> statutes subordinating mortgages on corporation property to the liens of certain judgments,<sup>49</sup> statutes enlarging the jurisdiction of courts where the existing law operated mischievously,<sup>50</sup> national bankruptcy acts,<sup>51</sup>

Cullins, 104 U. S. 177, 26 U. S. (L. ed.) 704; *In re Matthews*, 109 Fed. 603. See also *Davis v. Alvord*, 94 U. S. 549, 24 U. S. (L. ed.) 285; *Gilchrist v. Helena, etc., R. Co.*, 58 Fed. 717.

But while a statute creating a mechanics' lien "is to be liberally construed in reference to the property to which the lien attaches, only those persons enumerated and embraced in the statute are to be held entitled to the lien, and that no persons are to be included under its provisions unless they make it clearly appear that they are so entitled, without a strained construction of the statute." *In re American Lime Co.*, 201 Fed. 433.

See § 102 for rule applicable to maritime liens.

37. *U. S. v. New York Steam Fitting, etc., Co.*, 235 U. S. 327, 35 S. Ct. 108, 59 U. S. (L. ed.) 253; *Hill v. American Surety Co.*, 200 U. S. 197, 26 S. Ct. 168, 50 U. S. (L. ed.) 437.

38. *Smith v. Townsend*, 148 U. S. 498, 13 S. Ct. 634, 37 U. S. (L. ed.) 535; *U. S. Bank v. Lee*, 13 Pet. 118, 10 U. S. (L. ed.) 87; *Hahn v. Salmon*, 20 Fed. 801; *Edmondson v. Hyde*, 2 Sawy. 212, 8 Fed. Cas. No. 4,285.

39. *Stewart v. Baltimore, etc., R. Co.*, 168 U. S. 448, 18 S. Ct. 105, 42 U. S. (L. ed.) 537. Compare *Bowen v. Illinois Cent. R. Co.*, (C. C. A.) 136 Fed. 306.

40. *Baring v. Erdman*, 2 Fed. Cas. No. 981.

41. *Texas v. Chiles*, 21 Wall. 490, 22 U. S. (L. ed.) 650.

42. *Corbett v. Nutt*, 10 Wall. 474, 20 U. S. (L. ed.) 978; *Dubois v. Hepburn*, 10 Pet. 1, 9 U. S. (L. ed.) 325.

43. *Singer Mfg. Co. v. McCulloch*, 24 Fed. 667.

44. *Canney v. Walkeine*, (C. C. A.) 113 Fed. 66. See also *Casey v. Barber Asphalt Paving Co.*, 192 Fed. 432.

45. *St. Louis, etc., R. Co. v. Mathews*, 165 U. S. 1, 17 S. Ct. 243, 41 U. S. (L. ed.) 611.

46. *Tracy v. Tuffy*, 134 U. S. 206, 10 S. Ct. 527, 33 U. S. (L. ed.) 879.

47. *Evans-Snyder-Buel Co. v. McFadden*, (C. C. A.) 105 Fed. 293. See also *Denn v. Reid*, 10 Pet. 526, 9 U. S. (L. ed.) 228.

48. *U. S. v. Atlantic Coast Line R. Co.*, (C. C. A.) 211 Fed. 897; *U. S. v. Kansas City Southern R. Co.*, 189 Fed. 471; *Chicago, etc., R. Co. v. Voelker*, (C. C. A.) 129 Fed. 522, reversing 116 Fed. 267.

49. *Guardian Trust, etc., Co. v. Fisher*, 200 U. S. 57, 26 S. Ct. 186, 50 U. S. (L. ed.) 367. Compare *Fidelity Ins., etc., Co. v. Norfolk*, 90 Fed. 175, wherein it was held that a statute providing that executions on certain judgments against a corporation should take precedence of mortgages on its property, being in derogation of the common law and hence subject to strict construction, must be confined to judgments against the mortgagor corporation and cannot be enforced as to judgments obtained against its officers and agents.

50. *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.*, (C. C. A.) 72 Fed. 553; *Larkin v. Saffarans*, 15 Fed. 150.

51. *Neal v. Clark*, 95 U. S. 709, 24 U. S. (L. ed.) 587; *In re Scott*, 126 Fed. 981; *In re Carley*, 106 Fed. 863; *In re Kenney*, (C. C. A.) 105 Fed. 893; *Botts v. Hammond*, (C. C. A.) 99 Fed. 920; *Murray v. Beal*, 97 Fed. 568; *Southern L. & T. Co. v. Benbow*, 96 Fed. 528; *Blake v. Francis Valentine Co.*, 89 Fed. 691. See also *Matter of Ankrim*, 3 McLean 285, 1 Fed. Cas. No. 395; *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171; *Matter of Billing*, 3 Ben. 215, 3 Fed. Cas. No. 1,408. But their provisions should not be stretched "in order to meet what may seem like a hard case." *Citizens' Bank v. De Pauw Co.*, (C. C. A.) 105 Fed. 930.

In *Wetmore v. Markoe*, 196 U. S. 68, 25 S. Ct. 172, 49 U. S. (L. ed.) 390, it was held that a judgment for alimony rendered against the bankrupt was not a debt barred



the patent laws of Congress,<sup>52</sup> and the copyright laws,<sup>53</sup> the federal statute prohibiting an injunction against any proceeding in a state court,<sup>54</sup> donation land grants made in order to encourage settlement of distant public lands,<sup>55</sup> statutes giving the government priority of payment out of the estates of insolvent debtors,<sup>56</sup> the federal civil rights act,<sup>57</sup> land bounty acts,<sup>58</sup> statutes designed to give to a class of claimants a legal remedy for the enforcement of their claims where none exists available to them,<sup>59</sup> a statute adjusting conflicting land grants,<sup>60</sup> and an act of Congress for the purpose of meeting and obviating hardships resulting from the rejection of claims to lands under supposed or defective grants.<sup>61</sup> The captured and abandoned property act of Congress of 1863<sup>62</sup> was liberally construed to give effect to the beneficent intention of Congress.<sup>63</sup> In the construction of statutes which fix the compensation of public officers, if the words are loose and obscure and admit of two meanings they should be construed in favor of the officer.<sup>64</sup>

**95. Declaratory.**—"When a statute is merely declarative of the common law, or in affirmance of it, and is in the general terms of the common law, there is no safer rule for its construction than 'to construe it as near to the rule and reason of the common law as may be, and by the course which that observes in other cases.'"<sup>65</sup> Accordingly, where a statute declares an obligation existent at common law and prescribes for the breach thereof severe penalties, that statute should be construed to impose the penalties only for a breach of the duty as it existed at common law though a strict adherence to the language used would warrant the imposition of a broader obligation.<sup>66</sup> Similarly, an act affirming a prior statute

by a discharge in bankruptcy, the court saying: "Unless positively required by direct enactment the courts should not presume a design upon the part of Congress in relieving the unfortunate debtor to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children."

<sup>52.</sup> *Grant v. Raymond*, 6 Pet. 218, 8 U. S. (L. ed.) 376; *Whitney v. Emmett*, Baldw. 303, 29 Fed. Cas. No. 17,585. See also *Whittemore v. Cutler*, 1 Gall. 430, 29 Fed. Cas. No. 17,600.

<sup>53.</sup> *Myers v. Callaghan*, 5 Fed. 732.

<sup>54.</sup> *Aultman v. Blumfield*, 102 Fed. 14; *American Assoc. v. Hurst*, (C. C. A.) 59 Fed. 1.

<sup>55.</sup> *Silver v. Ladd*, 7 Wall. 219, 19 U. S. (L. ed.) 138; *Stark v. Starrs*, 6 Wall. 402, 18 U. S. (L. ed.) 925; *Cutting v. Cutting*, 6 Fed. 266; *Bear v. Luse*, 6 Sawy. 151, 2 Fed. Cas. No. 1,179.

<sup>56.</sup> *U. S. v. Duncan*, 4 McLean 628, 25 Fed. Cas. No. 15,003; *U. S. v. State Bank*, 6 Pet. 29, 8 U. S. (L. ed.) 308; *Beaston v. Farmers' Bank*, 12 Pet. 134, 9 U. S. (L. ed.) 1029.

<sup>57.</sup> *U. S. v. Rhodes*, 1 Abb. 28, 27 Fed. Cas. No. 16,151.

<sup>58.</sup> *Ross v. Doe*, 1 Pet. 667, 7 U. S. (L. ed.) 307.

<sup>59.</sup> *Christie Street Commission Co. v.*

*U. S.*, (C. C. A.) 136 Fed. 326, *affirming* 129 Fed. 506; *Neurath's Motion*, 17 Ct. Cl. 225. See also *U. S. v. Wiley*, 11 Wall. 508, 20 U. S. (L. ed.) 211.

<sup>60.</sup> *U. S. v. Southern Pac. R. Co.*, 184 U. S. 49, 22 S. Ct. 285, 46 U. S. (L. ed.) 425.

<sup>61.</sup> *Logan v. Davis*, 233 U. S. 613, 58 U. S. (L. ed.) 1121, 34 S. Ct. 685; *U. S. v. Colorado Anthracite Co.*, 225 U. S. 219, 32 S. Ct. 617, 56 U. S. (L. ed.) 1063; *Beley v. Naphtaly*, (C. C. A.) 73 Fed. 124, *affirmed* 169 U. S. 353, 18 S. Ct. 354, 42 U. S. (L. ed.) 775.

<sup>62.</sup> Act of March 12, 1863.

<sup>63.</sup> *U. S. v. Padelford*, 9 Wall. 537, 19 U. S. (L. ed.) 790; *U. S. v. Anderson*, 9 Wall. 56, 19 U. S. (L. ed.) 615.

<sup>64.</sup> *Delaney v. U. S.*, 31 Ct. Cl. 61, *affirmed* 164 U. S. 282, 17 S. Ct. 84, 41 U. S. (L. ed.) 435; *Butler v. U. S.*, 23 Ct. Cl. 165; *Moore's Case*, 4 Ct. Cl. 141 [*quoting U. S. v. Morse*, 3 Story 97, 27 Fed. Cas. No. 15,820]; *U. S. v. Collier*, 3 Blatchf. 325, 25 Fed. Cas. No. 14,833. But see *U. S. v. Clough*, (C. C. A.) 55 Fed. 375.

<sup>65.</sup> *Per Lurton*, C. J., in *Cumberland, etc., Tel. Co. v. Kelly*, (C. C. A.) 160 Fed. 316. To the same effect *Kepner v. U. S.*, 195 U. S. 100, 24 S. Ct. 797, 49 U. S. (L. ed.) 114.

<sup>66.</sup> *Hampton v. St. Louis, etc., R. Co.*, 227 U. S. 456, 33 S. Ct. 263, 57 U. S. (L.

should not be construed to enlarge or diminish the scope of its provisions. "The true purpose and the designed effect of statutes, declaratory of the common or existing law and preservatory of the rights vested thereunder, is to dispel doubt and to make plain the fact that such laws and rights shall remain undisturbed." <sup>67</sup>

**96. Indian legislation.**—A statute in the nature of a contract with Indians should never be construed to their prejudice when susceptible of any other interpretation, those people being wards of the nation and wholly dependent on its good faith for protection.<sup>68</sup> Thus, doubtful expressions in such a statute as to the exemption of Indian property from taxation are liberally construed and an exemption is held an incident to the property rather than a personal privilege.<sup>69</sup> But this rule is limited strictly to statutes contractual in nature, and other acts affecting Indians are construed according to generally prevailing canons.<sup>70</sup>

*Statutes Derogatory of Common Law and Common Right; Denouncing Forfeitures*

**97. Derogatory of common law.**—"No statute is to be construed as altering the common law, farther than its words import," said Mr. Justice Strong. "It is not to be construed as making any innovation upon the common law which it does not fairly express."<sup>71</sup> Thus, a legislative intention to place bills of lading on the same footing in all respects with bills of exchange ought not to be inferred from words that can be fully satisfied without it,<sup>72</sup> and statutes giving administrators power over realty, being in derogation of common law, must be strictly construed.<sup>73</sup> For the same

ed.) 596; Cumberland, etc., Tel. Co. v. Kelly, (C. C. A.) 160 Fed. 316.

<sup>67.</sup> *Per* Sanborn, C. J., in *In re McKenzie*, (C. C. A.) 142 Fed. 383. See also *Porter v. Lazear*, 109 U. S. 84, 3 S. Ct. 58, 27 U. S. (L. ed.) 865.

<sup>68.</sup> *Choate v. Trapp*, 224 U. S. 665, 32 S. Ct. 565, 56 U. S. (L. ed.) 941, *followed* in *Gleason v. Wood*, 224 U. S. 679, 32 S. Ct. 571, 56 U. S. (L. ed.) 947. To the same effect, *Cherokee Intermarriage Cases*, 203 U. S. 76, 27 S. Ct. 29, 51 U. S. (L. ed.) 96; *Minnesota v. Hitchcock*, 185 U. S. 373, 22 S. Ct. 650, 46 U. S. (L. ed.) 954. See also *Starr v. Long Jim*, 227 U. S. 613, 33 S. Ct. 358, 57 U. S. (L. ed.) 670; *Northern Pac. R. Co. v. U. S.*, 227 U. S. 355, 33 S. Ct. 368, 57 U. S. (L. ed.) 544.

<sup>69.</sup> *Choate v. Trapp*, 224 U. S. 665, 32 S. Ct. 565, 56 U. S. (L. ed.) 941, *followed* in *Gleason v. Wood*, 224 U. S. 679, 32 S. Ct. 571, 56 U. S. (L. ed.) 947.

<sup>70.</sup> *U. S. v. Detroit First Nat. Bank*, 234 U. S. 245, 34 S. Ct. 846, 58 U. S. (L. ed.) 1298.

<sup>71.</sup> *Shaw v. North Pennsylvania R. Co.*, 101 U. S. 565, 25 U. S. (L. ed.) 892; *Brunswick Terminal Co. v. Baltimore Nat. Bank*, 192 U. S. 386, 24 S. Ct. 314, 48 U. S. (L. ed.) 491; *Wells v. Jersey City*, 207 Fed. 871; *Central Wisconsin Trust Co. v. Barter*, (C. C. A.) 194 Fed. 835;

*Barber Asphalt Paving Co. v. Austin*, (C. C. A.) 186 Fed. 443; *Wilson Sewing Mach. Co. v. Jackson*, 1 Hughes 295, 30 Fed. Cas. No. 17,853. To the point that statutes in derogation of the common law are to be strictly construed, see also *Meister v. Moore*, 96 U. S. 79, 24 U. S. (L. ed.) 826; *Nudd v. Burrows*, 91 U. S. 442, 23 U. S. (L. ed.) 286; *Douglass v. Lewis*, 131 U. S. 75, 9 S. Ct. 634, 33 U. S. (L. ed.) 53; *McCool v. Smith*, 1 Black 470, 17 U. S. (L. ed.) 218; *Brown v. Barry*, 3 Dall. 367, 1 U. S. (L. ed.) 638; *Harrington v. Herrick*, (C. C. A.) 64 Fed. 471; *Gwathmay v. Clisby*, 31 Fed. 222; *Steiger v. Third Nat. Bank*, 6 Fed. 575; *Wick v. Schooner Samuel Strong*, 6 McLean 592, 29 Fed. Cas. No. 17,607; *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 283; *Ross v. Jones*, 22 Wall. 591, 22 U. S. (L. ed.) 730.

"Whenever an act is in derogation of the common law and should be strictly construed and strictly pursued, the party seeking the benefit of it must bring himself clearly within not only the spirit and meaning, but the letter, of the act. He can take nothing by intentment." *Per* Speer, J., in *August v. Calloway*, 35 Fed. 386.

<sup>72.</sup> *Shaw v. North Pennsylvania R. Co.*, 101 U. S. 565, 25 U. S. (L. ed.) 892.

<sup>73.</sup> *Jones v. Lamar*, 34 Fed. 454.

reason a statute giving married women the right to sue for torts committed against them as fully and freely as if they were unmarried, does not authorize a suit by a married woman against her husband for personal injuries of his infliction.<sup>74</sup> And a statutory right is preferably held cumulative and additional to, rather than exclusive of, an existing common law right if the two are not clearly inconsistent.<sup>75</sup> But where the purpose of the legislature to repeal or modify the common law is clear the statute must be executed according to its terms.<sup>76</sup> And a rule of construction prescribed by the legislature that all statutes including those in derogation of common law be liberally construed is binding on the judiciary.<sup>77</sup>

**98. Derogatory of common right.**—Statutes in derogation of common right are to be strictly construed and will be given no effect beyond the fair meaning of the words employed.<sup>78</sup> The rule applies to statutes which abridge the power to make contracts.<sup>79</sup> "All legislation interfering with the right of the individual, whether he be a natural person or a corporation, to enter into contracts or to exercise his preferences as to the person with whom he shall do business, should be cautiously construed. It is legislation of a novel character, and should not be extended beyond the plain import

74. *Thompson v. Thompson*, 218 U. S. 611, 31 S. Ct. 111, 54 U. S. (L. ed.) 1180. Mr. Justice Day, voicing the opinion of the court in that case, said: "It must be presumed that the legislators who enacted this statute were familiar with the long established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the power of the legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention." Mr. Justice Harlan, however, with whom concurred Mr. Justice Hughes and Mr. Justice Holmes, submitted a dissenting opinion wherein among other things this was said: "My brethren feel constrained to say that the present case illustrates the attempt, often made, to effect radical changes in the common law by mere construction. On the contrary, the judgment just rendered will have, as I think, the effect to defeat the clearly expressed will of the legislature by a construction of its words that cannot be reconciled with their ordinary meaning."

75. *Barber Asphalt Paving Co. v. Austin* (C. C. A.) 186 Fed. 443. See also *Tennessee Coal, etc., Co. v. George*, 233 U. S. 354, 34 S. Ct. 587, 58 U. S. (L. ed.) 997.

76. *Southern Pac. Co. v. Schoer*, (C. C. A.) 114 Fed. 469; *U. S. v. Matthews*, 173 U. S. 381, 19 S. Ct. 413, 43 U. S. (L. ed.) 738. See dissenting opinion in *Thompson v. Thompson*, 218 U. S. 611, 31 S. Ct. 111, 54 U. S. (L. ed.) 1180.

"The dogma as to the strict construction of statutes in derogation of the com-

mon law only amounts to the recognition of a presumption against an intention to change existing law, and as there is no doubt of that intention here, the extent of the application of the change demands at least no more rigorous construction than would be applied to penal laws. And, as Chief Justice Parker remarked, conceding that statutes in derogation of the common law are to be construed strictly, 'they are also to be construed sensibly, and with a view to the object aimed at by the legislature.'" *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363, citing *Gibson v. Jenney*, 15 Mass. 205.

77. *Smith v. Smith*, 210 Fed. 947.

78. *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 22 S. Ct. 881, 46 U. S. (L. ed.) 1144; *Barry v. Snowden*, 106 Fed. 572; *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 673, 15 S. Ct. 413, 39 U. S. (L. ed.) 574; *August v. Calloway*, 35 Fed. 381.

All laws in restraint of liberty must be strictly construed. *In re Wolf*, 27 Fed. 609; *In re Schenkein*, 113 Fed. 429.

"A statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 U. S. (L. ed.) 553.

79. *In re Johnson*, 224 Fed. 180; *Barry v. Snowden*, 106 Fed. 571, where the court strictly construed a statute declaring void stipulations for attorneys' fees in written evidence of indebtedness.

of the language used by the lawmakers." <sup>80</sup> The power of eminent domain is an inherent and essential attribute of sovereignty, but it is arbitrary in character, and is subversive of the right of private property wherever it is resorted to. Therefore, before it can be exercised, its delegation must plainly appear, and may not be deduced from ambiguous language by doubtful inference. <sup>81</sup>

**99. Denouncing forfeitures.**—By the settled doctrine of the United States Supreme Court, "whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed, and the condemnation, when obtained, relates back to that time and avoids all intermediate sales and alienations, even to purchases in good faith." <sup>82</sup> The rule was early applied under statutes enacting that whenever goods, the importation of which was prohibited, should be imported, they should be forfeited, and that if any ship should leave port without clearance or giving bond as required by law, the ship and the cargo should be forfeited. <sup>83</sup> It has been recognized and acted on in cases of goods imported in fraud of the customs laws, <sup>84</sup> and it has been steadfastly upheld under the internal revenue laws; <sup>85</sup> in one case under an enactment punishing by fine and imprisonment any person removing distilled spirits from the distillery contrary to law, with intent to evade the payment of the tax thereon; <sup>86</sup> and in another case under an enactment that any person fraudulently executing an instrument required by the internal revenue laws should be punished by fine and imprisonment, and the property to which the instrument related should be forfeited. <sup>87</sup> But unless the words of the statute are absolute, the right of property is not divested until the property is condemned. <sup>88</sup> Where

<sup>80.</sup> *Per* Lacombe, J., in *Prescott, etc., v. R. Co. v. Atchison, etc., R. Co.*, 73 Fed. 438.

<sup>81.</sup> *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 25 S. Ct. 133, 49 U. S. (L. ed.) 312; *U. S. v. A Certain Tract Land*, 70 Fed. 943; *U. S. v. Ranera*, 70 Fed. 748. See also 16 Op. Atty.-Gen. 326; 17 Op. Atty.-Gen. 509.

<sup>82.</sup> *Per* Mr. Justice Gray, in *U. S. v. Stowell*, 133 U. S. 16, 10 S. Ct. 244, 33 U. S. (L. ed.) 555. See also *U. S. v. One Hundred Barrels Spirits*, 2 Abb. 313, 27 Fed. Cas. No. 15,948; *Prince v. U. S.*, 2 Gall. 209, 19 Fed. Cas. No. 11,425; *U. S. v. Stevenson*, 3 Ben. 119, 27 Fed. Cas. No. 16,396; *U. S. v. Schooner Catherine*, 2 Paine 721, 25 Fed. Cas. Nos. 14,755; *U. S. v. Bark Reindeer*, 2 Cliff. 57, 27 Fed. Cas. No. 16,144; *Jones v. Shore*, 1 Wheat. 474, 4 U. S. (L. ed.) 136; *Smith v. Maryland*, 6 Cranch 286, 3 U. S. (L. ed.) 225; *U. S. v. One Water Cask*, 27 Fed. Cas. No. 15,966; *U. S. v. Twenty-One Barrels High Wines*, 28 Fed. Cas. No. 16,567.

<sup>83.</sup> *U. S. v. 1,960 Bags Coffee*, 8 Cranch 398, 3 U. S. (L. ed.) 602; *U. S. v. The Brigantine Mars*, 8 Cranch 417, 3 U. S.

(L. ed.) 609. See also *The Florenzo, Blatchf. & H.* 52, 9 Fed. Cas. No. 4,886; *The Maria, Deady* 99, 16 Fed. Cas. No. 9,075.

<sup>84.</sup> *Gelston v. Hoyt*, 3 Wheat. 311, 4 U. S. (L. ed.) 381; *Wood v. U. S.*, 16 Pet. 362, 10 U. S. (L. ed.) 987; *Caldwell v. U. S.*, 8 How. 366, 12 U. S. (L. ed.) 1115; *U. S. v. Certain Diamonds*, 30 Fed. 364.

<sup>85.</sup> *Heidritter v. Elizabeth Oil-Cloth Co.*, 6 Fed. 138; *U. S. v. Fifty-Six Barrels Whiskey*, 1 Abb. 93, 25 Fed. Cas. No. 15,095; *U. S. v. Spring Valley Distillery*, 11 Blatchf. 255, 25 Fed. Cas. No. 14,963.

<sup>86.</sup> *Henderson's Distilled Spirits*, 14 Wall. 44, 20 U. S. (L. ed.) 815.

<sup>87.</sup> *Thatcher's Distilled Spirits*, 103 U. S. 679, 26 U. S. (L. ed.) 535.

<sup>88.</sup> *Burbank v. Conrad*, 96 U. S. 299, 24 U. S. (L. ed.) 731; *Bennett v. Hunter*, 9 Wall. 326, 19 U. S. (L. ed.) 672; *U. S. v. One Hundred Barrels Spirits*, 1 Dill. 49, 2 Abb. 305, 27 Fed. Cas. No. 15,948; *The Kate Heron*, 6 Sawy. 106, 14 Fed. Cas. No. 7,619; *Clark v. Protection Ins. Co.*, 1 Story 135, 5 Fed. Cas. No. 2,860; *U. S. v. Three Hundred and Ninety-Six Barrels*

by the terms of the act the government may elect to proceed against the property or the person who committed the wrongful act,<sup>89</sup> or the declaration of forfeiture is declared disjunctively of the property or its value,<sup>90</sup> the title does not vest in the government until condemnation of the property. And a statute must be clear and unequivocal which imposes upon a court the duty of declaring a forfeiture of one man's property for the fault of another.<sup>91</sup> Thus, a team and wagon used in the unlawful removal of unstamped barrels of whiskey was not forfeited to the government under the drastic provisions of the revenue laws as against a mortgagee thereof who, by reason of condition broken, had become the legal owner and who was ignorant of the purpose for which it was used.<sup>92</sup>

*Statutes Validating Unlawful Acts; Statutes of Limitation; Maritime Lien Acts*

**100. Validation of unlawful acts.**—Where an act of Congress legalized a bridge across a navigable river which theretofore constituted a public nuisance, the effect of the act was to put an end to suits instituted to prevent the maintenance of the bridge, even though judgment in such suits had been rendered against the defendant.<sup>93</sup> Upon the same principle the United States Supreme Court has dismissed appeals where by the repeal of a statute or the occurrence of some other event the court found itself unable to grant any effectual relief to the plaintiff in the suit.<sup>94</sup>

**101. Statutes of limitation.**—Statutes of limitation, "which are among the most beneficial to be found in our books,"<sup>95</sup> are now regarded favorably in all our courts.<sup>96</sup> Their provisions should not be lightly overturned<sup>97</sup> by any construction not warranted by the natural import of the words.<sup>98</sup> "No creditor has a right to complain of a strict construction," said Mr. Justice Story, "since it is only by his own fault and laches that it can be brought to bear injuriously upon him."<sup>99</sup> Courts uniformly decline to read into statutes of limitation exceptions not named therein.<sup>1</sup> Acts of limitation operate only prospectively unless the contrary clearly appears.<sup>2</sup>

Distilled Spirits, 28 Fed. Cas. No. 16,503; The Nabob, Brown Adm. 115. See also Fairfax v. Hunter, 7 Cranch 624, 3 U. S. (L. ed.) 453; Schooner Paulina's Cargo v. U. S., 7 Cranch 60, 3 U. S. (L. ed.) 266.

<sup>89</sup> U. S. v. Grundy, 3 Cranch 338, 2 U. S. (L. ed.) 459.

<sup>90</sup> Caldwell v. U. S., 8 How. 366, 12 U. S. (L. ed.) 1115; U. S. v. Grundy, 3 Cranch 337, 2 U. S. (L. ed.) 459; The Mary Celeste, 2 Lowell 357, 16 Fed. Cas. No. 9,202; Six Hundred Tons Iron Ore, 9 Fed. 595.

<sup>91</sup> U. S. v. Two Barrels Whisky, (C. C. A.) 96 Fed. 481.

See § 108.

<sup>92</sup> U. S. v. Two Barrels Whisky, (C. C. A.) 96 Fed. 479.

<sup>93</sup> Pennsylvania v. Wheeling, etc., Bridge Co., 18 How. 421, 15 U. S. (L. ed.) 435; The Clinton Bridge, 10 Wall. 454, 19 U. S. (L. ed.) 969, Woolw. 150, 5 Fed. Cas. No. 2,900. See also U. S. v. Elliott, 74 Fed. 92.

<sup>94</sup> Mills v. Green, 159 U. S. 651, 16 S. Ct. 132, 40 U. S. (L. ed.) 293; New Orleans Flour Inspectors v. Glover, 160 U. S. 170, 161 U. S. 101, 16 S. Ct. 321, 492, 40 U. S. (L. ed.) 382, 632.

<sup>95</sup> Per Livingston, J., in Denn v. Harnden, 1 Paine 61, 9 Fed. Cas. No. 4,819.

<sup>96</sup> Leffingwell v. Warren, 2 Black 606, 17 U. S. (L. ed.) 261, where the court said: "Usually they are founded in a wise and salutary policy, and promote the ends of justice." See also Lewis v. Marshall, 5 Pet. 470, 8 U. S. (L. ed.) 195.

<sup>97</sup> Bell v. Morrison, 1 Pet. 362, 7 U. S. (L. ed.) 174.

<sup>98</sup> Denn v. Harnden, 1 Paine 61, 9 Fed. Cas. No. 4,819. See also Amy v. Watertown, 130 U. S. 320, 9 S. Ct. 537, 32 U. S. (L. ed.) 953.

<sup>99</sup> Bell v. Morrison, 1 Pet. 362, 7 U. S. (L. ed.) 174.

<sup>1</sup> See *supra*, § 26, as to avoidance of judicial legislation.

<sup>2</sup> Vaughan v. East Tennessee, etc., R.

**102. Maritime lien acts.**— Construing a statute of the state of Maine giving certain artisans and materialmen maritime liens for work done on or material furnished a vessel at its home port, Judge Curtis said: "Privileged liens constituting a *jus in re*, accompanying the property into the hands of *bona fide* purchasers, and operating to the prejudice of general creditors, are matters *stricti juris*, which cannot be extended from one case to another argumentatively, or by analogy or inference. They must be given by the law itself, and the case must be found described in the law."<sup>3</sup> And in numerous other instances the courts have confined such liens strictly within the terms of the statutes creating them.<sup>4</sup>

### *Penal Statutes*

**103. Rule of strict construction.**— In a leading federal case expounding the rule, which is as old as construction itself, that penal statutes must be construed strictly, Chief Justice Marshall said: "The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation which it would be unsafe to consider as precedents forming a general rule for other cases."<sup>5</sup> Accordingly,

Co., 1 Flipp. 626, 28 Fed. Cas. No. 16,898; Union Pac. R. Co. v. Laramie Stock Yards Co., 231 U. S. 190, 34 S. Ct. 101, 58 U. S. (L. ed.) 179.

See § 37 as to prospective operation of statutes of limitation.

3. The *Kiersage*, 2 Curt. 421, 14 Fed. Cas. No. 7,762. To the same effect *The Mary F. Chisholm*, 129 Fed. 814. See also *The Cabarga*, 3 Blatchf. 75, 4 Fed. Cas. No. 2,276.

See § 94 as to the construction of mechanics' and materialmen's liens.

4. *The Edith*, 94 U. S. 518, 24 U. S. (L. ed.) 167; *The James T. Furber*, 157 Fed. 124; *Fredericks v. James Rees, etc., Co.*, (C. C. A.) 135 Fed. 730; *The Young Sam*, 2 Flipp. 440, 30 Fed. Cas. No. 18,186; *Drew v. Hull of a New Ship*, 17 Leg. Int. 405, 7 Fed. Cas. No. 4,078; *Brown v. The Alida*, 13 Leg. Int. 369, 4 Fed. Cas. No. 1,989; *The Alida*, 1 Abb. Adm. 165, 1 Fed. Cas. No. 199. See also *The John S. Parsons*, 110 Fed. 994; *The Haytian Republic*, 65 Fed. 120; *Parker v. Little Acme*, 43 Fed. 925; *The H. N. Emilie*, 70 Fed. 511; *The Kingston*, 23 Fed. 200; *Kretzmer v. The William A. Lewering*, 35 Fed. 783. But a statute giving such liens for labor done or material furnished "by virtue of a written or parol agreement" was held to have within its purview im-

plied as well as express agreement. *Read v. Hull of a New Brig*, 1 Story 244, 20 Fed. Cas. No. 11,609.

5. *U. S. v. Wiltberger*, 5 Wheat. 96, 5 U. S. (L. ed.) 37. See further to the point that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport, *U. S. v. Baltimore, etc., R. Co.*, 222 U. S. 8, 32 S. Ct. 6, 56 U. S. (L. ed.) 68; *U. S. v. New York, etc., R. Co.*, 212 U. S. 509, 29 S. Ct. 313, 53 U. S. (L. ed.) 629; *Hackfeld v. U. S.*, 197 U. S. 442, 25 S. Ct. 456, 49 U. S. (L. ed.) 826; *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 25 S. Ct. 443, 49 U. S. (L. ed.) 790; *Swearingen v. U. S.*, 161 U. S. 451, 16 S. Ct. 562, 40 U. S. (L. ed.) 765; *France v. U. S.*, 164 U. S. 683, 17 S. Ct. 219, 41 U. S. (L. ed.) 595; *Sarila v. U. S.*, 152 U. S. 570, 14 S. Ct. 720, 38 U. S. (L. ed.) 556; *U. S. v. Reese*, 92 U. S. 219, 23 U. S. (L. ed.) 563; *U. S. v. Gooding*, 12 Wheat. 477, 6 U. S. (L. ed.) 693; *Andrews v. U. S.*, 2 Story 202, 1 Fed. Cas. No. 381; *U. S. v. Missouri Pac. R. Co.*, (C. C. A.) 213 Fed. 169; *Northern Pac. R. Co. v. U. S.*, (C. C. A.) 213 Fed. 162; *African Prince*, 212 Fed. 552; *Anamoose First Nat. Bank v. U. S.*, (C. C. A.) 206 Fed. 374; *U. S. v. Van Wert*, 195 Fed. 974; *Younts v. Southwestern Tel., etc., Co.*, 192

it was held that an act of Congress punishing certain offenses committed on the "high seas" could not be extended to an offense committed on the tidal waters of a navigable river in the interior of a foreign country.<sup>6</sup> "There can be no constructive offenses," said Chief Justice Fuller, "and before a man can be punished his case must be plainly and unmistakably within the statute."<sup>7</sup> In the construction of penal statutes "every case must come, not only within its letter, but within its spirit and purpose."<sup>8</sup> "Courts will not give an equitable construction to a penal law, even for the purpose of embracing cases clearly within the mischief intended to be remedied."<sup>9</sup> It has been said that the rule of strict construction "has been much relaxed and given a more liberal application than in days when there were a great many more offenses punishable with death."<sup>10</sup> A penal statute "must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the

Fed. 200; *U. S. v. Stone*, 188 Fed. 836; *St. Louis, etc., R. Co. v. U. S.*, (C. C. A.) 188 Fed. 191; *U. S. v. Ehr Gott*, 182 Fed. 267; *Southern R. Co. v. Sutton*, (C. C. A.) 179 Fed. 471; *U. S. v. Illinois Cent. R. Co.*, (C. C. A.) 177 Fed. 801; *U. S. v. Louisville, etc., R. Co.*, 165 Fed. 936; *U. S. v. Baltimore, etc., R. Co.*, (C. C. A.) 159 Fed. 33; *St. Louis, etc., R. Co. v. Delk*, (C. C. A.) 158 Fed. 937; *U. S. v. Seventy-Five Bales of Tobacco*, (C. C. A.) 147 Fed. 127; *McInerney v. U. S.*, (C. C. A.) 143 Fed. 729; *U. S. v. Ninety-Nine Diamonds*, (C. C. A.) 139 Fed. 961; *Field v. U. S.*, (C. C. A.) 137 Fed. 6; *The Ben R.*, (C. C. A.) 134 Fed. 784; *U. S. v. Twenty Boxes of Corn Whiskey*, (C. C. A.) 133 Fed. 910, *affirming* 123 Fed. 135; *U. S. v. York*, 131 Fed. 323; *Rothschild v. Adler-Weinberger Steamship Co.*, (C. C. A.) 130 Fed. 866; *U. S. v. Moffitt*, (C. C. A.) 128 Fed. 375; *U. S. v. Twenty Boxes of Corn Liquor*, 123 Fed. 135, *affirmed* (C. C. A.) 133 Fed. 910; *U. S. v. Hewecker*, 79 Fed. 64; *In re McDonough*, 49 Fed. 362; *U. S. v. Chong Sam*, 47 Fed. 885; *U. S. v. Garretson*, 42 Fed. 25; *Schwerin v. North Pac. R. Co.*, 36 Fed. 712; *Sarony v. Ehrich*, 28 Fed. 80; *Pentlarge v. Kirby*, 19 Fed. 504; *French v. Foley*, 11 Fed. 805; *Taylor v. Gilman*, 23 Blatchf. 325; *Wilson v. Singer Mfg. Co.*, 9 Bias. 175, 30 Fed. Cas. No. 17,836; *U. S. v. La Coste*, 2 Mason 138, 26 Fed. Cas. No. 15,548; *U. S. v. Sharp*, Pet. C. C. 122, 27 Fed. Cas. No. 16,264; 17 Op. Atty-Gen. 419 (Brewster, 1882).

See § 23 as to the consideration to be given the mischief aimed at by a penal statute. See § 61 as to reference to statutes *in pari materia*.

6. *U. S. v. Wiltberger*, 5 Wheat. 76, 5 U. S. (L. ed.) 37.

7. *U. S. v. Lacher*, 134 U. S. 624, 10

S. Ct. 625, 33 U. S. (L. ed.) 1060. See also *Todd v. U. S.*, 158 U. S. 282, 15 S. Ct. 889, 39 U. S. (L. ed.) 982; *U. S. v. Brewer*, 139 U. S. 288, 11 S. Ct. 538, 35 U. S. (L. ed.) 190; *Andrews v. U. S.*, 2 Story 202, 1 Fed. Cas. No. 381.

"Penal statutes are to be construed strictly. They are never extended by implication." *Per Justice Story*, in *Andrews v. U. S.*, 2 Story 213, 1 Fed. Cas. No. 381. See also *U. S. v. Starr*, Hempst. 469, 27 Fed. Cas. No. 16,379; *In re Wolf*, 27 Fed. 609.

8. *Per Lurton, C. J.*, in *U. S. v. 1,150 1/2 Pounds Celluloid*, (C. C. A.) 82 Fed. 634. See also *U. S. v. Gay*, 80 Fed. 255.

"It is a sound rule for the construction of a penal statute," said Judge Johnson of the federal Circuit Court, "that if the case of the accused is clearly within the letter of a statute in his favor," that is, if an alleged offender is protected by its letter, "the court will rarely, if ever, take his case out of it, upon the ground that it is not within the spirit and intent of the act." *U. S. v. Ragsdale*, Hempst. 501, 27 Fed. Cas. No. 16,113, where the rule just stated was applied in favor of the accused, who pleaded a pardon by virtue of a treaty with the Cherokee nation which provided that "all offenses and crimes committed by a citizen or citizens of the Cherokee nation against the nation or an individual or individuals are hereby pardoned."

See § 23 as to consideration to be given the mischief aimed at by a penal statute.

9. *Per Betts, J.*, in *Ferrett v. Atwill*, 1 Blatchf. 156, 8 Fed. Cas. No. 4,747. To the same point see *U. S. v. Williams*, 3 Fed. 491.

10. *Per Purnell, D. J.*, in *MacDaniel v. U. S.*, (C. C. A.) 87 Fed. 327.

defendant than it would if the statute were remedial. In both cases it will endeavor to effect substantial justice."<sup>11</sup>

**104. Limitations of rule.**—The evident intention of the legislature ought not to be defeated by a forced and over-strict construction.<sup>12</sup> "Criminal statutes, like other acts of legislation, are to receive a reasonable construction, with a view to effecting the purpose of their enactment."<sup>13</sup> "Where the words are general," said Mr. Justice Story in one of the leading cases, "and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word."<sup>14</sup> Expressing the same thought, Mr. Justice Swayne said that "the rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."<sup>15</sup> And chief Justice Marshall conceded

11. *Per* Justice Brown in *Bolles v. Outing Co.*, 175 U. S. 265, 20 S. Ct. 94, 44 U. S. (L. ed.) 156.

12. *Per* Taney, C. J., in *U. S. v. Morris*, 14 Pet. 475, 10 U. S. (L. ed.) 543. See also *U. S. v. Antikamnia Chemical Co.*, 231 U. S. 654, 34 S. Ct. 222, 58 U. S. (L. ed.) 419; *Ex p. Webb*, 225 U. S. 663, 32 S. Ct. 769, 56 U. S. (L. ed.) 1248; *U. S. v. Corbett*, 215 U. S. 233, 30 S. Ct. 81, 54 U. S. (L. ed.) 173; *Hackfeld v. U. S.*, 197 U. S. 442, 25 S. Ct. 456, 47 U. S. (L. ed.) 826; *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363, *reversing* (C. C. A.) 117 Fed. 462; *Northern Securities Co. v. U. S.*, 193 U. S. 197, 24 S. Ct. 436, 48 U. S. (L. ed.) 679; *Sundry Goods, etc. v. U. S.*, 2 Pet. 367, 7 U. S. (L. ed.) 450; *U. S. v. Wiltberger*, 5 Wheat. 95, 5 U. S. (L. ed.) 37; *The Emily*, 9 Wheat. 385, 6 U. S. (L. ed.) 116; *Wiborg v. U. S.*, 163 U. S. 647, 16 S. Ct. 1127, 1197, 41 U. S. (L. ed.) 289; *U. S. v. Souders*, 2 Abb. 461, 27 Fed. Cas. No. 16,358; *U. S. v. Wilson*, *Baldw.* 107, 28 Fed. Cas. No. 16,730; *U. S. v. Sweeney*, 1 Biss. 312, 28 Fed. Cas. No. 16,426; *U. S. v. Stone*, 188 Fed. 836; *Southern R. Co. v. Sutton*, (C. C. A.) 179 Fed. 471; *U. S. v. Illinois, etc., R. Co.*, (C. C. A.) 177 Fed. 801; *U. S. v. Dillin*, (C. C. A.) 168 Fed. 813; *U. S. v. Williams*, 159 Fed. 310; *U. S. v. Lonabaugh*, 158 Fed. 314; *McInerney v. U. S.*, (C. C. A.) 143 Fed. 729; *U. S. v. Southern R. Co.*, 135 Fed. 122; *In re Moore*, 66 Fed. 951; *U. S. v. Morrissey*, 32 Fed. 147; *In re Coy*, 31 Fed. 800; *U. S. v. Gaylord*, 17 Fed. 443; *U. S. v. Stone*, 8 Fed. 251; *The Annie S. Cooper*, 48 Fed. 703; *U. S.*

*v. Hall*, 9 Am. L. Reg. 232, 26 Fed. Cas. No. 15,281; *Schooner Bolina*, 1 Gall. (U. S.) 83, 3 Fed. Cas. No. 1,608.

"The law delights in the liberty and happiness of the citizen. Penalties denounced against those who invade these rights, in order to protect that liberty and happiness, are not subjects of disfavor in the law. They are never construed with the same strictness, or on the same footing, with penalties which regulate or restrain the exercise of natural right, or forbid the doing of things not intrinsically wrong. No man has any natural right to keep another in involuntary servitude." *Peonage Cases*, 123 Fed. 671.

13. *Per* Mr. Justice Day, in *U. S. v. New York Cent., etc., R. Co.*, 212 U. S. 509, 29 S. Ct. 313, 53 U. S. (L. ed.) 629.

14. *U. S. v. Winn*, 3 Sumn. 209, 28 Fed. Cas. No. 16,740, in which case it was held that under an act of Congress providing that "if any master or other officer," etc., shall, from malice, etc., "beat, wound, or imprison any one or more of the crew," he shall be punished, etc., the word "crew" was intended to include the officers as well as the common seamen, and that a master was liable, under the statute, for an imprisonment of the first mate of his ship. See also the similar case of *U. S. v. Trice*, 30 Fed. 490. See also, in line with the text, *U. S. v. Amedy*, 11 Wheat. 392, 6 U. S. (L. ed.) 502; *U. S. v. McArdle*, 2 Sawy. 367, 26 Fed. Cas. No. 15,653; *U. S. v. Belew*, 2 Brock. 283, 24 Fed. Cas. No. 14,563.

15. *U. S. v. Hartwell*, 6 Wall. 396, 18 U. S. (L. ed.) 830, quoted in *Peonage*



that the rule of strict construction of penal statutes "is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptance, or in that sense in which the legislature has obviously used them, would comprehend."<sup>16</sup> It was held that sheep were within the meaning of the word "cattle" in an act of Congress punishing any person who should drive "horses, mules, or cattle to range or feed upon" Indian lands.<sup>17</sup> In one case certain words in a penal statute were rejected as surplusage, since by giving them effect the entire act would have been made inoperative and impossible of execution.<sup>18</sup> Judge Deady said that "nothing more is meant" by the rule of strict construction of penal statutes "than that such statutes shall not be extended by what is known as equitable construction to cases other than those which clearly appear to have been intended by the legislature, and are fairly included in the language used to express such intention. The intention, then, of the legislature is as proper a subject of inquiry for the court in the case of a penal statute as any other; and that intention, when ascertained by applying the usual rules of construction, is to govern in the one case as well as the other."<sup>19</sup> "The natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that if one of them is impossible, it does not

Cases, 123 Fed. 671. See also, to the same effect, *U. S. v. French*, 57 Fed. 386; *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 328, 17 S. Ct. 540, 41 U. S. (L. ed.) 1007; *U. S. v. Debs*, 64 Fed. 748; *U. S. v. Pratt*, 2 Am. L. T. Rep. N. S. 238, 27 Fed. Cas. No. 16,082; *The Schooner Harriet*, 1 Story 256, 12 Fed. Cas. No. 6,099; *The Schooner Industry*, 1 Gall. 114, 13 Fed. Cas. No. 7,028; *U. S. v. One Raft Timber*, 13 Fed. 796.

16. *U. S. v. Wiltberger*, 5 Wheat. 95, 5 U. S. (L. ed.) 37, *quoted* in *U. S. v. Anamoose First Nat. Bank*, 190 Fed. 336. See also *U. S. v. Palmer*, 3 Wheat. 629, 4 U. S. (L. ed.) 471; *U. S. v. Sullivan*, 43 Fed. 605.

17. *U. S. v. Mattock*, 2 Sawy. 148, 26 Fed. Cas. No. 15,744, where Judge Deady said: "The mischief to be prevented or remedied \* \* \* was the depasturing of the Indian lands by the stock of white persons. Sheep are as much within the reason of the enactment as horses or mules. It can hardly be presumed that Congress intended to impose a penalty upon persons for feeding horses upon the Indian range, and at the same time permit them to cover it with sheep with impunity. Although the word cattle in its primary sense includes horses and mules, at this day it is not often so applied in the United States. Therefore, I presume, Congress, out of abundance of caution, particularized that class of animals, and used the word cattle to describe all others included in the term. If the act had read other cattle, there would be some reason for holding that the general phrase was restrained to other cattle of the horse genus or kind, if there be any such. But

here the term cattle is not used merely to round a period, or as an expletory embellishment of what precedes it, but as an independent and particular enumeration of a class of subjects in addition to those already named."

18. *U. S. v. Stern*, 5 Blatchf. 512, 27 Fed. Cas. No. 16,389, where an act of Congress provided that persons who shall offer a bribe to a public officer "and shall be thereof convicted" shall be liable to indictment, etc., and the quoted words were rejected and a conviction upheld.

19. *U. S. v. Mattock*, 2 Sawy. 151, 26 Fed. Cas. No. 15,744, *citing* *U. S. v. Wiltberger*, 5 Wheat. 95, 5 U. S. (L. ed.) 37; *Sundry Goods, etc. v. U. S.*, 2 Pet. 367, 7 U. S. (L. ed.) 450; *U. S. v. Winn*, 3 Sumn. 219, 28 Fed. Cas. No. 16,740, and *U. S. v. Morris*, 14 Pet. 464, 10 U. S. (L. ed.) 543. But the authorities cited do not fully sanction the broad statement that "the usual rules of construction" invariably govern the interpretation of penal statutes. In *U. S. v. Wiltberger*, 5 Wheat. 95, 5 U. S. (L. ed.) 37, above cited, Chief Justice Marshall merely said that "the intention of the lawmaker must govern in the construction of penal as well as other statutes," and that penal laws "are not to be construed so strictly as to defeat the obvious intention of the legislature."

In a penal statute the words "this act" are literally construed and cannot be extended to another act *in pari materia*, which is contrary to the prevailing rule of construction of statutes not penal. See *U. S. v. Stocking*, 87 Fed. 859; and in other parts of this article it will appear that courts apply ordinary rules of

mean on that account to let the defendant escape."<sup>20</sup> That inference should be given effect.

**105. Rule of reasonable doubt.**—In construing penal statutes the intention of the legislature "must be gathered from the words, and," said Mr. Justice Swayne, "they must be such as to leave no room for reasonable doubt upon the subject."<sup>21</sup> The same rule has been declared in numerous other cases,<sup>22</sup> but questioned in a case in the federal Circuit Court.<sup>23</sup>

**106. Meaning of words.**—In construing penal statutes the legislative intent "is, in most cases, to be found by giving to the words the meaning in which they are used in ordinary speech."<sup>24</sup> Thus, lager beer is not "spirituous liquors," nor "wine," within the meaning of those terms in

construction with some degree of caution where the result may be prejudicial to a person on trial for a crime.

20. *Per* Mr. Justice Holmes, in *U. S. v. Union Supply Co.*, 215 U. S. 50, 30 S. Ct. 15, 54 U. S. (L. ed.) 87.

21. *U. S. v. Hartwell*, 6 Wall. 396, 18 U. S. (L. ed.) 830.

22. *Martin v. U. S.*, (C. C. A.) 168 Fed. 198; *Harrison v. Vose*, 9 How. 378, 13 U. S. (L. ed.) 179, where Justice Woodbury said: "In the construction of a penal statute it is well settled also that all reasonable doubts concerning its meaning ought to operate in favor of the respondent." *U. S. v. Garretson*, 42 Fed. 22; *U. S. v. Mathias*, 36 Fed. 895; *U. S. v. Comerford*, 25 Fed. 903; *U. S. v. Hewitt*, 11 Fed. 245; *U. S. v. Long*, 10 Fed. 880; *U. S. v. Voorhees*, 9 Fed. 144; *U. S. v. Reese*, 5 Dill. 405, 27 Fed. Cas. No. 16,137; *U. S. v. Whittier*, 5 Dill. 39, 28 Fed. Cas. No. 16,688, where Judge Dillon said: "If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused" [*reiterated in In re Buell*, 3 Dill. 123, 4 Fed. Cas. No. 2,102]; *The Schooner Enterprise*, 1 Paine 34, 8 Fed. Cas. No. 4,499, where Livingston, J., said: "If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labors under the same uncertainty as to the meaning of the legislature;" *U. S. v. Williams*, 3 Fed. 491, where Commissioner Allen said: "If there is a fair doubt whether the act charged is embraced within the prohibition of the statute, the doubt is to be resolved in favor of the defendant."

"One who was not beyond reasonable doubt within the class declared punishable by the expressed will of Congress may not be brought within that class after the event by interpretation. *Ex post facto* law by judicial construction is as pernicious as *ex post facto* legislation." *Erbaugh v. U. S.*, (C. C. A.) 173 Fed. 433.

23. *U. S. v. Huggett*, 40 Fed. 637, where

Judge Hammond said: "The defendants first insist that where there is a reasonable doubt the construction should be in their favor. I am not quite prepared to hold that this rule of reasonable doubt by analogy to the well-known principle which governs a jury in trying the facts should exempt the defendants from that penalty which they have incurred if the statute be against them, for this would be to abrogate by judicial action every dubious or doubtful enactment; and the elasticity of language is such, and the carelessness of legislation is so fruitful of ambiguity in drawing statutes, that it would be a dangerous doctrine to establish by that broad expression of it. Nor do I find that the Supreme Court of the United States has so expressed it in the cases cited for it in *U. S. v. Whittier*, 5 Dill. 35, 28 Fed. Cas. No. 16,688; *U. S. v. Clayton*, 2 Dill. 226, 25 Fed. Cas. No. 14,814; 12 Myers, Fed. Dec., § 345, and *U. S. v. Comerford*, 25 Fed. 903. That court has undoubtedly enforced the rule of a strict, though reasonable, construction of penal statutes, confines them within the clearly expressed or necessarily implied meaning of the language used, and refuses to enlarge the words to include other conduct of like, equal, or greater atrocity, simply because it may be within the same mischief to be remedied, when it is not fairly included in the language of the act; but I do not observe that it lays down any rule that a reasonable doubt as to the interpretation of a statute is to be resolved in favor of the accused. \* \* \* Such a formulary of a rule for expounding statutes may be found elsewhere, perhaps, but not in these decisions, I think; and nowhere, it seems to me, can the doctrine mean more than they express."

24. *Per* Justice Shiras in *Sarlls v. U. S.*, 152 U. S. 574, 14 S. Ct. 720, 38 U. S. (L. ed.) 557. See also *U. S. v. Chase*, 135 U. S. 258, 10 S. Ct. 756, 34 U. S. (L. ed.) 119; *Baldwin v. Franks*, 120 U. S. 691, 7 S. Ct. 656, 763, 30 U. S. (L. ed.) 770; *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 17 S. Ct. 540, 41 U. S. (L. ed.) 1007; *Parsons v.*

an act of Congress forbidding their sale to Indians.<sup>25</sup> A statute prohibiting the removal from public lands of certain "trees or other timber" does not embrace articles manufactured from the trees, such as shingles or boards.<sup>26</sup> Under an act of Congress of 1812, making it a misdemeanor to "transport" articles of provision and munitions of war from the United States to Canada, living fat oxen were held to be included in the description of prohibited articles, but driving them on foot was not a "transport" of them in the ordinary sense of that word, and was therefore not an offense.<sup>27</sup> An act of Congress punishing the unlawful transportation of live stock by "any company, owner, or custodian of such animals" does not extend to receivers operating a railroad by appointment and order of court.<sup>28</sup> Where words which have acquired a technical meaning by frequent judicial interpretation are used in a statute they are presumed to be used with that meaning.<sup>29</sup> The literal import of words will be restrained, if necessary, to conform to what it must reasonably be supposed the legislature intended.<sup>30</sup> Thus, in an act of Congress making it the duty of the master of a vessel to deposit his ship's papers with the consul on "arrival at a foreign port," the word "arrival" means an arrival for purposes of business, not the mere touching at a port for advices or to ascertain the state of the market, or an arrival by compulsion of adverse winds, the vessel sailing again as soon as the wind changes.<sup>31</sup> When acts of Congress use words which have a familiar common-law meaning they are supposed to be used with that meaning,<sup>32</sup> and this rule

Hunter, 2 Sumn. 422, 18 Fed. Cas. No. 10,778; *The African Prince*, 212 Fed. 552; *U. S. v. Reese*, 5 Dill. 413, 27 Fed. Cas. No. 16,137, where Parker, D. J., said: "When the words are not technical, or words of art, the presumption is a reasonable and strong one that they were used by the legislature in their ordinary, popular, and general signification;" *U. S. v. Buchanan*, 9 Fed. 690; *U. S. v. McArdle*, 2 Sawy. 373, 26 Fed. Cas. No. 15,653; *U. S. v. Souders*, 2 Abb. 461, 27 Fed. Cas. No. 16,358; *U. S. v. Wilson*, Baldw. 101, 28 Fed. Cas. No. 16,730; *U. S. v. Clayton*, 2 Dill. 225, 25 Fed. Cas. No. 14,814; *U. S. v. Belew*, 2 Brock. 283, 24 Fed. Cas. No. 14,563.

"The language of the statute is to be particularly adhered to in the construction of penal laws, and when it has a natural and plain meaning, an artificial or forced one is not to be adopted." *Per Betts, J.*, in *Ferrett v. Atwill*, 1 Blatchf. 156, 8 Fed. Cas. No. 4,747.

See §§ 83-93 as to meaning of words generally.

<sup>25</sup> *Sarlls v. U. S.*, 152 U. S. 570, 14 S. Ct. 720, 38 U. S. (L. ed.) 556. To the same point see *In re McDonough*, 49 Fed. 360.

<sup>26</sup> *U. S. v. Schuler*, 6 McLean 28, 27 Fed. Cas. No. 16,234, where the case depended upon the construction of the word "timber" and Judge Wilkins said: "Unless the contrary clearly appears from the context, it will be presumed that the

word was employed in its ordinary popular sense."

<sup>27</sup> *U. S. v. Sheldon*, 2 Wheat. 119, 4 U. S. (L. ed.) 199.

<sup>28</sup> *U. S. v. Harris*, 78 Fed. 290, where Judge Butler said: "No straining, however desperately, would be adequate to make the terms embrace the defendants; they are simply the court's officers, appointed to execute its orders. \* \* \* It would be immaterial to say that in this view no one can be punished under the section during such custody, if it were true."

<sup>29</sup> *The African Prince*, 212 Fed. 552; *North Carolina v. Vanderford*, 35 Fed. 282, construing the words "wantonly and wilfully."

See § 89 as to meaning of terms judicially construed.

<sup>30</sup> *Harrison v. Vose*, 9 How. 378, 13 U. S. (L. ed.) 181; *U. S. v. Morris*, 2 Bond 23, 26 Fed. Cas. No. 15,814.

See also § 19 as to departure from literal construction.

<sup>31</sup> *Harrison v. Vose*, 9 How. 372, 13 U. S. (L. ed.) 179; *Toler v. White*, 1 Ware 277, 24 Fed. Cas. No. 14,079. Mr. Justice Story seems to have entertained a contrary opinion in *Parsons v. Hunter*, 2 Sumn. 419, 18 Fed. Cas. No. 10,778.

<sup>32</sup> *U. S. v. San Jacinto Tin Co.*, 125 U. S. 280, 8 S. Ct. 850, 31 U. S. (L. ed.) 749.

See § 85 as to interpretation of words of technical or other special meaning.

applies to penal statutes.<sup>33</sup> And a statute providing that "there is no common law in any case where the law is declared by the codes" does not prevent courts from referring to the common law in order to determine the meaning of a term used in the codes, when they fail to define it, any more than it prevents courts from looking into the dictionary for the meaning of words.<sup>34</sup> Under an act of Congress punishing offenses committed by "Indians," one whose mother is an Indian and whose father is a negro cannot be convicted, since at common law the rule *partus sequitur patrem* prevails in determining the status of free persons.<sup>35</sup> But where an act of Congress defining a crime used a common-law name therefor, associated, however, with other words in such a way as clearly to indicate that it was not used in a technical sense, the court gave it a more extended meaning than it had at common law.<sup>36</sup>

**107. Intent as implied element of offense.**—At common law, and usually in statutory crimes, the intention with which the act is done constitutes an element of the crime; and ordinarily the legislature is supposed to pass penal laws with the understanding that courts will not inflict the penalties for such violations as are unintentional.<sup>37</sup> But a contrary inference may arise where the legislature studiously avoids the use of any terms or words making the intention of the party an ingredient of the offense.<sup>38</sup>

**108. Illustrations of penal statutes.**—Besides statutes too clearly penal to require notice, a *qui tam* action to recover a penalty for falsely marking articles as "patented,"<sup>39</sup> a statute imposing a forfeiture of a specified sum for infringement of a copyright, recoverable by the party injured, irrespective of the damages actually sustained by him, and further providing that "one-half of the amount recovered shall be to the use of the United States,"<sup>40</sup> and an action by the government to recover a penalty

33. *Keck v. U. S.*, 172 U. S. 446, 19 S. Ct. 254, 43 U. S. (L. ed.) 510; *U. S. v. Trans-Missouri Freight Assoc.*, (C. C. A.) 58 Fed. 67; *In re Greene*, 52 Fed. 111; *U. S. v. Clark*, 46 Fed. 635; *U. S. v. Coppersmith*, 4 Fed. 205; *U. S. v. Seeley*, 27 Fed. Cas. No. 16,248a; *U. S. v. Outerbridge*, 5 Sawy. 621, 27 Fed. Cas. No. 15,978; *U. S. v. Jones*, 3 Wash. 215, 26 Fed. Cas. No. 15,494.

34. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 S. Ct. 590, 29 U. S. (L. ed.) 755.

35. *U. S. v. Ward*, 42 Fed. 320; *Ex p. Reynolds*, 5 Dill. 403, 20 Fed. Cas. No. 11,719.

36. *U. S. v. Stone*, 8 Fed. 232, where the word "steal" in a penal statute was used in connection with "plunder" and "destroy," and therefore was not confined to acts denounced as larceny at common law.

37. *The William Gray*, 1 Paine 16, 29 Fed. Cas. No. 17,694; *U. S. v. Ninety-Nine Diamonds*, (C. C. A.) 139 Fed. 961. See also *U. S. v. Kirby*, 7 Wall. 482, 19 U. S. (L. ed.) 278; *U. S. v. Bishop*, (C. C. A.) 125 Fed. 181; *U. S. v. A Lot Silk Umbrellas*, 12 Fed. 413, and the punctuation case, quoted *supra*, § 50, note 20.

See generally § 25, as to implications and incidents.

38. *U. S. v. Warner*, 4 McLean 468, 27 Fed. Cas. No. 16,643, where the court said: "It is declared in words so plain as to admit of no doubt that any act of 'misconduct, negligence, or inattention' on the part of any one concerned in steamboat navigation, producing as a result the loss of life, shall incur the guilt and the penalty of the crime of manslaughter." See also *U. S. v. Southern Ry. Co.*, 135 Fed. 122.

"Where acts constituting a crime at common law are described in general terms in a statute of the United States, and made a criminal offense, and a criminal intent is not in terms or by necessary implication mentioned as an ingredient of the offense, such intent must be read into the statute and proved on the trial in those cases only where such intent was a necessary ingredient of the common-law offense." *U. S. v. Fifty Waltham Watch Movements*, 139 Fed. 291.

39. *Pentlarge v. Kirby*, 19 Fed. 503; *Wilson v. Singer Mfg. Co.*, 9 Biss. (U. S.) 175, 30 Fed. Cas. No. 17,836; *U. S. v. Morris*, 2 Bond 23, 26 Fed. Cas. No. 15,814.

40. *Bolles v. Outing Co.*, 175 U. S. 262, 20 S. Ct. 94, 44 U. S. (L. ed.) 156; *Backus v. Gould*, 7 How. 798, 12 U. S.

for violation of the Alien Contract Labor Act of Congress of 1885,<sup>41</sup> have been held to be penal and subject to the rule of strict construction. A section of a statute may be penal as to some of its provisions and not penal as to others. Thus, "if Congress see fit to impose a penalty on any individual who attempts to enter a homestead without possessing the statutory qualifications, the clause imposing the penalty may require a strict construction in a proceeding against the alleged wrongdoer, but that does not give to the residue of the statute prescribing the qualifications a penal character."<sup>42</sup> Statutes denouncing forfeitures, other than acts constituting a part of the revenue laws,<sup>43</sup> are within the category of penal statutes to be construed strictly.<sup>44</sup>

### Grants

**109. Generally.**—Legislative grants are to be regarded not merely as contracts, but also as laws; and being so regarded, are subject to the rules governing the interpretation of other laws.<sup>45</sup> "And where words are ambiguous," said Mr. Justice Peckham, "legislative grants must be interpreted most strongly against the grantee and for the Government, and are not to be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed. Any ambiguity must operate against the grantee and in favor of the public."<sup>46</sup> Thus, "if the terms of an act of Congress, granting public lands, 'admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.'"<sup>47</sup> But since the policy of Congress in making grants for educational purposes has been generous, such grants must be construed so as to further that policy.<sup>48</sup> "Whenever a statute is passed containing a

(L. ed.) 919; *Hefel v. Whitely Land Co.*, 54 Fed. 180; *Sarony v. Ehrich*, 28 Fed. 80; *Taylor v. Gilman*, 23 Blatchf. 327.

41. *U. S. v. Gay*, 80 Fed. 254, *affirmed* (C. C. A.) 95 Fed. 226.

42. *Smith v. Townsend*, 148 U. S. 497, 13 S. Ct. 634, 37 U. S. (L. ed.) 535. See also *Taylor v. Gilman*, 23 Blatchf. 327.

43. As to the construction of revenue laws, see § 113; as to the construction of statutes denouncing forfeitures, see § 99.

44. *U. S. v. Twenty Boxes of Corn Whiskey*, (C. C. A.) 133 Fed. 910, *affirming* 123 Fed. 135; *Morrison v. Pettibone*, 87 Fed. 332; *The Falmouth*, 1 Gall. 133, 8 Fed. Cas. No. 4,631; *Fairfax v. Hunter*, 7 Cranch 624, 3 U. S. (L. ed.) 460; *The Enterprise*, 1 Paine 33, 8 Fed. Cas. No. 4,499. See also *U. S. v. Athens Armory*, 2 Abb. 141, 24 Fed. Cas. No. 14,473.

45. *U. S. v. Oregon, etc.*, R. Co., 164 U. S. 526, 17 S. Ct. 165, 41 U. S. (L. ed.) 541; *U. S. v. Oregon, etc.*, R. Co., 186 Fed. 861; *St. Paul, etc.*, R. Co. v. *Greenhalge*, 26 Fed. 563.

46. *U. S. v. Michigan*, 190 U. S. 379, 23 S. Ct. 742, 47 U. S. (L. ed.) 1103. See

also *Swan, etc., Co. v. U. S.*, 190 U. S. 143, 23 S. Ct. 702, 47 U. S. (L. ed.) 984.

See § 28 as to constructions prejudicial to the government; §§ 121-125 as to the construction of exemptions.

47. *Per* Mr. Justice Harlan, in *Sioux City, etc., R. Co. v. U. S.*, 159 U. S. 349, 16 S. Ct. 17, 40 U. S. (L. ed.) 177, *quoting* from *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733, 23 U. S. (L. ed.) 634; *Sena v. U. S.*, 189 U. S. 233, 239, 23 S. Ct. 596, 47 U. S. (L. ed.) 787. To the same effect *Sena v. U. S.*, 189 U. S. 233, 239, 23 S. Ct. 596, 47 U. S. (L. ed.) 787; *U. S. v. Oregon, etc.*, R. Co., 164 U. S. 526, 17 S. Ct. 165, 41 U. S. (L. ed.) 541; *Slidell v. Grandjean*, 111 U. S. 412, 4 S. Ct. 475, 28 U. S. (L. ed.) 321; *Dubuque, etc., R. Co. v. Litchfield*, 23 How. 66, 16 U. S. (L. ed.) 500; *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733, 23 U. S. (L. ed.) 634; *U. S. v. Oregon, etc.*, R. Co., 186 Fed. 861. And the rule obtains to grants from the federal government to a state. *U. S. v. Michigan*, 190 U. S. 379, 23 S. Ct. 742, 47 U. S. (L. ed.) 1103.

48. *Johanson v. Washington*, 190 U. S. 179, 23 S. Ct. 825, 47 U. S. (L. ed.) 1008.

general provision for the disposal of public lands, it is, unless an intent to the contrary is clearly manifest by its terms, to be held inapplicable to lands which for some special public purpose have been in accordance with law taken full possession of by and are in the actual occupation of the Government."<sup>49</sup>

**110. Powers and franchises to private and public corporations.**—Charters of private corporations duly accepted are in general executed contracts, but the different provisions, unless they are clear, unambiguous, and free of doubt, are subject to construction, and their true intent and meaning must be ascertained by the same rules of interpretation as apply to other legislative grants, the universal rule being that whenever the privileges granted to such a corporation come under revision in the courts the grant is to be strictly construed against the corporation and in favor of the public, and that nothing passes to the corporation but what is granted in clear and explicit terms.<sup>50</sup> "Whatever is not unequivocally granted in such charters is taken to have been withheld, as all such charters and acts extending the privileges of corporate bodies are to be taken most strongly against the corporations."<sup>51</sup> And this rule of construction applies with still greater force to articles of association organizing a corporation under general laws.<sup>52</sup> A power granted to a canal company to

49. *Per* Mr. Justice Brewer, in *Scott v. Carrew*, 196 U. S. 100, 25 S. Ct. 193, 49 U. S. (L. ed.) 403; *Newhall v. Sanger*, 2 U. S. 761, 23 U. S. (L. ed.) 769; *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733, 33 U. S. (L. ed.) 634; *Wilcox v. Jackson*, 13 Pet. 498, 10 U. S. (L. ed.) 264.

50. *Blair v. Chicago*, 201 U. S. 400, 26 S. Ct. 427, 50 U. S. (L. ed.) 801; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 U. S. (L. ed.) 224, 50 U. S. (L. ed.) 353; *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 539, 25 U. S. (L. ed.) 914; *Hannibal, etc., R. Co. v. Missouri River Packet Co.*, 125 U. S. 271, 8 S. Ct. 874, 31 U. S. (L. ed.) 735; *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 588, 17 S. Ct. 198, 41 U. S. (L. ed.) 563; *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63, 24 U. S. (L. ed.) 651; *Holyoke Co. v. Lyman*, 15 Wall. 511, 21 U. S. (L. ed.) 137; *The Binghamton Bridge*, 3 Wall. 75, 18 U. S. (L. ed.) 143; *Minturn v. Larne*, 23 How. 436, 16 U. S. (L. ed.) 575; *Richmond, etc., R. Co. v. Louisa R. Co.*, 13 How. 81, 14 U. S. (L. ed.) 60; *Perrine v. Chesapeake, etc., Canal Co.*, 9 How. 192, 13 U. S. (L. ed.) 101; *Mills v. St. Clair County*, 8 How. 581, 12 U. S. (L. ed.) 1207; *Beatty v. Knowler*, 4 Pet. 168, 7 U. S. (L. ed.) 819; *Cumberland Gaslight Co. v. West Virginia, etc., Gas Co.*, (C. C. A.) 188 Fed. 585, *affirming* 182 Fed. 667; *Bartholomew v. Austin*, (C. C. A.) 85 Fed. 364; *Louisville Trust Co. v. Cincinnati*, 73 Fed. 726; *Tod v. Kentucky Union Land Co.*, 57 Fed. 50; *Pauly v. Coronado Beach Co.*, 50 Fed. 430; *Hughes v. Northern Pac. R. Co.*, 18 Fed. 112; *Burns v. Multnomah R. Co.*, 15 Fed.

185; *Camblos v. Philadelphia, etc., R. Co.*, 4 Brewst. 563, 4 Fed. Cas. No. 2,331. See also *Helena Water Works Co. v. Helena*, 195 U. S. 383, 25 S. Ct. 40, 49 U. S. (L. ed.) 245.

"Where a statute making a grant of property, or of powers, or of franchises to a private individual, or a private corporation, becomes the subject of construction as regards the extent of the grant, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the government or the general public." *Per* Justice Miller, in *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 26, 9 S. Ct. 409, 32 U. S. (L. ed.) 842.

"The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of these powers implies the exclusion of all others not fairly incidental." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 48, 11 S. Ct. 478, 35 U. S. (L. ed.) 64, *quoted* in *Pauly v. Coronado Beach Co.*, 56 Fed. 430; *Louisville, etc., R. Co. v. Ohio Valley Imp., etc., Co.*, 69 Fed. 434.

51. *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 540, 25 U. S. (L. ed.) 915; *Blair v. Chicago*, 201 U. S. 400, 26 S. Ct. 427, 50 U. S. (L. ed.) 801; *Holyoke Co. v. Lyman*, 15 Wall. 512, 21 U. S. (L. ed.) 137; *Charles River Bridge v. Warren Bridge*, 11 Pet. 544, 9 U. S. (L. ed.) 822; *Stein v. Bienville Water-Supply Co.*, 34 Fed. 148. *Compare* *Chesapeake, etc., Canal Co. v. Key*, 3 Cranch (C. C.) 605.

52. *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. 962.

charge certain tolls for commodities passing through the canal and for empty vessels, except such as returned empty, gave no power to take toll from passengers, or from a vessel on account of passengers on board.<sup>53</sup> In a statute making specific grants to a corporation, the use of the words "successors or assigns" in a proviso does not give the corporation implied power to transfer all its property and franchises to another corporation.<sup>54</sup> It is an unbending rule that a grant of corporate existence is never implied; in the construction of a statute every presumption is against it.<sup>55</sup> But public grants are not to be so construed as to defeat the intent of the legislature or to withhold what is given either expressly or by necessary and fair implication.<sup>56</sup> When an act operating as a general law, and manifesting clearly the intention of Congress to secure public advantages or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations inducements to undertake and accomplish great and extensive enterprises or works of a quasi-public character in or through an immense and undeveloped public domain, such legislation stands upon a different footing from a mere private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.<sup>57</sup> Accordingly, an act of Congress giving to a railroad company the right to take timber "necessary for the construction of said railroad" from the public lands adjacent to the line of the road is not limited to what is necessary for the construction of such portion of the road as is adjacent to the place from which the timber is taken.<sup>58</sup> Exclusive rights to public franchises are not favored, and can rest only upon express language or the clearest implication.<sup>59</sup> Thus,

53. *Perrine v. Chesapeake, etc., Canal Co.*, 9 How. 172, 13 U. S. (L. ed.) 92.

54. *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 30, 9 S. Ct. 409, 32 U. S. (L. ed.) 843, where Justice Miller said: "It is strenuously argued, and with some degree of plausibility, that the language of this proviso, and the use of the words 'successors' and 'assigns' in other statutes, which are referred to, imply that by the law of Oregon railroad companies may make, and must be supposed to be capable of making, assignments. But whatever may have been the intent in the minds of the legislators in using these words, it is not precisely the form in which we would expect to find a grant of the power to sell, to lease, or to transfer the title, ownership, or use of railroad lines, the property belonging thereto, and the franchises necessary to carry them on, by one corporation to another. One of the most important powers with which a corporation can be invested is the right to sell out its whole property together with the franchises under which it is operated, or the authority to lease its property for a long term of years. In the case of a railroad company these privileges, next to the right to build and operate its railroad, would be the most important which could be given it, and this idea would impress itself upon the legislature. Naturally, we would look for the authority to do

these things in some express provision of law. We would suppose that if the legislature saw fit to confer such rights it would do so in terms which could not be misunderstood. To infer, on the contrary, that it either intended to confer them or to recognize that they already existed, by the simple use of the word 'assigns,' a very loose and indefinite term, is a stretch of the power of the court in making implications which we do not feel to be justified."

55. *Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 618, 5 S. Ct. 299, 28 U. S. (L. ed.) 837; *Central R., etc., Co. v. Georgia*, 92 U. S. 670, 23 U. S. (L. ed.) 760.

56. *U. S. v. Denver, etc., R. Co.*, 150 U. S. 14, 14 S. Ct. 16, 37 U. S. (L. ed.) 979; *Tod v. Kentucky Union Land Co.*, 57 Fed. 50; *Hughes v. Northern Pac. R. Co.*, 18 Fed. 106.

57. *Per* Justice Jackson, in *U. S. v. Denver, etc., R. Co.*, 150 U. S. 14, 14 S. Ct. 16, 37 U. S. (L. ed.) 979.

58. *U. S. v. Denver, etc., R. Co.*, 150 U. S. 1, 14 S. Ct. 11, 37 U. S. (L. ed.) 975.

59. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 696, 17 S. Ct. 718, 41 U. S. (L. ed.) 1168; *Pearsall v. Great Northern R. Co.*, 161 U. S. 669, 16 S. Ct. 705, 40 U. S. (L. ed.) 846; *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 11 S. Ct. 892, 35 U. S. (L. ed.) 622; *Hamilton Gas Light Co. v. Hamilton City*, 146

the right given to a corporation to establish a bridge and fix its rate of toll does not bind the state or its instrumentalities not to establish another in case of necessity.<sup>60</sup> But where an exclusive privilege is granted in words clear and unambiguous, effect must be given to them according to their ordinary signification.<sup>61</sup> When in the early and declaratory sections of a statute the scope and extent of the powers and privileges granted to a corporation are once stated, the character of the grant as thus disclosed controls and interprets all subsequent sections; and it is unnecessary in each subsequent section to restate or use words and expressions which shall fully disclose the extent of those powers and privileges.<sup>62</sup>

It is a rule of construction of grants to public corporations that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant.<sup>63</sup> But the powers granted should not be so strictly construed as to defeat the manifest intention and design of the legislature.<sup>64</sup>

### *Appropriation, Taxation, and Revenue Laws*

**111. Appropriation.**—In view of the constitutional provision that “no money shall be drawn from the treasury but in consequence of appropriations made by law,”<sup>65</sup> “a statute should not be construed as making an appropriation, or authorizing the expenditure of money, unless the language is sufficiently explicit to clearly justify it; authority for the use of the public money cannot arise by inference without very clear terms requiring it.”<sup>66</sup> The construction of appropriation acts in various particulars has been considered elsewhere in this article.<sup>67</sup> A private act conferring upon the Court of Claims jurisdiction of claims against the United States must be strictly construed and cannot be held to confer any other jurisdiction than that plainly indicated by its terms.<sup>68</sup> “All acts which give

U. S. 268, 13 S. Ct. 90, 36 U. S. (L. ed.) 968; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 12 S. Ct. 689, 36 U. S. (L. ed.) 537; *Wheeling, etc., Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 11 S. Ct. 301, 34 U. S. (L. ed.) 967; *Wright v. Nagle*, 101 U. S. 796, 25 U. S. (L. ed.) 923; *Fanning v. Gregoire*, 16 How. 534, 14 U. S. (L. ed.) 1047; *Richmond, etc., R. Co. v. Louisa R. Co.*, 13 How. 81, 14 U. S. (L. ed.) 60. See also *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 13 U. S. (L. ed.) 518; *Minturn v. Larue*, 23 How. 435, 16 U. S. (L. ed.) 574; *Illinois Trust, etc., Bank v. Arkansas City*, (C. C. A.) 76 Fed. 271; *Grand Rapids Electric Light, etc., Co. v. Grand Rapids Edison Electric Light, etc., Co.*, 33 Fed. 659.

<sup>60.</sup> *Wright v. Nagle*, 101 U. S. 791, 25 U. S. (L. ed.) 921.

<sup>61.</sup> *Blair v. Chicago*, 201 U. S. 400, 26 S. Ct. 427, 50 U. S. (L. ed.) 801; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 6 S. Ct. 57, 29 U. S. (L. ed.) 510; *The Binghamton Bridge*, 3 Wall. 51, 18 U. S. (L. ed.) 137; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 17 U. S. (L. ed.) 571.

<sup>62.</sup> *Talbott v. Silver Bow County*, 139 U. S. 443, 11 S. Ct. 594, 35 U. S. (L. ed.) 211.

<sup>63.</sup> *Minturn v. Larue*, 23 How. 436, 16 U. S. (L. ed.) 575; *Detroit Citizens' St. R. Co. v. Detroit R. Co.*, 171 U. S. 48, 18 S. Ct. 732, 43 U. S. (L. ed.) 67; *Boise City Artesian Hot Water, etc., Co. v. Boise City*, (C. C. A.) 123 Fed. 232; *Illinois Trust, etc., Bank v. Arkansas City*, (C. C. A.) 76 Fed. 279; *Superior v. Norton*, (C. C. A.) 63 Fed. 359; *Katzenberger v. Aberdeen*, 16 Fed. 745.

<sup>64.</sup> *James v. Milwaukee*, 16 Wall. 159, 21 U. S. (L. ed.) 267; *Lynde v. Winnebago County*, 16 Wall. 6, 21 U. S. (L. ed.) 272; *Curtis v. Butler County*, 24 How. 448, 16 U. S. (L. ed.) 748; *Detroit Citizens' St. R. Co. v. Detroit*, (C. C. A.) 64 Fed. 628.

<sup>65.</sup> Const. U. S., art. 1, § 9.

<sup>66.</sup> *Per* Atty.-Gen. Garland, in 18 Op. Atty.-Gen. 174. See also *Milchrist v. U. S.*, 31 Ct. Cl. 403; 19 Op. Atty.-Gen. 79 (Garland, 1887).

<sup>67.</sup> See § 5 as to construction of proviso in appropriation act.

<sup>68.</sup> *Atocha's Case*, 6 Ct. Cl. 71.



away the public money are to be interpreted strictly against the party to whom it is given."<sup>69</sup>

**112. Taxation.**—"A tax cannot be imposed without clear and express words for that purpose."<sup>70</sup> This rule is most reasonable since "it is fairly and justly presumable that the legislature, which was unrestrained in its authority over the subject, has so shaped the law as, without ambiguity or doubt, to bring within it everything it was meant should be embraced."<sup>71</sup> But statutes levying taxes "are to receive a reasonable construction with a view to carrying out their purpose and intent."<sup>72</sup> And statutory exemptions from taxation are construed with the utmost strictness.<sup>73</sup>

**113. Revenue.**—It is well established by decisions of the United States Supreme Court that "statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, are not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature."<sup>74</sup> The construction of provisions for forfeitures

<sup>69.</sup> 9 Op. Atty.-Gen. 59, where Attorney-General Black said: "He who claims a payment out of the treasury, and bases that claim upon an act of Congress, must show the payment to be authorized either expressly or by very clear implication. Ambiguous phrases will not serve his turn. When two meanings can be assigned to an act like this, and the arguments in favor of both are nearly balanced, the public is entitled to the benefit of the doubt. Of course, I do not now mean to say that a claim ought to be defeated by straining the sense of the law against it. But if Congress has all the money of the United States under its control, it also has the whole English language to give it away with; and it is so easy to use definite terms in a law like this, that when they are not used we will presume them not to be meant. All legislative grants, whether of money or of privileges, are and ought to be construed strictly against the grantees."

<sup>70.</sup> *Per* Pollock, C. B., in *Gurr v. Scudds*, 11 Exch. 191, *quoted* with approval in *U. S. v. Isham*, 17 Wall. 504, 21 U. S. (L. ed.) 730. To the same effect see *Gill v. Bartlett*, (C. C. A.) 224 Fed. 927; *Rockefeller v. O'Brien*, 224 Fed. 541; *In re Hawley*, 220 Fed. 372; *Anderson v. Morris*, etc., R. Co., (C. C. A.) 216 Fed. 83; *Forty-two Broadway Co. v. Anderson*, 209 Fed. 991, *affirmed* (C. C. A.) 213 Fed. 777; *Missouri, etc., Ry. Co. v. Meyer*, 204 Fed. 140; *Parkview Building, etc., Assoc. v. Herold*, 203 Fed. 876; *Mutual Benefit Life Ins. Co. v. Herold*, 198 Fed. 199, *affirmed* 201 Fed. 918; *U. S. v. Mullins*, (C. C. A.) 119 Fed. 334; *McNally v. Field*, 119 Fed. 445; *Commercial Bank v. Sandford*, 103 Fed. 98; *Treat v. Tolman*, (C. C. A.) 113 Fed. 894; *Campbellsville Lumber Co. v. Hubbert*, (C. C. A.) 112 Fed. 723; *Rice v. U. S.*, (C. C. A.) 53 Fed. 912; *Gibson County v. Pullman Southern Car Co.*, 42

Fed. 577; *U. S. v. Wigglesworth*, 2 Story 374, 28 Fed. Cas. No. 16,690; *U. S. v. Watts*, 1 Bond 584, 28 Fed. Cas. No. 16,653; *Equitable Trust Co. v. Seldon*, 8 Fed. Cas. No. 4,508; *Beaty v. Knowles*, 4 Pet. 170, 7 U. S. (L. ed.) 820; 20 Op. Atty.-Gen. 682 (Olney, 1893). As to the construction of laws imposing duties on imports, see *infra*, §§ 114-120.

This rule is most cogent when the taxes are of a special or unusual nature. *Lynch v. Union Trust Co. of San Francisco*, (C. C. A.) 164 Fed. 161, *affirming* 148 Fed. 49.

<sup>71.</sup> *Wright International Revenue Collector v. Michigan Cent. R. Co.*, (C. C. A.) 130 Fed. 843.

<sup>72.</sup> *Scottish, etc., Ins. Co. v. Bowland*, 196 U. S. 611, 25 S. Ct. 345, 49 U. S. (L. ed.) 619.

<sup>73.</sup> See *infra*, §§ 121-124.

<sup>74.</sup> *Per* Mr. Justice Gray in *U. S. v. Stowell*, 133 U. S. 12, 10 S. Ct. 244, 33 U. S. (L. ed.) 558; which was an information for forfeiture of distillery machinery. The court cited *Taylor v. U. S.*, 3 How. 210, 11 U. S. (L. ed.) 564; *Cliquot's Champagne*, 3 Wall. 145, 18 U. S. (L. ed.) 121; *U. S. v. Hodson*, 10 Wall. 406, 19 U. S. (L. ed.) 939, and *Smythe v. Fiske*, 23 Wall. 380, 23 U. S. (L. ed.) 49. To the same effect see *Rankin v. Hoyt*, 4 How. 332, 11 U. S. (L. ed.) 998; *Hartford v. U. S.*, 8 Cranch 109, 3 U. S. (L. ed.) 504; *U. S. v. Thompson*, 189 Fed. 838; *John J. Sesmon Co. v. U. S.*, (C. C. A.) 182 Fed. 573; *U. S. v. National Surety Co. of Kansas City*, (C. C. A.) 122 Fed. 904; *Anglo-California Bank v. Secretary of Treasury*, (C. C. A.) 76 Fed. 748; *Hunter v. Corning*, (C. C. A.) 86 Fed. 915; *The Coquitlam*, (C. C. A.) 77 Fed. 751; *U. S. v. Sapinkow*, 90 Fed. 654; *State v. Sullivan*, 50 Fed. 603; *U. S. v. De Goer*, 38 Fed. 83; *U. S. v. Allen*, 38 Fed. 736; *U. S. v. Breed*, 1 Sumn. 160, 24 Fed. Cas.

in revenue laws is considered more particularly elsewhere in this article.<sup>75</sup>

### Tariff Acts

**114. Rule of construction.**—While it is declared that acts imposing duties are not to be construed strictly against the government, like penal laws, but so as most effectually to accomplish the intention of the legislature in passing them,<sup>76</sup> yet as duties are never imposed on the citizen upon vague or doubtful interpretations, the question whether an article is dutiable, if one of doubt, must be resolved in favor of the importer.<sup>77</sup> But the doubt here meant is one of legal interpretation; a mere doubt as to the commercial meaning of a term, the importer seeking a reduction of duty, and the question being submitted to a jury, does not entitle the importer to a verdict in his favor.<sup>78</sup> Moreover, it has been said that the rule which gives the importer the benefit of a doubt is "limited to cases where it relieves

No. 14,638; Ten Cases Opium, Deady 70, 23 Fed. Cas. No. 13,828; *In re Muller*, Deady 523, 17 Fed. Cas. No. 9,912; U. S. v. Three Tons Coal, 6 Biss. 379, 28 Fed. Cas. No. 16,515; U. S. v. Olney, 1 Abb. 282, 27 Fed. Cas. No. 15,918; U. S. v. 1,412 Gallons Distilled Spirits, 10 Blatchf. 433, 27 Fed. Cas. No. 15,960; Two Hundred Fifty Barrels Molasses, 511, 24 Fed. Cas. No. 14,293; Twenty-Eight Cases Wine, 2 Ben. 66, 24 Fed. Cas. No. 14,281; The Missouri, 3 Ben. 511, 17 Fed. Cas. No. 9,652; U. S. v. Willetts, 5 Ben. 220, 29 Fed. Cas. No. 16,699; U. S. v. One Hundred Barrels Spirits, 1 Dill. 49, 27 Fed. Cas. No. 15,948; U. S. v. One Hundred Barrels Spirits, 2 Abb. 314, 27 Fed. Cas. No. 15,948; U. S. v. Hodson, 26 Fed. Cas. No. 15,376; U. S. v. One Hundred and Twenty-Nine Packages, 2 Am. L. Reg. N. S. 419, 27 Fed. Cas. No. 15,941; U. S. v. Mynderse, 7 Blatchf. 489, 27 Fed. Cas. No. 15,850; The Industry, 1 Gall. 114, 13 Fed. Cas. No. 7,028; U. S. v. Dustin, 25 Fed. Cas. No. 15,012; U. S. v. Belding, 24 Fed. Cas. No. 14,562.

**Conflicting authorities.**—There was an opposing dictum by Mr. Justice McLean in U. S. v. Eighty-Four Boxes Sugar, 7 Pet. 453, 8 U. S. (L. ed.) 745 (which was expressly disapproved in U. S. v. Stowell, 133 U. S. 12, 10 S. Ct. 244, 33 U. S. (L. ed.) 558, cited at the head of this note). Other cases laying down a rule of strict construction of revenue laws imposing penalties or forfeitures are: U. S. v. 1,150½ Pounds Celluloid, (C. C. A.) 82 Fed. 634, citing U. S. v. Eighty-Four Boxes Sugar, 7 Pet. 453, 8 U. S. (L. ed.) 745. See also *Sixty Pipes Brandy*, 10 Wheat. 424, 6 U. S. (L. ed.) 357; U. S. v. A Lot Silk Umbrellas, 12 Fed. 412; U. S. v. Ten Cases Shawls, 2 Paine 166, 28 Fed. Cas. No. 16,448; *Taber v. U. S.*, 1 Story 1, 23 Fed. Cas. No. 13,722.

"A statute \* \* \* for the raising of a revenue, even when accompanied by provisions of a very highly penal nature, is

still to be construed as a whole and in a fair and reasonable manner, and not strictly in favor of a defendant." U. S. v. Graf Distilling Co., 208 U. S. 198, 28 S. Ct. 264, 52 U. S. (L. ed.) 452.

See § 63 as to reference to prior revenue laws in the construction of a particular act.

75. See § 99.

76. *Rankin v. Hoyt*, 4 How. 332, 11 U. S. (L. ed.) 999, citing *Taylor v. U. S.*, 3 How. 210, 11 U. S. (L. ed.) 565. See also U. S. v. Breed, 1 Sumn. 159, 24 Fed. Cas. No. 14,638; *Anglo-California Bank v. Secretary of Treasury*, (C. C. A.) 76 Fed. 748. But compare *Rice v. U. S.*, (C. C. A.) 53 Fed. 910.

77. *Benziger v. U. S.*, 192 U. S. 38, 24 S. Ct. 189, 48 U. S. (L. ed.) 331; *Eidman v. Martinez*, 184 U. S. 578, 22 S. Ct. 515, 46 U. S. (L. ed.) 697; *Hartranft v. Wiegmann*, 121 U. S. 616, 7 S. Ct. 1240, 30 U. S. (L. ed.) 1015; *Shallus v. U. S.*, (C. C. A.) 162 Fed. 653, reversing 155 Fed. 213; *Thomas v. Vandegrift*, (C. C. A.) 162 Fed. 645; U. S. v. Tiffany, (C. C. A.) 160 Fed. 408, affirming 154 Fed. 168; *Burditt, etc., Co. v. U. S.*, (C. C. A.) 153 Fed. 67; *Hayes v. U. S.*, (C. C. A.) 150 Fed. 63; *Hempstead v. Thomas*, (C. C. A.) 122 Fed. 538; U. S. v. Merck, 91 Fed. 639; *In re Southern Pac. Co.*, 82 Fed. 313; *Matheson v. U. S.*, (C. C. A.) 71 Fed. 395; *In re Myers*, 69 Fed. 239; *Henderson v. U. S.*, (C. C. A.) 66 Fed. 56; *Schmid v. U. S.*, 66 Fed. 745; *In re Wetherell*, 60 Fed. 270; U. S. v. Davis, (C. C. A.) 54 Fed. 149; *Rice v. U. S.*, (C. C. A.) 53 Fed. 910; *Adams v. Bancroft*, 3 Sumn. 387, 1 Fed. Cas. No. 44; U. S. v. Wigglesworth, 2 Story 374, 28 Fed. Cas. No. 16,690; *Powers v. Barney*, 5 Blatchf. 202, 19 Fed. Cas. No. 11,361; 21 Op. Atty-Gen. 67 (Maxwell, 1894).

See § 64 as to reference to prior tariffs in construing tariff act.

78. *Earnshaw v. Cadwalader*, 145 U. S. 262, 12 S. Ct. 851, 36 U. S. (L. ed.) 699.

all importers of all articles whatsoever of the class concerned;" that it probably "has no practical use except in cases of extraordinary doubt;" that "it has a more appropriate application when the question is one of any tax at all;" and that "the federal reports are full of suits where the courts have not hesitated to perform the duty of determining mere questions of classification where it was admitted some duty was to be imposed, in favor of a higher rate, under circumstances of great difficulty."<sup>79</sup> That a tariff was enacted for protective purposes is properly considered by the court in construing its provisions<sup>80</sup> and a construction should not be condemned in such an instance because it would result in the imposition of double duties.<sup>81</sup>

**115. Commercial meaning of words.**—If words used in a tariff act to designate particular kinds or classes of goods have a well-known signification in our trade and commerce, the commercial meaning is to prevail unless Congress has clearly manifested a contrary intention.<sup>82</sup> When it is claimed that the commercial use of a word or phrase in a tariff act differs

79. *U. S. v. Wetherell*, (C. C. A.) 65 Fed. 990. See also *In re Chase*, 48 Fed. 631, where the court said: "In dealing with such a difficult, intricate, and complex subject as the tariff, embracing, as it does, the enumeration and proper classification of hundreds of different articles of commerce, it is hardly possible that Congress could succeed in every instance in expressing, in exact and unambiguous language, precisely what was intended; and in the construction of the customs laws the Supreme Court have conformed to what they believed was the intent of Congress, though such construction may have involved a change or modification of the exact language of the statute."

80. *Heide v. U. S.*, 175 Fed. 316; *Burditt, etc., Co. v. U. S.*, (C. C. A.) 153 Fed. 67.

81. *Burditt, etc., Co. v. U. S.*, (C. C. A.) 153 Fed. 67.

82. *Komada v. U. S.*, 215 U. S. 392, 30 S. Ct. 136, 54 U. S. (L. ed.) 249; *Dejonge v. Magone*, 159 U. S. 562, 16 S. Ct. 119, 40 U. S. (L. ed.) 260; *Hedden v. Richard*, 149 U. S. 346, 13 S. Ct. 891, 37 U. S. (L. ed.) 763; *Toplitz v. Hedden*, 146 U. S. 256, 13 S. Ct. 70, 36 U. S. (L. ed.) 963; *Cadwalader v. Zeh*, 151 U. S. 176, 14 S. Ct. 288, 38 U. S. (L. ed.) 118; *Magone v. Heller*, 150 U. S. 75, 14 S. Ct. 18, 37 U. S. (L. ed.) 1003; *Robertson v. Salomon*, 144 U. S. 609, 12 S. Ct. 752, 36 U. S. (L. ed.) 562; *American Net, etc., Co. v. Worthington*, 141 U. S. 471, 12 S. Ct. 55, 35 U. S. (L. ed.) 823; *Seeberger v. Cahn*, 137 U. S. 97, 11 S. Ct. 28, 34 U. S. (L. ed.) 600; *Pickhardt v. Merritt*, 132 U. S. 257, 10 S. Ct. 80, 33 U. S. (L. ed.) 356; *Robertson v. Salomon*, 130 U. S. 412, 9 S. Ct. 559, 32 U. S. (L. ed.) 995; *Arthur v. Butterfield*, 125 U. S. 70, 8 S. Ct. 714, 31 U. S. (L. ed.) 643; *Worthington v. Abbott*, 124 U. S. 436, 8 S. Ct. 562, 31 U. S. (L. ed.) 494; *Schneider v. Barney*, 113 U. S. 645,

5 S. Ct. 624, 28 U. S. (L. ed.) 1130; *Swan v. Arthur*, 103 U. S. 597, 26 U. S. (L. ed.) 525; *Recknagel v. Murphy*, 102 U. S. 200, 26 U. S. (L. ed.) 390; *Arthur v. Morrison*, 96 U. S. 108, 24 U. S. (L. ed.) 764; *Arthur v. Davies*, 96 U. S. 135, 24 U. S. (L. ed.) 810; *Arthur v. Unkart*, 96 U. S. 118, 24 U. S. (L. ed.) 768; *Tyng v. Grinnell*, 92 U. S. 470, 23 U. S. (L. ed.) 735; *Arthur v. Cumming*, 91 U. S. 362, 23 U. S. (L. ed.) 438; *Curtis v. Martin*, 3 How. 106, 11 U. S. (L. ed.) 516; *Elliott v. Swartwout*, 10 Pet. 137, 9 U. S. (L. ed.) 373; *Barlow v. U. S.*, 7 Pet. 409, 8 U. S. (L. ed.) 730; *U. S. v. One Hundred and Twelve Casks Sugar*, 8 Pet. 277, 8 U. S. (L. ed.) 944; *U. S. v. Shing Shun*, 173 Fed. 844; *Mills v. Robertson*, 147 Fed. 634; *German v. U. S.*, (C. C. A.) 137 Fed. 817; *Loggie v. U. S.*, (C. C. A.) 137 Fed. 813; *Brennan v. U. S.*, (C. C. A.) 136 Fed. 743, *reversing* 129 Fed. 837; *U. S. v. Klotz*, 133 Fed. 808, *affirmed* (C. C. A.) 139 Fed. 606; *Hempstead v. Thomas*, (C. C. A.) 129 Fed. 907, *reversing* 123 Fed. 346; *Sonoma Wine, etc., Co. v. U. S.*, 123 Fed. 999; *Hempstead v. Thomas*, (C. C. A.) 122 Fed. 538; *Grace v. Collector of Customs*, (C. C. A.) 79 Fed. 319; *Field v. U. S.*, (C. C. A.) 73 Fed. 808; *Dennison Mfg. Co. v. U. S.*, (C. C. A.) 72 Fed. 259; *In re Irwin*, 62 Fed. 152; *U. S. v. Eisner, etc., Co.*, (C. C. A.) 59 Fed. 354; *In re Downing*, (C. C. A.) 56 Fed. 474; *U. S. v. Wotton*, (C. C. A.) 53 Fed. 346; *In re H. B. Claflin Co.*, (C. C. A.) 52 Fed. 122; *Erhardt v. Ullman*, (C. C. A.) 51 Fed. 415; *Baumgarten v. Magone*, 50 Fed. 71; *Field's Appeal*, 50 Fed. 909; *U. S. v. Wooten*, 50 Fed. 694; *White v. Barney*, 43 Fed. 474; *Weilbacher v. Merritt*, 37 Fed. 88; *Nichols v. Beard*, 15 Fed. 437; *May v. Simmons*, 4 Fed. 499; *U. S. v. Breed*, 1 Summ. 163, 24 Fed. Cas. No. 14,638; *Roosevelt v. Maxwell*, 2 Blatchf. 391, 20 Fed. Cas. No. 12,034; *Bacon v. Bancroft*, 1 Story 341, 2 Fed. Cas.

from the ordinary signification of such word or phrase, in order that the former prevail over the latter it must appear that the commercial designation is the result of established usage in commerce and trade, and that at the time of the passage of the act that usage was definite, uniform, and general, and not partial, local, or personal.<sup>83</sup> And the word "commercial" in this connection is to be understood in its comprehensive sense of buying, selling, and exchange in the general sales or traffic in our own markets.<sup>84</sup> The commercial designation of an imported article is not a matter of which courts can take judicial notice, but is a fact to be proved by evidence,<sup>85</sup> and the burden is upon the importer to prove the interpretation for which he contends,<sup>86</sup> for a word will always be understood to have the same meaning in commerce that it has in the community at large, unless the contrary is shown.<sup>87</sup> The phrase "of similar description" is not a commercial term, and does not present a case of commercial designation of articles.<sup>88</sup> Where the words in a tariff act are unequivocal, and there is no reference in the statute, either expressly or by implication, to any commercial usage, and no language in it which requires for its interpretation the aid of any extrinsic circumstances, it is not a case for application of a commercial meaning to the terms used.<sup>89</sup>

No. 714; *Lee v. Lincoln*, 1 Story 610, 15 Fed. Cas. No. 8,195; *Lane v. Russell*, 4 Cliff. 125, 14 Fed. Cas. No. 8,053; *Wilkinson v. Greely*, 1 Curt. 441, 29 Fed. Cas. No. 17,672. See also U. S. r. Two Hundred and Fifty Kegs Nails, (C. C. A.) 61 Fed. 411; U. S. r. Buffalo Natural Gas Fuel Co., 172 U. S. 339, 19 S. Ct. 200, 43 U. S. (L. ed.) 469.

Of course where manifestly a term was used in a different sense, it is not to be given its commercial meaning. *Hahn v. U. S.*, 131 Fed. 1000.

See §§ 83-93 as to meaning of words generally.

See § 62 as to reference to prior tariff acts to determine the meaning of a word used in a tariff.

<sup>83</sup> *Sonn v. Magone*, 159 U. S. 420, 16 S. Ct. 67, 40 U. S. (L. ed.) 203; *Maddock v. Magone*, 152 U. S. 368, 14 S. Ct. 588, 38 U. S. (L. ed.) 482; *Berbacker v. Robertson*, 152 U. S. 376, 14 S. Ct. 590, 38 U. S. (L. ed.) 485; *Tanhauser v. U. S.*, 159 Fed. 228; *Knauth, etc. v. U. S.*, 155 Fed. 144; *Frame v. U. S.*, 143 Fed. 682; *U. S. v. Durand*, (C. C. A.) 137 Fed. 382, *affirming* 127 Fed. 624; *U. S. v. Nordlinger*, (C. C. A.) 121 Fed. 690; *Woolworth v. U. S.*, 113 Fed. 1007; *Dennison Mfg. Co. v. U. S.*, (C. C. A.) 72 Fed. 259. See also *Rossmann v. Hedden*, 145 U. S. 570, 12 S. Ct. 925, 36 U. S. (L. ed.) 821; *Barlow v. U. S.*, 7 Pet. 409, 8 U. S. (L. ed.) 730; *U. S. v. Breed*, 1 Summ. 163, 24 Fed. Cas. No. 14,638; *Wilkinson v. Greely*, 1 Curt. 441, 29 Fed. Cas. No. 17,672.

"We are not aware of any adjudication in which it had been declared that the commercial meaning is to be ascertained by a resort solely to the understanding of im-

porters." *Per* Wallace, J., in *Erhardt v. Ballin*, (C. C. A.) 55 Fed. 969.

The name given articles by retailers puffing their wares or by the persons who use or buy them does not control their classification. *Hesse v. U. S.*, 154 Fed. 171.

<sup>84</sup> "Zante Currants," 73 Fed. 189; 18 Op. Atty.-Gen. 530.

Articles not kept in stock or dealt in as general merchandise but made to the individual order of those requiring them can acquire no commercial nomenclature. *Thomas v. Vandegrift*, (C. C. A.) 162 Fed. 645.

<sup>85</sup> *Seeberger v. Schlesinger*, 152 U. S. 581, 14 S. Ct. 729, 38 U. S. (L. ed.) 560; 21 Op. Atty.-Gen. 256 (Harmon, 1895). See also *Saltonstall v. Wiebusch*, 156 U. S. 602, 15 S. Ct. 476, 39 U. S. (L. ed.) 549.

<sup>86</sup> *Earnshaw v. Cadwalader*, 145 U. S. 263, 12 S. Ct. 851, 36 U. S. (L. ed.) 699; *U. S. v. Nordlinger*, (C. C. A.) 121 Fed. 690, *reversing* 115 Fed. 828.

<sup>87</sup> *Schmieder v. Barney*, 113 U. S. 647, 5 S. Ct. 624, 28 U. S. (L. ed.) 1131; *Swan v. Arthur*, 103 U. S. 598, 26 U. S. (L. ed.) 525; *U. S. v. Nordlinger*, (C. C. A.) 121 Fed. 690, *reversing* 115 Fed. 828.

<sup>88</sup> *Greenleaf v. Goodrich*, 101 U. S. 284, 25 U. S. (L. ed.) 847; *Schmieder v. Barney*, 113 U. S. 646, 5 S. Ct. 624, 28 U. S. (L. ed.) 1130.

<sup>89</sup> *Newman v. Arthur*, 109 U. S. 137, 3 S. Ct. 88, 27 U. S. (L. ed.) 883. See also *U. S. v. Bartram*, (C. C. A.) 131 Fed. 833, *reversing* 123 Fed. 327.

Thus, in a case where it was unsuccessfully contended that by commercial usage certain shawls were not embraced within the phrase "wearing apparel of every description, of whatever material composed,"

**116. Ordinary or scientific meaning.**—Where there is no evidence that words have acquired any special meaning in trade or commerce,<sup>90</sup> they must receive their ordinary meaning.<sup>91</sup> Of that meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court.<sup>92</sup> While the scientific designation of an article may be of value in some cases in fixing a proper classification,<sup>93</sup> it is usually of no importance if it conflicts with the ordinary or commercial meaning of the terms used.<sup>94</sup> It certainly cannot prevail when diametrically opposed both to the popular idea of an article and to its actual use in the arts.<sup>95</sup>

**117. Departmental construction.**—In the construction of tariff acts Congress must be assumed to use words and phrases in the sense in which they have been applied by the treasury department and executive and

etc., the court said: "The effort has been to substitute for the literal and lexicographical and popular meaning of the phrase 'wearing apparel' some supposed mercantile or commercial signification of these words. \* \* \* In instances in which words or phrases are novel or obscure, as in terms of art, where they are peculiar or exclusive in their signification, it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate; but if language which is familiar to all classes and grades and occupations—language the meaning of which is impressed upon all by the daily habits and necessities of all—may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society. \* \* \* If therefore the strange concession were admissible that, in the opinion of a portion of the mercantile men, shawls were not considered wearing apparel, it would still remain to be proved that this opinion was sustained by the judgment of the community generally, or that the legislature designed a departure from the natural and popular acceptance of language." *Maillard v. Lawrence*, 16 How. 261, 14 U. S. (L. ed.) 930.

But compare *Hedden v. Richard*, 149 U. S. 346, 13 S. Ct. 891, 37 U. S. (L. ed.) 763, where Mr. Justice Shiras said: "While a customs law taxing an article which every one in the community might be expected to import, such as 'wearing apparel,' may use words which every one understands, and which, unless taken in the ordinary sense, would mislead the whole community, and cannot, therefore, be supposed to be intended in any other sense, unless there is something to indicate such intention, yet, on the other hand, a tariff law may use language not intended for the community at large, but for merchants, or for a particular trade, and such as to mislead those for whom it is intended if not taken in the commercial or

trade sense; and such language is that under consideration, speaking of a manufactured article in various stages of its construction. In such a case, as in the other case, the words are to be taken in the sense in which they will naturally be understood by those to whom they are addressed."

90. "It is only when no commercial meaning is called for or proved that the common meaning of the words is to be adopted." *Cadwalader v. Zeh*, 151 U. S. 176, 14 S. Ct. 288, 38 U. S. (L. ed.) 117. See also *Toplitz v. Hedden*, 146 U. S. 256, 13 S. Ct. 70, 36 U. S. (L. ed.) 963; *Robertson v. Salomon*, 130 U. S. 415, 10 S. Ct. 559, 32 U. S. (L. ed.) 996; *Knauth, etc. v. U. S.*, 155 Fed. 144; *Erhardt v. Ullman*, (C. C. A.) 51 Fed. 415.

91. *Patton v. U. S.*, 159 U. S. 506, 16 S. Ct. 89, 40 U. S. (L. ed.) 236; *Nix v. Hedden*, 149 U. S. 306, 13 S. Ct. 881, 37 U. S. (L. ed.) 746; *Hempstead v. Thomas*, (C. C. A.) 122 Fed. 538; *Salomon v. Robertson*, 41 Fed. 519. See also *U. S. v. Cheshbrough*, 176 Fed. 778; *S. S. Pierce Co. v. U. S.*, 176 Fed. 440.

92. *Nix v. Hedden*, 149 U. S. 306, 13 S. Ct. 881, 37 U. S. (L. ed.) 746; *Marvel v. Merritt*, 116 U. S. 12, 6 S. Ct. 207, 29 U. S. (L. ed.) 550; *Salomon v. Robertson*, 41 Fed. 519; *Saltonstall v. Wiebusch*, 156 U. S. 602, 15 S. Ct. 476, 39 U. S. (L. ed.) 549.

93. *Lutz v. Magone*, 153 U. S. 105, 14 S. Ct. 777, 38 U. S. (L. ed.) 651.

94. See *U. S. v. Buffalo Natural Gas Fuel Co.*, (C. C. A.) 78 Fed. 111; "Zante Currants," 73 Fed. 188; *American Net, etc., Co. v. Worthington*, 141 U. S. 468, 12 S. Ct. 55, 35 U. S. (L. ed.) 821; *Hempstead v. Thomas*, (C. C. A.) 122 Fed. 538; *U. S. v. Eisner, etc., Co.*, (C. C. A.) 59 Fed. 354; *In re Irwin*, 62 Fed. 152; *Two Hundred Chests Tea*, 9 Wheat. 430, 6 U. S. (L. ed.) 128.

95. *Lutz v. Magone*, 153 U. S. 105, 14 S. Ct. 777, 38 U. S. (L. ed.) 651.

administrative officers of the government under earlier statutes which contained the same words and phrases.<sup>96</sup>

118. "Not otherwise herein provided for"; "manufactures." — The words "not otherwise herein provided for" in an act providing for customs duties mean not otherwise provided for in the act of which they are a part;<sup>97</sup> and the words "not herein otherwise provided for" have the same meaning.<sup>98</sup>

The application of labor to an article, either by hand or by mechanism, does not necessarily make it a "manufactured" article within the meaning of that term as used in the tariff laws.<sup>99</sup> In order to constitute an article a manufacture of another, the labor bestowed upon it must be carried to such an extent as to transform it into an article which has a different character, name, or use from the article that it was in the first place.<sup>1</sup> Thus, hay pressed into bales, ready for market, is not a manufactured article.<sup>2</sup> Round copper plates turned up and raised at the edges from four to five inches by the application of labor, to fit them for subsequent use in the manufacture of copper vessels, but which were still bought by the pound as copper for use in making copper vessels, were held not to be manufactured copper.<sup>3</sup> Marble which had been cut into blocks for convenience of transportation was held not to be manufactured marble, but was free from duty as unmanufactured.<sup>4</sup> But where an article has been advanced through one or more processes into a complete commercial article, known and recognized in trade by a specific and distinctive name other than the name of the material, and is put into a completed shape designed and adapted for a particular use, it is deemed to be a manufacture.<sup>5</sup> India-rubber shoes, made in Brazil by simply allowing the sap of the india-rubber tree to harden upon a mould, were held to be manufactured articles, because they were capable of use in that shape as shoes, and had been put into a new form capable of use and designed to be used in such new form.<sup>6</sup> An article does not lose its character as a manufacture by reason of age or relative unfitness for its normal use; but is classified under that head so long as it remains vendible for the purposes for which it was made.<sup>7</sup>

119. **Specific designation.**— Where Congress has designated an article by a specific name and imposed a duty upon it, general terms in the same

96. *U. S. v. Baruch*, 223 U. S. 191, 32 S. Ct. 306, 56 U. S. (L. ed.) 399; *Komada v. U. S.*, 215 U. S. 392, 30 S. Ct. 136, 54 U. S. (L. ed.) 249; *U. S. v. Cerecedo Herman y Compania*, 209 U. S. 337, 28 S. Ct. 532, 52 U. S. (L. ed.) 821; *Dunham v. U. S.*, (C. C. A.) 150 Fed. 562; *U. S. v. Kuttroff*, 147 Fed. 758; *U. S. v. W. N. Proctor Co.*, (C. C. A.) 145 Fed. 126, *affirming* 139 Fed. 586; *U. S. v. Crucible Steel Co. of America*, (C. C. A.) 137 Fed. 384, *affirming* 132 Fed. 269; *U. S. v. Bartram*, (C. C. A.) 131 Fed. 833; *U. S. v. Townsend*, (C. C. A.) 113 Fed. 443, *citing* *Robertson v. Downing*, 127 U. S. 612, 8 S. Ct. 1328, 32 U. S. (L. ed.) 270. See also *Kuttroff v. U. S.*, (C. C. A.) 154 Fed. 1004, *affirming* 147 Fed. 758.

See §§ 56-60 as to departmental construction generally.

97. *Arthur v. Butterfield*, 125 U. S. 76, 8 S. Ct. 714, 31 U. S. (L. ed.) 645.

98. *Arthur v. Vietor*, 127 U. S. 576, 8 S. Ct. 1225, 32 U. S. (L. ed.) 202.

99. *Hartranft v. Wiegmann*, 121 U. S. 609, 7 S. Ct. 1240, 30 U. S. (L. ed.) 1012.

1. *Hartranft v. Wiegmann*, 121 U. S. 609, 7 S. Ct. 1240, 30 U. S. (L. ed.) 1012; *Dejonge v. Magone*, 41 Fed. 433. See *in re* *Gardner*, 72 Fed. 495.

2. *Frazee v. Moffitt*, 20 Blatchf. 267.

3. *U. S. v. Potts*, 5 Cranch 284, 3 U. S. (L. ed.) 102.

4. *U. S. v. Wilson*, 1 Hunt Mer. Mag. 167, 28 Fed. Cas. No. 16,736.

5. *Erhardt v. Hahn*, (C. C. A.) 55 Fed. 275; *Schriefer v. Wood*, 5 Blatchf. 215, 21 Fed. Cas. No. 12,481; *Stockwell v. U. S.*, 3 Cliff. 284, 23 Fed. Cas. No. 13,466.

6. *Lawrence v. Allen*, 7 How. 785, 12 U. S. (L. ed.) 914.

7. *Downing v. U. S.*, (C. C. A.) 122 Fed. 445.

or a subsequent act, though sufficiently broad to comprehend such article, are not applicable to it; in other words, the article will be classified by its specific designation rather than under a general description.<sup>8</sup> The rule is not arbitrary, however; and a classification will be made with respect to a general description rather than a direct reference if that course seems consonant with the legislative intent.<sup>9</sup> The specific designation of an article is not indicative of an intention to classify it exclusively under the section wherein the designation is made when the specific words follow and serve to explain a preceding general description.<sup>10</sup> When articles have been specially dealt with and classified, apart from a larger class which might have included them, and a new statute changes the duty on the larger class and is silent as to the smaller, it is not to be considered as intending to change the duty on the latter.<sup>11</sup> Thus, where almonds had been mentioned in several statutes and classed differently from fruits, an amendment which reduced the duty on all fruits did not apply to almonds.<sup>12</sup> And where birds had been for a long time placed in a separate list from other animals, a duty imposed on horses, mules, cattle, sheep, hogs, and other live animals was held not to include canary birds.<sup>13</sup> So where sheepskins, with the wool on them, had been specially mentioned in several acts, and there separated from hides or skins, they were not held to be included in the general description of hides or skins in a new statute.<sup>14</sup> If an article is reached in some of its aspects by provisions found in separate paragraphs, it is to be controlled by that paragraph which is the more definite in its application.<sup>15</sup> In determining which is the general and

8. *Bogle v. Magone*, 152 U. S. 626, 14 S. Ct. 718, 38 U. S. (L. ed.) 575; *American Net, etc., Co. v. Worthington*, 141 U. S. 473, 12 S. Ct. 468, 35 U. S. (L. ed.) 823, citing *Homer v. Collector*, 1 Wall. 486, 17 U. S. (L. ed.) 688; *Arthur v. Lahey*, 96 U. S. 112, 24 U. S. (L. ed.) 766; *Arthur v. Stephani*, 96 U. S. 125, 24 U. S. (L. ed.) 771; and *Movius v. Arthur*, 95 U. S. 144, 24 U. S. (L. ed.) 420. To the same point see *Victor v. Arthur*, 104 U. S. 499, 26 U. S. (L. ed.) 634; *Arthur v. Rheim*, 96 U. S. 143, 24 U. S. (L. ed.) 813; *Arthur v. Zimmerman*, 96 U. S. 124, 24 U. S. (L. ed.) 770; *Seeberger v. Cahn*, 137 U. S. 97, 11 S. Ct. 28, 34 U. S. (L. ed.) 600; *Nash v. U. S.*, 152 Fed. 573; *U. S. v. Boden*, 133 Fed. 839; *U. S. v. Borgfeldt*, 124 Fed. 304; *Meyer v. U. S.*, 124 Fed. 293; *Wise v. Chew Hing Lung*, (C. C. A.) 83 Fed. 165; "Zante Currants," 73 Fed. 189; *U. S. v. Field*, (C. C. A.) 71 Fed. 514; *U. S. v. Gunther*, (C. C. A.) 71 Fed. 500; *Matheson v. U. S.*, (C. C. A.) 71 Fed. 395; *U. S. v. Davis*, (C. C. A.) 54 Fed. 149; *Chung Yune v. Kelly*, 14 Fed. 643; *Tong Duck Chung v. Kelly*, 7 Fed. 741, 24 Fed. Cas. No. 14,093. See also *Magone v. King*, (C. C. A.) 51 Fed. 525; *Wise v. Chew Hing Lung*, (C. C. A.) 83 Fed. 162; *Magone v. Heller*, 150 U. S. 70, 14 S. Ct. 18, 37 U. S. (L. ed.) 1001. Compare *U. S. v. Klumpp*, 169 U. S. 209, 18 S. Ct. 311, 42 U. S. (L. ed.) 720, where the rule was held inapplicable.

9. *Brennan v. U. S.*, (C. C. A.) 136 Fed.

743, wherein "limes in brine" were classified as "fruit not otherwise provided for" rather than as "limes," such classification according both with the uniform practice of the customs officers and with commercial usage. To the same effect *U. S. v. Reiss*, (C. C. A.) 136 Fed. 741.

10. *Goldenberg Bros., etc., Co. v. U. S.*, (C. C. A.) 130 Fed. 108.

11. *Faxon v. Russell*, 8 Fed. Cas. No. 4,707.

12. *Homer v. Collector*, 1 Wall. 490, 17 U. S. (L. ed.) 688.

13. *Reiche v. Smythe*, 13 Wall. 162, 20 U. S. (L. ed.) 566.

14. *DeForest v. Lawrence*, 13 How. 274, 14 U. S. (L. ed.) 143.

15. *Fink v. U. S.*, 170 U. S. 586, 18 S. Ct. 770, 42 U. S. (L. ed.) 1154, citing *Isaacs v. Jonas*, 148 U. S. 648, 13 S. Ct. 677, 37 U. S. (L. ed.) 596, and *Bogle v. Magone*, 152 U. S. 623, 14 S. Ct. 718, 38 U. S. (L. ed.) 574. See also *Arnold v. U. S.*, 147 U. S. 497, 13 S. Ct. 406, 37 U. S. (L. ed.) 255; *Solomon v. Arthur*, 102 U. S. 208, 26 U. S. (L. ed.) 147; *Hartranft v. Meyer*, 135 U. S. 237, 10 S. Ct. 772, 34 U. S. (L. ed.) 110; *Robertson v. Glendenning*, 132 U. S. 158, 10 S. Ct. 44, 33 U. S. (L. ed.) 298; *Fisk v. Arthur*, 103 U. S. 431, 26 U. S. (L. ed.) 520; *Arthur v. Sussfield*, 96 U. S. 128, 24 U. S. (L. ed.) 772; *U. S. v. Schwarz*, 140 Fed. 302; *Schoellkopf, etc., Co. v. U. S.*, 139 Fed. 58; *U. S. v. Lehm*, 124 Fed. 87.

Though an article may be bought and

which is the specific, it seems that the court may adopt that provision as the more specific which fixes the rate of duty on an article by the specific use to which that particular article is put.<sup>16</sup>

**120. Intent of importer; goods unknown at date of act.**—It is a well-settled doctrine that intent is not an element in determining the proper classification of imported articles, and that merchants are at liberty so to manufacture and so to import their goods as to subject them to the lowest possible duties under the tariff laws;<sup>17</sup> they are to be classified according to their actual character and condition when imported into the country, and the use to which they will be ultimately put is not to be considered.<sup>18</sup>

Tariff laws are made for the future, and the fact that at the date of an act imposing duties goods of a certain kind had not been manufactured does not withdraw them from the class to which they belong when the language of the statute clearly and fairly includes them.<sup>19</sup>

### *Exemptions*

**121. Contracts of exemption from taxation.**—It is competent for a state to make a contract not to exercise the taxing power, or to exercise it only within certain limits with respect to a particular subject, and such a contract once made cannot be rescinded.<sup>20</sup> In the case of a corporation created by a state legislature the exemption, if contained in the act of incorporation, is ordinarily a contract supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter, and is within the protection of the Federal Constitution.<sup>21</sup> It is not necessary that the charter should contain an express declaration that the exemption given shall not be withdrawn.<sup>22</sup> And when the exemption is made by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation.<sup>23</sup> A like stipulation in a general corporation law is binding upon the state,<sup>24</sup> unless the subject

sold under a particular name, yet it may be described with like articles by one comprehensive term, and such an article, when not referred to with greater particularity, must be classified under the group to which it belongs. *Lueders v. U. S.*, 140 Fed. 970.

16. *U. S. v. Lehm*, 124 Fed. 87; *In re Arnold*, 46 Fed. 512; *Heller v. Magone*, 38 Fed. 908.

17. *Johnson v. U. S.*, 123 Fed. 997; *U. S. v. Irwin*, (C. C. A.) 78 Fed. 801.

18. *U. S. v. Hilbert*, (C. C. A.) 171 Fed. 69; *Boker v. U. S.*, 168 Fed. 573; *U. S. v. Wotton*, (C. C. A.) 53 Fed. 346.

19. *Pickhardt v. Merritt*, 132 U. S. 257, 10 S. Ct. 80, 33 U. S. (L. ed.) 355; *Newman v. Arthur*, 109 U. S. 132, 3 S. Ct. 88, 27 U. S. (L. ed.) 883.

20. *New Jersey v. Wilson*, 7 Cranch 164, 3 U. S. (L. ed.) 303; *New Jersey v. Yard*, 95 U. S. 104, 24 U. S. (L. ed.) 352.

21. *Tomlinson v. Jessup*, 15 Wall. 459, 21 U. S. (L. ed.) 204; *Raleigh, etc., R. Co. v. Reid*, 13 Wall. 269, 20 U. S. (L. ed.)

570; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 U. S. (L. ed.) 173; *Gordon v. Appeal Tax Ct.*, 3 How. 133, 11 U. S. (L. ed.) 529; *Dodge v. Woolsey*, 18 How. 331, 15 U. S. (L. ed.) 401; *Home of Friendless r. Rouse*, 8 Wall. 430, 19 U. S. (L. ed.) 495; *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 14 S. Ct. 968, 36 U. S. (L. ed.) 793; *Welch v. Cook*, 97 U. S. 542, 24 U. S. (L. ed.) 1112; *Farrington v. Tennessee*, 95 U. S. 679, 24 U. S. (L. ed.) 558. See also *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 376, 20 U. S. (L. ed.) 611; *New Orleans v. Houston*, 119 U. S. 265, 7 S. Ct. 198, 30 U. S. (L. ed.) 411.

22. *St. Anna's Asylum v. New Orleans*, 105 U. S. 369, 26 U. S. (L. ed.) 1128.

23. *Tomlinson v. Jessup*, 15 Wall. 459, 21 U. S. (L. ed.) 204. See also *Pacific R. Co. v. Maguire*, 20 Wall. 36, 22 U. S. (L. ed.) 232.

24. *Piqua Branch of Ohio Bank v. Knoop*, 16 How. 369, 14 U. S. (L. ed.) 977.



matter of the law shows that no contract could have been intended.<sup>25</sup> But a statute providing for exemption from taxation is not construed to be an irrevocable contract, unless the language used be too clear to admit of doubt.<sup>26</sup> "Certainly it is not to be inferred from the imposition of a tax that no additional tax shall be laid."<sup>27</sup> The right to withdraw a charter exemption may be sustained by existing provisions in the constitution or statutes expressly reserving that power,<sup>28</sup> unless, in the case of a statutory provision of the character last mentioned, they are expressly repealed or suspended in connection with the granting of the exemption.<sup>29</sup> A mere spontaneous concession of exemption to a corporation without the imposition of any service or duty or other remunerative condition may be revoked at the pleasure of the state.<sup>30</sup> And a statutory exemption by way of a bounty or other form of mere gratuity may be repealed at any time, if it contains no pledge to the contrary.<sup>31</sup>

**122. Construction of exemptions from taxation.**—In the leading case on statutory exemptions from taxation, Chief Justice Marshall, speaking of a partial release of the power of taxation by a state in a charter to a corporation, said: "That the taxing power is of vital importance; that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm." "As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." "We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction."<sup>32</sup> In a later case Mr. Justice Lurton declared: "The power of taxation is never to be regarded as surrendered or bargained away if there is room for rational doubt as to the purpose."<sup>33</sup> In the subsequent decisions the same rule has been strictly upheld and constantly reaffirmed in every variety of

25. *Ohio L. Ins., etc., Co. v. Debolt*, 16 How. 416, 14 U. S. (L. ed.) 997.

26. *North Missouri R. Co. v. Maguire*, 20 Wall. 46, 22 U. S. (L. ed.) 287; *Gilman v. Sheboygan*, 2 Black 513, 17 U. S. (L. ed.) 305. See also *Memphis Gas Light Co. v. Shelby County Taxing Dist.*, 109 U. S. 398, 3 S. Ct. 205, 27 U. S. (L. ed.) 976; *Christ Church v. Philadelphia County*, 24 How. 302, 16 U. S. (L. ed.) 602; *Providence Bank v. Billings*, 4 Pet. 560, 7 U. S. (L. ed.) 939; *Hoge v. Richmond R. Co.*, 99 U. S. 355, 25 U. S. (L. ed.) 303; *Bailey v. Magwire*, 22 Wall. 215, 22 U. S. (L. ed.) 850; *New Orleans City, etc., Co. v. New Orleans*, 143 U. S. 192, 12 S. Ct. 406, 36 U. S. (L. ed.) 121; *Tucker v. Ferguson*, 22 Wall. 527, 22 U. S. (L. ed.) 805.

27. *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. 335, 17 Fed. Cas. No. 9,645.

28. *Covington v. Kentucky*, 173 U. S. 231, 19 S. Ct. 383, 43 U. S. (L. ed.) 679; *Citizens Sav. Bank v. Owensboro*, 173 U. S. 636, 19 S. Ct. 530, 571, 43 U. S. (L. ed.) 840; *Tomlinson v. Jessup*, 15 Wall. 454, 21 U. S. (L. ed.) 204; *Hoge v. Richmond, etc., R. Co.*, 99 U. S. 348, 25 U. S. (L. ed.) 303; *Hewitt v. New York*,

*etc., R. Co.*, 12 Blatchf. 452, 12 Fed. Cas. No. 6,443; *Northern Bank v. Stone*, 88 Fed. 413; *Henderson v. Central Pass. R. Co.*, 21 Fed. 358.

29. *Home of Friendless v. Rouse*, 8 Wall. 430, 19 U. S. (L. ed.) 495.

30. *Christ Church v. Philadelphia County*, 24 How. 300, 16 U. S. (L. ed.) 602.

31. *Welch v. Cook*, 97 U. S. 541, 24 U. S. (L. ed.) 1112; *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595, 23 U. S. (L. ed.) 814; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 373, 20 U. S. (L. ed.) 611; *Tucker v. Ferguson*, 22 Wall. 527, 22 U. S. (L. ed.) 805. See also *Choate v. Trappe*, 224 U. S. 665, 32 S. Ct. 565, 56 U. S. (L. ed.) 941.

32. *Providence Bank v. Billings*, 4 Pet. 561, 7 U. S. (L. ed.) 939.

See § 28 as to constructions prejudicial to government; §§ 109 and 110 as to the construction of grants.

33. *Wright v. Georgia R., etc., Co.*, 216 U. S. 420, 30 S. Ct. 242, 54 U. S. (L. ed.) 544. To the same effect *Philadelphia, etc., R. Co. v. Maryland*, 10 How. 376, 13 U. S. (L. ed.) 461.

expression.<sup>34</sup> The doctrine applies, too, with full force in an inquiry whether a territorial legislature has the power of granting exemptions

34. *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 668, 6 S. Ct. 625, 29 U. S. (L. ed.) 770, where Mr. Justice Gray said: "It has been said that 'neither the right of taxation nor any other power of sovereignty will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken;' that exemption from taxation 'should never be assumed unless the language used is too clear to admit of doubt;' that 'nothing can be taken against the state by presumption or inference; the surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the state;' that a state 'cannot by ambiguous language be deprived of this highest attribute of sovereignty;' that any contract of exemption 'is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require;' and that such exemptions are regarded 'as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris*.'" Citing *Jefferson Branch Bank v. Skelly*, 1 Black 446, 17 U. S. (L. ed.) 173; *Gilman v. Sheboygan*, 2 Black 513, 17 U. S. (L. ed.) 305; *Delaware Railroad Tax*, 18 Wall. 226, 21 U. S. (L. ed.) 888; *Hoge v. Richmond R. Co.*, 99 U. S. 355, 25 U. S. (L. ed.) 303; *Southwestern R. Co. v. Wright*, 116 U. S. 236, 6 S. Ct. 375, 29 U. S. (L. ed.) 626; *Erie R. Co. v. Pennsylvania*, 21 Wall. 499, 22 U. S. (L. ed.) 595; *Memphis Gas Light Co. v. Shelby County Taxing Dist.*, 109 U. S. 401, 3 S. Ct. 205, 27 U. S. (L. ed.) 976; *Tucker v. Ferguson*, 22 Wall. 575, 22 U. S. (L. ed.) 805; *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 597, 23 U. S. (L. ed.) 814; and *Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 618, 5 S. Ct. 299, 28 U. S. (L. ed.) 837. To the same effect see *Great Northern R. Co. v. Minnesota*, 216 U. S. 206, 30 S. Ct. 344, 54 U. S. (L. ed.) 446; *Metropolitan St. R. Co. v. New York*, 199 U. S. 1, 25 S. Ct. 705, 50 U. S. (L. ed.) 65; *Cornell v. Coyne*, 192 U. S. 418, 24 S. Ct. 383, 48 U. S. (L. ed.) 504; *Central R., etc., Co. v. Wright*, 164 U. S. 335, 17 S. Ct. 80, 41 U. S. (L. ed.) 454; *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 586, 17 S. Ct. 198, 41 U. S. (L. ed.) 560; *Ford v. Delta, etc., Co.*, 164 U. S. 666, 17 S. Ct. 230, 41 U. S. (L. ed.) 590; *Bank of Commerce v. Tennessee*, 163 U. S. 423, 16 S. Ct. 1113, 41 U. S. (L. ed.) 211; *Bank of*

*Commerce v. Tennessee*, 161 U. S. 146, 16 S. Ct. 456, 40 U. S. (L. ed.) 645; *Spokane Valley Land, etc., Co. v. Kootenai County*, 199 Fed. 481; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 177, 16 S. Ct. 471, 40 U. S. (L. ed.) 660, where the court said: "The claim for exemption must be made out wholly beyond doubt." *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 306, 14 S. Ct. 592, 38 U. S. (L. ed.) 450; *People v. Cook*, 148 U. S. 409, 13 S. Ct. 645, 37 U. S. (L. ed.) 498; *New Orleans City, etc., R. Co. v. New Orleans*, 143 U. S. 195, 12 S. Ct. 406, 36 U. S. (L. ed.) 121; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 294, 13 S. Ct. 72, 36 U. S. (L. ed.) 972; *Picard v. East Tennessee, etc., R. Co.*, 130 U. S. 641, 9 S. Ct. 640, 32 U. S. (L. ed.) 1051; *Yazoo R. Co. v. Thomas*, 132 U. S. 185, 10 S. Ct. 68, 33 U. S. (L. ed.) 302; *Chicago, etc., R. Co. v. Guffey*, 120 U. S. 575, 7 S. Ct. 693, 30 U. S. (L. ed.) 732; *Tennessee v. Whitworth*, 117 U. S. 149, 6 S. Ct. 649, 29 U. S. (L. ed.) 833; *Given v. Wright*, 117 U. S. 655, 6 S. Ct. 907, 29 U. S. (L. ed.) 1021; *Sturges v. Carter*, 114 U. S. 521, 5 S. Ct. 1014, 29 U. S. (L. ed.) 240; *Gillfillan v. Union Canal Co.*, 109 U. S. 401, 3 S. Ct. 304, 27 U. S. (L. ed.) 977; *Memphis, etc., R. Co. v. Loftin*, 105 U. S. 261, 26 U. S. (L. ed.) 1042; *Bank of Commerce v. Tennessee*, 104 U. S. 495, 26 U. S. (L. ed.) 810; *Annapolis, etc., R. Co. v. Anne Arundel County*, 103 U. S. 3, 26 U. S. (L. ed.) 359; *St. Louis, etc., R. Co. v. Loftin*, 98 U. S. 564, 25 U. S. (L. ed.) 222; *Farrington v. Tennessee*, 95 U. S. 686, 24 U. S. (L. ed.) 558; *Morgan v. Louisiana*, 93 U. S. 222, 23 U. S. (L. ed.) 860; *Bailey v. Magwire*, 22 Wall. 226, 22 U. S. (L. ed.) 850; *Pacific R. Co. v. Maguire*, 20 Wall. 42, 22 U. S. (L. ed.) 282; *North Missouri R. Co. v. Maguire*, 20 Wall. 61, 22 U. S. (L. ed.) 287; *Tomlinson v. Jessup*, 15 Wall. 458, 21 U. S. (L. ed.) 204; *Wilmington, etc., R. Co. v. Reid*, 13 Wall. 266, 20 U. S. (L. ed.) 568; *Savings Soc. v. Coite*, 6 Wall. 606, 18 U. S. (L. ed.) 897; *Christ Church v. Philadelphia County*, 24 How. 302, 16 U. S. (L. ed.) 602; *Ohio L. Ins., etc., Co. v. Debolt*, 16 How. 435, 14 U. S. (L. ed.) 997; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 371, 2 S. Ct. 257, 27 U. S. (L. ed.) 419; *Northern Bank v. Stone*, 88 Fed. 422; *Walters v. Western, etc., R. Co.*, 68 Fed. 1006; *Custer County v. Anderson*, (C. C. A.) 68 Fed. 343; *Keokuk, etc., R. Co. v. Scotland County Ct.*, 41 Fed. 307; *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. 385; *Davenport Nat. Bank v. Mittelbuscher*, 15 Fed. 228; *Louisville, etc., R. Co. v. Gaines*, 3 Fed. 276; *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. 335, 17 Fed. Cas. No. 9,645.

under an original act; for though full legislative power is generally presumed, in such an instance that presumption has no application.<sup>35</sup> "Nor does the rule rest merely upon the authority of adjudged cases," said Chief Justice Taney. "It is founded in principles of justice, and necessary for the safety and well-being of every state in the Union. For it is matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, or other corporations is drawn originally by the parties who are personally interested in obtaining the charter, and that they are often passed by the legislature in the last days of its session, when, from the nature of our political institutions, the business is unavoidably transacted in a hurried manner, and it is impossible that every member can deliberately examine every provision in every bill upon which he is called on to act. On the other hand, those who accept the charter have abundant time to examine and consider its provisions before they invest their money. And if they mean to claim under it any peculiar privileges, or any exemption from the burden of taxation, it is their duty to see that the right or exemption they intend to claim is granted in clear and unambiguous language."<sup>36</sup> "Courts are astute to seize upon evidence tending to show either that exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the corporations in whose favor they were granted."<sup>37</sup> On the other hand, it has been said that the court is not "required to hunt for an escape from the exemption;" that "it is a question of sound and reasonable construction, with the presumption against an intent to create or transfer it;" and that "if the intent clearly appears the court is bound, without evasion, to give it effect."<sup>38</sup> When a statute creates an exemption with the evident design of aiding in accomplishing a particular result, the exemption should be expected to cease when that result has been accomplished, and the statute should be read in the light of such expectation.<sup>39</sup>

**123. As a personal privilege.**—The same considerations which call for clear and unambiguous language to justify the conclusion that immunity

35. *Berryman v. Whitman College*, 222 U. S. 334, 32 S. Ct. 147, 56 U. S. (L. ed.) 225, reversing 156 Fed. 112.

36. *Ohio L. Ins., etc., Co. v. Debolt*, 16 How. 436, 14 U. S. (L. ed.) 997.

37. *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 22, 21 S. Ct. 240, 45 U. S. (L. ed.) 395.

38. *Per Severens, J.*, in *Buchanan v. Knoxville, etc., R. Co.*, (C. C. A.) 71 Fed. 333. See also *Wright v. Georgia R., etc., Co.*, 216 U. S. 420, 30 S. Ct. 242, 54 U. S. (L. ed.) 544; *Wilmington, etc., R. Co. v. Reid*, 13 Wall. 267, 20 U. S. (L. ed.) 568; *Home of Friendless v. Rouse*, 8 Wall. 437, 19 U. S. (L. ed.) 495; *Spokane Valley Land, etc., Co. v. Kootenai County*, 199 Fed. 481; *Louisville, etc., R. Co. v. Gaines*, 3 Fed. 276.

"We recognize the force and salutary character of the rule, but it must not be misunderstood. It is not a substitute for all other rules. It does not mean that whenever a controversy is or can be raised of the meaning of a statute, ambiguity

occurs, which immediately and inevitably determines the interpretation of the statute. The decisive simplicity of such effect is very striking. It conveniently removes all difficulties from judgment in many cases of controverted construction of laws. But we cannot concede such effect to the rule, nor is such effect necessary in order to make the rule useful and, at times, decisive. Its proper office is to help to solve ambiguities, not to compel an immediate surrender to them—to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute." *Citizens' Bank v. Parker*, 192 U. S. 73, 24 S. Ct. 181, 48 U. S. (L. ed.) 346.

39. *Per Justice Brewer*, in *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 531, 16 S. Ct. 83, 40 U. S. (L. ed.) 247. See also *Memphis, etc., R. Co. v. Loftin*, 105 U. S. 258, 26 U. S. (L. ed.) 1042.

from taxation has been granted in any instance require similar distinctness of expression before the immunity will be extended to others than the original grantee.<sup>40</sup> The exemption of a corporation from taxation must be construed to be a personal privilege of the very corporation specifically referred to, and to perish with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor.<sup>41</sup> It will not pass merely by a conveyance of the property and franchises of a corporation, although such corporation holds its property exempt from taxation.<sup>42</sup> The presumption is that when two railroads are consolidated each of the united lines will be respectively held with all the privileges and burdens originally attaching thereto,<sup>43</sup> although where one of them thus preserving its identity holds as to its own property an exemption from taxation, such exemption will not be extended to the property of the other without express words to that effect.<sup>44</sup> But where two companies agree to consolidate their stock, issue new certificates, take a new name, and elect a new board of directors, and the constituent companies are to cease their functions, a new corporation is thereby formed, subject to existing laws in respect of taxation.<sup>45</sup>

**124. Particular provisions.**—A grant to a corporation of all the "rights, privileges, and immunities" of another corporation is certainly full and ample for the purpose of granting an exemption from taxation enjoyed by the latter corporation, the word "immunities" expressing more clearly and definitely an intention to include therein an exemption from taxation than does either of the other words; yet when in granting to still another corporation certain rights the word "immunities" is dropped, it must be deemed to signify that the exemption from taxation is omitted.<sup>46</sup> Although the grant of "all the rights, powers, and privileges" conferred on another corporation has been held to grant to the former an exemption from taxation if the latter possessed by law such right of exemption,<sup>47</sup> the later

40. *Picard v. East Tennessee, etc., R. Co.*, 130 U. S. 637, 9 S. Ct. 640, 32 U. S. (L. ed.) 1051.

41. *Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 617, 5 S. Ct. 299, 28 U. S. (L. ed.) 837; *Keokuk, etc., R. Co. v. Scotland County Ct.*, 41 Fed. 307. See also *Walters v. Western, etc., R. Co.*, 68 Fed. 1002.

42. *Mercantile Bank v. Tennessee*, 161 U. S. 161, 16 S. Ct. 461, 40 U. S. (L. ed.) 656; *Picard v. East Tennessee, etc., R. Co.*, 130 U. S. 641, 9 S. Ct. 640, 32 U. S. (L. ed.) 1051; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 3 S. Ct. 193, 27 U. S. (L. ed.) 922; *Wilson v. Gaines*, 103 U. S. 417, 26 U. S. (L. ed.) 401; *East Tennessee, etc., R. Co. v. Hamblen County*, 102 U. S. 273, 26 U. S. (L. ed.) 152; *Morgan v. Louisiana*, 93 U. S. 217, 23 U. S. (L. ed.) 860. See also *St. Louis, etc., R. Co. v. Gill*, 156 U. S. 656, 15 S. Ct. 484, 39 U. S. (L. ed.) 567; *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 673, 15 S. Ct. 413, 39 U. S. (L. ed.) 574.

43. *Tomlinson v. Branch*, 15 Wall. 460, 21 U. S. (L. ed.) 189; *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 23 U. S.

(L. ed.) 757; *Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718, 24 U. S. (L. ed.) 310. See also *Citizens St. R. Co. v. Memphis*, 53 Fed. 715.

44. *Tomlinson v. Branch*, 15 Wall. 460, 21 U. S. (L. ed.) 189; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. 376, 13 U. S. (L. ed.) 461; *Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718, 24 U. S. (L. ed.) 310.

45. *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 19, 21 S. Ct. 240, 45 U. S. (L. ed.) 395. See also *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 14 S. Ct. 592, 38 U. S. (L. ed.) 450; *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465, 5 S. Ct. 529, 28 U. S. (L. ed.) 1055; *Atlantic, etc., R. Co. v. Georgia*, 98 U. S. 359, 25 U. S. (L. ed.) 185; *Maine Cent. R. Co. v. Maine*, 96 U. S. 499, 24 U. S. (L. ed.) 836; *Keokuk, etc., R. Co. v. Scotland County Ct.*, 41 Fed. 305.

46. *Per Justice Peckham*, in *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 176, 16 S. Ct. 471, 40 U. S. (L. ed.) 660. See also *Buchanan v. Knoxville, etc., R. Co.*, (C. C. A.) 71 Fed. 324.

47. *Humphrey v. Pegues* 16 Wall. 244, 21 U. S. (L. ed.) 326; *Tennessee v. Whit-*

authorities show that there must be other language than the mere word "privilege" or other provisions in the statute removing all doubt as to the intention of the legislature before the exemption will be admitted.<sup>48</sup> "A statute authorizing or directing the grant or transfer of the 'privileges' of a corporation, which enjoys immunity from taxation or regulation, should not be interpreted as including that immunity."<sup>49</sup> A general exemption of the property of a corporation from taxation is to be construed as referring only to the property held for the transaction of the business of the company.<sup>50</sup> "It is a general rule of construction that a clause exempting from taxation does not release the property so exempted from liability for assessments for local improvements."<sup>51</sup> But where the exemption of land is contained in a statute providing for the improvement thereof, and to encourage purchases of land, the exemption extends to taxes imposed for the cost of the improvements.<sup>52</sup> The fact that in an act amending the charter of a railroad corporation special provision is made for ascertaining the taxes to become due by the corporation to the state, nothing being said about the matter of ascertaining other taxes, is not of itself enough to work an exemption of the corporation from county or municipal taxation.<sup>53</sup> Where the charter of a railroad company exempted its property from taxation "for ten years after the completion of said road," it was held that there was no exemption until the completion of the road, despite the contention that the exemption was designed to aid the road, and was, therefore, much more needed during its construction than when completed.<sup>54</sup> A charter exemption from taxation "for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this act," was construed to confer exemption beginning at the completion of the road to the river and to continue for twenty years thereafter if the road was completed to the river in five years from the date of the act, but subject to reduction of the time in excess of five years

worth, 117 U. S. 139, 6 S. Ct. 649, 29 U. S. (L. ed.) 833. See also *Philadelphia, etc., R. Co. v. Maryland*, 10 How. 393, 13 U. S. (L. ed.) 461; *Louisville, etc., R. Co. v. Gaines*, 3 Fed. 266.

48. *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 182, 16 S. Ct. 471, 40 U. S. (L. ed.) 660; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 5 S. Ct. 813, 29 U. S. (L. ed.) 121; *Morgan v. Louisiana*, 93 U. S. 217, 23 U. S. (L. ed.) 860. See also *Gulf, etc., R. Co. v. Hewes*, 183 U. S. 66, 22 S. Ct. 28, 46 U. S. (L. ed.) 86; *Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 609, 5 S. Ct. 299, 28 U. S. (L. ed.) 837; *Picard v. East Tennessee, etc., R. Co.*, 130 U. S. 642, 9 S. Ct. 640, 32 U. S. (L. ed.) 1051; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 297, 13 S. Ct. 72, 36 U. S. (L. ed.) 972; *Annapolis, etc., R. Co. v. Anne Arundel County*, 103 U. S. 1, 26 U. S. (L. ed.) 359; *Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718, 24 U. S. (L. ed.) 310.

In *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 179, 16 S. Ct. 471, 40 U. S. (L. ed.) 660, the court said: "It cannot

be denied that the decisions of this court are somewhat involved in relation to this question of exemption. It is difficult in some cases to distinguish the language used in each so far that the different results arrived at by the court can be seen to be founded upon a real difference in the meaning of such language."

49. *Rochester R. Co. v. Rochester*, 205 U. S. 236, 27 S. Ct. 469, 51 U. S. (L. ed.) 784, quoted with approval in *Wright v. Georgia R., etc., Co.*, 216 U. S. 420, 30 S. Ct. 242, 54 U. S. (L. ed.) 544.

50. *Ford v. Delta, etc., Co.*, 164 U. S. 667, 17 S. Ct. 230, 41 U. S. (L. ed.) 590.

51. *Per Justice Brewer*, in *Ford v. Delta, etc., Co.*, 164 U. S. 670, 17 S. Ct. 230, 41 U. S. (L. ed.) 590. See also *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 13 S. Ct. 293, 37 U. S. (L. ed.) 132.

52. *McGee v. Mathis*, 4 Wall. 143, 18 U. S. (L. ed.) 314.

53. *Bailey v. Magwire*, 22 Wall. 215, 22 U. S. (L. ed.) 850.

54. *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665, 6 S. Ct. 625, 29 U. S. (L. ed.) 770, by a divided court.

consumed by the completion of the road to the river.<sup>55</sup> A charter exemption of "the property" of a railroad corporation exempts its franchise as well as its rolling stock and real estate.<sup>56</sup>

**125. Exemptions from governmental control.**—"Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established the legislature is free to act on all subjects within its general jurisdiction as the public interest may seem to require."<sup>57</sup> For example, a surrender of legislative control of tolls to be exacted by a corporation established by authority of law for the construction of a public highway should never be implied; if it can be bargained away at all, it can be only by words of positive grant, or something which is in law equivalent.<sup>58</sup>

## VII. CONSTRUCTION OF STATUTES REFERRED TO OR ADOPTED—PROVISOS AND EXCEPTIONS—AMENDMENTS

**126. Statutes referred to or adopted by reference.**—A general reference in one statute to another antecedent one embraces also its amendments and additions, because all the provisions must be construed together as composing the act.<sup>59</sup> Where laws enacted by a foreign legislative body are adopted by reference, the adoption is considered as referring to the law existing at the time of adoption, and does not carry with it changes afterwards made in the adopted law.<sup>60</sup> Where an act of Congress adopts by reference certain penal statutes of a state, the act stands as if it defined the offenses in the very words of the state statutes.<sup>61</sup> When a prior act is incorporated in a subsequent one in terms or by relation, the repeal of the former leaves the latter in force, unless also repealed expressly or by necessary implication.<sup>62</sup>

**127. Rule as to statutes judicially construed.**—When a statute enacted by one state is literally or substantially adopted by another state,<sup>63</sup>

<sup>55</sup> *Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 174, 10 S. Ct. 68, 33 U. S. (L. ed.) 302.

<sup>56</sup> *Wilmington, etc., R. Co. v. Reid*, 13 Wall. 264, 20 U. S. (L. ed.) 568.

<sup>57</sup> *Per* Chief Justice Waite, in *Ruggles v. Illinois*, 108 U. S. 531, 2 S. Ct. 832, 27 U. S. (L. ed.) 812. To the same effect see *Pennsylvania R. Co. v. Miller*, 132 U. S. 84, 10 S. Ct. 34, 33 U. S. (L. ed.) 267; *District of Columbia v. Washington Market Co.*, 108 U. S. 254, 2 S. Ct. 543, 27 U. S. (L. ed.) 714. See also *Cairo, etc., R. Co. v. Hecht*, 95 U. S. 168, 24 U. S. (L. ed.) 423; *Newton v. Mahoning County*, 100 U. S. 548, 25 U. S. (L. ed.) 710; *Wells v. Oregon, etc., R. Co.*, 15 Fed. 561.

<sup>58</sup> *Railroad Commission Cases*, 116 U. S. 325, 6 S. Ct. 334, 348, 349, 388, 391, 1191, 29 U. S. (L. ed.) 636; *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 587, 17 S. Ct. 198, 41 U. S. (L. ed.) 560; *Georgia R., etc., Co. v. Smith*, 123 U. S. 174, 9 S. Ct. 47, 32 U. S. (L. ed.) 377; *St. Louis, etc., R. Co. v. Gill*, 156

U. S. 656, 15 S. Ct. 484, 39 U. S. (L. ed.) 567; *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 673, 15 S. Ct. 413, 39 U. S. (L. ed.) 674; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 517, 22 S. Ct. 95, 46 U. S. (L. ed.) 298; *Atlantic, etc., R. Co. v. U. S.*, 76 Fed. 192.

<sup>59</sup> *U. S. v. Woolsey*, 28 Fed. Cas. No. 16,763.

<sup>60</sup> *Kendall v. U. S.*, 12 Pet. 625, 9 U. S. (L. ed.) 1181. See also *In re Heath*, 144 U. S. 94, 12 S. Ct. 615, 36 U. S. (L. ed.) 358.

<sup>61</sup> *U. S. v. Coppersmith*, 4 Fed. 205.

<sup>62</sup> *In re Heath*, 144 U. S. 94, 12 S. Ct. 615, 36 U. S. (L. ed.) 358.

<sup>63</sup> *Robinson v. Belt*, 187 U. S. 41, 23 S. Ct. 16, 47 U. S. (L. ed.) 65, *affirming* (C. C. A.) 100 Fed. 718; *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 19 S. Ct. 327, 43 U. S. (L. ed.) 637; *New York Fourth Nat. Bank v. Francklyn*, 120 U. S. 752, 7 S. Ct. 757, 30 U. S. (L. ed.) 825; *Shelby v. Guy*, 11 Wheat. 361, 6 U. S. (L. ed.) 495; *Stonebraker v. Hunter*, (C. C. A.) 215 Fed. 67; *Maki v.*

or by a territorial legislature,<sup>64</sup> or by Congress,<sup>65</sup> or is imposed by Congress upon a United States territory,<sup>66</sup> the judicial construction already placed upon it by the courts of the state where it originated accompanies the statute, and is to be treated as incorporated therein.<sup>67</sup> Where provisions of statutes of New York regulating judicial procedure were incorporated by Congress in substantially the same language in legislation concerning the District of Columbia, it was held that Congress must be presumed to have adopted those provisions as then understood in New York and already construed by the courts of that state, and not as affected by the previous practice in Maryland or in the courts of the District of Columbia.<sup>68</sup> And the Landlord and Tenant Act of the District of Columbia providing for summary process to recover possession of land<sup>69</sup> bears such a remarkable resemblance to an earlier Massachusetts statute that it was evidently taken therefrom; and the judicial construction which the statute received in Massachusetts before its enactment by Congress must be considered as having been adopted by Congress with the text thus expounded.<sup>70</sup> Where English statutes, such, for instance, as the statute of frauds of Charles II.,<sup>71</sup> or the statute of Elizabeth against fraudulent conveyances,<sup>72</sup> or the statute of limitations,<sup>73</sup> have been adopted into our own legislation, the known and settled construction of those statutes at the time they are admitted to operate in this country, indeed, to the time of our

Union Pac. Coal Co., (C. C. A.) 187 Fed. 389; *Jennings v. Alaska Treadwell Gold Mining Co.*, (C. C. A.) 170 Fed. 146; *Welsh v. Barber Asphalt Paving Co.*, (C. C. A.) 167 Fed. 465; *Iarussi v. Missouri Pac. R. Co.*, 155 Fed. 654; *Peterman v. Northern Pac. R. Co.*, 105 Fed. 335; *Chicago, etc., R. Co. v. Stahley*, (C. C. A.) 62 Fed. 364; *Coulter v. Stafford*, 48 Fed. 266. See also *Goodall v. Tuttle*, 3 Biss. 219, 10 Fed. Cas. No. 5,533; *Allen v. St. Louis Bank*, 120 U. S. 34, 7 S. Ct. 460, 30 U. S. (L. ed.) 573.

64. *James v. Appel*, 192 U. S. 129, 24 S. Ct. 222, 48 U. S. (L. ed.) 377; *Harrell v. Davis*, (C. C. A.) 168 Fed. 187.

65. *Capital Traction Co. v. Hof*, 174 U. S. 36, 19 S. Ct. 580, 43 U. S. (L. ed.) 873; *Willis v. Eastern Trust, etc., Co.*, 169 U. S. 295, 18 S. Ct. 347, 42 U. S. (L. ed.) 752; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 S. Ct. 1334, 30 U. S. (L. ed.) 1022; *Love v. Pavlovich*, (C. C. A.) 222 Fed. 842. See also 20 Op. Atty-Gen. (Olney, 1894) 721.

66. The Act of Congress of May 2, 1890, 26 Stat. at L. 94, § 31, declares that certain general laws of Arkansas "which are not locally inapplicable, or in conflict with this act, or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory." The courts of the Indian Territory are bound to respect the decisions of the Supreme Court of Arkansas interpreting the statutes thus put in force in the territory. *Robinson v. Belt*, 187 U. S. 41, 23 S. Ct. 16, 47 U. S. (L. ed.) 65; *Adkins v. Arnold*, 235 U. S. 417, 35

S. Ct. 118, 59 U. S. (L. ed.) 294; *Mus-tard v. Elwood*, (C. C. A.) 223 Fed. 225; *Robinson v. Long Gas Co.*, (C. C. A.) 221 Fed. 398; *In re Burns*, 113 Fed. 989; *Blaylock v. Muskogee*, (C. C. A.) 117 Fed. 125; *Sanger v. Flow*, (C. C. A.) 48 Fed. 152.

And under the act of Congress which extends the laws of Oregon over Alaska the same rule was applied. *Kohn v. McKinnon*, 90 Fed. 623.

The construction placed on an act by the Supreme Court of Hawaii at a time when that country was under an independent government will be considered as incorporated into a re-enactment of that statute by Congress. *Kealoha v. Castle*, 210 U. S. 149, 28 S. Ct. 684, 52 U. S. (L. ed.) 998.

67. See the cases cited in the preceding notes.

68. *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 S. Ct. 1334, 30 U. S. (L. ed.) 1022.

69. Rev. Stat. D C., c. 19.

70. *Willis v. Eastern Trust, etc., Co.*, 169 U. S. 295, 18 S. Ct. 347, 42 U. S. (L. ed.) 752.

71. *Warner v. Texas, etc., R. Co.*, 164 U. S. 423, 17 S. Ct. 147, 41 U. S. (L. ed.) 495; *Ullman v. Meyer*, 10 Fed. 242. See also *Jones's Case*, 11 Ct. Cl. 740. See also *Robinson v. Belt*, 187 U. S. 41, 23 S. Ct. 16, 47 U. S. (L. ed.) 65, *affirming* (C. C. A.) 100 Fed. 718.

72. *Cathcart v. Robinson*, 5 Pet. 264, 8 U. S. (L. ed.) 120.

73. *McDonald v. Hovey*, 110 U. S. 619, 4 S. Ct. 142, 28 U. S. (L. ed.) 269. See also *Robinson v. Belt*, 187 U. S. 41, 23 S.

separation from the British empire, if they were enacted prior thereto, is construed as forming an integral part of those statutes;<sup>74</sup> but the subsequent English decisions, though entitled to great respect, are not of absolute authority.<sup>75</sup> In speaking of our patent act, which was largely taken from the English statute of monopolies, Mr. Justice Story said: "The words of our statute are not identical with those of the statute of James, but it can scarcely admit of doubt that they must have been within the contemplation of those by whom it was framed, as well as the construction which had been put upon them by Lord Coke."<sup>76</sup> It is to be presumed that the Interstate Commerce Act, so far as it adopts the language of the English Traffic Act, bears the construction given to the latter by the English courts.<sup>77</sup> Provisions in federal bankrupt acts have been construed in accordance with English decisions upon like provisions in various acts of Parliament on the same subject, from which much of the bankrupt acts was drawn.<sup>78</sup> The general rule applies with more than ordinary force, if possible, where, in adopting English statutes, the legislature adds the very language used by the English courts construing them.<sup>79</sup> Where the provisions of the Louisiana Code and the Code of Napoleon are identical, the exposition of the civil-law writers and the adjudications of the French courts are persuasive<sup>80</sup> as to the proper construction of the Louisiana Code, though not binding.<sup>81</sup>

**128. Limitation of rule.**—Where a statute of a state has not been precisely construed prior to its adoption by another state, subsequent decisions in the former state are not controlling in the latter.<sup>82</sup> And the general rule that the settled construction of a statute accompanies its adoption by another state is inapplicable where radical or material changes are made in the statute,<sup>83</sup> where a different practical construction has been given the statute in the state of its adoption and it has been codified without any manifestation of legislative disapproval of the practical construction

Ct. 16, 47 U. S. (L. ed.) 65, *affirming* (C. C. A.) 100 Fed. 718.

<sup>74.</sup> *Robinson v. Belt*, 187 U. S. 41, 23 S. Ct. 18, 47 U. S. (L. ed.) 65; *Cathcart v. Robinson*, 5 Pet. 280, 8 U. S. (L. ed.) 120; *Kirkpatrick v. Gibson*, 2 Brock. 388, 14 Fed. Cas. No. 7,848; *Bains v. The Schooner James and Catherine*, Baldw. 559, 2 Fed. Cas. No. 756. See also *Brown v. Walker*, 161 U. S. 600; *Ex p. Wells*, 18 How. 311, 15 U. S. (L. ed.) 421; *Pruseux v. Welch*, 20 Fed. Cas. No. 11,456, and the cases cited in the last two notes, and in the following notes. *Compare* U. S. v. *Scroggins*, Hempst. 480, 27 Fed. Cas. No. 16,243.

<sup>75.</sup> *Cathcart v. Robinson*, 5 Pet. 280, 8 U. S. (L. ed.) 120.

<sup>76.</sup> *Pennock v. Dialogue*, 2 Pet. 20, 7 U. S. (L. ed.) 327.

<sup>77.</sup> *Interstate Commerce Commission v. Delaware, etc., R. Co.*, 220 U. S. 235, 37 S. Ct. 392, 55 U. S. (L. ed.) 448; *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 284, 12 S. Ct. 844, 36 U. S. (L. ed.) 699, 43 Fed. 53. See also *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 222, 16 S. Ct. 666, 40 U. S. (L. ed.) 940.

<sup>78.</sup> *U. S. v. Herron*, 20 Wall. 251, 22 U. S. (L. ed.) 275; *Tucker v. Oxley*, 5 Cranch 42, 3 U. S. (L. ed.) 29; *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 Nat. Bankr. Reg. 311, 10 Fed. Cas. No. 5,486.

<sup>79.</sup> *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 Nat. Bankr. Reg. 311, 10 Fed. Cas. No. 5,486.

<sup>80.</sup> *Meyer v. Richards*, 163 U. S. 399, 16 S. Ct. 1148, 41 U. S. (L. ed.) 199, *citing* *Viterbo v. Friedlander*, 120 U. S. 728, 7 S. Ct. 962, 30 U. S. (L. ed.) 776; *Groves v. Sentell*, 153 U. S. 478, 14 S. Ct. 898, 38 U. S. (L. ed.) 785.

<sup>81.</sup> *Penn Bridge Co. v. New Orleans*, (C. C. A.) 222 Fed. 737.

<sup>82.</sup> *Stutsman County v. Wallace*, 142 U. S. 312, 12 S. Ct. 227, 35 U. S. (L. ed.) 1018.

<sup>83.</sup> *Copper Queen Consol. Min. Co. v. Board of Equalization*, 206 U. S. 474, 27 S. Ct. 695, 51 U. S. (L. ed.) 1143; *Stutsman County v. Wallace*, 142 U. S. 312, 12 S. Ct. 227, 35 U. S. (L. ed.) 1018; *Allen v. St. Louis Bank*, 120 U. S. 34, 7 S. Ct. 460, 30 U. S. (L. ed.) 573; *Swofford Bros. Dry-Goods Co. v. Mills*, 86 Fed. 560.



given,<sup>84</sup> or where the construction of the adopted statute is affected by adverse constitutional provisions.<sup>85</sup> Nor does the general rule absolutely and under all circumstances forbid a different construction of the adopted statute which is deemed to be more reasonable.<sup>86</sup> So where a statute construed in the state where it was enacted is adopted by another state, where it receives a different construction, and is then borrowed from the latter by a third state, the original construction may be followed in preference to the different one.<sup>87</sup> Moreover, it may be uncertain from which of two states the last enactment was taken, in which case there can be no objection to the adoption of the decisions in the state where it was first enacted.<sup>88</sup> Where the settled construction of a statute is repudiated in the state adopting the statute, the latter ruling, though contrary to sound principles, will be followed by federal courts administering the statute in that state.<sup>89</sup>

**129. Provisos: generally.**—“The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview.”<sup>90</sup> “Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof.”<sup>91</sup> A statute gave mechanics and materialmen a lien on buildings or improvements superior to any prior lien, or incumbrance, or

84. *Copper Queen Consol. Min. Co. v. Board of Equalization*, 206 U. S. 474, 27 S. Ct. 695, 51 U. S. (L. ed.) 1143.

See § 55 as to force of practical construction.

85. *In re Swearinger*, 5 Sawy. 52, 23 Fed. Cas. No. 13,683.

86. *Whitney v. Fox*, 166 U. S. 637, 17 S. Ct. 713, 41 U. S. (L. ed.) 1145.

87. *Coulam v. Doull*, 133 U. S. 216, 10 S. Ct. 253, 33 U. S. (L. ed.) 596.

88. *Texas, etc., R. Co. v. Humble*, 181 U. S. 57, 21 S. Ct. 526, 45 U. S. (L. ed.) 747.

89. *Stonebraker v. Hunter*, (C. C. A.) 215 Fed. 67; *Chicago, etc., R. Co. v. Stahley*, (C. C. A.) 62 Fed. 363.

90. *Per Mr. Justice Story*, in *Minia v. U. S.*, 15 Pet. 445, 10 U. S. (L. ed.) 791, quoted with approval in *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 22 S. Ct. 881, 46 U. S. (L. ed.) 1144. To the same effect see *Anderson v. Pacific Coast Steamship Co.*, 225 U. S. 187, 32 S. Ct. 626, 56 U. S. (L. ed.) 1047; *American Exp. Co. v. U. S.*, 212 U. S. 522, 29 S. Ct. 315, 53 U. S. (L. ed.) 635; *Schlemmer v. Buffalo, etc., R. Co.*, 205 U. S. 1, 27 S. Ct. 407, 51 U. S. (L. ed.) 681; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 S. Ct. 563, 46 U. S. (L. ed.) 860; *White v. U. S.*, 191 U. S. 545, 24 S. Ct. 171, 48 U. S. (L. ed.) 295; *Selma, etc., R. Co. v. U. S.*, 139 U. S. 566, 11 S. Ct.

638, 35 U. S. (L. ed.) 266; *Georgia R., etc., Co. v. Smith*, 128 U. S. 181, 9 S. Ct. 47, 32 U. S. (L. ed.) 377; *U. S. v. Cook*, 17 Wall. 177, 21 U. S. (L. ed.) 538; *U. S. v. Kansas Southern R. Co.*, 189 Fed. 471; *In re Matthews*, 109 Fed. 614; *U. S. v. One Hundred Thirty-two Packages Spirituous Liquors*, 65 Fed. 983; *Gould v. Hammond*, McAll. 242, 10 Fed. Cas. No. 5,638. See also *Savings Bank v. Collector*, 3 Wall. 513, 18 U. S. (L. ed.) 207; *U. S. v. Bellm*, 182 Fed. 161; *Truitt v. U. S.*, 30 Ct. Cl. 28.

91. *Per Mr. Justice Story*, in *U. S. v. Dickson*, 15 Pet. 165, 10 U. S. (L. ed.) 689, quoted with approval in *U. S. v. Kansas Southern R. Co.*, 189 Fed. 471. Other cases laying down the rule of strict construction of provisos are *Carter, etc., Co. v. U. S.*, (C. C. A.) 143 Fed. 256, *affirming* 137 Fed. 978; *U. S. v. Newhall*, 91 Fed. 529; *Ryan v. Carter*, 93 U. S. 82, 23 U. S. (L. ed.) 807; *In re Matthews*, 109 Fed. 614; *Wall v. Cox*, (C. C. A.) 101 Fed. 410; *Royce v. U. S.*, 36 Ct. Cl. 328. See also *Barlow v. U. S.*, 7 Pet. 404, 8 U. S. (L. ed.) 728, and *compare*, as to the burden of proof, *Selma, etc., R. Co. v. U. S.*, 139 U. S. 560, 11 S. Ct. 638, 35 U. S. (L. ed.) 266.

In *U. S. v. Dickson*, 15 Pet. 141, 10 U. S. (L. ed.) 689, the enacting clause gave to a receiver a commission of one per cent. upon all public moneys received by

mortgage, with a proviso that if the prior lien, etc., was given or executed for the purpose of raising money with which to erect the buildings or make the improvements, then such prior lien, etc., should be superior to the lien of the mechanics or materialmen. Applying the rule of strict construction to the proviso, the court held that the prior lien, etc., was entitled to precedence only when the money raised thereby was actually used for the purpose mentioned, and only to the extent that it was so used.<sup>92</sup> The decision in the case would seem to warrant the proposition that when the enacting clause of a statute is of a character which entitles it to a liberal construction, a proviso thereto should be construed with more than ordinary strictness.

**130. Same: relation to enacting clause.**—The general rule of interpretation is that a proviso must be confined by construction to the subject-matter of the section of which it forms a part.<sup>93</sup> Nevertheless, effect must be given to a manifest legislative intention that the proviso shall limit the operation of other sections.<sup>94</sup> No proviso should be construed so as to destroy the enacting clause,<sup>95</sup> for it is fundamental in the construction of statutes that if possible a statute should be so construed that all parts of it shall stand.<sup>96</sup> The same principle, on the other hand, requires that some effect shall be given to a proviso.<sup>97</sup> And in cases of irreconcilable repugnancy, the proviso, as the last expression of the legislative will, must prevail.<sup>98</sup> Most frequently, perhaps, a proviso is intended to restrain the enacting clause and to except something which would otherwise have been within it.<sup>99</sup> As a corollary, in such cases the general language in the

him. A proviso limited that percentage to an amount not exceeding twenty-five hundred dollars for any one year. The receiver having resigned before the expiration of the fiscal year, the government contended that he was entitled only to a *pro rata* commission. But the court held that he was entitled to the commission upon the entire amount received until the percentage reached the maximum specified in the proviso.

<sup>92.</sup> *In re Matthews*, 109 Fed. 603.

<sup>93.</sup> *White v. U. S.*, 191 U. S. 545, 24 S. Ct. 171, 48 U. S. (L. ed.) 295; *Merchants Nat. Bank v. U. S.*, (C. C. A.) 214 Fed. 200; *Aaron v. U. S.*, (C. C. A.) 204 Fed. 943; *U. S. v. Bernays*, (C. C. A.) 158 Fed. 792; *U. S. v. Downing*, (C. C. A.) 146 Fed. 56, *reversing* 135 Fed. 250, 139 Fed. 58; *Carter v. U. S.*, (C. C. A.) 143 Fed. 256, *affirming* 137 Fed. 978; *Boston Safe Deposit, etc., Co. v. Hudson*, (C. C. A.) 68 Fed. 760; *U. S. v. One Hundred Thirty-two Packages Spirituous Liquors*, 65 Fed. 983 [citing *Callaway v. Harding*, 23 Gratt. (Va.) 542; *Dollar Sav. Bank v. U. S.*, 19 Wall. 227, 22 U. S. (L. ed.) 80]; *Henderson's Tobacco*, 11 Wall. 658, 20 U. S. (L. ed.) 235; *U. S. v. Slazenger*, 113 Fed. 525; *Chattanooga, etc., R. Co. v. Evans*, (C. C. A.) 66 Fed. 814.

<sup>94.</sup> *U. S. v. Falk*, 204 U. S. 143, 27 S. Ct. 191, 51 U. S. (L. ed.) 411; *U. S. v. Scruggs, etc., Dry Goods Co.*, (C. C. A.) 156 Fed. 940, *reversing* 147 Fed. 888; *U. S. v. Downing*, (C. C. A.) 146 Fed. 56;

*Carter v. U. S.*, (C. C. A.) 143 Fed. 256; *In re Scheld*, (C. C. A.) 104 Fed. 870; *In re Lange*, 91 Fed. 361; *Gearing's Case*, 3 Ct. Cl. 165. See also *Marriott v. Brune*, 9 How. 635, 13 U. S. (L. ed.) 282.

<sup>95.</sup> *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 33 S. Ct. 148, 57 U. S. (L. ed.) 314; *Anderson v. Pacific Coast Steamship Co.*, 225 U. S. 187, 32 S. Ct. 626, 56 U. S. (L. ed.) 1047; *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 U. S. (L. ed.) 553; *Greely v. Thompson*, 10 How. 237, 13 U. S. (L. ed.) 397; *In re Matthews*, 109 Fed. 614; *Wall v. Cox*, (C. C. A.) 101 Fed. 410.

A construction of a proviso which would make it plainly repugnant to the body of the act should be rejected, if possible. *Dollar Sav. Bank v. U. S.*, 19 Wall. 236, 22 U. S. (L. ed.) 80. See also *Greely v. Thompson*, 10 How. 237, 13 U. S. (L. ed.) 397.

<sup>96.</sup> *Anderson v. Pacific Coast Steamship Co.*, 225 U. S. 187, 32 S. Ct. 626, 56 U. S. (L. ed.) 1047.

See, generally, § 34.

<sup>97.</sup> *Dauids Co. v. Dauids Mfg. Co.*, 233 U. S. 461, 34 S. Ct. 648, 58 U. S. (L. ed.) 1046; *Jackson v. Clark*, 1 Pet. 628, 7 U. S. (L. ed.) 290; *Quackenbush v. U. S.*, 33 Ct. Cl. 355.

<sup>98.</sup> *Merchants Nat. Bank of New Haven v. U. S.*, (C. C. A.) 214 Fed. 200.

<sup>99.</sup> *Wayman v. Southard*, 10 Wheat. 30, 6 U. S. (L. ed.) 253; *Long v. Palmer*, 16 Pet. 69, 10 U. S. (L. ed.) 888; *Gould v.*

enacting clause is to be construed as covering the matters contained in the proviso, if the enacting clause had stood alone.<sup>1</sup> "But this rule must not be carried too far. Such clauses are often introduced from excessive caution and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended; the rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires the court to give effect to the general intent, if that can be discovered within the four corners of the act. If such general intention would be defeated by construing the act as embracing everything of the same general description as those particularly excepted therefrom, an arbitrary application of the rule is not admissible."<sup>2</sup>

**131. As independent legislation.**—Then, too, an enactment in the form of a proviso may have no relation to anything preceding it, and may be clearly designed to have an independent operation.<sup>3</sup> "It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."<sup>4</sup> It is a familiar practice of Congress to enact general and permanent legislation in the form of provisos in annual appropriation acts.<sup>5</sup> However, the general rule is that a proviso

Hammond, McAll. 235, 10 Fed. Cas. No. 5,638; *Savings Bank v. Collector*, 3 Wall. 513, 18 U. S. (L. ed.) 207; *In re Matthews*, 109 Fed. 603; *In re Schallenberger*, 72 Fed. 494; *Tatum v. Tamaroa*, 14 Fed. 103; *Rand v. U. S.*, 36 Fed. 675.

1. *Thaw v. Ritchie*, 136 U. S. 519, 10 S. Ct. 1037, 24 U. S. (L. ed.) 531; *Wayman v. Southard*, 10 Wheat. 30, 6 U. S. (L. ed.) 253. See also *Alexander v. Alexandria*, 5 Cranch 1, 3 U. S. (L. ed.) 19; *U. S. v. Holy Trinity Church*, 36 Fed. 303 [*reversed sub nom. Holy Trinity Church v. U. S.*, 143 U. S. 457, 12 S. Ct. 511, 36 U. S. (L. ed.) 226]. See also *U. S. v. Treadwell*, 15 Fed. 532.

Although a proviso has been repealed, it may still be examined for the purpose of construing the enacting clause. *Savings Bank v. Collector*, 3 Wall. 513, 18 U. S. (L. ed.) 207.

2. *Per* Lurton, Circuit Judge, in *Baggaley v. Pittsburg, etc., Iron Co.*, (C. C. A.) 90 Fed. 638, citing *Tinkham v. Tapscott*, 17 N. Y. 141. See also *In re Perrone*, 89 Fed. 150; *Truitt v. U. S.*, 30 Ct. Cl. 28, 21 Op. Atty.-Gen. 255, where, in reply to a contention that a certain proviso relating to importers indicated an intention that the entire section was to apply to importations and not exportations, Attorney-General Harmon said: "Care must always be had not to put too great weight upon such exceptions and provisos. They are apt to be thrown in upon a congressional debate or in committee, without full appreciation of the

scope of the section under consideration, but in order to protect some particular class of persons from any possibility of embarrassment."

3. *Tiger v. Western Inv. Co.*, 221 U. S. 286, 31 S. Ct. 578, 55 U. S. (L. ed.) 738; *American Exp. Co. v. U. S.*, 212 U. S. 522, 29 S. Ct. 315, 53 U. S. (L. ed.) 635; *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 22 S. Ct. 881, 46 U. S. (L. ed.) 1144; *U. S. v. Babbit*, 1 Black 55, 17 U. S. (L. ed.) 94. See also *Russell v. Worthington*, 23 Fed. 248; *In re Schallenberger*, 72 Fed. 494; *Ryan's Case*, 17 Ct. Cl. 47. And see § 5.

"While no doubt the grammatical and logical scope of a proviso is confined to the subject matter of the principal clause . . . in practice no such limit is observed." *U. S. v. Whitridge*, 197 U. S. 135, 25 S. Ct. 406, 49 U. S. (L. ed.) 696.

4. *Per* Mr. Justice Field, in *Georgia R., etc., Co. v. Smith*, 128 U. S. 181, 9 S. Ct. 47, 32 U. S. (L. ed.) 377; *U. S. v. Puleston*, (C. C. A.) 106 Fed. 294.

5. *The Ship Concord*, 27 Ct. Cl. 142; *U. S. v. Puleston*, (C. C. A.) 106 Fed. 294. See also § 5; and § 46, note by Justice Field.

"The practice, however, of embodying general laws in appropriation bills has become so common that to adopt a narrow and restrictive construction confining their language to the subject-matter generally dealt with by the appropriation act would go far to nullify a good deal of the legislation of Congress. These pro-

in an appropriation act should be limited to the appropriations made by the act, and not be extended to all future appropriations, unless the intention so to extend it is expressed in clear and positive terms.<sup>6</sup> A proviso clearly contemplating independent legislation should not receive a construction so narrow as to defeat its purpose.<sup>7</sup> And where a restriction of the proviso to the matter preceding it would make the proviso mean precisely the same thing as the clause to which it is appended, the language employed should be given the natural and ordinary meaning it conveys as an independent clause.<sup>8</sup>

**132. Exceptions.**—“Doubtless there is a technical distinction between an exception and a proviso, as an exception ought to be of that which would otherwise be included in the category from which it is excepted, and the office of a proviso is either to except something from the enacting clause or to qualify or restrain its generality, or to exclude some ground of misinterpretation of it, as extending to cases not intended to be brought within its operation; but there are a great many examples where the distinction is disregarded and where the words are used as if they were of the same signification.”<sup>9</sup> It is a maxim of interpretation that “an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted.” *Exceptio probat regulam de rebus non exceptis*.<sup>10</sup> As in the case of provisos,<sup>11</sup> it is presumed that a clause or section to which an exception is attached relates to matters of the general character indicated by the exception; but an exception will not support such an inference, or, rather, the exception will be construed as a substantive enactment, if the evident purpose of the legislature would be defeated and an arbitrary and unjust result would be produced by construing it technically as an exception.<sup>12</sup>

**133. Amendments.**—By amending a statute the legislature demonstrates an intent to change the pre-existing law, and the presumption must be that it was intended to change the meaning of the statute in all the particulars wherein there is a material change in the language of the amending act.<sup>13</sup> In the absence of constitutional restriction an amendatory statute will be upheld though it purports to amend a statute which

visos that are attached to appropriation acts for the purpose of procuring what is believed to be needed legislation, but which could not be accomplished by an independent statute by reason of the press of business before Congress, must be treated the same as if they were separate and independent enactments.” *National Bank of Commerce v. Cleveland*, 156 Fed. 251.

6. *Minis v. U. S.*, 15 Pet. 423, 10 U. S. (L. ed.) 791. See, generally, as to permanency of provisions in appropriation acts, § 5.

7. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 S. Ct. 563, 48 U. S. (L. ed.) 860.

8. *Allen v. U. S.*, 52 Fed. 577.

9. *U. S. v. Cook*, 17 Wall. 177, 21 U. S. (L. ed.) 538. See also 21 Op. Atty.-Gen. 597.

10. *Bend v. Hoyt*, 13 Pet. 271, 10 U. S. (L. ed.) 154. For applications of the

rule, see *Arnold v. U. S.*, 147 U. S. 499, 13 S. Ct. 406, 37 U. S. (L. ed.) 253; *Equitable L. Assur. Soc. v. Clements*, 140 U. S. 226, 11 S. Ct. 822, 35 U. S. (L. ed.) 497; *Adams v. Bancroft*, 3 Sumn. 387, 1 Fed. Cas. No. 44; *Thornton v. U. S.*, 27 Ct. Cl. 342; 19 Op. Atty.-Gen. 101.

“The exception of a particular thing from the general words proves that in the opinion of the lawgiver the thing excepted would be within the general clause had the exception not been made.” *Per Chief Justice Marshall*, in *Brown v. Maryland*, 12 Wheat. 438, 6 U. S. (L. ed.) 678.

“If another exception had been intended, it would have been expressed along with that which was significantly declared.” *In re Baumann*, 96 Fed. 948.

11. See § 129.

12. *Carroll v. Carroll*, 16 How. 282, 14 U. S. (L. ed.) 936.

13. *U. S. v. Bashaw*, (C. C. A.) 50 Fed.

had already been amended or which was for any reason invalid.<sup>14</sup> And an unconstitutional amendment in no wise affects the validity of the original act.<sup>15</sup> When in the United States Revised Statutes there is found a general system of law regulating a subject, it seems that subsequent legislation by Congress on the same subject must be understood as enacted with reference to that system, and should be construed as a part of it, if it can be so construed;<sup>16</sup> and this is the general rule of construction of statutes *in pari materia*.<sup>17</sup> An amendatory statute clearly intended as a substitute for the statute amended impliedly repeals provisions omitted from the amendatory statute.<sup>18</sup> An amendatory act usually operates only prospectively from the time of its enactment.<sup>19</sup>

### VIII. TERMINATION AND REVIVAL OF STATUTES

#### *Suspension; Expiration; Express Repeal*

**134. Suspension.**—Where an act is repealed and simultaneously the repealing act is suspended until a day certain, the manifest legislative intent is that the repeal shall not take effect until the day named and that in the meanwhile the act shall remain in force.<sup>20</sup> Where Congress by joint resolution directed that the execution of an act passed by the preceding Congress be suspended "until the further order of Congress," and Congress made no "further order" in the premises, it was held that the act was suspended and would remain suspended until any future Congress should dispose of the matter.<sup>21</sup> A territorial statute providing for the punishment of the crime of incest was not repealed by the Edmunds-Tucker Act of 1887 relating to the same offense, but was superseded thereby, and when the territory became a state and the act of Congress ceased to operate, the territorial statute went into force as a law of the state, pursuant to the provisions of the state constitution.<sup>22</sup>

**135. Expiration.**—When an act expires by its own limitation the effect upon past transactions is the same as if it were repealed at that time.<sup>23</sup>

749. See also *U. S. v. Keitel*, 211 U. S. 370, 29 S. Ct. 123, 53 U. S. (L. ed.) 230.

If, however, the amendment is patently declaratory and is designed only to make clear the legislative intent in enacting the original statute, it will not be construed to alter the pre-existing law. *Mosle v. Bidwell*, (C. C. A.) 130 Fed. 334.

14. *Columbia Wire Co. v. Boyce*, (C. C. A.) 104 Fed. 173; *Minnesota, etc., Land, etc., Co. v. Billings*, (C. C. A.) 111 Fed. 972; *Heinze v. Butte, etc., Consol. Min. Co.*, (C. C. A.) 107 Fed. 165; *Beatrice v. Masslich*, (C. C. A.) 108 Fed. 743.

15. *Eberle v. Michigan*, 232 U. S. 700, 34 S. Ct. 464, 58 U. S. (L. ed.) 803; *U. S. v. Wheeling, etc., R. Co.*, 167 Fed. 198.

16. *U. S. v. Sapinkow*, 90 Fed. 654; *U. S. v. Jessup*, 15 Fed. 792, where the court said: "If subsequent acts are to be interpreted as having been passed without reference to the sections of the Revised Statutes regulating the same subject, the advantages of a codification of the laws

will soon be lost, and the purposes of the codification defeated;" *Robinson v. Baltimore, etc., R. Co.*, 222 U. S. 506, 32 S. Ct. 114, 56 U. S. (L. ed.) 288. See also *U. S. v. Chamberlin*, 219 U. S. 250, 31 S. Ct. 155, 55 U. S. (L. ed.) 204, reversing (C. C. A.) 156 Fed. 881; *U. S. v. Keitel*, 211 U. S. 370, 29 S. Ct. 123, 53 U. S. (L. ed.) 230; *Saxonville Mills v. Russell*, 116 U. S. 13, 6 S. Ct. 237, 29 U. S. (L. ed.) 554.

17. See §§ 61-66.

18. 21 Op. Atty.-Gen. 253. See also *U. S. v. Barr*, 4 Sawy. 256, 24 Fed. Cas. No. 14,527; *U. S. v. Prentiss*, 182 Fed. 894; *McDougald v. New York, etc., Ins. Co.*, (C. C. A.) 146 Fed. 674.

19. 15 Op. Atty.-Gen. 259. See, generally, §§ 37-39.

20. *Brown v. Barry*, 3 Dall. 365, 1 U. S. (L. ed.) 638.

21. *U. S. v. Stockslager*, 129 U. S. 470, 9 S. Ct. 382, 32 U. S. (L. ed.) 785.

22. *In re Nelson*, 69 Fed. 712.

23. *The Irresistible*, 7 Wheat. 552, 5 U. S. (L. ed.) 520; *U. S. v. Boisdore*,

Thus, an offense against a temporary penal act cannot be punished after the expiration of the act, unless some special provision be made therefor by statute.<sup>24</sup> The effect of repeals is elsewhere considered in this article,<sup>25</sup> as also the effect of expiration of a repealing statute.<sup>26</sup>

**136. Express repeals.**—Where a prior act is incorporated in a subsequent one in terms or by relation, the repeal of the former leaves the latter in force, unless also repealed expressly or by necessary implication.<sup>27</sup> Thus, where a section of the United States Revised Statutes defined an offense and affixed thereto the penalties "prescribed in the preceding section," a repeal of the preceding section did not obliterate the reference made in the other section nor render it ineffectual.<sup>28</sup> Few cases have arisen in the federal courts touching the construction of express repealing provisions in statutes. Cases relating to the effect of repeals are considered in another section of this article.<sup>29</sup> Where a state legislature was accustomed to sit twice a year, the first session being always styled the summer session and the other the winter session, and the laws of both sittings were published in separate volumes and always referred to as the acts of the different sessions, a statute repealing all laws of a specified description passed at the "last session" was construed to repeal only those passed at the immediately preceding winter session.<sup>30</sup>

### *Repeal by Implication*

**137. Rule as to implied repeal.**—The settled rule is that repeals by implication are not favored, and will not be held to exist if there is any other reasonable construction.<sup>31</sup> To repeal a statute by implication there

8 How. 121, 12 U. S. (L. ed.) 1009; Moore v. U. S., (C. C. A.) 85 Fed. 468. See also *The Reform*, 3 Wall. 629, 18 U. S. (L. ed.) 105; Yeaton v. U. S., 5 Cranch 283, 3 U. S. (L. ed.) 101; McNulty v. Batty, 10 How. 78, 13 U. S. (L. ed.) 333.

<sup>24</sup> *The Irresistible*, 7 Wheat. 552, 5 U. S. (L. ed.) 520; U. S. v. Ship Helen, 6 Cranch 203, 3 U. S. (L. ed.) 199.

<sup>25</sup> See *infra*, §§ 148-155, as to effect of repeal.

<sup>26</sup> See *infra*, § 158, as to revival by expiration of repealing statute.

<sup>27</sup> *In re Heath*, 144 U. S. 93, 12 S. Ct. 615, 36 U. S. (L. ed.) 358.

<sup>28</sup> U. S. v. Lackey, 99 Fed. 969.

<sup>29</sup> See §§ 148-155, as to effect of repeal.

<sup>30</sup> *Matthews v. Murchison*, 17 Fed. 770.

<sup>31</sup> *Washington v. Miller*, 235 U. S. 422, 35 S. Ct. 119, 59 U. S. (L. ed.) 295; *Rainey v. Grace*, 231 U. S. 703, 34 S. Ct. 242, 58 U. S. (L. ed.) 445; *Ex p. Webb*, 225 U. S. 663, 32 S. Ct. 769, 56 U. S. (L. ed.) 1248; *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 U. S. (L. ed.) 553; *Gibson v. U. S.*, 194 U. S. 182, 24 St. Ct. 613, 48 U. S. (L. ed.) 926 [*affirming* 38 Ct. Cl. 752], *followed in* *Lowe v. U. S.*, 194 U. S. 193, 24 S. Ct. 617, 48 U. S.

(L. ed.) 931; *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 23 S. Ct. 452, 47 U. S. (L. ed.) 651; *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483, 22 S. Ct. 165, 46 U. S. (L. ed.) 289; *North American Commercial Co. v. U. S.*, 171 U. S. 130, 18 S. Ct. 817, 43 U. S. (L. ed.) 98; *U. S. v. Greathouse*, 166 U. S. 605, 17 S. Ct. 701, 41 U. S. (L. ed.) 1130; *Ward v. Race Horse*, 163 U. S. 511, 16 S. Ct. 1076, 41 U. S. (L. ed.) 244; *U. S. v. Healey*, 160 U. S. 146, 16 S. Ct. 247, 40 U. S. (L. ed.) 369; *Frost v. Wenie*, 157 U. S. 58, 15 S. Ct. 532, 39 U. S. (L. ed.) 614; *Cope v. Cope*, 137 U. S. 686, 11 S. Ct. 222, 34 U. S. (L. ed.) 832; *Holden v. Minnesota*, 137 U. S. 483, 11 S. Ct. 143, 34 U. S. (L. ed.) 734; *U. S. v. Langston*, 118 U. S. 393, 6 S. Ct. 1185, 30 U. S. (L. ed.) 164; *Chew Heong v. U. S.*, 112 U. S. 549, 5 S. Ct. 255, 28 U. S. (L. ed.) 770; *Ex p. Crow Dog*, 109 U. S. 556, 3 S. Ct. 396, 27 U. S. (L. ed.) 1030; *Red Rock v. Henry*, 106 U. S. 601, 1 S. Ct. 434, 27 U. S. (L. ed.) 251; *Wilmoth v. Mudge*, 103 U. S. 221, 26 U. S. (L. ed.) 536; *Mills v. Scott*, 99 U. S. 25, 25 U. S. (L. ed.) 294; *Barney v. Dolph*, 97 U. S. 656, 24 U. S. (L. ed.) 1063; *U. S. v. Gillis*, 95 U. S. 416, 24 U. S. (L. ed.) 503; *Wood County v. Lackawanna Iron, etc., Co.*, 93 U. S. 624, 23 U. S. (L. ed.) 989; *Osborn v. Nichol-*

must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled;<sup>32</sup>

son, 13 Wall. 662, 20 U. S. (L. ed.) 689; U. S. v. Tynen, 11 Wall. 92, 20 U. S. (L. ed.) 153; *The Distilled Spirits*, 11 Wall. 356, 20 U. S. (L. ed.) 167; *Ex p. Yerger*, 8 Wall. 105, 19 U. S. (L. ed.) 332; *Furman v. Nichol*, 8 Wall. 61, 19 U. S. (L. ed.) 370; *Galena v. Amy*, 5 Wall. 708, 18 U. S. (L. ed.) 560; *The Reform*, 3 Wall. 633, 18 U. S. (L. ed.) 105; U. S. v. Walker, 22 How. 311, 16 U. S. (L. ed.) 382; *Doolittle v. Bryan*, 14 How. 566, 14 U. S. (L. ed.) 543; *Nichols, etc., Lumber Co. v. U. S.*, (C. C. A.) 212 Fed. 588; *Allen v. Francisco Sugar Co.*, (C. C. A.) 193 Fed. 825; *United States Exp. Co. v. Friedman*, (C. C. A.) 181 Fed. 673; *City Realty Co. v. S. R. H. Robinson Contracting Co.*, 183 Fed. 176; *Mills v. Smith*, (C. C. A.) 177 Fed. 652; *Southern R. Co. v. McNeill*, 155 Fed. 756; U. S. v. Chicago, etc., R. Co., 151 Fed. 84; *Bealmear v. Hutchins*, 134 Fed. 257; U. S. v. Jacobus, (C. C. A.) 96 Fed. 260; *Bailey Liquor Co. v. Austin*, 82 Fed. 786; *Goddard v. Mailer*, 80 Fed. 424; *Peck v. Elliott*, (C. C. A.) 79 Fed. 17; *The J. D. Peters*, 78 Fed. 368; *Bernardin v. Northall*, 77 Fed. 852; *In re Moore*, 66 Fed. 949; *Gowen v. Herley*, (C. C. A.) 56 Fed. 979; *Central Trust Co. v. Marietta, etc., R. Co.*, (C. C. A.) 48 Fed. 874; U. S. v. Crawford, 47 Fed. 561; *Gilchrist v. Helena, etc., R. Co.*, 47 Fed. 595; U. S. v. Whitcomb Metallic Bedstead Co., 45 Fed. 90; *Marine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. 654; U. S. v. Mexican Nat. R. Co., 40 Fed. 772; *Edwin v. U. S.*, 37 Fed. 470; *Fiak v. Henarie*, 35 Fed. 232; *Metropolitan Trust Co. v. Pennsylvania, etc., R. Co.*, 25 Fed. 762; *Stubblefield v. Menzies*, 11 Fed. 275; *Russell v. Worthington*, 23 Fed. 248; *Seavey v. Seymour*, 3 Cliff. 453, 21 Fed. Cas. No. 12,596; U. S. v. One Case Hair Pencils, 1 Paine 405, 27 Fed. Cas. No. 15,924; *Hamlin v. Pettibone*, 6 Biss. 170, 11 Fed. Cas. No. 5,995; *Cooke v. Ford*, 2 Flipp. 22, 6 Fed. Cas. No. 3,173; U. S. v. One Hundred Barrels Spirits, 1 Dill. 49, 27 Fed. Cas. No. 15,948; *St. Louis Third Nat. Bank v. Harrison*, 3 McCrary 163; *Den v. Pine*, 4 Wash. 695, 29 Fed. Cas. No. 17,423; *Dennis v. Alachua County*, 3 Woods 688, 7 Fed. Cas. No. 3,791; *Gohen v. Texas Pac. R. Co.*, 2 Woods 346, 10 Fed. Cas. No. 5,506; *Langston v. U. S.*, 21 Ct. Cl. 13; *Winchester's Case*, 14 Ct. Cl. 13; *Hubbell's Case*, 6 Ct. Cl. 56; *French's Case*, 16 Ct. Cl. 419; *Milchrist v. U. S.*, 31 Ct. Cl. 403; 21 Op. Atty-Gen. 55 (Olney, 1894); 19 Op. Atty-Gen. 430 (Miller, 1889); 9 Op. Atty-Gen. 47 (Black, 1857); 3 Op. Atty-Gen. (Butler, 1838) 334.

32. U. S. v. Greathouse, 166 U. S. 605,

17 S. Ct. 701, 41 U. S. (L. ed.) 1130; *Smith v. Townsend*, 148 U. S. 499, 13 S. Ct. 634, 37 U. S. (L. ed.) 533; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 587, 13 S. Ct. 557, 37 U. S. (L. ed.) 284; *Cope v. Cope*, 137 U. S. 686, 11 S. Ct. 222, 34 U. S. (L. ed.) 832; U. S. v. American Bell Telephone Co., 128 U. S. 315, 9 S. Ct. 90, 32 U. S. (L. ed.) 450; *Lovejoy v. U. S.*, 128 U. S. 171, 9 S. Ct. 57, 32 U. S. (L. ed.) 389; *Chicago, etc., R. Co. v. U. S.*, 127 U. S. 409, 8 S. Ct. 1194, 32 U. S. (L. ed.) 180; *Siemens v. Sellers*, 123 U. S. 285, 8 S. Ct. 117, 31 U. S. (L. ed.) 153; U. S. v. Langston, 118 U. S. 393, 6 S. Ct. 1185, 30 U. S. (L. ed.) 164; *Fussell v. Gregg*, 113 U. S. 560, 5 S. Ct. 631, 28 U. S. (L. ed.) 993; *Hess v. Reynolds*, 113 U. S. 73, 5 S. Ct. 377, 28 U. S. (L. ed.) 927; *Chew Heong v. U. S.*, 112 U. S. 549, 5 S. Ct. 255, 28 U. S. (L. ed.) 770; U. S. v. Graham, 110 U. S. 219, 3 S. Ct. 582, 28 U. S. (L. ed.) 126; *Savannah v. Kelly*, 108 U. S. 188, 2 S. Ct. 468, 27 U. S. (L. ed.) 696; *Louisiana v. Taylor*, 105 U. S. 459, 26 U. S. (L. ed.) 1133; *Venable v. Richards*, 105 U. S. 636, 26 U. S. (L. ed.) 1196; *Clay County v. Savings Soc.*, 104 U. S. 588, 26 U. S. (L. ed.) 856; U. S. v. Taylor, 104 U. S. 218, 26 U. S. (L. ed.) 721; U. S. v. Winchester, 99 U. S. 375, 25 U. S. (L. ed.) 479; *Welch v. Cook*, 97 U. S. 541, 24 U. S. (L. ed.) 1112; *Arthur v. Homer*, 96 U. S. 140, 24 U. S. (L. ed.) 811; U. S. v. Gillis, 95 U. S. 407, 24 U. S. (L. ed.) 503; *Wood County v. Lackawanna Iron, etc., Co.*, 93 U. S. 622, 23 U. S. (L. ed.) 989; *Donovan v. U. S.*, 23 Wall. 404, 23 U. S. (L. ed.) 104; *South Carolina v. Stoll*, 17 Wall. 431, 21 U. S. (L. ed.) 650; *The Distilled Spirits*, 11 Wall. 356, 20 U. S. (L. ed.) 167; *Henderson's Tobacco*, 11 Wall. 652, 20 U. S. (L. ed.) 235; *The Protector*, 9 Wall. 690, 19 U. S. (L. ed.) 812; *Ex p. Yerger*, 8 Wall. 105, 19 U. S. (L. ed.) 332; *Furman v. Nichol*, 8 Wall. 44, 19 U. S. (L. ed.) 370; *Galena v. Amy*, 5 Wall. 705, 18 U. S. (L. ed.) 560; *Philadelphia v. Collector*, 5 Wall. 733, 18 U. S. (L. ed.) 614; *McCool v. Smith*, 1 Black 470, 17 U. S. (L. ed.) 218; *Stuart v. Maxwell*, 16 How. 150, 14 U. S. (L. ed.) 883; *Doolittle v. Bryan*, 14 How. 563, 14 U. S. (L. ed.) 543; *Beals v. Hale*, 4 How. 51, 11 U. S. (L. ed.) 865; *Aldridge v. Williams*, 3 How. 29, 11 U. S. (L. ed.) 469; U. S. v. Gear, 3 How. 131, 11 U. S. (L. ed.) 523; *Wood v. U. S.*, 16 Pet. 363, 10 U. S. (L. ed.) 987; *Wilcox v. Jackson*, 13 Pet. 514, 10 U. S. (L. ed.) 264; *Harford v. U. S.*, 8 Cranch 109, 3 U. S. (L. ed.) 504; *Soliss v. General Electric Co.*, (C. C. A.) 213 Fed. 204; *Nichols, etc., Lumber Co. v. U. S.*, (C. C. A.) 212

or the later statute must contain negative words,<sup>33</sup> or cover the whole ground occupied by the earlier and be clearly intended as a substitute for it.<sup>34</sup> "It is so easy for the legislature, in making one law, to say that another law on the same subject is repealed, and when it is meant it is so likely to be said, that we never presume it when it is not said, unless the two laws are in such palpable conflict that both cannot be executed."<sup>35</sup> Unless the repugnancy between the subsequent and prior statutes is so absolute and palpable as to be recognized at once, without the aid of ingenious argument, it should be assumed that the legislative department

Fed. 588; *Marks v. U. S.*, (C. C. A.) 196 Fed. 476; *Great Northern, etc., R. Co. v. U. S.*, (C. C. A.) 155 Fed. 945, *affirmed* 208 U. S. 452, 28 S. Ct. 313, 52 U. S. (L. ed.) 567; *Aultman, etc., Co. v. Brumfield*, 102 Fed. 7; *Barber County v. Savings Soc.*, (C. C. A.) 101 Fed. 767; *U. S. v. Lackey*, 99 Fed. 952; *Pratt County v. Savings Soc.*, (C. C. A.) 90 Fed. 236; *Bailey Liquor Co. v. Austin*, 82 Fed. 786; *Goddard v. Mailler*, 80 Fed. 424; *Peck v. Elliott*, (C. C. A.) 79 Fed. 17; *The J. D. Peters*, 78 Fed. 372; *Bernardin v. Northall*, 77 Fed. 852; *In re Secretary of Treasury*, 71 Fed. 510; *In re Race Horse*, 70 Fed. 611; *Smith v. Atchison, etc., R. Co.*, 64 Fed. 277; *U. S. v. Reed*, (C. C. A.) 61 Fed. 416; *U. S. v. Mexican Nat. R. Co.*, 40 Fed. 772; *Bell v. U. S.*, 35 Fed. 889; *Babcock v. U. S.*, 34 Fed. 875; *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. 737; *Melendy v. Currier*, 22 Fed. 129; *Stubblefield v. Menzies*, 11 Fed. 275; *U. S. v. Dowdell*, 8 Fed. 881; *McGlinchy v. U. S.*, 4 Cliff. 320, 16 Fed. Cas. No. 8,803; *U. S. v. One Hundred Barrels Spirits*, 2 Abb. 318, 27 Fed. Cas. No. 15,948; *Lottimer v. Lawrence*, 1 Blatchf. 613, 15 Fed. Cas. No. 8,521; *Cooke v. Ford*, 2 Flipp. 22, 6 Fed. Cas. No. 3,173; *The Ship Argo*, 1 Gall. 151, 1 Fed. Cas. No. 516; *Harden v. Gordon*, 2 Mason 551, 11 Fed. Cas. No. 6,047; *St. Louis Third Nat. Bank v. Harrison*, 3 McCrary 164; *Aspden's Estate*, 2 Wall. Jr. 368, 2 Fed. Cas. No. 589; *Dennis v. Alachua County*, 3 Woods 688, 7 Fed. Cas. No. 3,791; *Den v. Pine*, 4 Wash. 695, 29 Fed. Cas. No. 17,423; *U. S. v. The Cuba*, 2 Hughes 491, 25 Fed. Cas. No. 14,898; *U. S. v. 10,000 Cigars*, Woolw. 123, 28 Fed. Cas. No. 16,451; *In re McConnell*, 10 Phila. (Pa.) 287, 31 Leg. Int. 61, 15 Fed. Cas. No. 8,712; *Cote's Case*, 3 Ct. Cl. 69; *Winchester's Case*, 14 Ct. Cl. 13; *Spofford v. U. S.*, 32 Ct. Cl. 458; *Wilcox's Case*, 12 Ct. Cl. 502; 21 Op. Atty.-Gen. 597 (McKenna, 1897); 21 Op. Atty.-Gen. 119 (Olney, 1895); 21 Op. Atty.-Gen. 204 (Harmon, 1895); 16 Op. Atty.-Gen. 549 (Phillips); 2 Op. Atty.-Gen. 188 (Wirt, 1828); 19 Op. Atty.-Gen. 430 (Miller, 1889); 15 Op. Atty.-Gen. 326; 6 Op. Atty.-Gen. 326

33. This alternative, viz., that in order to operate as an implied repeal the later

statute must be affirmatively repugnant to the earlier, or contain negative words, is the form in which the rule is commonly stated, as will appear in some of the cases cited in the preceding note. But, in *London v. Reg.*, 13 Q. B. 33, 66 E. C. L. 33, *quoted* with approval in *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. 322, Baron Alderson said: "The words 'negative' and 'affirmative' statutes mean nothing. The question is whether they are repugnant or not to that which before existed. That may more easily be shown when the statute is negative than when it is affirmative, but the question is the same."

34. If the later act not repugnant to the earlier and containing no negative words is not clearly intended to cover the whole ground of the earlier, there is no implied repeal. *U. S. v. New York*, 160 U. S. 598, 16 S. Ct. 402, 40 U. S. (L. ed.) 551; *Frost v. Wenie*, 157 U. S. 46, 15 S. Ct. 532, 39 U. S. (L. ed.) 614; *Red Rock v. Henry*, 106 U. S. 601, 1 S. Ct. 434, 27 U. S. (L. ed.) 251; *Edgington v. U. S.*, 164 U. S. 361, 17 S. Ct. 72, 41 U. S. (L. ed.) 467; *Savannah v. Kelly*, 108 U. S. 184, 2 S. Ct. 468, 27 U. S. (L. ed.) 696; *Henderson's Tobacco*, 11 Wall. 652, 20 U. S. (L. ed.) 235.

"A second law on the same subject does not repeal a former one without a repealing clause or negative words, unless so clearly repugnant as to imply a negative." *Beals v. Hale*, 4 How. 53, 11 U. S. (L. ed.) 865.

"Where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court — no purpose to repeal being clearly expressed or indicated — is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute." *Per Justice Harlan*, in *Frost v. Wenie*, 157 U. S. 58, 15 S. Ct. 532, 39 U. S. (L. ed.) 614.

35. *Per Atty.-Gen. Black*, in 9 Op. Atty.-Gen. 47.



intended both statutes to stand.<sup>36</sup> Repugnancy in principle merely is not enough to work a repeal.<sup>37</sup> Where a statute would still be consistent and harmonious if the provisions of a later statute were incorporated therein, it is evidently not repealed by the later statute.<sup>38</sup>

**138. Presumptions, tests and manifestation of intent.**—It would be extremely difficult to adjudge irreconcilable conflict between two acts passed on the same day or with only a few days between them; the presumption is very strong against so sudden a change or revolution of the minds of the legislators.<sup>39</sup> Where a repeal, if admitted, would operate to the prejudice of the government, the supposed repugnancy ought to be clear and controlling before it can be held to have that effect.<sup>40</sup> This principle was applied where such repeal would operate to reopen accounts at the treasury department long since settled and closed.<sup>41</sup> The right of the government to examine a claimant before trial and withhold or use his deposition is a statutory prerogative which is not taken away by a subsequent statute, except by special and particular words.<sup>42</sup> A long-established policy of the government can scarcely be held to have been abrogated by an implied repeal of statutes enacted in furtherance of that policy.<sup>43</sup> Thus, the court declared it most unreasonable to suppose that Congress intended, by doubtful inference, to repeal salutary provisions in a very early statute which, in numerous enactments, it had cautiously preserved.<sup>44</sup> In the absence of specific language so providing a statute will not be construed to end the government's right to prosecute for an offense on account of the grand jury's delay in returning an indictment when the adoption of that construction would work a radical change in the existing law.<sup>45</sup> The purpose of Congress to embody in a private act a repeal, suspension, or change of a public law must clearly appear.<sup>46</sup> Courts are especially averse to an implied repeal that may have the effect of unsettling titles to land.<sup>47</sup> Where an act expressly provides that designated portions of a prior act shall not affect its provisions, it cannot be held that the prior act is otherwise repealed or modified.<sup>48</sup> Where a statute expressly repeals so much of an earlier statute as is inconsistent

36. *Per* Harlan, J., in *U. S. v. Cook County Nat. Bank*, 9 Biss. 60, 25 Fed. Cas. No. 14,853.

"The repeal of a law by implication and construction of a subsequent law should be so clear as to leave no reasonable doubt that such was the intention of the legislature; it should be as certain as an express repeal. It should not be deduced by an ingenious course of argument, but should appear at once. It can seldom be satisfactory to arrive at this conclusion by taking a phrase from one section of the subsequent act and putting it into another section, where the legislature had not put it. The general presumption is that if a repeal was intended, it would have been expressly declared; and such is the usual practice of legislation." *Per* Hopkins, J., in *U. S. v. Twenty-Five Cases Cloths*, Crabbe 370, 28 Fed. Cas. No. 16,563.

37. *Peck v. Elliott*, (C. C. A.) 79 Fed. 17.

38. *Goddard v. Mailler*, 80 Fed. 424.

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39. 21 Op. Atty-Gen. 597 (McKenna, 1897); *Stubblefield v. Menzies*, 11 Fed. 275.

40. *The Reform*, 3 Wall. 633, 18 U. S. (L. ed.) 105. See also *Title Guaranty, etc., Co. v. Guarantee Title, etc., Co.*, (C. C. A.) 174 Fed. 385. And see § 28 as to constructions prejudicial to the government.

41. *U. S. v. Walker*, 22 How. 311, 16 U. S. (L. ed.) 382.

42. *Truitt v. U. S.*, 30 Ct. Cl. 19.

43. *U. S. v. Munday*, 222 U. S. 175, 32 S. Ct. 53, 56 U. S. (L. ed.) 149; *U. S. v. Cook County Nat. Bank*, 9 Biss. 61, 25 Fed. Cas. No. 14,853.

44. *Fussell v. Gregg*, 113 U. S. 565, 5 S. Ct. 631, 28 U. S. (L. ed.) 993.

45. *U. S. v. Cadarr*, 197 U. S. 475, 25 S. Ct. 487, 49 U. S. (L. ed.) 842.

46. *Hubbell's Case*, 6 Ct. Cl. 56.

47. *Doolittle v. Bryan*, 14 How. 567, 14 U. S. (L. ed.) 543.

48. *Pratt County v. Savings Soc.*, (C. C. A.) 90 Fed. 237.

therewith, it evinces a clear legislative intent that the earlier statute shall stand in respect of its other provisions.<sup>49</sup> Where an act of Congress expressly designates certain sections of the Revised Statutes,<sup>50</sup> or a state statute certain sections of the state code,<sup>51</sup> as repealed or supplied thereby, it may be presumed that no other sections are repealed. Express reference in one statute to another *in pari materia* is a significant indication that the repeal of the latter was not intended.<sup>52</sup> Where Congress attempts by legislation to harmonize an earlier law with a still earlier treaty, the fact indicates that Congress believed that the law impliedly repealed the treaty to some extent.<sup>53</sup> And the enactment of statutes for the purpose of removing certain statutory restrictions imports a legislative understanding that those restrictions were not removed by earlier acts.<sup>54</sup> Express repeal of a statute is perhaps some evidence that it was not impliedly repealed by previous legislation.<sup>55</sup>

**139. Effect of general repealing clause.**—Where a statute repeals “all acts and parts of acts inconsistent with” its provisions, it is quite inadmissible to engraft upon this express declaration of legislative intent an implication of more extensive repeal.<sup>56</sup> Such repealing clauses are merely declaratory of the general principle that absolutely irreconcilable provisions in prior statutes are repealed by implication.<sup>57</sup> Indeed, the common formula in a repealing clause that “all acts and parts of acts in conflict with the provisions of this act are hereby repealed” implies very strongly that there may be acts on the same subject which are not thereby repealed.<sup>58</sup> But an act repealing “all laws and parts of laws that come within the meaning and purview of this act” repeals former acts upon the same subject, though the latter are reconcilable with the former.<sup>59</sup> Where the repealing clause in an unconstitutional statute repeals all inconsistent acts, the repealing clause is to stand and have effect, notwithstanding the invalidity of the rest.<sup>60</sup>

49. *Hanrick v. Patrick*, 119 U. S. 156, 7 S. Ct. 147, 30 U. S. (L. ed.) 396.

50. *Robinson v. Baltimore, etc., R. Co.*, 222 U. S. 506, 32 S. Ct. 114, 56 U. S. (L. ed.) 288; *U. S. v. Barber*, (C. C. A.) 74 Fed. 487; *North American Trading, etc., Co. v. Smith*, (C. C. A.) 93 Fed. 9.

51. *Meese v. Northern Pac. R. Co.*, (C. C. A.) 211 Fed. 254.

52. *Hannum v. U. S.*, 226 U. S. 436, 33 S. Ct. 172, 57 U. S. (L. ed.) 287.

53. *Ropes v. Clinch*, 8 Blatchf. 313, 20 Fed. Cas. No. 12,041.

54. *Taylor v. Parker*, 235 U. S. 42, 35 S. Ct. 22, 59 U. S. (L. ed.) 121.

55. *Cape Girardeau County Ct. v. Hill*, 118 U. S. 72, 6 S. Ct. 951, 30 U. S. (L. ed.) 73.

56. *Henderson's Tobacco*, 11 Wall. 656, 20 U. S. (L. ed.) 235; *Holden v. Minnesota*, 137 U. S. 483, 11 S. Ct. 143, 34 U. S. (L. ed.) 734; *Hamlin v. Pettibone*, 6 Biss. 170, 11 Fed. Cas. No. 5,995; *Great Northern R. Co. v. U. S.*, (C. C. A.) 155 Fed. 945, *affirmed* 208 U. S. 452, 28 S. Ct. 313, 52 U. S. (L. ed.) 567. See also *Davies v. Fairbairn*, 3 How. 649, 11 U. S. (L. ed.) 760.

57. *U. S. v. Irwin*, 5 McLean 180, 26

Fed. Cas. No. 1,445; *Great Northern R. Co. v. U. S.*, (C. C. A.) 155 Fed. 945, *affirmed* 208 U. S. 452, 28 S. Ct. 313, 52 U. S. (L. ed.) 567.

“A clear repealing clause \* \* \* expressly repealing all inconsistent provisions of previous statutes, often introduced at the close of legislative enactments, is not necessary to give effect to the otherwise expressed intention of the legislature. It may intensify or emphasize that intention, but it is not required to give force and effect.” *Per* Chief Justice Richardson, in *Fisher's Case*, 15 Ct. Cl. 328.

58. *Hess v. Reynolds*, 113 U. S. 79, 5 S. Ct. 377, 28 U. S. (L. ed.) 927, where Justice Miller also said: “The usual formula of a repealing clause intended to be universal is that all acts on that subject, or all acts coming within its purview, are repealed, or the acts intended to be repealed are named or specifically referred to.” See also *Whelan v. New York, etc., R. Co.*, 35 Fed. 853.

59. *Ogden v. Witherspoon*, 2 Hayw. (N. C.) 227, 18 Fed. Cas. No. 10,461.

60. *Harvey v. Com.*, 20 Fed. 417, *quoting* *Cooley on Const. Lim.* (3d ed.) 186.

**140. Statutes relating to different subjects.**—"It may be doubted whether a statute relating to one subject can be construed to repeal by implication a prior statute relating entirely to another subject."<sup>61</sup> A statute declaring a forfeiture of goods imported contrary to law cannot be inconsistent with a purely criminal statute which deals only with the person of the offender.<sup>62</sup>

**141. Cumulative or auxiliary statutes.**—An earlier act will not be repealed by a later act merely because the latter repeats some of the provisions of the former, and omits others or adds new provisions. In such cases there is an implied repeal only where it plainly appears that the last act was intended as a substitute for the first.<sup>63</sup> A statute obviating the future application of a prior act conferring jurisdiction on a particular court does not operate as a repeal of the prior act and has no effect on jurisdiction already acquired thereunder.<sup>64</sup> An act conferring jurisdiction over a certain class of actions upon one court is not repealed by a subsequent act conferring like jurisdiction upon another court; the effect of the later act is simply to confer concurrent jurisdiction.<sup>65</sup> The provision of a new and more convenient mode of exercising an appellate jurisdiction does not necessarily take away the old.<sup>66</sup> The presumption against implied repeals is of great cogency where it is sought to abrogate provisions concerning the revenue and its collection by later laws on the same subject.<sup>67</sup> It is a very common thing for cumulative remedies to be thus provided in the revenue laws,<sup>68</sup> and "the more natural if not the necessary inference in all such cases is that the legislature intended the new law to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may be equally within the reach of each."<sup>69</sup> A statute authorizing an acknowledgment to be taken before a mayor or a justice is not repealed as to acknowledgments before a mayor by a later statute authorizing such acknowledgments to be taken by a

61. *Per Strong, J.*, in *U. S. v. Gillis*, 95 U. S. 416, 24 U. S. (L. ed.) 503. See also the *J. D. Peters*, 78 Fed. 373; *U. S. v. Mexican Nat. R. Co.*, 40 Fed. 773; *U. S. v. Claffin*, 97 U. S. 552, 24 U. S. (L. ed.) 1082.

62. *U. S. v. A Lot of Jewelry, etc.*, 59 Fed. 684.

63. *Chicago, etc., R. Co. v. U. S.*, 127 U. S. 409, 8 S. Ct. 1194, 32 U. S. (L. ed.) 180; *The Menominie*, 36 Fed. 202; *Winchester's Case*, 14 Ct. Cl. 13.

Where an act provided that mortgages executed after a certain date "may be registered" in the county where the lands lie, and a later act provided that they "shall be recorded" in the registry of the city, if the lands lie within its limits, "these provisions," said the court, "may stand well together, upholding under one act recording of mortgages in the city registry as good in all cases of property situated there; and under the other, upholding a record of mortgages of like lands in the county registry as also good whenever any persons prefer to resort to that." *Beals v. Hale*, 4 How. 53, 11 U. S. (L. ed.) 865.

64. *Hendrix v. U. S.*, 219 U. S. 79, 31 S. Ct. 193, 55 U. S. (L. ed.) 102.

65. *Gowen v. Harley*, (C. C. A.) 56 Fed. 978, citing *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. 737, and *In re Opening of Twenty-Eighth St.*, 102 Pa. St. 140.

"Where an act of Parliament made an offense punishable at the Quarter Sessions and another passed making it punishable at the Assizes, without any words of repeal, it was held that you may indict under either, or at either court." *Foster's Case*, 11 Coke 63, quoted in *Beals v. Hale*, 4 How. 53, 11 U. S. (L. ed.) 865.

66. *Ex p. Yerger*, 8 Wall. 105, 19 U. S. (L. ed.) 332.

67. *Fabbri v. Murphy*, 95 U. S. 196, 24 U. S. (L. ed.) 468.

68. *The Distilled Spirits*, 11 Wall. 356, 20 U. S. (L. ed.) 167, holding that an act providing for the forfeiture of "all goods, wares," etc., if found in possession of any person in fraud of the internal revenue laws is applicable to distilled spirits, notwithstanding the forfeiture of spirits is provided for in later acts.

69. *Per Justice Story*, in *Wood v. U. S.*, 16 Pet. 363, 10 U. S. (L. ed.) 987. To the same effect see *Saxonville Mills v. Russell*, 116 U. S. 21, 6 S. Ct. 237, 29 U. S. (L. ed.) 554; *Movius v. Arthur*,

commissioned justice; the two provisions will stand together, the latter as cumulative of the former.<sup>70</sup>

**142. Special and general statutes on same subject.**—It is a well-established rule that general and specific provisions in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general.<sup>71</sup> “Where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.”<sup>72</sup> This principle is

95 U. S. 146, 24 U. S. (L. ed.) 420; U. S. v. Sixty-Seven Packages Dry Goods, 17 How. 85, 15 U. S. (L. ed.) 54; U. S. v. The Cuba, 2 Hughes 491, 25 Fed. Cas. No. 14,898; Anglo-California Bank v. Secretary of Treasury, (C. C. A.) 76 Fed. 753; U. S. v. Ortega, 66 Fed. 716; *In re* Secretary of Treasury, 71 Fed. 510; Revenue Cutter No. 1, Brown Adm. 94, 20 Fed. Cas. No. 11,713; U. S. v. One Hundred Barrels Spirits, 2 Abb. 305, 27 Fed. Cas. No. 15,948. See also Stockwell v. U. S., 13 Wall. 531, 20 U. S. (L. ed.) 491, which, however, was doubted or disapproved in U. S. v. Claffin, 97 U. S. 550, 24 U. S. (L. ed.) 1082.

70. *Davies v. Fairbairn*, 3 How. 636, 11 U. S. (L. ed.) 760.

71. *Townsend v. Little*, 109 U. S. 504, 3 S. Ct. 357, 27 Fed. Cas. No. 1,012, holding that under a special statute directing that deeds of certain property should be executed “by the mayor of the city or town under seal of the corporation,” a deed thus executed but not witnessed was valid, although a general law in force at the time of its execution required deeds to be witnessed. To the same effect see U. S. v. Matthews, 173 U. S. 387, 19 S. Ct. 413, 43 U. S. (L. ed.) 740; *Cook County Nat. Bank v. U. S.*, 107 U. S. 445, 2 S. Ct. 561, 27 U. S. (L. ed.) 537; *Merchant v. Lewis*, 1 Bond 172, 17 Fed. Cas. No. 9,437; *Partee v. St. Louis, etc., R. Co.*, (C. C. A.) 204 Fed. 970; *Priddy v. Thompson*, (C. C. A.) 204 Fed. 955; *Hemmer v. U. S.*, (C. C. A.) 204 Fed. 898; *Jackson v. Chicago R. Co.*, (C. C. A.) 78 Fed. 432; *Christie Street Commission Co. v. U. S.*, (C. C. A.) 136 Fed. 326; *George v. Wallace*, (C. C. A.) 135 Fed. 286; *Guthrie v. Sparks*, (C. C. A.) 131 Fed. 443; *The New York*, (C. C. A.) 108 Fed. 110; *Commercial Bank v. Sandford*, 103 Fed. 98; *Ripon Knitting Works v. Schreiber*, 101 Fed. 816; *Seward County v. Aetna L. Ins. Co.*, (C. C. A.) 90 Fed. 222; *In re Mason*, 85 Fed. 145; *Magone v. King*, (C. C. A.) 51 Fed. 526; *Marine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. 643; *Babcock v. U. S.*, 34 Fed. 873; U. S.

v. 10,000 Cigars, Woolw. 123, 25 Fed. Cas. No. 14,793; *Sams v. U. S.*, 27 Ct. Cl. 266; 15 Op. Atty.-Gen. 529 (Phillips, 1876).

See §§ 35 and 36 as to the construction of general and special provisions in the same act.

72. *Per* Justice Brown, in *Rodgers v. U. S.*, 185 U. S. 83, 22 S. Ct. 583, 46 U. S. (L. ed.) 816, citing *Ex p. Crow Dog*, 109 U. S. 556, 3 S. Ct. 396, 27 U. S. (L. ed.) 1030, where the court said: “The rule is, *generalia specialibus non derogant*. ‘The general principle to be applied,’ said Bovill, C. J., in *Thorpe v. Adams*, L. R. 6 C. P. 135, ‘to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.’ ‘And the reason is,’ said Wood, V. C., in *Fitzgerald v. Champneys*, 2 Johns. & H. 54, 30 L. J. Ch. 777, ‘that the legislature, having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.’” To same effect, *Washington v. Miller*, 235 U. S. 422, 35 S. Ct. 119, 59 U. S. (L. ed.) 295; *Eastern Extension, etc., Tel. Co. v. U. S.*, 231 U. S. 326, 34 S. Ct. 57, 58 U. S. (L. ed.) 250; *Ex p. U. S.*, 226 U. S. 420, 33 S. Ct. 170, 57 U. S. (L. ed.) 281; *U. S. v. Nix*, 189 U. S. 199, 23 S. Ct. 495, 47 U. S. (L. ed.) 775; *U. S. v. Gear*, 3 How. 131, 11 U. S. (L. ed.) 528; *Bas v. Tingy*, 4 Dall. 42, 1 U. S. (L. ed.) 734; *Wong You v. U. S.*, (C. C. A.) 181 Fed. 313; *U. S. v. Trans-Missouri Freight Assoc.*, 53 Fed. 455; *Gilchrist v. Helena, etc., R. Co.*, 47 Fed. 595; *Westinghouse Air-Brake Co. v. Great Northern R. Co.*, (C. C. A.) 88 Fed. 258; *Fire Extinguisher Mfg. Co. v. Graham*, 16 Fed. 543; *Cote's Case*, 3 Ct. Cl. 70; 21 Op. Atty.-Gen. 338 (Harmon, 1896). And see the dissenting opinion in *The Cherokee*

frequently applied to general and special statutes prescribing the jurisdiction of courts.<sup>73</sup> Jurisdiction conferred on special tribunals is strictly confined, and never excludes that of courts of general jurisdiction, except upon the clearest direction of the legislative will.<sup>74</sup> Powers and privileges granted to a corporation by special act or charter are not affected by prior or subsequent general legislation on the same subject,<sup>75</sup> nor is a general act necessarily repealed even *pro tanto* by a subsequent act on the same subject applying to particular cases.<sup>76</sup> Where the provisions of a statute which relates to a particular class of cases are repugnant to those of another statute of a more general character approved the same day or at the same session, the former must prevail as to the particular class therein referred to.<sup>77</sup> But general legislation which expressly repeals all

Tobacco, 11 Wall. 622, 20 U. S. (L. ed.) 230. *Compare* Rogers v. Nashville, etc., R. Co., (C. C. A.) 91 Fed. 299, where the earlier act was not regarded as a "special" law within the rule stated in the text.

The presumption is of added weight when subsequent to the enactment of the general statute, other special acts have been passed making similar provisions to those of the prior special act. *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 26 S. Ct. 133, 50 U. S. (L. ed.) 281.

73. *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 26 S. Ct. 133, 50 U. S. (L. ed.) 281; *Smithmeyer v. U. S.*, 147 U. S. 342, 13 S. Ct. 321, 37 U. S. (L. ed.) 196; *In re Hohorst*, 150 U. S. 661, 14 S. Ct. 221, 37 U. S. (L. ed.) 1214; *Lees v. U. S.*, 150 U. S. 476, 14 S. Ct. 163, 37 U. S. (L. ed.) 1150; *In re Louisville Underwriters*, 134 U. S. 488, 10 S. Ct. 587, 33 U. S. (L. ed.) 991; *Aspley v. Murphy*, 50 Fed. 376; *East Tennessee, etc., R. Co. v. Atlanta, etc., R. Co.*, 49 Fed. 608; *U. S. v. Whitcomb Metallic Bedstead Co.*, 45 Fed. 89; *U. S. v. Mexican Nat. R. Co.*, 40 Fed. 769; *Ames v. Hager*, 36 Fed. 129; *U. S. v. Shaw*, 39 Fed. 433; *Price v. Abbott*, 17 Fed. 506; *U. S. v. Mooney*, 11 Fed. 476; *St. Louis Third Nat. Bank v. Harrison*, 8 Fed. 721; *Western Transp. Co. v. The Great Western*, 29 Fed. Cas. No. 17,443; *Braden's Case*, 16 Ct. Cl. 409.

74. *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. 737.

75. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 22, 19 S. Ct. 77, 43 U. S. (L. ed.) 350; *Louisiana v. Taylor*, 105 U. S. 454, 26 U. S. (L. ed.) 1133; *Clay County v. Savings Soc.*, 104 U. S. 588, 26 U. S. (L. ed.) 856; *Cass County v. Gillett*, 100 U. S. 585, 25 U. S. (L. ed.) 585; *State v. Stoll*, 17 Wall. 436, 21 U. S. (L. ed.) 655; *Alden v. Easton*, (C. C. A.) 113 Fed. 65; *Huron v. Second Ward Sav. Bank*, (C. C. A.) 86 Fed. 281; *Gowen v. Harley*, (C. C. A.) 56 Fed. 973.

76. *Pratt County v. Savings Soc.*, (C. C. A.) 90 Fed. 233, holding that a county

might proceed either under a general law authorizing issuance of refunding bonds, or under a later special act affecting only that particular county. See also *U. S. v. Whitcomb Metallic Bedstead Co.*, 45 Fed. 89.

77. *Mead v. Bagnall*, 15 Wis. 156, quoted with approval in 21 Op. Atty.-Gen. 606 (McKenna, 1897); *Sams v. U. S.*, 27 Ct. Cl. 274, where Chief Justice Richardson said: "In *Endlich on the Interpretation of Statutes*, p. 288, and following, the subject is discussed and many cases cited. One of those referred to is strikingly like the present case. An act was passed by the legislature of Indiana January 16, 1849, which, among other things, provided that the auditor of the county of La Grange shall receive \$700 per annum, which sum shall be in full compensation for all services which he may perform as such officer. The next day, January 17, 1849, an act was passed by the same legislature which, after requiring county auditors to perform duties theretofore belonging to the office of school commissioners, provided that for the discharge of such duties they should be allowed one-half of one per cent. upon the amount of school funds on loan in the respective counties. This last provision applied in terms to all county auditors, and was broad enough to include the auditor of La Grange county. But the Supreme Court of Indiana held that the two acts must be construed *in pari materia*, and that 'the intention evinced in the statutes under consideration, when taken together, may be stated thus: For services relative to the school funds each county auditor shall receive as a compensation one-half of one per cent. upon the amount of that fund on loan in his county; provided, the auditor of the county of La Grange shall not be allowed such per centum in addition to his fixed salary of \$700.' *La Grange County v. Cufler*, 6 Ind. 354." See also *Rodgers v. U. S.*, 36 Ct. Cl. 266.

prior special laws inconsistent therewith must, of course, be given the effect clearly intended.<sup>78</sup>

**143. Statutes in irreconcilable conflict.**—A later statute without any repealing clause must be held to repeal an earlier one where under no reasonable hypothesis can the provisions of both be construed as coexisting.<sup>79</sup> In the leading federal case on repeals by implication it was held that an act punishing an offense by imprisonment or fine thereby declares that the punishment shall not be both, and is repealed by a later act authorizing both punishments in the discretion of the court.<sup>80</sup> An enactment permitting the plaintiff on a joint cause of action to sue all the joint contractors, or as many thereof as he may think proper, and another

78. *Louisville Water Co. v. Clark*, 143 U. S. 12, 12 S. Ct. 346, 36 U. S. (L. ed.) 58; *In re Clerkship of Circuit Ct.*, 90 Fed. 248. See also *Guthrie v. Sparks*, (C. C. A.) 131 Fed. 443.

79. *Rainey v. W. R. Grace Co.*, 231 U. S. 703, 34 S. Ct. 242, 58 U. S. (L. ed.) 445; *Gibson v. U. S.*, 194 U. S. 182, 24 S. Ct. 613, 48 U. S. (L. ed.) 926, followed in *Lowe v. U. S.*, 194 U. S. 193, 24 S. Ct. 617, 48 U. S. (L. ed.) 931; *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 19 S. Ct. 327, 43 U. S. (L. ed.) 637; *Ward v. Race Horse*, 163 U. S. 504, 16 S. Ct. 1076, 41 U. S. (L. ed.) 244; *U. S. v. Ewing*, 140 U. S. 142, 11 S. Ct. 743, 35 U. S. (L. ed.) 388; *U. S. v. Auffmordt*, 122 U. S. 197, 7 S. Ct. 1182, 30 U. S. (L. ed.) 1182; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 5 S. Ct. 601, 28 U. S. (L. ed.) 1098; *U. S. v. Mitchell*, 109 U. S. 146, 3 S. Ct. 151, 27 U. S. (L. ed.) 887; *U. S. v. Claffin*, 97 U. S. 546, 24 U. S. (L. ed.) 1082; *Collector v. Richards*, 23 Wall. 246, 23 U. S. (L. ed.) 95; *New Jersey Steamboat Co. v. Collector*, 18 Wall. 478, 21 U. S. (L. ed.) 769; *U. S. v. Hosmer*, 9 Wall. 432, 19 U. S. (L. ed.) 662; *McKee v. U. S.*, 8 Wall. 167, 19 U. S. (L. ed.) 331; *U. S. v. Tynen*, 11 Wall. 88, 20 U. S. (L. ed.) 153; *Norris v. Crocker*, 13 How. 429, 14 U. S. (L. ed.) 210; *Bas v. Tingy*, 4 Dall. 37, 1 U. S. (L. ed.) 731; *The Young Mechanic*, 3 Ware 58, 30 Fed. Cas. No. 18,182; *U. S. v. Balsara*, (C. C. A.) 180 Fed. 694; *Haymes v. Brown*, 132 Fed. 525; *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. 322; *In re Clerkship of Circuit Ct.*, 90 Fed. 248; *Grossett v. Townsend*, (C. C. A.) 86 Fed. 908; *Morris v. Graham*, 51 Fed. 53; *Calvert v. U. S.*, 37 Fed. 762; *Strong v. U. S.*, 34 Fed. 17; *The Chase*, 14 Fed. 854; *Union Iron Co. v. Pierce*, 4 Biss. 327, 24 Fed. Cas. No. 14,367; *Re Leavenworth Sav. Bank*, 4 Dill. 363, 15 Fed. Cas. No. 8,165; *U. S. v. Irwin*, 5 McLean 178, 26 Fed. Cas. No. 15,445; *U. S. v. Greene*, 4 Mason 427, 26 Fed. Cas. No. 15,258; *Milne v. Huber*, 3 McLean 212, 17 Fed. Cas. No. 9,617; *Schenk v. Peay*, 1 Dill. 267, 21 Fed. Cas. No. 12,451; *Wyman v. U. S.*, 26 Ct. Cl. 103. See also *Belknap v. U. S.*, 24 Ct. Cl.

433; *Faris v. U. S.*, 23 Ct. Cl. 374; *Marvin v. U. S.*, 44 Fed. 405; *Francis v. U. S.*, 22 Ct. Cl. 403; *Fisher's Case*, 15 Ct. Cl. 323; *Dyer v. U. S.*, 20 Ct. Cl. 166; *Kidder v. U. S.*, 20 Ct. Cl. 46.

"In *Michell v. Brown*, 1 El. & El. 267, 102 E. C. L. 267, it was ruled in the Court of Queen's Bench, that if a later statute again describes an offense created by a former statute, and affixes a different punishment to it, varying the procedure, etc., the later operates by way of substitution, not cumulatively, and the former statute is repealed. A similar rule was asserted by Baron Bramwell, in *In re Baker*, 2 H. & N. 219. So in *Parry v. Croydon Commercial Gas, etc., Co.*, 15 C. B. N. S. 568, 109 E. C. L. 568, an act imposing a penalty of £200 upon the undertaker of any gasworks for fouling any stream, etc., to be recovered by the person into whose water the foul substance should be conveyed, was held to repeal by implication a former act describing the same offense and imposing the same penalty, to be sued for by any common informer. The two penalties were held not to be cumulative. The principle of these rulings has been frequently recognized by courts in this country." *U. S. v. Claffin*, 97 U. S. 551, 24 U. S. (L. ed.) 1085.

"It is impossible that there should be in force, at the same time, a statute punishing the offense of taking excessive fees by a fine not exceeding the sum of three hundred dollars and an imprisonment not exceeding two years, for each offense, and a statute punishing the same offense by a fine of five hundred dollars and an imprisonment for five years. The later statute, in such case, operates as a repeal of the former statute." *Per Hunt, J.*, in *U. S. v. Bennett*, 12 Blatchf. 349, 24 Fed. Cas. No. 14,570.

An act authorizing an acknowledgment to be taken before any justice is controlled by a later act requiring the acknowledgment to be taken before a justice commissioned as provided in the act. *Davies v. Fairbairn*, 3 How. 645, 11 U. S. (L. ed.) 765.

80. *U. S. v. Tynen*, 11 Wall. 93, 20 U. S. (L. ed.) 155. See also *U. S. v. One Hun-*

compelling him to sue all, are repugnant and inconsistent and cannot stand together.<sup>81</sup> A provision in the public-land laws giving to a settler unlimited power to sell and convey land before receiving a patent must prevail over an earlier enactment transferring a settler's title, in case of his death before receiving the patent, to his child, heir, or devisee.<sup>82</sup> Where a jurisdiction conferred by statute is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring jurisdiction.<sup>83</sup> Where a penal statute not only imposes a milder punishment than that denounced in a prior statute, but also changes and adds to the substantive portion of the statute, there is a strong presumption of intent to repeal that part of the prior statute which defines the crime.<sup>84</sup> Courts have generally upheld parts of a statute capable of standing alone when other parts have been repealed by implication because repugnant to a later act.<sup>85</sup>

**144. Later acts or revisions covering same ground.**—Though two acts are not in all respects repugnant, yet if the later act covers the whole subject of the earlier, and embraces new provisions which plainly show that it was a substitute for the first, it will operate as a repeal.<sup>86</sup> And when a revising statute covers the whole subject-matter of antecedent statutes, it impliedly repeals the earlier enactments, unless there is something in the nature of the subject-matter or revising statute to indicate a contrary intention.<sup>87</sup> Where a revising statute or one enacted for another omits

dred Barrels Spirits, 1 Dill. 49, 27 Fed. Cas. No. 15,948.

81. *Johnson v. Byrd*, Hempst. 436, 13 Fed. Cas. No. 7,376.

82. *Barney v. Dolph*, 97 U. S. 658, 24 U. S. (L. ed.) 1065.

83. *Merchants Ins. Co. v. Ritchie*, 5 Wall. 541, 18 U. S. (L. ed.) 540.

84. *U. S. v. Irwin*, 5 McLean 182, 26 Fed. Cas. No. 15,445.

85. *McLaughry v. Deming*, 186 U. S. 49, 22 S. Ct. 786, 46 U. S. (L. ed.) 1049; *Baltimore, etc., R. Co. v. Bates*, 119 U. S. 464, 7 S. Ct. 285, 30 U. S. (L. ed.) 436; *U. S. v. One Hundred Barrels Spirits*, 1 Dill. 49, 27 Fed. Cas. No. 15,948; *Woods v. Jackson Iron Mfg. Co.*, 1 Holmes 385, 30 Fed. Cas. No. 17,993; *Wood v. U. S.*, 16 Pet. 363, 10 U. S. (L. ed.) 995; *In re Moore*, 66 Fed. 951; *Central Trust Co. v. Marietta, etc., R. Co.*, (C. C. A.) 48 Fed. 874.

86. *Ex p. Webb*, 225 U. S. 663, 32 S. Ct. 769, 56 U. S. (L. ed.) 1248; *Murphy v. Utter*, 186 U. S. 95, 22 S. Ct. 776, 46 U. S. (L. ed.) 1070; *The Paquete Habana*, 175 U. S. 677, 20 S. Ct. 290, 44 U. S. (L. ed.) 320; *U. S. v. Rider*, 163 U. S. 132, 16 S. Ct. 983, 41 U. S. (L. ed.) 101; *Hanrick v. Hanrick*, 153 U. S. 197, 14 S. Ct. 835, 38 U. S. (L. ed.) 687; *District of Columbia v. Hutton*, 143 U. S. 18, 12 S. Ct. 369, 36 U. S. (L. ed.) 60; *Fisk v. Henarie*, 142 U. S. 459, 12 S. Ct. 207, 35 U. S. (L. ed.) 1080; *Eckloff v. District of Columbia*, 135 U. S. 240, 10 S. Ct. 752, 34 U. S. (L. ed.) 120; *Tracy v. Tuffy*, 134 U. S. 223, 10 S. Ct. 527, 33 U. S. (L. ed.) 884; *Heinemann v. Arthur*, 120 U. S.

85, 7-8. Ct. 446, 30 U. S. (L. ed.) 606; *Baltimore, etc., R. Co. v. Bates*, 119 U. S. 464, 7 S. Ct. 285, 30 U. S. (L. ed.) 436; *Ayers v. Watson*, 113 U. S. 594, 5 S. Ct. 641, 28 U. S. (L. ed.) 1093; *Pana v. Bowler*, 107 U. S. 538, 2 S. Ct. 704, 27 U. S. (L. ed.) 428; *King v. Cornell*, 106 U. S. 396, 1 S. Ct. 312, 27 U. S. (L. ed.) 60; *Hyde v. Ruble*, 104 U. S. 407, 26 U. S. (L. ed.) 823; *Welch v. Cook*, 97 U. S. 541, 24 U. S. (L. ed.) 1112; *U. S. v. Claffin*, 97 U. S. 546, 24 U. S. (L. ed.) 1082; *Murdock v. Memphis*, 20 Wall. 590, 22 U. S. (L. ed.) 429; *U. S. v. Jonas*, 19 Wall. 598, 22 U. S. (L. ed.) 177; *U. S. v. Tynen*, 11 Wall. 92, 20 U. S. (L. ed.) 154; *Stead v. Curtis*, (C. C. A.) 191 Fed. 529; *City Realty Co. v. Robinson Contracting Co.*, 183 Fed. 176; *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. 299; *Gladstone v. Throop*, (C. C. A.) 71 Fed. 341; *McGlashan v. U. S.*, (C. C. A.) 71 Fed. 434; *Schmid v. U. S.*, 66 Fed. 744; *La Republique Francaise v. Schultz*, 57 Fed. 37; *U. S. v. Warwick*, 51 Fed. 280; *Gilmour v. Ewing*, 50 Fed. 656; *U. S. v. Crawford*, 47 Fed. 561; *Minnick v. Union Ins. Co.*, 40 Fed. 369; *August v. Calloway*, 35 Fed. 381; *Short v. Chicago, etc., R. Co.*, 33 Fed. 114; *U. S. v. Buckley*, 31 Fed. 805; *The Aurania*, 29 Fed. 102; *U. S. v. Nelson*, 29 Fed. 202; *Tuedt v. Carson*, 13 Fed. 353; *U. S. v. Bennett*, 12 Blatchf. 345, 24 Fed. Cas. No. 14,570; *U. S. v. Cheeseman*, 3 Sawy. 424, 25 Fed. Cas. No. 14,790; *Ogden v. Witherspoon*, 2 Hayw. (N. Car.) 227, 18 Fed. Cas. No. 10,461.

87. *P. S. v. Ranlett*, 172 U. S. 133, 19 S. Ct. 114, 43 U. S. (L. ed.) 393; *U. S.*

provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled.<sup>88</sup> Where an amendatory statute purporting to amend a statute which has already been amended covers the entire subject-matter of the prior amendment, the latter is repealed by implication.<sup>89</sup> In a case wherein a construction of certain provisions in a state code of civil procedure was in question, the court said that "where a statute upon a specific subject has been repealed, not expressly, but by implication, by the enactment of a later statute upon the same subject, inconsistent with the first, and both laws are subsequently re-enacted in a revision or codification, they still have the same relative force and effect as before the codification; that is to say, the earlier remains repealed by the later statute. In such a case the presumption arises that the repeal of the earlier statute has been overlooked by the codifiers, and therein lies the reason of the rule."<sup>90</sup>

**145. Repeal by inference arising from subject-matter.**—When, to a board having general administrative supervision of the affairs of a community, and with plenary powers in the matter of appointment and removal of subordinates, is added the control of another department, and no express words of limitation are found in the act making the transfer, it is to be presumed that such board has the same plenary power in respect to this new department, and is not hampered by limitations attached to the board which theretofore had control of it. In such a case the court said: "The presumption against implied repeal obtaining in the construction of ordinary statutes yields to the inferences arising from the subject-matter of the legislation."<sup>91</sup>

*v. Allen*, 163 U. S. 499, 16 S. Ct. 1071, 41 U. S. (L. ed.) 242; *Kohlsaat v. Murphy*, 96 U. S. 158, 24 U. S. (L. ed.) 845; *Baker v. Kaiser*, (C. C. A.) 126 Fed. 317; *Saunders v. U. S.*, (C. C. A.) 114 Fed. 42; *Kent v. U. S.*, (C. C. A.) 73 Fed. 682; *U. S. v. Murphy*, (C. C. A.) 72 Fed. 1008; *In re Straus*, 46 Fed. 522. Compare *Harkison v. Harkison*, (C. C. A.) 101 Fed. 71; *Patterson v. Tatum*, 3 Sawy. 164, 18 Fed. Cas. No. 10,830; 23 Op. Atty-Gen. 379.

Many of the foregoing cases were decided in the construction of new tariff acts.

<sup>88.</sup> *Johnson v. U. S.*, 225 U. S. 405, 32 S. Ct. 748, 56 U. S. (L. ed.) 1142; *U. S. v. Wong You*, 223 U. S. 67, 32 S. Ct. 195, 56 U. S. (L. ed.) 354; *Johnson v. Browne*, 205 U. S. 309, 27 S. Ct. 539, 51 U. S. (L. ed.) 816; *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 25 S. Ct. 443, 49 U. S. (L. ed.) 790; *Gibson v. U. S.*, 194 U. S. 182, 24 S. Ct. 613, 48 U. S. (L. ed.) 926, followed in *Lowe v. U. S.*, 194 U. S. 193, 24 S. Ct. 617, 48 U. S. (L. ed.) 931; *Stewart v. Kahn*, 11 Wall. 502, 20 U. S. (L. ed.) 177; *U. S. v. Nelson*, 29 Fed. 202; *Butler v. Russel*, 3 Cliff. 251, 5 Fed. Cas. No. 2,243; 21 Op. Atty-Gen. 253 (Conrad, 1895).

The foregoing cases were not decided with reference to the United States Revised Statutes.

But in *Taylor v. Bowker*, 111 U. S. 110,

4 S. Ct. 397, 28 U. S. (L. ed.) 368, it was held that if a statute confers upon a judgment creditor of a corporation an equitable remedy on the issue of an execution on the judgment and its return unsatisfied, and in a revision of the statutes the same equitable remedy is given, but without mention of the issue and return of execution, it is not to be presumed that the legislature intended by the omission to abrogate or modify an established rule of equity; and that when it is attempted by equitable process to reach equitable interests fraudulently conveyed, the bill should set forth a judgment, issue of execution thereon, and its return unsatisfied. See also *Cape Girardeau County Ct. v. Hill*, 118 U. S. 72, 6 S. Ct. 951, 30 U. S. (L. ed.) 75.

<sup>89.</sup> *Minnesota, etc., Land, etc., Co. v. Billings*, (C. C. A.) 111 Fed. 972; *Columbia Wire Co. v. Boyce*, (C. C. A.) 104 Fed. 172; *Rowan v. Ide*, (C. C. A.) 107 Fed. 161.

<sup>90.</sup> *Per Hawley, D. J.*, in *The Louis Olsen*, (C. C. A.) 57 Fed. 849, citing *Mobile Sav. Bank v. Patty*, 16 Fed. 751, but holding that neither the letter nor the reason of the rule applied to the particular case in hand. In support of the text see also *The Louis Olsen*, 52 Fed. 652.

<sup>91.</sup> *Eckloff v. District of Columbia*, 135 U. S. 242, 10 S. Ct. 752, 34 U. S. (L. ed.)



**146. By constitution or treaty.**—Legislative enactments are repealed by the subsequent adoption of provisions inconsistent therewith in a constitution<sup>92</sup> or a treaty.<sup>93</sup> In accordance with the rule that repeals by implication are not favored, however, “a later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty.”<sup>94</sup> But a constitutional provision imposing liability in exemplary damages for death by wrongful act is not repugnant to, and does not repeal, a prior legislative enactment authorizing recovery of compensatory damages in such cases.<sup>95</sup>

**147. Subsequent legislative recognition of repealed act.**—When an act of Congress is impliedly repealed by a later act, a subsequent recognition of the earlier act by Congress as a still subsisting law will not operate to prevent such repeal. The question of repeal “is a judicial question to be determined by the courts,” it was said, “and is not for the legislative branch of the government to determine.”<sup>96</sup> However, it seems that such subsequent recognition may be so positive as to amount to a re-enactment of the earlier act.<sup>97</sup>

### *Effect of Repeal*

**148. Simultaneous repeal and re-enactment.**—Where a statute is repealed and its provisions are substantially re-enacted in the repealing statute, the latter is held to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating or annulling them and re-enacting the same as a new and original act.<sup>98</sup> In the leading federal case on this subject an action was brought to recover pilotage fees allowed by statute, which statute was repealed and substantially re-enacted during the pendency of

121. To the same effect *Wicomico County v. Bancroft*, 203 U. S. 112, 27 S. Ct. 21, 51 U. S. (L. ed.) 112.

92. *Fidelity Trust, etc., Co. v. Lawrence County*, (C. C. A.) 92 Fed. 576; *Norton v. Taxing Dist.*, 129 U. S. 479, 9 S. Ct. 331, 32 U. S. (L. ed.) 774; *Daggs v. Ewell*, 3 Woods 344, 6 Fed. Cas. No. 3,537.

See § 80 as to avoidance of any construction that would render statute unconstitutional.

93. *Hijo v. U. S.*, 194 U. S. 315, 24 S. Ct. 727, 48 U. S. (L. ed.) 994; *U. S. v. Lee Yen Tai*, 185 U. S. 213, 22 S. Ct. 629, 46 U. S. (L. ed.) 878; *Denn v. Harneden*, 1 Paine 55, 9 Fed. Cas. No. 4,819; *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.*, (C. C. A.) 155 Fed. 842, *affirming* 148 Fed. 31. See also *U. S. v. The Peggy*, 1 Cranch 103, 2 U. S. (L. ed.) 49.

See § 82 as to avoidance of any construction of statute that would bring it into conflict with treaty.

94. *Johnson v. Browne*, 205 U. S. 309, 27 S. Ct. 539, 51 U. S. (L. ed.) 816.

In cases of repugnancy the repeal is only *pro tanto*. *U. S. v. Lee Yen Tai*, 185 U. S. 213, 22 S. Ct. 629, 46 U. S. (L. ed.) 878.

95. *Gohen v. Texas Pac. R. Co.*, 2 Woods 346, 10 Fed. Cas. No. 5,506.

96. *District of Columbia v. Hutton*, 143 U. S. 27, 12 S. Ct. 369, 36 U. S. (L. ed.) 62. See also *Ogden v. Blackledge*, 2 Cranch 277, 2 U. S. (L. ed.) 276. See also § 28, as to legislative construction.

97. See *Schenck v. Peay*, 21 Fed. Cas. No. 12,451, where Judge Caldwell cited with evident approval *Planters' Bank v. Black*, 11 Smed. & M. (Miss.) 43, holding that where two statutes were passed on the same day, one limiting a judgment lien to two years, and the other extending it to five years, and a statute passed two years afterwards recognized the former statute as existing and in full force by expressly declaring how it should be construed, the statute so recognized should prevail over the other. See also *Jarman v. Knights Templars, etc., L. Indemnity Co.*, 95 Fed. 74.

98. *Bear Lake, etc., Water-Works, etc., Co. v. Garland*, 164 U. S. 1, 17 S. Ct. 7, 41 U. S. (L. ed.) 327; *U. S. v. Landram*, 118 U. S. 81, 6 S. Ct. 954, 30 U. S. (L. ed.) 58 [*affirming* *Landram v. U. S.*, 21 Ct. Cl. 128]; *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. 450, 17 U. S. (L. ed.) 805; *Treat v. Staples*, 1 Holmes 5, 24 Fed. Cas. No. 14,162; *Hamilton v. Titus*, 185

the action, and it was held that the new statute did not impair the right to prosecute the action to effect.<sup>99</sup>

**149. Vested rights.**—The repeal of a statute does not affect vested rights acquired under it.<sup>1</sup> “If, for example, a statute of descents be repealed, it has never been supposed that rights of property already vested during its existence were gone by such repeal. Such a construction would overturn the best-established doctrines of law, and sap the very foundations on which property rests.”<sup>2</sup> The repeal of patent laws cannot impair the right of property then existing in a patentee or his assignee.<sup>3</sup> When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right which stands independent of the statute.<sup>4</sup> The repeal of a mechanics’ lien law after the lien has attached by performance of work does not defeat the lien.<sup>5</sup>

**150. Original jurisdiction of courts.**—Where a statute conferring original jurisdiction (or jurisdiction by removal from a state court) is repealed expressly or by implication, jurisdiction of cases pending at the time of repeal, no judgment having been rendered therein, fails with the passage of the repealing act, unless pending cases are expressly excepted from its operation.<sup>6</sup> Upon the same principle, where an act of Congress confirmed a certain pre-emption entry for public lands and directed the issuance of a patent therefor, it put an end to the jurisdiction of the land department over the question of the validity of the entry in a contest pending therein.<sup>7</sup> An administrator has no power to sell real estate pursuant to an order of the court, where the statute authorizing the court to

Fed. 140; *Great Northern Ry. Co. v. U. S.*, (C. C. A.) 155 Fed. 945, *affirmed in* 208 U. S. 452, 28 S. Ct. 313, 52 U. S. (L. ed.) 567; *McDougald v. New York Life Ins. Co.*, (C. C. A.) 146 Fed. 674; *Eidman v. Tilghman*, (C. C. A.) 136 Fed. 141, *affirming* 131 Fed. 651; *Lamb v. Powder River Live Stock Co.*, (C. C. A.) 132 Fed. 434; *Sabin v. Connor*, 21 Fed. Cas. No. 12,197. See also *Torrens v. Hammond*, 10 Fed. 907.

*A fortiori* such is the effect of the reenactment where the act expressly declares that it is to be construed as a continuation of the existing law. *Butte First Nat. Bank v. Weidenbeck*, (C. C. A.) 97 Fed. 896.

**99.** *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. 450, 17 U. S. (L. ed.) 805, *citing* *Wright v. Oakley*, 5 Met. (Mass.) 406.

**1.** *Society, etc., v. New Haven*, 8 Wheat. 493, 5 U. S. (L. ed.) 669. See also *Rutherford v. Greene*, 2 Wheat. 196, 4 U. S. (L. ed.) 218; *The Vigilancia*, (C. C. A.) 73 Fed. 452.

**2.** *Per* Justice Washington, in *Society, etc. v. New Haven*, 8 Wheat. 464, 5 U. S. (L. ed.) 662.

**3.** *McClurg v. Kingsland*, 1 How. 206, 11 U. S. (L. ed.) 103.

**4.** *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. 457, 17 U. S. (L. ed.) 807. See also *Hall v. Wisconsin*, 103 U. S. 5, 26 U. S. (L. ed.) 302; *Memphis v. U. S.*, 97 U. S. 293, 24 U. S. (L. ed.) 920; *Twenty Per Cent. Cases*, 20 Wall. 179, 22 U. S. (L. ed.) 339; *Goshorn v. Alexander*, 2 Bond 159, 10 Fed. Cas. No. 5,630.

**5.** *In re Hope Min. Co.*, 1 Sawy. 710, 12 Fed. Cas. No. 6,681.

**6.** *In re Hall*, 167 U. S. 38, 17 S. Ct. 723, 42 U. S. (L. ed.) 69; *South Carolina v. Gaillard*, 101 U. S. 433, 25 U. S. (L. ed.) 937; *Assessors v. Osborne*, 9 Wall. 567, 19 U. S. (L. ed.) 748; *Merchants Ins. Co. v. Ritchie*, 5 Wall. 541, 18 U. S. (L. ed.) 540; *Norris v. Crocker*, 13 How. 429, 14 U. S. (L. ed.) 210; *Emblen v. Lincoln Land Co.*, 94 Fed. 710; *Fairchild v. U. S.*, 91 Fed. 297; *U. S. v. McCrory*, (C. C. A.) 91 Fed. 295; *McGlashan v. U. S.*, (C. C. A.) 71 Fed. 434; *Manley v. Olney*, 32 Fed. 708. See also *Birdseye v. Shaeffer*, 37 Fed. 821; *U. S. v. Preston*, 3 Pet. 57, 7 U. S. (L. ed.) 601; *Gilmour v. Ewing*, 50 Fed. 656.

**7.** *Emblen v. Lincoln Land Co.*, 94 Fed. 710. See also *Gordon v. U. S.*, 7 Wall. 188, 19 U. S. (L. ed.) 35.

make such order is repealed before the sale is effected.<sup>8</sup> If a court proceeds to judgment after jurisdiction has been thus divested, the judgment will be *coram non judge* and absolutely void on collateral attack. For that reason no title was acquired by a purchaser of property at a judicial sale under judgment and order of a state court in statutory proceedings instituted for forfeiture and sale of property of persons who adhered to the enemies of the state in the war of 1812, a treaty ratified during the pendency of the proceedings having provided that no future confiscations should be made for such cause.<sup>9</sup> But an Indian prosecuted before a tribal court for an offense within its jurisdiction cannot defeat such jurisdiction by becoming naturalized as a citizen of the United States before conviction, pursuant to an act of Congress.<sup>10</sup> Upon the admission of a territory as a state, jurisdiction of the territorial courts is thereby abrogated, and subsequent suits instituted therein must be dismissed.<sup>11</sup> When a final determination by judgment or sentence has been reached before repeal of a statute conferring jurisdiction on a court, such repeal does not affect the judgment or sentence,<sup>12</sup> and it may be reviewed on appeal or error by the proper appellate court, if the jurisdiction of the latter is not in terms cut off by the repealing statute.<sup>13</sup> But such appellate jurisdiction cannot be exercised where the repealing act abolishes the court wherein the judgment or sentence was pronounced, since a judgment of reversal by the appellate tribunal could not be executed by mandate and proceedings thereon.<sup>14</sup> And where the Court of Claims rendered judgment from which an appeal was taken to the Supreme Court, and pending the appeal Congress repealed the act conferring the jurisdiction upon which the judgment was founded, enacting that all proceedings under the act should be vacated and that no judgment rendered pursuant to the act should be paid, the appeal was dismissed for want of jurisdiction and without any determination of the rights of the parties.<sup>15</sup>

**151. Appellate jurisdiction.**—Where a statute without a saving clause withdraws appellate jurisdiction conferred by a prior statute, it, of course,

8. *Hamilton Bank v. Dudley*, 2 Pet. 522, 7 U. S. (L. ed.) 506.

9. *Denn v. Harnden*, 1 Paine 55, 9 Fed. Cas. No. 4,819.

10. *Ex p. Kyle*, 67 Fed. 306.

11. *Benner v. Porter*, 9 How. 235, 13 U. S. (L. ed.) 119.

12. *U. S. v. Jacobus*, (C. C. A.) 96 Fed. 261. See also *In re Hall*, 167 U. S. 38, 17 S. Ct. 723, 42 U. S. (L. ed.) 69; *Gilmour v. Ewing*, 50 Fed. 660.

13. *U. S. v. Jacobus*, (C. C. A.) 96 Fed. 260, where the court said: "The right of appeal is expressly given, and scrupulously regulated. Under these circumstances, a court should be slow to spell out a repeal by implication of such important provisions so clearly expressed, when the result of such repeal would be to leave the decision of the court of first instance standing as *res adjudicata* between the parties, with no machinery for reviewing it, or for re-examining into its justice or propriety." The case was decided upon

the authority of *U. S. v. Boisdoré*, 8 How. 113, 12 U. S. (L. ed.) 1009.

The case first above cited is contrary, it seems, to the ruling in *U. S. v. McCrory*, (C. C. A.) 91 Fed. 295, and in *U. S. v. Kelly*, (C. C. A.) 97 Fed. 460, where, under apparently the same circumstances, the Circuit Court of Appeals abated a writ of error.

A distinction has been drawn in cases where appeal suspends the judgment, as in admiralty, and it is the rule in such cases that the appellate court loses jurisdiction if the law conferring jurisdiction on the court below is repealed pending the appeal. *Yeaton v. U. S.*, 5 Cranch 281, 3 U. S. (L. ed.) 101; *U. S. v. Peggy*, 1 Cranch 103, 2 U. S. (L. ed.) 49.

14. *Hunt v. Palao*, 4 How. 589, 11 U. S. (L. ed.) 1115.

15. *District of Columbia v. Eslin*, 183 U. S. 62, 22 S. Ct. 17, 46 U. S. (L. ed.) 85. See also *In re Hall*, 167 U. S. 38, 17 S. Ct. 723, 42 U. S. (L. ed.) 69.

deprives the appellate court of jurisdiction of appellate proceedings instituted after the last statute takes effect.<sup>16</sup> The repeal of a statute conferring appellate jurisdiction on a court does not vacate or annul any judgment already rendered by that court; it destroys no vested rights.<sup>17</sup> But a party has no vested rights in an appeal or writ of error; and while the repeal of a statute conferring appellate jurisdiction does not vacate or annul an appeal or a writ of error already taken or sued out, it takes away the right of the appellate court to hear and determine the cause, and the proceeding must be dismissed, unless the repealing act makes special provision to the contrary.<sup>18</sup> This rule applies whether the repealing act takes effect before or after argument of the cause in the appellate court.<sup>19</sup> Where the appellate power of the United States Supreme Court over judgments of a territorial court depends upon laws regulating the judicial proceedings of the territory, a writ of error pending when the territory is admitted as a state must be dismissed, since the laws conferring appellate jurisdiction fall with the termination of the territorial government.<sup>20</sup> There is always a strong presumption that a statute withdrawing jurisdiction by a repeal of the act which conferred it is not limited to future cases, but applies to pending cases, unless the latter are expressly excepted from its operation.<sup>21</sup> But where a repealing act provides that no appeal or writ of error shall "hereafter" be allowed, the evident intention is to prevent a failure of jurisdiction of pending appellate proceedings, and these will not be affected by the repeal.<sup>22</sup> In one instance where a statute conferring jurisdiction of suits against the United States was repealed without a saving clause, pending cases which were consequently dismissed by the court were reinstated by a subsequent act of Congress.<sup>23</sup>

**152. Criminal prosecutions; penal actions by government.**—It is a clear rule that if a statute creating an offense is repealed expressly or by implication, no prosecution can be instituted for any offense committed against the statute previous to its repeal,<sup>24</sup> unless there be a saving clause or a general statute reserving the right of prosecution.<sup>25</sup> "The end of

16. *Wilkinson v. Nebraska*, 123 U. S. 286, 8 S. Ct. 120, 31 U. S. (L. ed.) 152; *Sherman v. Grinnell*, 123 U. S. 679, 8 S. Ct. 260, 31 U. S. (L. ed.) 278; *Gurnee v. Patrick County*, 137 U. S. 141, 11 S. Ct. 34, 34 U. S. (L. ed.) 601; *National Exch. Bank v. Peters*, 144 U. S. 570, 12 S. Ct. 767, 36 U. S. (L. ed.) 545; *Wauton v. De Wolf*, 142 U. S. 138, 12 S. Ct. 173, 35 U. S. (L. ed.) 965; *Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co.*, 159 U. S. 698, 16 S. Ct. 189, 40 U. S. (L. ed.) 311; *Mason v. Pewabic Min. Co.*, 153 U. S. 361, 14 S. Ct. 847, 38 U. S. (L. ed.) 745; *Interstate Commerce Commission v. Atchison, etc., R. Co.*, 149 U. S. 264, 13 S. Ct. 837, 37 U. S. (L. ed.) 727; *Cincinnati Safe, etc., Co. v. Grand Rapids Safety Deposit Co.*, 146 U. S. 54, 13 S. Ct. 13, 36 U. S. (L. ed.) 885; *Scott v. Hamner*, (C. C. A.) 72 Fed. 289.

17. *Baltimore, etc., R. Co. v. Grant*, 98 U. S. 401, 25 U. S. (L. ed.) 232.

18. *Gwin v. U. S.*, 184 U. S. 669, 22 S. Ct. 526, 46 U. S. (L. ed.) 741; *Baltimore, etc., R. Co. v. Grant*, 98 U. S. 398, 25 U. S. (L. ed.) 231; *Dennison v. Alex-*

*ander*, 103 U. S. 522, 26 U. S. (L. ed.) 313; *Baltimore, etc., R. Co. v. Trook*, 100 U. S. 112, 25 U. S. (L. ed.) 571; *Gowen v. Bush*, (C. C. A.) 72 Fed. 299.

19. *Ex p. McCardle*, 7 Wall. 506, 19 U. S. (L. ed.) 264.

20. *McNulty v. Batty*, 10 How. 72, 13 U. S. (L. ed.) 333.

21. *Baltimore, etc., R. Co. v. Grant*, 98 U. S. 402, 25 U. S. (L. ed.) 232. See also *Wilkinson v. Nebraska*, 123 U. S. 286, 8 S. Ct. 120, 31 U. S. (L. ed.) 152. But compare *Strong v. U. S.*, 93 Fed. 257.

22. *Keller v. Ashford*, 133 U. S. 610, 10 S. Ct. 494, 33 U. S. (L. ed.) 667.

23. Act of February 26, 1900, 31 Stat. at L. 33, c. 25, 2 Supp. Rev. Stat. 1119.

24. *U. S. v. Reisinger*, 128 U. S. 401, 9 S. Ct. 99, 32 U. S. (L. ed.) 481; *Anonymous*, 1 Wash. 84, 1 Fed. Cas. No. 475; *U. S. v. Bennett*, 12 Blatchf. 345, 24 Fed. Cas. No. 14,570; *U. S. v. Passmore*, 4 Dall. 372, 1 U. S. (L. ed.) 871; *U. S. v. Van Vliet*, 22 Fed. 643; *U. S. v. Ulrici*, 3 Dill. 532, 28 Fed. Cas. No. 16,594.

25. *U. S. v. Van Vliet*, 23 Fed. 35.

punishment," said Judge Washington, speaking nearly a hundred years ago, "is not only to correct the offender, but to deter others from committing like offenses. But if the legislature has ceased to consider the act in the light of an offense, those purposes are no longer to be answered, and punishment is then unnecessary."<sup>26</sup> If the repealing act contains no provision saving pending prosecutions, such prosecutions can proceed no further.<sup>27</sup> "There can be no legal conviction nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal, the legislative will is expressed that no further proceedings be had under the act repealed."<sup>28</sup> This effect is produced as well when the statute is repealed by implication as when it is expressly repealed;<sup>29</sup> but the power to punish in pending cases may be saved by the express language of the repealing act.<sup>30</sup> Where a criminal action on behalf of the government for the recovery of a penalty, or a proceeding to enforce a forfeiture prescribed in a legislative act, is pending at the time of the repeal of the act, or instituted after the repeal, such repeal is a bar to the action or proceeding, in the absence of a saving clause in the repealing act.<sup>31</sup>

**153. Private actions on penal statutes.**—Actions on statutes in their nature penal cannot be instituted, or, if pending, cannot be further prosecuted after the repeal of such statutes, unless the repealing act, or an existing general provision, saves the right to prosecute pending suits.<sup>32</sup> After the repeal of a usury law, no forfeiture or penalty can be visited upon the party holding the usurious contract.<sup>33</sup> A statutory cause of action and a suit pending thereon for the recovery of money paid on a contract made in violation of law fall with the repeal of the statute creating the remedy.<sup>34</sup> But the doctrine that the unconditional repeal of a statute

<sup>26</sup> Anonymous, 1 Wash. 89, 1 Fed. Cas. No. 475.

<sup>27</sup> U. S. v. Finlay, 1 Abb. 364, 25 Fed. Cas. No. 15,099, holding that an indictment previously found, but not yet tried, should be quashed on motion; Yeaton v. U. S., 5 Cranch 283, 3 U. S. (L. ed.) 102; U. S. v. Hague, 22 Fed. 706; U. S. v. Barr, 4 Sawy. 254, 24 Fed. Cas. No. 14,527; Moore v. U. S., (C. C. A.) 85 Fed. 465.

<sup>28</sup> U. S. v. Tynen, 11 Wall. 95, 20 U. S. (L. ed.) 155.

"Even if the act be repealed after conviction, judgment will be arrested." U. S. v. Van Vliet, 22 Fed. 643, citing Yeaton v. U. S., 5 Cranch 281, 3 U. S. (L. ed.) 101, and U. S. v. Preston, 3 Pet. 57, 7 U. S. (L. ed.) 601. See also U. S. v. Mathews, 23 Fed. 74.

<sup>29</sup> U. S. v. Tynen, 11 Wall. 88, 20 U. S. (L. ed.) 153; U. S. v. Baum, 74 Fed. 45.

<sup>30</sup> U. S. v. Baum, 74 Fed. 43; U. S. v. Barr, 4 Sawy. 254, 24 Fed. Cas. No. 14,527.

<sup>31</sup> U. S. v. Six Fermenting Tubs, 1 Abb. 268, 27 Fed. Cas. No. 16,296, where, however, the proceeding for forfeiture was preserved by a saving clause; U. S. v. Clafin, 97 U. S. 546, 24 U. S. (L. ed.) 1082, affirming 14 Blatchf. 55, 25 Fed. Cas. No. 14,799. See also Yeaton v. U. S., 5 Cranch 283, 3 U. S. (L. ed.) 102; U. S.

v. Keokuk, etc., Bridge Co., 45 Fed. 188; U. S. v. Koch, 40 Fed. 250; The Irresistible, 7 Wheat. 552, 5 U. S. (L. ed.) 521; U. S. v. Ship Helen, 6 Cranch 203, 3 U. S. (L. ed.) 199.

"There are cases which go so far as to say that the unqualified repeal of a law as effectually destroys rights and liabilities dependent upon it, not past and concluded, as if the statute had never existed. It is, however, putting it strongly enough to say, that an unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations and as a remission of penalties and forfeitures dependent upon the destroyed statute." Hertz v. Woodman, 218 U. S. 205, 30 S. Ct. 621, 54 U. S. (L. ed.) 1001.

<sup>32</sup> Norris v. Crocker, 13 How. 429, 14 U. S. (L. ed.) 210; Royston v. Miller, 76 Fed. 54. See also Kemmish v. Ball, 30 Fed. 759.

<sup>33</sup> Ewell v. Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 U. S. (L. ed.) 682, affirming Daggs v. Ewell, 3 Woods 344, 6 Fed. Cas. No. 3,537. See also for an application of the same principle, Rosenplanter v. Provident Sav. L. Assur. Soc., (C. C. A.) 96 Fed. 721. Compare Latrobe v. Hulbert, 6 Fed. 209.

<sup>34</sup> Kimbro v. Colgate, 5 Blatchf. 229, 14 Fed. Cas. No. 7,778.

river, in obedience to an order of the secretary of war;<sup>52</sup> to the repeal of an act making the unlawful entry of imported goods an indictable offense;<sup>53</sup> to the repeal of an act making certain offenses against the revenue laws indictable;<sup>54</sup> and to an act making it an indictable offense to have counterfeit coin in possession knowing the same to be false.<sup>55</sup> The provision in the Sherman Anti-trust Act of 1890, making criminal certain contracts in restraint of trade or commerce "in any territory of the United States,"<sup>56</sup> ceased to be in force in Utah when it was superseded by the constitution of Utah upon the admission of the territory as a state; but prosecutions for offenses against the act theretofore committed were not saved by section 13 of the Revised Statutes, since the language of that section applies only to cases where the statute defining an offense has been *repealed*.<sup>57</sup> This conclusion is, perhaps, in conflict with an earlier case holding that a pending indictment for the crime of adultery in Utah territory, in violation of the Edmunds-Tucker Act of 1887,<sup>58</sup> was saved by section 13, above mentioned, and that it was properly transferred to and prosecuted in the federal District Court after the admission of Utah as a state.<sup>59</sup> A creditor who received property from his debtor while the Bankrupt Act of 1867 was in force under such circumstances that it was recoverable from the creditor by the debtor's assignee in bankruptcy incurred a "liability" which remained enforceable by the assignee after the repeal of the provision creating the liability.<sup>60</sup> Where an act of Congress imposing certain taxes on banks and banking associations was repealed, it was held that section 13 of the Revised Statutes did not authorize the collection of taxes not assessable at the time the repealing act was passed, no "liability" therefor having been incurred at that time.<sup>61</sup> If the repealing act is itself either expressly or impliedly in conflict with section 13, that section is not operative, the courts giving effect to the latest manifestation of the legislative will.<sup>62</sup> Unless the repugnancy

641; *U. S. v. Matthews*, 23 Fed. 74, wherein the statutes imposing the punishment were an act of June 20, 1878, 20 Stat. at L. 243, c. 367, and an act of March 3, 1881, 21 Stat. at L. 408, and the repeal was by an act of July 4, 1884, 23 Stat. at L. 98, c. 181, § 1.

The federal statute, Rev. Stat., § 13, was probably overlooked by the court in *U. S. v. Hague*, 22 Fed. 706.

52. *U. S. v. Keokuk, etc., Bridge Co.*, 45 Fed. 178, an action based on an act of Aug. 11, 1888, c. 860, §§ 9, 10, 25 Stat. at L. 425, which was repealed by an act of Sept. 19, 1890, c. 907, §§ 4, 5, 26 Stat. at L. 426, 1 Supp. Rev. Stat. (2d ed.) 800, 801.

53. *U. S. v. Four Cases Lastings*, 10 Ben. 371, 25 Fed. Cas. No. 15,145, wherein the information was filed under Rev. Stat. U. S., § 2864, which was amended by the substitution of a different provision in an act of Feb. 18, 1875, c. 80, 18 Stat. at L. 319.

54. *U. S. v. Ulrici*, 3 Dill. 533, 28 Fed. Cas. No. 16,594.

55. *U. S. v. Barr*, 4 Sawy. 254, 24 Fed. Cas. No. 14,527, where the indictment was based on Rev. Stat. U. S., § 5457,

which was superseded and repealed by an act of Jan. 16, 1877.

56. Act of July 2, 1890, 26 Stat. at L. 209.

57. *Moore v. U. S.*, (C. C. A.) 85 Fed. 465, holding, however, that a pending prosecution in a territorial court could not be transferred to and prosecuted in the United States District Court for the District of Utah after the admission of Utah as a state, because the case was not one of those within the provisions for transfer in the enabling act.

58. Act of March 3, 1887, 24 Stat. at L. 635.

59. *U. S. v. Baum*, 74 Fed. 43.

60. *Bradbury v. Galloway*, 3 Sawy. 346, 3 Fed. Cas. No. 1,764; *Tinker v. Van Dyke*, 1 Flipp. 521, 23 Fed. Cas. No. 14,058; *Warren v. Garber*, 1 Hughes 365, 29 Fed. Cas. No. 17,196.

61. 17 Op. Atty-Gen. 539 (*Brewster*, 1883).

62. *Hertz v. Woodman*, 218 U. S. 205, 30 S. Ct. 621, 54 U. S. (L. ed.) 1001. See also *Great Northern R. Co. v. U. S.*, 208 U. S. 452, 28 S. Ct. 313, 52 U. S. (L. ed.) 567; 17 Op. Atty-Gen. 544.

is irreconcilable, however, the repealing act will be so construed as to give it conjoint effect with section 13.<sup>63</sup> Of course, the section does not make an act unlawful which was unforbidden by statute at the time of its commission.<sup>64</sup>

### Revival

**156. Common-law rule as to revival by repeal.**—Where an act repealing another is itself repealed, the act originally repealed is restored as it was before its repeal, unless the effect of the last repealing act is by its terms, or by some general statute, limited to the abrogation of the act repealed thereby.<sup>65</sup> If a statute abrogates the common law and is afterwards repealed, the common law revives.<sup>66</sup> But the repeal of a repealing act cannot effect the revival of any previous act which is repugnant to the provisions of the last repealing act.<sup>67</sup> And the doctrine that repeal of a repealing act revives the first act is not applicable where such a conclusion would be opposed to the obvious legislative intention in the enactment of the last repealing act.<sup>68</sup> Thus, it would be impossible to impute to a legislature the intention, in amending parts of a code and repealing other parts which had been declared unconstitutional, to revive earlier laws which might render the amended law liable to the same objections.<sup>69</sup>

**157. Rule under statutory provisions.**—It has been said that an act declaring that the repeal of a repealing act shall not revive the first act repealed, being in derogation of the common law, is to be strictly construed;<sup>70</sup> and that it does not, for example, apply to an act temporarily suspending a former repealing act.<sup>71</sup> In like manner on the repeal of a special act excepting certain cases from the operation of a general statute, the general statute governs the cases formerly covered by the special act.<sup>72</sup> But a statute prohibiting revivals by repeal does apply where an act is repealed by implication arising from repugnancy in a later act which, in turn, is expressly repealed, and in such a case the original act is not revived.<sup>73</sup> A federal statute provides that "whenever an act is repealed which repealed a former act, such former act shall not thereby be revived unless it shall be expressly so provided."<sup>74</sup> The statute not only prevents an express repeal,<sup>75</sup> but also an implied repeal<sup>76</sup> of a repealing statute from operating to revive the original act. But it applies only to express

63. *Great Northern R. Co. v. U. S.*, 208 U. S. 452, 28 S. Ct. 313, 52 U. S. (L. ed.) 567, *affirming* 155 Fed. 945; *U. S. v. Chicago, etc., R. Co.*, 151 Fed. 84; *U. S. v. Standard Oil Co.*, 148 Fed. 719; *Lang v. U. S.*, (C. C. A.) 133 Fed. 201.

64. *U. S. v. Bennett*, 12 Blatchf. 351, 25 Fed. Cas. No. 14,570.

65. *U. S. v. Philbrick*, 120 U. S. 57, 7 S. Ct. 413, 30 U. S. (L. ed.) 559. See also *Ex p. Yerger*, 8 Wall. 106, 19 U. S. (L. ed.) 332.

66. *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281.

67. *Converse v. U. S.*, 21 How. 472, 16 U. S. (L. ed.) 192.

68. *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 353, 18 S. Ct. 862, 43 U. S. (L. ed.) 191; *Kohlsaat v. Murphy*, 96 U. S. 153, 24 U. S. (L. ed.) 844.

69. *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 353, 18 S. Ct. 862, 43 U. S. (L. ed.) 191.

70. *Brown v. Barry*, 3 Dall. 367, 1 U. S. (L. ed.) 638.

71. *Brown v. Barry*, 3 Dall. 367, 1 U. S. (L. ed.) 638.

72. *Pepin Tp. v. Sage*, (C. C. A.) 129 Fed. 657.

73. *Milne v. Huber*, 3 McLean 212, 17 Fed. Cas. No. 9,617.

74. Rev. Stat. U. S., § 12, which is a re-enactment of the Act of Feb. 25, 1871, c. 71, § 3, 16 Stat. at L. 431.

75. *Parsons v. U. S.*, 30 Ct. Cl. 232. See also *Stanley v. Schwalby*, 162 U. S. 281, 16 S. Ct. 754, 40 U. S. (L. ed.) 960.

76. 18 Op. Atty.-Gen. 262 (Garland, 1885). See also *Jacksonville, etc., R. Co. v. U. S.*, 21 Ct. Cl. 173; *U. S. v. One*

or implied repeals, and not to a case where the repealing act is not repealed but expires of its own limitation; in such a case the original act is revived under the common-law rule.<sup>77</sup> Notwithstanding the statute, where an act merely excepts a particular class of cases from the provisions of a previously existing general law which continues in force, the repeal of the excepting statute operates to bring such cases under the general law.<sup>78</sup> Whether the statute operates as a rule of construction of the legislation in organized territories is uncertain,<sup>79</sup> in view of another federal statute which provides that "the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the United States."<sup>80</sup>

**158. Revival by expiration of repealing statute; by express statute.**—Where a repealing act expires by its own limitation, the act repealed is revived.<sup>81</sup> It is not competent for Congress to revive an expired act so as to make it retroact over the intervening time, except in those cases where Congress would have the power to pass an independent retroactive statute.<sup>82</sup> Congress may make the revival of an act depend upon a future event, and direct that event to be made known by proclamation.<sup>83</sup> Where an act is revived by a subsequent act, it is revived precisely in that form and with that effect which it had at the moment when it expired.<sup>84</sup> An

Horse, etc., 7 Ben. 405, 27 Fed. Cas. No. 15,932.

77. 20 Op. Att.-Gen. 466 (Miller, 1892).

78. Jacksonville, etc., R. Co. v. U. S., 21 Ct. Cl. 173, citing *Smith v. Hoyt*, 14 Wis. 252, wherein the same provision in a Wisconsin statute as in the federal statute was under consideration, and the court said: "If a proviso creating an exception to the general terms of a statute should be repealed, courts would be afterwards bound to give effect to it according to those general terms, as though the proviso had never existed. And this could not be said to revive a repealed statute. The rule against this relates to cases of absolute repeal, and not to cases where a statute is left in force, and all that is done in the way of repeal is to except certain cases from its operation."

79. *Munos v. Southern Pac. R. Co.*, (C. C. A.) 51 Fed. 188, where the court found it necessary to decide that "very interesting question."

80. Rev. Stat. U. S., § 1891.

81. An act of Congress was passed April 29, 1878, 20 Stat. at L. 37, giving to the executive certain powers upon the subject of quarantine regulations. Another act was passed June 2, 1879, providing for the repeal of many of the most important provisions of the act of 1878; but the later act was limited in its duration to the period of four years; that is, the act of June 2, 1879, expired by limitation on June 2, 1883. In 1892 it was held by Attorney-General Miller that the act of 1878 was then in force. 20 Op. Att.-Gen. 467, where it was said: "In *Collins v. Smith*, 6 Whart. (Pa.) 294, it was decided, Chief

Justice Gibson delivering the opinion, that where a repealing act expires by its own limitation the act repealed is revived. Accordingly, it was held by the late Mr. Secretary Folger, an eminent jurist, that this particular act of 1878 was revived on June 2, 1883. The same view was taken by my immediate predecessor, Attorney-General Garland, and was acted upon no doubt under his advice by President Cleveland and Secretary Manning in quarantining against smallpox in Canada in 1885. In this view I concur." Compare U. S. v. Twenty-Five Cases Cloths, Crabbe 383, 28 Fed. Cas. No. 16,563, when Judge Hopkinson, charging a jury, said: "On this subject I would suggest that where a statute contains an absolute affirmative repeal of an antecedent statute, or a part of it, the expiration of the subsequent statute, by its own limitation, would not revive the repealed act; but where there is no such express repeal the first statute is taken to be repealed by the implication that it is supplied by the subsequent law, then it would seem that we might well consider the second law was rather a suspension than a repeal of the first; and if the legislature, after the experiment, allowed the second act to expire, it was their intention to go back to the provisions of the first; otherwise there would be no legislation on the subject."

82. *Home Mut. Ins. Co. v. Stockdale*, 12 Fed. Cas. No. 6,662.

83. *Brig Aurora v. U. S.*, 7 Cranch 362, 3 U. S. (L. ed.) 378.

84. *Brig Aurora v. U. S.*, 7 Cranch 362, 3 U. S. (L. ed.) 378.



act reviving an antecedent one revives also all acts explanatory or supplemental to it.<sup>85</sup>

# IX. THE REVISED STATUTES, SUPPLEMENTS, AND STATUTES AT LARGE

## *First Edition of Revised Statutes*

**159. Compilation and enactment.**—The Revised Statutes were compiled under an act of June 27, 1866, providing “for the revision and consolidation of the statute laws of the United States,” the appointment of three commissioners being thereby authorized to accomplish the work. The commissioners were directed to “revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature, which shall be in force at the time such commissioners may make the final report of their doings;” also to arrange the statutes and parts of statutes “under titles, chapters, and sections, or other suitable divisions and subdivisions, with head-notes briefly expressive of the matter contained in such divisions; also with side-notes so drawn as to point to the contents of the text and with references to the original text from which each section is compiled,” etc.<sup>86</sup> By subsequent provisions a committee of the House of Representatives was authorized to accept the draft prepared by the commissioners.<sup>87</sup> It was also enacted that the printed volumes of the Revised Statutes “shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States and of the several states and territories.”<sup>88</sup> The Revised Statutes, commonly called the first edition, were enacted by Congress and approved by the President June 22, 1874.<sup>89</sup>

**160. Scope.**—It is provided in the Revised Statutes, section 5595, that “the foregoing seventy-three titles embrace the statutes of the United States general and permanent in their nature, in force on the 1st day of December, one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of Congress, and the same shall be designated and cited as The Revised Statutes of the United States.” The section is fully annotated elsewhere in this work.<sup>90</sup>

**161. Repeal; acts passed since Dec. 1, 1873.**—The Revised Statutes, section 5596, provide that “all acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: Provided, That the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or

<sup>85.</sup> U. S. v. Woolsey, 28 Fed. Cas. No. 16,763, citing Williams v. Roughedge, 2 Burr. 747, and Rex v. Surry, 2 T. R. 504. See also Hot Springs Cases, 10 Ct. Cl. 289.

<sup>86.</sup> Act of June 27, 1866, 14 Stat. at L. 74, c. 140, reprinted in the body of this work under the title STATUTES.

<sup>87.</sup> Act of March 3, 1873, 17 Stat. at L. 579, c. 241, reprinted in the body of this work under the title STATUTES.

<sup>88.</sup> “Act of June 20, 1874, 18 Stat. at L. 113, c. 333, § 2, reprinted in the body of this work under the title STATUTES.

As to the printed publications, the first edition is a transcript of the original Revised Statutes preserved in the department of state, and is *prima facie* evidence thereof. If, however, the correctness of the printed copy is drawn in question, the original is the only conclusive evidence of the exact text of the law.” *Per* Richardson, J., in Wright v. U. S., 15 Ct. Cl. 87.

<sup>89.</sup> Rev. Stat. U. S. (1st ed.), p. 1092.

<sup>90.</sup> See the title STATUTES in the body of this work.

temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local, or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last-named day no part of which are embraced in said revision, shall not be affected or changed by its enactment." The section is fully annotated elsewhere in this work. The Revised Statutes, section 5601, provide that "the enactment of the said revision is not to affect or repeal any act of Congress passed since the 1st day of December, one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith." The section is fully annotated elsewhere in this work.

**162. Accrued rights; prosecutions and punishments.**—The Revised Statutes, section 5597, provide that "the repeal of the several acts embraced in said revision shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal, but all rights and liabilities under said acts shall continue, and may be enforced in the same manner as if said repeal had not been made; nor shall said repeal in any manner affect the right to any office or change the term or tenure thereof." The section is fully annotated elsewhere in this work. The Revised Statutes, section 5598, provide that "all offenses committed, and all penalties or forfeitures incurred under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made." The section is fully annotated elsewhere in this work.

**163. Acts of limitation.**—The Revised Statutes, section 5599, provide that "all acts of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures, embraced in said revision and covered by said repeal, shall not be affected thereby, but all suits, proceedings, or prosecutions, whether civil or criminal, for causes arising, or acts done or committed prior to said repeal, may be commenced and prosecuted within the same time as if said repeal had not been made." The section is fully annotated elsewhere in this work.

**164. Arrangement and classification.**—The Revised Statutes, section 5600, provide that "the arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference of presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed." The section is fully annotated elsewhere in this work.

### *Construction of Revised Statutes*

**165. Legislative provisions.**—Several sections of the Revised Statutes touching the construction of its provisions have already been quoted.<sup>91</sup> Title I., chapter 1, of the Revised Statutes, entitled "Definitions," and

<sup>91</sup> See §§ 160, 162, 163.

chapter 2 of the same title, entitled "Form of Statutes and Effect of Repeals," also prescribe rules for the construction of the Revised Statutes and of other federal statutes.<sup>92</sup>

**166. Reviser's report and marginal notes.**—The Act of June 27, 1866, initiating the revision of the federal statutes, contained directions to the commissioners of revision "for making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text," and provided that in submitting to Congress the result of their labors the commissioners should "at the same time \* \* \* suggest to Congress such contradictions, omissions, and imperfections as may appear in the original text, with the mode in which they have reconciled, supplied, and amended the same."<sup>93</sup> "Reports of commissioners of revision suggesting changes which have been adopted," said Judge Putnam, "have been constantly accepted in Great Britain and in the various states in this country for aiding the construction of the statute as changed, even when less specific provisions were made for amendments, and for stating the reasons thereof, than are found in the statute" last above mentioned. "There can be no doubt, therefore, that under this statute, whenever the commissioners have stated in their report reasons for changing the text accompanied with amendments which have been followed by their adoption by Congress, it must ordinarily be held that there was an intention to change, and that the report aids in the construction of the new statute."<sup>94</sup>

By the Act of June 27, 1866, the commissioners to revise the statutes were directed to place at the sections of the revision "references to the original text from which each section is compiled."<sup>95</sup> The court may, therefore, consult these marginal references in order to ascertain what statutes were used in the compilation of the sections at which the references are placed.<sup>96</sup> A marginal note defining the scope of a section has been referred to for the purpose of interpreting general words used in that section.<sup>97</sup>

**167. Original statutes.**—In one of the first cases in which the Supreme Court had occasion to consider the propriety of referring to the original acts in construing the provisions of the Revised Statutes, Mr. Justice Miller said: "It must be admitted that in construing any part of the Revised Statutes it is admissible, and often necessary, to recur to its connection in the act of which it was originally a part."<sup>98</sup> The later decisions have established the following propositions: "Where there is a substantial doubt as to the meaning of the language used in the revision, the old law is a valuable source of information," and may be resorted to "when necessary to construe doubtful language used in expressing the meaning of

<sup>92</sup> See the title STATUTES in the body of this work.

<sup>93</sup> Act of June 27, 1866, 14 Stat. at L. 74, c. 140, §§ 2, 3, reprinted in the body of this work under the title STATUTES.

<sup>94</sup> *King v. McLean Asylum*, (C. C. A.) 64 Fed. 345. See also *Barrett v. U. S.*, 189 U. S. 228, 18 S. Ct. 332, 42 U. S. (L. ed.) 723.

<sup>95</sup> Act of June 27, 1866, 14 Stat. at L. 74, c. 140, § 2, reprinted in the body of this work under the title STATUTES.

<sup>96</sup> *U. S. v. Averill*, 130 U. S. 338, 9 S. Ct. 546, 32 U. S. (L. ed.) 978. See also *U. S. v. Fahrenback*, 2 Woods 177.

<sup>97</sup> *Mackey v. Miller*, (C. C. A.) 126 Fed. 161.

<sup>98</sup> *U. S. v. Hirsch*, 100 U. S. 35, 25 U. S. (L. ed.) 540, where a section of the Revised Statutes defining and punishing conspiracies to defraud generally was held not to be restricted by the prior act from which the section was taken to conspiracies arising under the revenue laws. In fact, as was held by the court, the prior

Congress;"<sup>99</sup> and "this is especially so where the act authorizing the revision directs marginal references as is the case" with the Revised Statutes.<sup>1</sup> Resort may be had to the original statute from which a section of the revision was taken "to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law."<sup>2</sup> A provision made in a statute but not included in the Revised Statutes may be resorted to for the purpose of ascertaining the meaning of terms used in other portions of the same statute and embraced in the revision.<sup>3</sup> But "when the meaning is plain the courts cannot look to the statutes which have been revised to see if Congress erred in that revision;"<sup>4</sup> since "the main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes upon the subject. If the language of the revision be plain upon the face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior Statutes at Large, the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject."<sup>5</sup> Discussing the same question, Mr. Justice Brown said: "The whole doctrine applicable to the subject may be summed up

act did not, upon a correct construction thereof, so restrict the provision.

<sup>99.</sup> *Per* Justice Miller, in *U. S. v. Bowen*, 100 U. S. 513, 25 U. S. (L. ed.) 632. To the same effect *Buck Stove, etc., Co. v. Vickers*, 226 U. S. 205, 33 S. Ct. 41, 57 U. S. (L. ed.) 189; *Low Wah Suey v. Backus*, 225 U. S. 460, 32 S. Ct. 731, 56 U. S. (L. ed.) 1165; *Merchants' Nat. Bank v. U. S.*, 214 U. S. 33, 29 S. Ct. 593, 53 U. S. (L. ed.) 900; *Myer v. Western Car Co.*, 102 U. S. 11, 26 U. S. (L. ed.) 61; *Doyle v. Wisconsin*, 94 U. S. 51, 24 U. S. (L. ed.) 64; *The Conqueror*, 166 U. S. 122, 17 S. Ct. 510, 41 U. S. (L. ed.) 943; *Viterbo v. Friedlander*, 120 U. S. 725, 7 S. Ct. 962, 30 U. S. (L. ed.) 782; *Baldwin v. Franks*, 120 U. S. 690, 7 S. Ct. 656, 763, 30 U. S. (L. ed.) 770; *U. S. v. Le Bris*, 121 U. S. 278, 7 S. Ct. 894, 30 U. S. (L. ed.) 946; *Ex p. Crow Dog*, 109 U. S. 556, 3 S. Ct. 396, 27 U. S. (L. ed.) 1030; *Thomas v. U. S.*, (C. C. A.) 156 Fed. 897; *Schmidt v. U. S.*, (C. C. A.) 133 Fed. 257; *U. S. v. Kuenstler*, 74 Fed. 221; *Pentlarge v. Kirby*, 20 Fed. 900; *U. S. v. Minges*, 16 Fed. 657; *U. S. v. Lawrence*, 13 Blatchf. 213, 26 Fed. Cas. No. 15,572.

1. *U. S. v. Lacher*, 134 U. S. 627, 10 S. Ct. 625, 33 U. S. (L. ed.) 1082; *People v. U. S. Bank v. Goodwin*, 162 Fed. 937.

2. *U. S. v. Lacher*, 134 U. S. 626, 10 S. Ct. 625, 33 U. S. (L. ed.) 1082, *citing* *U. S. v. Bowen*, 100 U. S. 513, 25 U. S. (L. ed.) 632; *U. S. v. Hirsch*, 100 U. S. 33, 25 U. S. (L. ed.) 539, and *Myer v. Western Car Co.*, 102 U. S. 11, 26 U. S. (L. ed.) 60. See also *U. S. v. Ryder*, 110 U. S. 729, 4 S. Ct. 196, 28 U. S. (L. ed.) 308; *McDonald v. Hovey*, 110 U. S. 619, 4 S. Ct. 142, 28 U. S. (L. ed.) 269; *Pott v.*

*Arthur*, 104 U. S. 735, 26 U. S. (L. ed.) 909.

3. *Clairmont v. U. S.*, 225 U. S. 551, 32 S. Ct. 787, 56 U. S. (L. ed.) 1201.

4. *Per* Justice Miller, in *U. S. v. Bowen*, 100 U. S. 513, 25 U. S. (L. ed.) 632. To the same point, see *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 39, 15 S. Ct. 508, 39 U. S. (L. ed.) 612; *Barrett v. U. S.*, 169 U. S. 228, 18 S. Ct. 332, 42 U. S. (L. ed.) 727; *Deffebach v. Hawke*, 115 U. S. 402, 6 S. Ct. 95, 29 U. S. (L. ed.) 426; *Vietor v. Arthur*, 104 U. S. 499, 26 U. S. (L. ed.) 634; *Arthur v. Dodge*, 101 U. S. 36, 25 U. S. (L. ed.) 949; *Cambria Iron Co. v. Ashburn*, 118 U. S. 57, 6 S. Ct. 929, 30 U. S. (L. ed.) 61; *Canan v. Pound Mfg. Co.*, 23 Fed. 186; *Berkowitz v. U. S.*, (C. C. A.) 93 Fed. 456; *U. S. v. North American Commercial Co.*, 74 Fed. 145; *Whelan v. New York, etc., R. Co.*, 35 Fed. 853; *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 35 Fed. 138; *U. S. v. Sixty-Five Terra Cotta Vases*, 18 Fed. 508; *U. S. v. One Raft Timber*, 13 Fed. 797; *The Marine City*, 6 Fed. 415; *Reid v. U. S.*, 18 Ct. Cl. 641; *Wright's Case*, 15 Ct. Cl. 80; *Magaw's Case*, 16 Ct. Cl. 3; 20 Op. Atty.-Gen. 637.

In *Deffebach v. Hawke*, 115 U. S. 402, 6 S. Ct. 95, 29 U. S. (L. ed.) 426, the court said: "No reference \* \* \* can be had to the original statutes to control the construction of any section of the Revised Statutes when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given to it in the revision."

5. *Per* Justice Brown, in *Hamilton v. Rathbone*, 175 U. S. 421, 20 S. Ct. 155, 44

in the single observation that prior acts may be resorted to to *solve*, but not to *create* an ambiguity."<sup>6</sup>

**168. Changes in phraseology or arrangement.**—In the construction of the Revised Statutes the presumption is against an intention to change the meaning and construction of a statute re-enacted therein.<sup>7</sup> Mere changes in phraseology arising from a condensation or otherwise are not to be regarded as changing the pre-existing law.<sup>8</sup> Nor is it to be inferred that Congress, by consolidating or transposing earlier provisions, intended to change their effect, unless an intention to do so is clearly expressed.<sup>9</sup> But where the language in the revision cannot possibly bear the same construction as the revised and repealed act, full effect must be given to the new enactment.<sup>10</sup>

*Amendments; Second Edition; Supplements; Statutes at Large*

**169. Omnibus amendments.**—An act was passed February 18, 1875, entitled "An act to correct errors and to supply omissions in the Revised Statutes of the United States,"<sup>11</sup> and on February 27, 1877, another was passed, entitled "An act to perfect the revision of the statutes of the United States, and of the statutes relating to the District of Columbia."<sup>12</sup> By these and other acts several hundred errors and omissions have been corrected, and most of the corrections were incorporated in the text of the second edition of the Revised Statutes.

**170. Second edition.**—The second edition of the Revised Statutes is

U. S. (L. ed.) 222. See also remarks of Chief Justice Drake in *Bowen's Case*, 14 Ct. Cl. 171.

6. *Hamilton v. Rathbone*, 175 U. S. 421, 20 S. Ct. 155, 44 U. S. (L. ed.) 222. See also *Barrett v. U. S.*, 169 U. S. 228, 18 S. Ct. 332, 42 U. S. (L. ed.) 726.

7. *Crenshaw v. U. S.*, 134 U. S. 109, 10 S. Ct. 431, 33 U. S. (L. ed.) 829; *Baldwin v. Franks*, 120 U. S. 690, 7 S. Ct. 656, 763, 30 U. S. (L. ed.) 770; *Pott v. Arthur*, 104 U. S. 736, 26 U. S. (L. ed.) 910; *Schmidt v. U. S.*, (C. C. A.) 133 Fed. 257; *Mackey v. Miller*, (C. C. A.) 126 Fed. 161; *U. S. v. Barnaby*, 51 Fed. 20; *Pentlarge v. Kirby*, 20 Fed. 900; *U. S. v. Tilden*, 10 Ben. 173, 28 Fed. Cas. No. 16,520; *The Bark Brothers*, 10 Ben. 402, 4 Fed. Cas. No. 1,968; *U. S. v. Moore*, 7 Fed. 198, 26 Fed. Cas. No. 15,804. See also *Hall v. Equator Min., etc., Co.*, 11 Fed. Cas. No. 5,931.

8. *Savin, Petitioner*, 131 U. S. 276, 9 S. Ct. 699, 33 U. S. (L. ed.) 153; *In re Dana*, 68 Fed. 898; *Ames v. Hager*, 36 Fed. 129; *Kensett v. Stivers*, 10 Fed. 517; *Louisiana Lottery Cases*, 20 Fed. 628; *U. S. v. Sanche*, 7 Fed. 718; *Wade v. U. S.*, 21 Ct. Cl. 147; 15 Op. Atty-Gen. 495. See also *Anderson v. Pacific, etc., Co.*, 225 U. S. 187, 32 S. Ct. 626, 56 U. S. (L. ed.) 1047; *Union Pac. R. Co. v. U. S.*, 104 U. S. 666, 26 U. S. (L. ed.) 885; *Logan v. U. S.*, 144 U. S. 302, 12 S. Ct. 617, 36 U. S. (L. ed.) 442.

9. *Logan v. U. S.*, 144 U. S. 302, 12 S. Ct. 617, 36 U. S. (L. ed.) 442; *Potter*

*v. Chicago Third Nat. Bank*, 102 U. S. 163, 26 U. S. (L. ed.) 111; *McDonald v. Hovey*, 110 U. S. 619, 4 S. Ct. 142, 28 U. S. (L. ed.) 269; *U. S. v. Ryder*, 110 U. S. 740, 4 S. Ct. 196, 28 U. S. (L. ed.) 312; *U. S. v. Averill*, 130 U. S. 339, 9 S. Ct. 546, 32 U. S. (L. ed.) 979. See also 15 Op. Atty-Gen. (Devens, 1877) 370; 22 Op. Atty-Gen. 40 (Griggs, 1898); *U. S. v. One Hundred and Thirty-Two Packages*, 65 Fed. 983.

"The change of arrangement, which placed portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Anderson v. Pacific, etc., Co.*, 225 U. S. 187, 32 S. Ct. 626, 56 U. S. (L. ed.) 1047.

10. *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 36, 23 U. S. (L. ed.) 199; *King v. McLean Asylum*, (C. C. A.) 64 Fed. 331; *The Bark Brothers*, 10 Ben. 402, 4 Fed. Cas. No. 1,968; *Gillet v. Pierce*, Brown Adm. 557; *Dodge v. Arthur*, 7 Fed. Cas. No. 3,950; *U. S. v. York*, 131 Fed. 323; *The Marine City*, 6 Fed. 414. See also *U. S. v. Bowen*, 100 U. S. 508, 25 U. S. (L. ed.) 631; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54, 6 S. Ct. 929, 30 U. S. (L. ed.) 60.

11. 18 Stat. at L. 316, c. 80.

12. 19 Stat. at L. 240, c. 69.

neither a new revision nor a new enactment, but is only a new publication. It is a compilation containing a copy of the original Revised Statutes, like the first edition, with certain specific alterations and amendments made by subsequent enactments of the Forty-third and Forty-fourth Congresses, incorporated according to the judgment and discretion of the editor, under authority of the law providing for his appointment.<sup>13</sup> The editor had no power to change the substance or alter the language of the revision, nor to correct any errors or supply any omissions. The whole text of the Revised Statutes, as published in the first edition, is preserved; but where by the specific amendments made by the two Congresses mentioned, sections or parts of sections were repealed, those repealed provisions are printed in italics and included in brackets; and where in like manner, by legislative enactment, words were required to be added or inserted, they are incorporated in their proper places in ordinary Roman letters, and are also inclosed in brackets. The act for the preparation and publication of the second or new edition of the Revised Statutes provided that "the printed volume shall be legal evidence of the laws therein contained in all the courts of the United States and of the several states and territories, but shall not preclude reference to nor control, in case of any discrepancy, the effect of any original act as passed by Congress since the first day of December, eighteen hundred and seventy-three."<sup>14</sup>

171. "**Supplements.**"—By a joint resolution of June 7, 1880, and by divers subsequent acts,<sup>15</sup> these supplements "shall be taken to be *prima facie* evidence of the laws therein contained, but shall not change nor alter any existing law nor preclude reference to nor control, in case of any discrepancy, the effect of any original acts passed by Congress."<sup>16</sup>

172. **Statutes at large.**—Provision is made by act of Congress for the publication of pamphlet copies of the statutes of each session of Congress, and of bound volumes of the statutes enacted by each Congress, which shall "contain all laws, joint and concurrent resolutions passed by Congress, and also all conventions, treaties, proclamations, and agreements;" and "the pamphlet copies of the statutes and the bound copies of the acts of each Congress shall be legal evidence of the laws and treaties therein contained in all the courts of the United States and of the several states therein."<sup>17</sup>

13. Act of March 2, 1877, 19 Stat. at L. 268, c. 82, reprinted in the body of this work under the title STATUTES.

14. Act of March 2, 1877, 19 Stat. at L. 268, c. 82, as amended by Act of March 9, 1878, 20 Stat. at L. 27, c. 26, reprinted in the body of this work under the title STATUTES.

15. Congress has provided for the compilation and publication of supplements to the Revised Statutes, "embracing the statutes general and permanent in their nature passed after the Revised Statutes, with the references connecting provisions on the same subject, explanatory notes, citations of judicial decisions, and a general index," etc. Res. of June 7, 1880, No. 44, 21 Stat. at L. 308; Act of April 9, 1890, 26 Stat. at L. 50, c. 73; Act of Feb. 27, 1893, 27 Stat. at L. 477, c. 167; Act of Jan. 12, 1895, 28 Stat. at L. 601, c. 23, § 73, and other acts, all of which

are reprinted in the body of this work under the title STATUTES.

16. Act of April 9, 1890, 26 Stat. at L. 50, c. 73, § 3, relating to the first supplement, which comprises the general and permanent statutes enacted during the years 1874-1891. In respect of the subsequent supplements, "which shall only be published at the expiration of a Congress, and in one volume" (Act of June 4, 1897, 30 Stat. at L. 11, c. 2, § 1), it is provided that they "shall be legal evidence of the laws and treaties therein contained in all courts of the United States and of the several states therein." Act of Jan. 12, 1895, 28 Stat. at L. 601, c. 23, § 73. The foregoing acts are reprinted in the body of this work under the title STATUTES.

17. Act of Jan. 12, 1895, 28 Stat. at L. 601, c. 23, § 73.

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# FEDERAL STATUTES ANNOTATED

## SECOND EDITION

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**I. DEPARTMENT OF AGRICULTURE.**

**Sec. 520.** [Establishment of department of agriculture.] There shall be at the seat of Government a Department of Agriculture, the general design and duties of which shall be to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, in the most general and comprehensive sense of that word, and to procure, propagate, and distribute among the people new and valuable seeds and plants. [R. S.]

Act of May 15, 1862, 12 Stat. L. 387, known as the "Department of Agriculture Act."

**Sec. 521. [Commissioner of agriculture.]** The Department of Agriculture shall be under the charge of a Commissioner of Agriculture, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of four thousand dollars a year. [R. S.]

This section, though not repealed, is superseded by the Act of Feb. 9, 1889 (*infra*, p. 200), which makes the Department of Agriculture one of the executive departments, under the control of a secretary.

**Sec. 522. [Clerks and employees.]** There shall be in the Department of Agriculture:

One chief clerk, at a salary of two thousand dollars a year.

One chemist, at a salary of two thousand dollars a year.

One assistant chemist, at a salary of one thousand six hundred dollars a year.

One entomologist, at a salary of two thousand dollars a year.

One microscopist, at a salary of one thousand eight hundred dollars a year.

One botanist, at a salary of one thousand eight hundred dollars a year.

One statistician, at a salary of two thousand dollars a year.

One superintendent of experimental gardens and grounds, at a salary of two thousand dollars a year.

One assistant superintendent of experimental gardens and grounds, at a salary of one thousand two hundred dollars a year.

One disbursing clerk, at a salary of one thousand eight hundred dollars a year.

One superintendent of the seed-room, at a salary of one thousand eight hundred dollars a year.

One assistant superintendent of the seed-room, at a salary of one thousand two hundred dollars a year.

One librarian, at a salary of one thousand eight hundred dollars a year.

One engineer, at a salary of one thousand four hundred dollars a year.

One superintendent of the folding-room, at a salary of one thousand two hundred dollars a year.

Two attendants in the museum, at a salary of one thousand dollars a year each.

One carpenter, at a salary of nine hundred and sixty dollars a year. [R. S.]

Although not repealed this section has long been superseded by the annual appropriation acts which vary from year to year in making provision for clerks and employees.

Power to appoint and remove departmental clerks, messengers, and laborers cannot be delegated, but must be exercised by the secretary or acting secretary. 21 Op. Atty.-Gen. 355.

As to the right of the Secretary of Agriculture to promote or to appoint persons transferred to positions at higher rates of pay, see 20 Op. Atty.-Gen. 398.

**Sec. 523. [Officers and employees.]** The Commissioner of Agriculture shall appoint a chief clerk, with a salary of two thousand dollars a year, who in all cases during the necessary absence of the Commissioner, or when the office of Commissioner shall become vacant, shall perform the duties of Commissioner, and he shall appoint such other employes as Congress may from time to time provide, with salaries corresponding to the salaries of

similar officers in other Departments of the Government; and he shall, as Congress may from time to time provide, employ other persons, for such time as their services may be needed, including chemists, botanists, entomologists, and other persons skilled in the natural sciences pertaining to agriculture. [R. S.]

Commissioner superseded by secretary, see note under R. S. sec. 521, *supra*. See also note under R. S. sec. 522, *supra*.

**Sec. 524. [Bonds of commissioner and chief clerk.]** The Commissioner, and the chief clerk, before entering upon their duties, shall severally give bonds to the Treasurer of the United States, the former in the sum of ten thousand dollars, and the latter in the sum of five thousand dollars, conditioned to render a true and faithful account to the Treasurer quarterly of all moneys which shall be by them received by virtue of their office, with sureties to be approved by the Solicitor of the Treasury. Such bonds shall be filed in the office of the First Comptroller of the Treasury, to be by him put in suit upon any breach of the conditions thereof. [R. S.]

Commissioner superseded by secretary, see note under R. S. sec. 521, *supra*.  
By the Act of March 3, 1887, ch. 351, 24 Stat. L. 499, the amount of the commissioner's bond was raised to twenty-five thousand dollars.

**Sec. 525. [Custody of property, records, etc.]** The Commissioner of Agriculture shall have charge, in the building and premises appropriated to the Department, of the library, furniture, fixtures, records, and other property appertaining to it, or hereafter acquired for use in its business. [R. S.]

Commissioner superseded by secretary, see Act of Feb. 9, 1889, ch. 122, *infra*, p. 200.

**Sec. 526. [Duties of commissioner.]** The Commissioner of Agriculture shall procure and preserve all information concerning agriculture which he can obtain by means of books and correspondence, and by practical and scientific experiments, accurate records of which experiments shall be kept in his Office, by the collection of statistics, and by any other appropriate means within his power; he shall collect new and valuable seeds and plants; shall test, by cultivation, the value of such of them as may require such tests; shall propagate such as may be worthy of propagation; and shall distribute them among agriculturists. [R. S.]

Commissioner superseded by secretary, see Act of Feb. 9, 1889, ch. 122, *infra*, p. 200.

**Sec. 528. [Annual and special reports.]** The Commissioner of Agriculture shall annually make a general report in writing of his acts to the President and to Congress, in which he may recommend the publication of papers forming parts of or accompanying his report, which shall also contain an account of all moneys received and expended by him. He shall also make special reports on particular subjects whenever required to do so by the President or either House of Congress, or when he shall think the subject in his charge requires it. [R. S.]

Commissioner superseded by secretary, see Act of Feb. 9, 1889, ch. 122, *infra*, p. 200.

**Sec. 529. [Annual report of expenditures.]** The Commissioner of Agriculture shall, on or before the fifteenth day of December in each year,

make a report in detail to Congress of all moneys expended by him or under his direction. [R. S.]

See the note to the preceding R. S. sec. 528.

**An act to enlarge the powers and duties of the Department of Agriculture and to create an Executive Department to be known as the Department of Agriculture.**

[Act of Feb. 9, 1889, ch. 122, 25 Stat. L. 659.]

[SEC. 1.] [Department of agriculture to be an executive department.] That the Department of Agriculture, shall be an Executive Department, under the supervision and control of a Secretary of Agriculture, who shall be appointed by the President, by and with the advice and consent of the Senate; and section one hundred and fifty-eight of the Revised Statutes is hereby amended to include such Department, and the provisions of title four of the Revised Statutes, including all amendments thereto, are hereby made applicable to said Department. [25 Stat. L. 659.]

Section 158, R. S., above mentioned, gives a list of the executive departments. Title four, R. S., contains "provisions applicable to all the executive departments." See EXECUTIVE DEPARTMENTS.

The Agricultural Department was formerly under control of a Commissioner of Agriculture, See R. S. sec. 520, *supra*, p. 197.

The provisions of this act supersede those of R. S. sec. 3677, which provided that "The Commissioner of Agriculture shall direct and superintend the expenditure of all money appropriated to the Department and render accounts thereof. (Act of May 15, 1862, ch. 72, 12 Stat. L. 388.)

A provision of the Agricultural Appropriation Act of June 16, 1880, ch. 252, § 2, 21 Stat. L. 292, and repeated in the similar Act of March 3, 1881, ch. 129, § 2, 21 Stat. L. 385, requiring the Commissioner of Agriculture "to account and report to the proper accounting officers of the Treasury in the same manner and at the same times as the heads of executive departments of the government are now required by law to account and report," was also superseded by this act making the Department of Agriculture an executive department.

"Before the Act of May 15, 1862, ch. 72, to establish a department of agriculture, became a law, the annual appropriations for agricultural purposes were expended under the direction of the commissioner

of patents. In fact, until the year 1854, these appropriations were directed to be drawn from the patent fund, which was in charge of that officer." (1862) 10 Op. Atty.-Gen. 344.

SEC. 2. [Assistant secretary.] That there shall be in said Department an Assistant Secretary of Agriculture, to be appointed by the President, by and with the advice and consent of the Senate, who shall perform such duties as may be required by law or prescribed by the Secretary. [25 Stat. L. 659.]

SEC. 3. [Salaries.] That the Secretary of Agriculture shall receive the same salary as is paid to the Secretary of each of the Executive Departments, and the salary of the Assistant Secretary of Agriculture shall be the same as that now paid to the First Assistant Secretary of the Department of the Interior. [25 Stat. L. 659.]

The Legislative, Executive and Judicial Appropriation Act for the fiscal year ending June 30, 1916, carried twelve thousand dollars as salary for the Secretary of Agriculture and five thousand dollars as salary for the Assistant Secretary. 38 Stat. L. 1086.

SEC. 4. [Laws of existing department to apply.] That all laws and parts of laws relating to the Department of Agriculture now in existence,



as far as the same are applicable and not in conflict with this act, and only so far, are continued in full force and effect. [25 Stat. L. 659.]

[Sec. 1.] [Secretary to perform all duties of commissioner.] \* \* \*

The authority granted by the Commissioner of Agriculture by the act of May twenty-nine, eighteen hundred and eighty-four, establishing the Bureau of Animal Industry, and by the provisions of the appropriation act for the Agricultural Department, approved July eighteenth, eighteen hundred and eighty-eight, relating to said Bureau, is hereby vested in the Secretary of Agriculture; And the said Secretary is hereby authorized and directed to perform all the duties named in said acts and all other acts of Congress in force on February eighth, eighteen hundred and eighty-nine, to be performed by the Commissioner of Agriculture. [26 Stat. L. 288.]

This is from the Agricultural Appropriation Act of July 14, 1890, ch. 707.

The authority granted by the Act of July 18, 1888, ch. 677, 25 Stat. L. 333, is limited to the use of the sum therein appropriated. It is substantially repeated, but amplified though not made permanent, by the Appropriation Acts of 1889, 25 Stat. L. 839; 1890, 26 Stat. L. 287, and 1891, 26 Stat. L. 1049.

The provisions of the Act of July 18, 1888, are as follows: "Salaries and expenses Bureau of Animal Industry: For carrying out the provisions of the act of May twenty-ninth, eighteen hundred and eighty-four, establishing the Bureau of Animal Industry, five hundred thousand dollars; and the Commissioner of Agriculture is hereby authorized to use any part of this sum he may deem necessary or expedient, and in such manner as he may think best, to prevent the spread of pleuro-pneumonia, and for this purpose to employ as many persons as he may deem necessary, and to expend any part of this sum in the purchase and destruction of diseased or exposed animals and the quarantine of the same whenever in his judgment it is essential to prevent the spread of pleuro-pneumonia from one State into another." [25 Stat. L. 333.]

As to the Bureau of Animal Industry, see ANIMALS.

[Sec. 1.] [Existing statutes applicable to reorganized bureaus.] \* \* \*

That all existing statutes relating to the Division of Soils, reorganized into the Bureau of Soils; the Division of Forestry, reorganized into the Bureau of Forestry; the Division of Chemistry, reorganized into the Bureau of Chemistry; and the Division of Botany, the Division of Pomology, the Division of Vegetable Physiology and Pathology, the Division of Agrostology and Experimental Gardens and Grounds, reorganized into the Bureau of Plant Industry, not otherwise repealed, shall remain in effect as applying to the respective bureaus into which the divisions named have been reorganized: [32 Stat. L. 303.]

This is from the Agricultural Appropriation Act of June 3, 1902, ch. 985.

[Sec. 1.] [Department seal to be procured.] \* \* \*

The Secretary of Agriculture is hereby authorized and directed to procure a proper seal, with such suitable inscriptions and devices as he may approve, to be known as the official seal of the Department of Agriculture, and to be kept and used to verify official documents, under such rules and regulations as he may prescribe. [28 Stat. L. 272.]

This is from the Agricultural Appropriation Act of Aug. 8, 1894, ch. 238.

[SEC. 1.] **[Entomological work to be under control of agricultural department.]** \* \* \* For the completion of the work of the United States Entomological Commission under the Department of the Interior in the special investigation of the Rocky Mountain locust or grasshopper and the cottonworm, \* \* \* *Provided*, That after the close of the next fiscal year all work of the character herein provided for shall be exclusively under the control of the Agricultural Department, and all operations under the Interior Department shall be fully and finally closed before the thirtieth day of June, eighteen hundred and eighty-one. [21 Stat. L. 276.]

This is from the Agricultural Appropriation Act of June 16, 1880, ch. 235.

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[SEC. 1.] **[Legal work — solicitor.]** \* \* \* And hereafter the legal work of the Department of Agriculture shall be performed under the supervision and direction of the solicitor: [36 Stat. L. 416.]

This is from the Agricultural Appropriation Act of May 26, 1910, ch. 256.

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[SEC. 1.] **[Deputy disbursing clerk — authority, bond, etc.]** \* \* \* The deputy disbursing clerk herein provided for shall hereafter have authority to sign checks in the name of the disbursing clerk; he shall give bond to the United States in such sum as the Secretary of the Treasury may require, and when so acting for the disbursing clerk shall be subject to all the liabilities and penalties prescribed by law for the official misconduct in like cases of the disbursing clerk for whom he acts, and the official bond of the disbursing clerk executed shall also be made to cover and apply to the acts of the deputy disbursing clerk. [36 Stat. L. 1259.]

This is from the Agricultural Appropriation Act of March 4, 1911, ch. 238.  
As to the duties and liabilities of disbursing officers, see PUBLIC MONIES.

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[SEC. 1.] **[Classified laborers — promotion without examination.]** \* \* \* That all classified laborers whose positions were transferred from the lump funds to the statutory rolls by the Act making appropriations for the Department of Agriculture approved March third, nineteen hundred and five, and who were by the last clause of that Act placed in the classified service without further examination in the grades and at the rates of compensation provided in said Act, are hereby made eligible for promotion without further examination. [34 Stat. L. 695.]

This is from the Agricultural Appropriation Act of June 30, 1906, ch. 3913. The provision of the Act of March 3, 1905, referred to is as follows:

"All classified laborers whose positions are transferred from the lump funds to the statutory rolls are hereby placed in the classified service without further examination in the grades and at the rates of compensation herein provided." [33 Stat. L. 883.]

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[SEC. 1.] **[Watchmen given police powers.]** \* \* \* And hereafter all duly and lawfully constituted and appointed watchmen of the Department of Agriculture stationed in and upon the buildings and premises of said department in the city of Washington, District of Columbia, shall have and perform the same powers and duties, while on duty in and about said premises, as the Metropolitan police of the District of Columbia. [35 Stat. L. 1057.]

This is from the Agricultural Appropriation Act of March 4, 1909, ch. 1039.

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[SEC. 1.] **[Secretary to make appointments, changes in salaries.]** \* \* \* And hereafter the Secretary of Agriculture is hereby authorized to make such appointments, promotions, and changes in salaries, to be paid out of the lump funds of the several bureaus, divisions, and offices of the Department as may be for the best interests of the service. [34 Stat. L. 1280.]

This is from the Agricultural Appropriation Act of March 4, 1907, ch. 2907. Substantially the same provision occurs in earlier appropriation acts. The addition of the word "hereafter" makes this provision permanent.

A further provision, whereby the Secretary of Agriculture was "authorized and directed to submit to Congress each year a statement covering all appointments, promotions, or other changes made in the salaries paid from lump funds, giving in each case the title, salary, and amount of such change or changes, together with reasons therefor," was repealed by the Act of March 4, 1911, ch. 238, 36 Stat. L. 1284.

Appointment of experts to aid in enforcement of Food and Drugs Act.—Under this act the Secretary of Agriculture may appoint consulting scientific experts to aid in the enforcement of the Food and Drugs Act. (1909) 27 Op. Atty-Gen. 300.

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[SEC. 1.] **[Details of department employees.]** \* \* \* That hereafter employees of the Division of Accounts and Disbursements may be detailed by the Secretary of Agriculture for accounting and disbursing work in any of the bureaus and offices of the department for duty in or out of the city of Washington, and employees of the bureaus and offices of the department may also be detailed to the Division of Accounts and Disbursements for duty in or out of the city of Washington. traveling expenses of employees so detailed to be paid from the appropriation of the bureau or office in connection with which such travel is performed. [37 Stat. L. 294.]

This is from the Agricultural Appropriation Act of Aug. 10, 1912, ch. 284.

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[SEC. 1.] **[Details to and from other bureaus.]** \* \* \* That hereafter employees of the Library may be temporarily detailed by the Secretary of Agriculture for library service in the bureaus and offices of the department, and employees of the bureaus and offices of the department engaged in library work may also be temporarily detailed to the Library. [36 Stat. L. 1261.]

This is from the Agricultural Appropriation Act of March 4, 1911, ch. 238.

[SEC. 1.] [Details from or to office of secretary.] \* \* \* That details may be made from or to the office of the Secretary when necessary and the services of the person whom it is proposed to detail are not required in that office. [34 Stat. L. 1280.]

This is from the Agricultural Appropriation Act of March 4, 1907, ch. 2907. A similar provision occurs in earlier Appropriation Acts.

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[SEC. 1.] [Details of law clerks.] \* \* \* That hereafter the law clerks may be detailed by the Secretary of Agriculture for service in or out of Washington; [36 Stat. L. 1236].

This is from the Agricultural Appropriation Act of March 4, 1911, ch. 238. A similar provision except for the word "hereafter" occurred in the Appropriation Act of the preceding year.

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[SEC. 1.] [Rate of compensation of officers or employees.] \* \* \* And hereafter every officer or employee of the Department of Agriculture whose rate of compensation is specified herein shall receive compensation at the rate so specified. [37 Stat. L. 854.]

This is from the Agricultural Appropriation Act of March 4, 1913, ch. 145.

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[SEC. 1.] [Salaries to be paid from roll of bureau.] \* \* \* And the Secretary of Agriculture is hereby authorized and directed to pay the salary of each employee from the roll of the bureau, independent division, or office in which the employee is working, and no other: [34 Stat. L. 1280.]

This is from the Agricultural Appropriation Act of March 4, 1907, ch. 2907.

The word "employees" as used in this section does not embrace persons whose services have been contracted for in connection with a particular case in court and whose employment has no degree of permanence. So an expert witness for the government, in cases arising under the Food and Drugs Act, is not an employee as the term is used in this section. (1909) 28 Op. Atty.-Gen. 75.

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SEC. 2. [Salaries to persons receiving other compensation.] That no part of the money herein or hereafter appropriated for the Department of Agriculture shall be paid to any person, as additional salary or compensation, receiving at the same time other compensation as an officer or employee of the Government; \* \* \* [23 Stat. L. 356.]

This is from the Agricultural Appropriation Act of March 3, 1885, ch. 338.

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[SEC. 1.] [Lump-sum appropriations — payment for scientific, etc., work — pay of officers and employees established.] \* \* \* That hereafter section seven of the Act approved August twenty-sixth, nineteen hundred and twelve (Thirty-seventh Statutes, page six hundred and twenty-six), and any amendments thereto, shall not apply to the payment, out of moneys appropriated or which may be hereafter appropriated in lump sum for the Department of Agriculture, for personal services of employees engaged in strictly scientific or technical work: *Provided*, That nothing contained herein shall be construed to authorize the transfer of any person employed at a specific salary and the payment of compensation from lump-sum appropriations at a rate greater than said specific salary. [37 Stat. L. 854.]

This provision is from the Agricultural Appropriation Act of March 4, 1913, ch. 145. The Act of August 26, 1912, referred to places restrictions on salaries paid from money appropriated in lump sum.

[SEC. 1.] [Scientific investigators, etc.— salaries.] \* \* \* That hereafter the maximum salary of any scientific investigator, or other employee engaged in scientific work and paid from the general appropriations of the Department of Agriculture, shall not exceed at the rate of \$4,500 per annum. [38 Stat. L. 441.]

This is from the Agricultural Appropriation Act of June 30, 1914, ch. 131. Similar provisions, without the word "hereafter" and fixing the salaries of such employees at a less amount, were contained in earlier appropriation acts.

"Employee" as here used does not include expert witnesses for the government in cases arising under the Food and Drugs Act. (1909) 28 Op. Atty.-Gen. 75, wherein Attorney-General Wickersham said: "In Louisville, etc., R. R. Co. v. Wilson (138 U. S. 501, 505), it was insisted on behalf of the defendant in error that he was entitled to have paid him a certain sum as attorney's fees under an order of court directing the receiver to pay 'salaries of officers and wages of employees' that had accrued within a specified time. The court held that Wilson did not fall within the meaning of the term 'employee' as used in said order, and in passing upon this question used the following language: 'The terms "officers" and "employees" both alike refer to those in regular and continual service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an officer

nor an employee. They imply continuity of service, and exclude those employed for a special and single transaction. An attorney of an individual, retained for a single suit, is not his employee. It is true, he has engaged to render services; but his engagement is rather that of a contractor than that of an employee. The services of appellee, therefore, did not come within the order appointing the receiver.' See also *Vane v. Newcombe* (132 U. S. 220, 237); *Frick Company v. Norfolk & O. V. R. Co.* (86 Fed. 725, 738). I think the language of the court in Louisville, etc., R. R. Co. v. Wilson is equally applicable to the meaning of the word 'employee' as used in the statutes above cited, and that it does not embrace an individual whose services have been contracted for in connection with a particular case in court, and with reference to whose employment there is no degree of permanency."

[SEC. 1.] [Assignments of pay allowed employees.] \* \* \* And hereafter the Secretary of Agriculture is authorized to permit employees of the Department of Agriculture to make assignments of their pay, under

such regulations as he may prescribe, during such time as they may be in the employ of the said department. [35 Stat. L. 1057.]

This is from the Agricultural Appropriation Act of March 4, 1909, ch. 301.

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[SEC. 1.] **[Leave of absence to employees.]** \* \* \* The employees of the Department of Agriculture, outside of the city of Washington, may hereafter, in the discretion of the Secretary of Agriculture, be granted leave of absence not to exceed fifteen days in any one year, which leave may in exceptional and meritorious cases where such an employee is ill, be extended, in the discretion of the Secretary of Agriculture, not to exceed fifteen days additional in any one year. [35 Stat. L. 267.]

This is from the Agricultural Appropriation Act of May 23, 1908, ch. 192. Similar provisions having reference to employees of particular bureaus were contained in appropriation acts of previous years.

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[SEC. 1.] **[Leave of absence to employees in Alaska, Hawaii, Porto Rico, and Guam.]** \* \* \* Hereafter employees of the Department of Agriculture assigned to permanent duty in Alaska, Hawaii, Porto Rico, and Guam may, in the discretion of the Secretary of Agriculture, without additional expense to the Government, be granted leave of absence not to exceed thirty days in any one year, which leave may, in exceptional and meritorious cases where an employee is ill, be extended, in the discretion of the Secretary of Agriculture, not to exceed thirty days additional in any one year. [38 Stat. L. 441.]

This is from the Agricultural Appropriation Act of June 30, 1914, ch. 131.

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[SEC. 1.] **[Purchase of mileage books, etc.]** \* \* \* And hereafter the Secretary of Agriculture is authorized to purchase from appropriations made for traveling expenses for employees of the Department of Agriculture, mileage and mileage books, at commercial rates, in the manner in which such mileage or mileage books are usually purchased. [34 Stat. L. 1281.]

This is from the Agricultural Appropriation Act of March 4, 1907, ch. 2907.

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[SEC. 1.] **[Employees allowed expense of transferring property when stations changed.]** \* \* \* That hereafter officers and employees of the Department of Agriculture transferred from one official station to another for permanent duty, when authorized by the Secretary of Agriculture, may be allowed actual traveling expenses, including charges for the transfer of their effects and personal property used in official work, under such rules

and regulations as may be prescribed by the Secretary of Agriculture.  
[36 Stat. L. 1265.]

This is from the Agricultural Appropriation Act of March 4, 1911, ch. 238.

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[SEC. 1.] [Allowance to officials and employees for travel expenses.]  
\* \* \* That hereafter, when officials and employees of the Department of Agriculture are traveling on official business in the United States, they may be allowed necessary railroad and steamboat fares, sleeping berth, and stateroom on steamboats, livery hire and stage fare, and other means of conveyance between points not accessible by railroad, but in lieu of subsistence and all other traveling expenses they may receive a per diem allowance, to be fixed by the Secretary in each case, in addition to their regular salaries, subject to such rules and regulations as the Secretary of Agriculture may prescribe.

That hereafter officials and employees of the Department of Agriculture may, when authorized by the Secretary of Agriculture, receive reimbursement for moneys expended for street-car fares at their official headquarters when expended in the transaction of official business. [37 Stat. L. 300.]

This is from the Agricultural Appropriation Act of Aug. 10, 1912, ch. 284.

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[SEC. 1.] [Advances of public money to agents, etc.—bonds.] That advances of public money from the appropriations for the Department of Agriculture shall be made by the Secretary of Agriculture only to such chiefs of field parties, agricultural explorers, special agents, and others as shall have given bonds in such sums as the Secretary of Agriculture shall direct. [32 Stat. L. 303.]

This is from the Agricultural Appropriation Act of June 3, 1902, ch. 985.

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[SEC. 1.] [Purchases for bureaus, etc.—exchange of typewriters, etc.]  
\* \* \* That hereafter the Secretary of Agriculture may purchase stationery, supplies, furniture, and miscellaneous materials from this appropriation and transfer the same at actual cost to the various bureaus, divisions, and offices of the Department of Agriculture in the city of Washington, reimbursement therefor to be made to this appropriation by said bureaus, divisions, and offices from their lump-fund appropriations by transfer settlements through the Treasury Department: *Provided further*, That the Secretary of Agriculture may hereafter exchange typewriters and computing, addressing, and duplicating machines purchased from any lump-fund appropriation of the Department of Agriculture. [37 Stat. L. 296.]

This is from the Agricultural Appropriation Act of Aug. 10, 1912, ch. 284.

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[SEC. 1.] [Exchange of apparatus and equipment.] \* \* \* The Secretary of Agriculture may hereafter exchange general scientific apparatus and laboratory equipment purchased from any appropriation of the Department of Agriculture. [38 Stat. L. 441.]

This is from the Agricultural Appropriation Act of June 30, 1914, ch. 131.

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[SEC. 1.] [Books and periodicals of library — exchange authorized.] \* \* \* That hereafter the Secretary of Agriculture may exchange books and periodicals of the library not needed for permanent use for other books and periodicals. [38 Stat. L. 1107.]

This is from the Appropriation Act of March 4, 1915, ch. 144.

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[SEC. 1.] [Sale of photographic prints, condemned property, etc.] \* \* \* Hereafter he [the Secretary of Agriculture] may dispose of photographic prints (including bromide enlargements), lantern slides, transparencies, blueprints, and forest maps at cost and ten per centum additional, and condemned property or materials under his charge in the same manner as provided by law for other bureaus; [34 Stat. L. 1269.]

[Sale of prints and lantern slides.] \* \* \* And hereafter the Secretary of Agriculture is hereby authorized to furnish, upon application, prints and lantern slides from negatives in the possession of the Department and to charge for the same a price to cover the cost of preparation, such price to be determined and established by the Secretary of Agriculture, and the money received from such sales to be deposited in the Treasury of the United States. [34 Stat. L. 1281.]

The above two paragraphs are from the Agricultural Appropriation Act of March 4, 1907, ch. 2907. And with the exception of the addition in the second paragraph of the word "hereafter," which makes it permanent, the provision is found in the Agricultural Appropriation Act of June 30, 1906, 34 Stat. L. 696.

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[SEC. 1.] [Sale of pathological and zoölogical specimens.] \* \* \* And hereafter the Secretary of Agriculture is authorized to prepare and sell at cost such pathological and zoölogical specimens as he may deem of scientific or educational value to scientists or others engaged in the work of hygiene and sanitation: *Provided*, That all moneys received from the sale of such specimens shall be deposited in the Treasury as miscellaneous receipts. [37 Stat. L. 833.]

This is from the Agricultural Appropriation Act of March 4, 1913, ch. 145.

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[SEC. 1.] [Sales of waste paper, etc.] \* \* \* And hereafter the Secretary of Agriculture is authorized to sell as waste waste paper, or



otherwise to dispose of the accumulation of Department files which do not constitute permanent records, and all other documents and publications which have become obsolete or worthless. [34 Stat. L. 1281.]

This is from the Agricultural Appropriation Act of March 4, 1907, ch. 2907.

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[SEC. 1.] [Sale, etc., of animals and products permitted — deposit of receipts.] \* \* \* And hereafter the Secretary of Agriculture is authorized to sell in the open market or to exchange for other breeding animals or animal products to the best advantage, without the usual condemnation proceedings and public auction, such animals or animal products produced or purchased under the appropriations made by Congress for the use of the Bureau of Animal Industry as may not be needed in the work of that bureau: *Provided*, That all moneys received from the sale of such animals or animal products, or as a bonus in the exchange of the same, shall be deposited in the Treasury as miscellaneous receipts. [37 Stat. L. 274.]

This is from the Agricultural Appropriation Act of Aug. 10, 1912, ch. 284.  
For Acts relating to the Bureau of Animal Industry, see **ANIMALS**.

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[SEC. 1.] [Sale, etc., of live stock — disposition of moneys received.] \* \* \* Hereafter the Secretary of Agriculture is authorized to sell in the open market or to exchange for other live stock such animals or animal products as cease to be needed in the work of the department, and all moneys received from the sale of such animals or animal products or as a bonus in the exchange of the same shall be deposited in the Treasury of the United States as miscellaneous receipts. [38 Stat. L. 1114.]

This and the two paragraphs following are from the Agricultural Appropriation Act of March 4, 1915, ch. 144.

[Samples of sugars, etc., furnished state and municipal officers — price charged — disposition of receipts.] \* \* \* Hereafter the Secretary of Agriculture may furnish, upon application, samples of pure sugars, naval stores, microscopical specimens, and other products to State and municipal officers, educational institutions, and other parties and charge for the same a price to cover the cost thereof, such price to be determined and established by the Secretary, and the money received from sales to be deposited in the Treasury of the United States as miscellaneous receipts. [38 Stat. L. 1101.]

[American food products shipped to foreign countries — inspection — issuance of certificate of results.] \* \* \* That hereafter no certificate of results of any such inspection shall issue unless the owner or his agent shall first pay to the Secretary of Agriculture, at a price to be determined and established by the Secretary, the actual cost of the

inspection, the money received to be deposited in the Treasury of the United States as miscellaneous receipts. [38 Stat. L. 1102.]

"Such inspection" in the above paragraph relates to the right of owners or shippers of American food products shipped to foreign countries to have the same inspected by the Agricultural Department.

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**SEC. 2. [Detailed statement of expenditures.] \* \* \*** And in addition to the proper vouchers and accounts for the sums appropriated for the said Department to be furnished to the accounting officers of the Treasury, the Commissioner of Agriculture shall, at the commencement of each regular session, present to Congress a detailed statement of the expenditure of all appropriations for said Department for the last preceding fiscal year. [23 Stat. L. 356.]

The above provision is from the Agricultural Appropriation Act of March 3, 1885, ch. 338.

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**[SEC. 1.] [Estimates for Department of Agriculture.] \* \* \*** That hereafter the estimates of appropriations for the Department of Agriculture shall be prepared and submitted each year according to the order and arrangement of the Act for the year preceding; and any changes in such order or arrangement desired by the Secretary of Agriculture may be submitted by note in the estimates. It shall be the duty of the Secretary of Agriculture to submit, in the Book of Estimates for the fiscal year nineteen hundred and four, and annually thereafter, immediately following estimates of each of the respective offices, bureaus and divisions of the Department of Agriculture a statement showing in detail the number of clerks who were employed in the District of Columbia upon regular and continuous work for thirty days or more during the previous fiscal year in or under such offices, bureaus or divisions under authority of and paid from general appropriations, indicating in the case of every such employment the rate of compensation received and the appropriation from which paid. [32 Stat. L. 303.]

This is from the Agricultural Appropriation Act of June 3, 1902, ch. 985.

A provision of the Agricultural Appropriation Act of March 4, 1907, 34 Stat. L. 1282, requiring the Secretary of Agriculture to submit to Congress yearly "in addition to the estimates now required by law, classified and detailed estimates of every subject of expenditure intended for the Agricultural Department for the next fiscal year, and detailed reports of all expenditures under any appropriation for such service during the preceding fiscal year," was repealed by a provision of the Act of March 4, 1911, ch. 238, 36 Stat. L. 1264.

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**[SEC. 1.] [Estimates for officers, clerks, and employees.] \* \* \*** The Secretary of Agriculture for the fiscal year nineteen hundred and twelve, and annually thereafter, shall transmit to the Secretary of the Treasury for submission to Congress in the Book of Estimates detailed estimates for all executive officers, clerks, and employees below the grade of clerk,

indicating the salary or compensation of each, necessary to be employed by the various bureaus, offices, and divisions of the Department of Agriculture. [36 Stat. L. 440.]

This is from the Agricultural Appropriation Act of May 26, 1910, ch. 256, and is limited by the Act of Aug. 10, 1912, ch. 284, given below.

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[SEC. 1.] [Estimates for employees — exceptions.] \* \* \* Hereafter so much of the Act of May twenty-sixth, nineteen hundred and ten (Thirty-sixth Statutes, page four hundred and sixteen), as requires the Secretary of Agriculture to transmit annually to the Secretary of the Treasury, for submission to Congress, detailed estimates for executive officers, clerks, and other employees in the various bureaus, offices, and divisions of the Department of Agriculture shall not apply to such employees in the meat-inspection service or employees engaged in the enforcement of the insecticide Act of nineteen hundred and ten. [37 Stat. L. 301.]

This is from the Agricultural Appropriation Act of Aug. 10, 1912, ch. 284.

The provisions of the Act of May 26, 1910, ch. 256, mentioned in the text, are given in the paragraph immediately preceding.

For the Insecticide Act of April 26, 1910, ch. 191, see *infra*, p. 220.

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[SEC. 1.] [Report of expenditures for vehicles and boats.] \* \* \* That the Secretary of Agriculture shall, on the first day of each regular session of Congress, make a report to Congress showing the amount expended under the provisions of this paragraph for the purchase of such vehicles and boats during the preceding fiscal year. [38 Stat. L. 442.]

This is a proviso of the Agricultural Appropriation Act of June 30, 1914, ch. 131, following an appropriation for motor vehicles and motor boats for the field work of the department, to which the words "such vehicles and boats" refer.

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[SEC. 1.] [Report of expenditure of appropriation for rent.] \* \* \* For rent of buildings and parts of buildings in the District of Columbia, for use of the various bureaus, divisions, and offices of the Department of Agriculture, \* \* \* *Provided*, That the Secretary of Agriculture shall submit annually to Congress in his estimates of appropriations a statement showing what proportion of this appropriation is paid for the quarters occupied by the various branches of the department. [38 Stat. L. 1108.]

This is from the Agricultural Appropriation Act of March 4, 1915, ch. 144.

## II. EXPERIMENT STATIONS.

**An act to establish agricultural experiment stations in connection with the colleges established in the several States under the provisions of an act approved July second, eighteen hundred and sixty-two, and of the acts supplementary thereto.**

*[Act of March 2, 1887, ch. 314, 24 Stat. L. 440.]*

[SEC. 1.] **[Aid to state agricultural experiment stations at agricultural colleges.]** That in order to aid in acquiring and diffusing among the people of the United States useful and practical information on subjects connected with agriculture, and to promote scientific investigation and experiment respecting the principles and applications of agricultural science, there shall be established, under direction of the college or colleges or agricultural department of colleges in each State or Territory established, or which hereafter may be established, in accordance with the provisions of an act approved July second, eighteen hundred and sixty-two, entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," or any of the supplements to said act, a department to be known and designated as an "agricultural experiment station:" *Provided,* That in any State or Territory in which two such colleges have been or may be so established the appropriation hereinafter made to such State or Territory shall be equally divided between such colleges, unless the legislature of such State or Territory shall otherwise direct. *[24 Stat. L. 440.]*

This act is known as the "Agricultural Experiment Stations Act of 1887." It is also known as the "Hatch Act."

Donation of public lands for school purposes under Act of July 2, 1862.—See EDUCATION; PUBLIC LANDS.

[SEC. 2.] **[Object and duty of such station.]** That it shall be the object and duty of said experiment stations to conduct original researches or verify experiments on the physiology of plants and animals;

The diseases to which they are severally subject, with the remedies for the same;

The chemical composition of useful plants at their different stages of growth;

The comparative advantages of rotative cropping as pursued under a varying series of crops;

The capacity of new plants or trees for acclimation;

The analysis of soils and water;

The chemical composition of manures, natural or artificial, with experiments designed to test their comparative effects on crops of different kinds;

The adaptation and value of grasses and forage plants;

The composition and digestibility of the different kinds of food for domestic animals;

The scientific and economic questions involved in the production of butter and cheese;

And such other researches or experiments bearing directly on the agricultural industry of the United States as may in each case be deemed

advisable, having due regard to the varying conditions and needs of the respective States or Territories. [24 Stat. L. 440.]

By the Agricultural Appropriation Act of March 3, 1906, ch. 1405, 33 Stat. L. 869, the experiment stations are directed to co-operate with the Secretary of Agriculture in establishing and maintaining experimental grass stations for the study of different grasses and forage plants, their adaptability to various climates, and other questions relating thereto. Similar provisions appear in the Agricultural Appropriation Acts for previous years.

By the Agricultural Appropriation Act of March 3, 1905, ch. 1405, 33 Stat. L. 882, the experiment stations are authorized and directed to co-operate with the Secretary of Agriculture in irrigation and drainage investigations. The same provision has appeared in prior Agricultural Appropriation Acts.

**[SEC. 3.] [Secretary to advise, assist, furnish forms, etc.]** That in order to secure, as far as practicable, uniformity of methods and results in the work of said stations, it shall be the duty of the United States Commissioner of Agriculture to furnish forms, as far as practicable, for the tabulation of results of investigation or experiments; to indicate, from time to time, such lines of inquiry as to him shall seem most important; and, in general, to furnish such advice and assistance as will best promote the purposes of this act. It shall be the duty of each of said stations, annually, on or before the first day of February, to make to the governor of the State or Territory in which it is located a full and detailed report of its operations, including a statement of receipts and expenditures, a copy of which report shall be sent to each of said stations, to the said Commissioner of Agriculture, and to the Secretary of the Treasury of the United States. [24 Stat. L. 441.]

By the Agricultural Appropriation Acts for many years the Secretary of Agriculture is authorized to rent offices, employ assistants and clerks, and incur such other expense as may be necessary to carry out the objects of the acts relating to experiment stations. A provision of this character is contained in the Agricultural Appropriation Act of March 4, 1907, ch. 2907, 34 Stat. L. 1278.

By the Agricultural Appropriation Act of June 30, 1914, ch. 131, 38 Stat. L. 437, the Secretary of Agriculture was authorized to prescribe the form of the annual financial statement here required. Similar provisions have occurred in the Agricultural Appropriation Acts for previous years.

**SEC. 4. [Bulletins to be issued and mailed free.]** That bulletins or reports of progress shall be published at said stations at least once in three months, one copy of which shall be sent to each newspaper in the States or Territories in which they are respectively located, and to such individuals actually engaged in farming as may request the same, and as far as the means of the station will permit. Such bulletins or reports and the annual reports of said stations shall be transmitted in the mails of the United States free of charge for postage, under such regulations as the Postmaster-General may from time to time prescribe. [24 Stat. L. 441.]

**SEC. 5. [Annual appropriation — buildings.]** That for the purpose of paying the necessary expenses of conducting investigations and experiments and printing and distributing the results as hereinbefore prescribed, the sum of fifteen thousand dollars per annum is hereby appropriated to each State, to be specially provided for by Congress in the appropriations from year to year, and to each Territory entitled under the provisions of section eight of this act, out of any money in the Treasury proceeding

from the sales of public lands, to be paid in equal quarterly payments, on the first day of January, April, July, and October in each year, to the treasurer or other officer duly appointed by the governing boards of said colleges to receive the same, the first payment to be made on the first day of October, eighteen hundred and eighty-seven: *Provided, however*, That out of the first annual appropriation so received by any station an amount not exceeding one-fifth may be expended in the erection, enlargement, or repair of a building or buildings necessary for carrying on the work of such station; and thereafter an amount not exceeding five per centum of such annual appropriation may be so expended. [24 Stat. L. 441.]

The appropriation here made was increased by the Act of March 16, 1906, ch. 951, sec. 1, 34 Stat. L. 63. See *infra*, p. 216.

**SEC. 6. [Unexpended balance.]** That whenever it shall appear to the Secretary of the Treasury from the annual statement of receipts and expenditures of any of said stations that a portion of the preceding annual appropriation remains unexpended, such amount shall be deducted from the next succeeding annual appropriation to such station, in order that the amount of money appropriated to any station shall not exceed the amount actually and necessarily required for its maintenance and support. [24 Stat. L. 441.]

**SEC. 7. [Legal relation to states not affected.]** That nothing in this act shall be construed to impair or modify the legal relation existing between any of the said colleges and the government of the States or Territories in which they are respectively located. [24 Stat. L. 441.]

**SEC. 8. [Stations established separate from colleges or from those not agricultural.]** That in States having colleges entitled under this section to the benefits of this act and having also agricultural experiment stations established by law separate from said colleges, such States shall be authorized to apply such benefits to experiments at stations so established by such States; And in case any State shall have established under the provisions of said act of July second aforesaid, an agricultural department or experimental station, in connection with any university, college or institution not distinctively an agricultural college or school, and such State shall have established or shall hereafter establish a separate agricultural college or school, which shall have connected therewith an experimental farm or station, the legislature of such State may apply in whole or in part the appropriation by this act made, to such separate agricultural college, or school, and no legislature shall by contract express or implied disable itself from so doing. [24 Stat. L. 441.]

**SEC. 9. [Legislative assent necessary.]** That the grants of moneys authorized by this act are made subject to the legislative assent of the several States and Territories to the purposes of said grants: *Provided*, That payment of such instalments of the appropriation herein made as shall become due to any State before the adjournment of the regular session of its legislature meeting next after the passage of this act shall be made

upon the assent of the governor thereof duly certified to the Secretary of the Treasury. [24 Stat. L. 442.]

When the legislature is not in session the governor may assent, see Act of June 7, 1888, *infra*, this page.

**SEC. 10. [No permanent obligation imposed on U. S.]** Nothing in this act shall be held or construed as binding the United States to continue any payments from the Treasury to any or all the States or institutions mentioned in this act, but Congress may at any time amend, suspend or repeal any or all the provisions of this act. [24 Stat. L. 442.]

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**[SEC. 1.] [Examination of soils.]** Experimental Stations. \* \* \* That as far as practicable, all such stations shall devote a portion of their work to the examination and classification of the soils of their respective States and Territories, with a view to securing more extended knowledge and better development of their agricultural capabilities. [25 Stat. L. 841.]

This further duty was imposed on experiment stations by the Agricultural Appropriation Act of March 2, 1889, ch. 373.

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**[SEC. 1.] [Card index of agricultural literature—copies furnished institutions or individuals.]** \* \* \* And the Secretary of Agriculture hereafter may furnish to such institutions or individuals as may care to buy them copies of the card index of agricultural literature prepared by the Department of Agriculture in connection with its administration of the Act of March second, eighteen hundred and eighty-seven (Twenty-fourth Statutes at Large, page four hundred and forty), and the Act of March sixteenth, nineteen hundred and six (Thirty-fourth Statutes at Large, page sixty-three), and the Acts amendatory of and supplementary thereto, and charge for the same a price covering the additional expenses involved in the preparation of these copies, the money received from such sales to be deposited in the Treasury of the United States as miscellaneous receipts. [38 Stat. L. 1109.]

This is from the Appropriation Act of March 4, 1915, ch. 144. The Act of 1887 referred to is the act establishing experiment stations (*supra*, p. 212), while the Act of March 16, 1906, is the act providing for an increased annual appropriation for such stations. Similar provisions have occurred in the Agricultural Appropriation Acts of previous years. As to card indexes generally, see *infra*, this title, division VI, *Agricultural Reports and Literature*.

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**An act to amend an act entitled "An act to establish agricultural stations in connection with the colleges established in the several States under the provisions of an act approved July second, eighteen hundred and sixty-two, and the acts supplementary thereto."**

[Act of June 7, 1888, ch. 373, 25 Stat. L. 176.]

**[SEC. 1.] [When legislature is not in session, governor may assent.]** That the grant of money authorized by the act of Congress entitled "An

act to establish agricultural experiment stations in connection with the colleges established in the several States under the provisions of an act approved July second, eighteen hundred and sixty-two, and of acts supplementary thereto," are subject as therein provided to the legislative assent of the States or Territories to be affected thereby; but as to such installments of the appropriations as may be now due or may hereafter become due, when the legislature may not be in session, the governor of said State or Territory may make the assent therein provided, and upon a duly certified copy thereof to the Secretary of the Treasury he shall cause the same to be paid in the manner provided in the act of which this is amendatory, until the termination of the next regular session of the legislature of such State or Territory. [25 Stat. L. 176.]

See sec. 9 of the Act of March 2, 1887, *supra*, p. 214.

See also sec. 2 of the Act of March 16, 1906, providing for increased annual appropriation, *infra*, this page.

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**An act to provide increased annual appropriation for agricultural experiment stations and regulating the expenditure thereof.**

[Act of March 16, 1906, ch. 951, 34 Stat. L. 63.]

[SEC. 1.] [Annual appropriation to states and territories for experiment stations increased — amount of annual increase.] That there shall be, and hereby is, annually appropriated, out of any money in the Treasury not otherwise appropriated, to be paid as hereinafter provided, to each State and Territory, for the more complete endowment and maintenance of agricultural experiment stations now established or which may hereafter be established in accordance with the Act of Congress approved March second, eighteen hundred and eighty-seven, the sum of five thousand dollars in addition to the sum named in said Act for the year ending June thirtieth, nineteen hundred and six, and an annual increase of the amount of such appropriation thereafter for five years by an additional sum of two thousand dollars over the preceding year, and the annual amount to be paid thereafter to each State and Territory shall be thirty thousand dollars, to be applied only to paying the necessary expenses of conducting original researches or experiments bearing directly on the agricultural industry of the United States, having due regard to the varying conditions and needs of the respective States or Territories. [34 Stat. L. 63.]

This Act is known as the Agricultural Experiment Stations Act of 1906.

For the Act of March 2, 1887, above mentioned, see *supra*, p. 212.

Construction of this Act, see provision from the Act of June 30, 1906, ch. 3913, *infra*, p. 218.

SEC. 2. [Payments quarterly — report of receipts, etc. — legislative assent necessary — assent of governors.] That the sums hereby appropriated to the States and Territories for the further endowment and support of agricultural experiment stations shall be annually paid in equal quarterly payments on the first day of January, April, July, and October of each year by the Secretary of the Treasury, upon the warrant of the



Secretary of Agriculture, out of the Treasury of the United States, to the treasurer or other officer duly appointed by the governing boards of said experiment stations to receive the same, and such officers shall be required to report to the Secretary of Agriculture on or before the first day of September of each year a detailed statement of the amount so received and of its disbursement, on schedules prescribed by the Secretary of Agriculture. The grants of money authorized by this Act are made subject to legislative assent of the several States and Territories to the purpose of said grants: *Provided*, That payment of such installments of the appropriation herein made as shall become due to any State or Territory before the adjournment of the regular session of legislature meeting next after the passage of this Act shall be made upon the assent of the governor thereof, duly certified by the Secretary of the Treasury. [34 Stat. L. 63.]

**SEC. 3. [Apportionments when misapplied, etc.—restriction — annual reports to governors.]** That if any portion of the moneys received by the designated officer of any State or Territory for the further and more complete endowment, support, and maintenance of agricultural experiment stations as provided in this Act shall by any action or contingency be diminished or lost or be misapplied, it shall be replaced by said State or Territory to which it belongs, and until so replaced no subsequent appropriation shall be apportioned or paid to such State or Territory; and no portion of said moneys exceeding five per centum of each annual appropriation shall be applied, directly or indirectly, under any pretense whatever, to the purchase, erection, preservation, or repair of any building or buildings, or to the purchase or rental of land. It shall be the duty of each of said stations annually, on or before the first day of February, to make to the governor of the State or Territory in which it is located a full and detailed report of its operations, including a statement of receipts and expenditures, a copy of which report shall be sent to each of said stations, to the Secretary of Agriculture, and to the Secretary of the Treasury of the United States. [34 Stat. L. 63.]

**SEC. 4. [Certificates as to compliance with the law, etc.—reasons for withholding allotments to be reported — disposal of withheld allotments.]** That on or before the first day of July in each year after the passage of this Act the Secretary of Agriculture shall ascertain and certify to the Secretary of the Treasury as to each State and Territory whether it is complying with the provisions of this Act and is entitled to receive its share of the annual appropriation for agricultural experiment stations under this Act and the amount which thereupon each is entitled, respectively, to receive. If the Secretary of Agriculture shall withhold a certificate from any State or Territory of its appropriation, the facts and reasons therefor shall be reported to the President and the amount involved shall be kept separate in the Treasury until the close of the next Congress in order that the State or Territory may, if it shall so desire, appeal to Congress from the determination of the Secretary of Agriculture. If the next Congress shall not direct such sum to be paid, it shall be covered into the Treasury; and the Secretary of Agriculture is hereby charged with the proper administration of this law. [34 Stat. L. 64.]

**SEC. 5. [Report to Congress.]** That the Secretary of Agriculture shall make an annual report to Congress on the receipts and expenditures and work of the agricultural experiment stations in all of the States and Territories, and also whether the appropriation of any State or Territory has been withheld; and if so, the reason therefor. [34 Stat. L. 64.]

**SEC. 6. [Amendment.]** That Congress may at any time amend, suspend, or repeal any or all of the provisions of this Act. [34 Stat. L. 64.]

By the Agricultural Appropriation Act of March 4, 1915, ch. 144, 38 Stat. L. 1109, the Secretary of Agriculture is authorized to sell such products as are obtained on the land belonging to the experiment stations in Alaska, Hawaii, Porto Rico, and Guam. Similar provisions appear in the Appropriation Acts for previous years.

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**[SEC. 1.] [Construction of Act of March 16, 1906 — allotment — payments.]** \* \* \* The Act of Congress approved March sixteenth, nineteen hundred and six, entitled "An Act to provide for an increased annual appropriation for agricultural experiment stations and regulating the expenditures thereof," shall be construed to appropriate for each station the sum of five thousand dollars for the fiscal year ending June thirtieth, nineteen hundred and six, the sum of seven thousand dollars for the fiscal year ending June thirtieth, nineteen hundred and seven, the sum of nine thousand dollars for the fiscal year ending June thirtieth, nineteen hundred and eight, the sum of eleven thousand dollars for the fiscal year ending June thirtieth, nineteen hundred and nine, the sum of thirteen thousand dollars for the fiscal year ending June thirtieth, nineteen hundred and ten, and the sum of fifteen thousand dollars for the fiscal year ending June thirtieth, nineteen hundred and eleven. The sum of five thousand dollars appropriated for the fiscal year nineteen hundred and six shall be paid on or before June thirtieth, nineteen hundred and six, and the amounts appropriated for the subsequent years shall be paid as provided in the said Act to each State and Territory for the more complete endowment and maintenance of agricultural experiment stations now established or which may hereafter be established in accordance with the Act of Congress approved March second, eighteen hundred and eighty-seven. [34 Stat. L. 696.]

This and the paragraph following are from the Agricultural Appropriation Act of June 30, 1906, ch. 3913. The Act of March 16, 1906, above mentioned, is given *supra*, p. 216. And the Act of March 2, 1887, referred to is given *supra*, p. 212.

**[Leaves of absence to employees in Alaska, Hawaii, and Porto Rico.]** \* \* \* And the employees of the experiment stations in Alaska, Hawaii, and Porto Rico may hereafter, in the discretion of the Secretary of Agriculture, without additional expense to the Government, be granted leave of absence not to exceed fifteen days in any one year, which leave may, in exceptional and meritorious cases where such an employee is ill, be extended in the discretion of the Secretary of Agriculture not to exceed fifteen days additional in any one year. [34 Stat. L. 694.]

By a provision of the Appropriation Act of June 30, 1914 (see *supra*, p. 206), leave of absence is granted to employees assigned to permanent duty at these points and at Guam.

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[SEC. 1.] **[Report of expenditures — assistants, etc. — payment to States.]** \* \* \* The Secretary of Agriculture \* \* \* shall ascertain whether the expenditures under the appropriation hereby made are in accordance with the provisions of said Act, and shall make report thereon to Congress; and the Secretary of Agriculture is hereby authorized to employ such assistants, clerks, and other persons as he may deem necessary, in the city of Washington and elsewhere, and to incur such other expenses for office fixtures and supplies, stationery, traveling, freight, and express charges, illustration of the Experiment Station Record, bulletins and reports, as he may find essential in carrying out the objects of the above Acts, and the sums apportioned to the several States shall be paid quarterly in advance. [31 Stat. L. 935.]

This is from the Agricultural Appropriation Act of March 2, 1901, ch. 805, following an appropriation to carry into effect the provisions of the Act of March 2, 1887, ch. 314, *supra*, p. 212, and to which the words "said Act" refer.

### III. INSECTS AND INSECTICIDES.

**An Act To prohibit importation or interstate transportation of insect pests, and the use of the United States mails for that purpose.**

[Act of March 3, 1905, ch. 1501, 33 Stat. L. 1269.]

[SEC. 1.] **[Importation or interstate transportation of insect pests prohibited.]** That no railroad, steamboat, express, stage, or other transportation company shall knowingly transport from one State or Territory into any other State or Territory, or from the District of Columbia into a State or Territory, or from a State or Territory into the District of Columbia, or from a foreign country into the United States, the gypsy moth, brown-tail moth, leopard moth, plum curculio, hop plant-louse, boll weevil, or any of them in a live state, or other insect in a live state which is notoriously injurious to cultivated crops, including vegetables, field crops, bush fruits, orchard trees, forest trees, or shade trees; or the eggs, pupæ, or larvæ of any insect injurious as aforesaid, except when shipped for scientific purposes under the regulations hereinafter provided for; nor shall any person remove from one State or Territory into another State or Territory, or from a foreign country into the United States, or from a State or Territory into the District of Columbia, or from the District of Columbia into any State or Territory, except for scientific purposes under the regulations hereinafter provided for, the gypsy moth, brown-tail moth, leopard moth, plum curculio, hop plant-louse, boll weevil, or any of them in a live state, or other insect in a live state which is notoriously injurious to cultivated crops, including vegetables, field crops, bush fruits, orchard trees, forest trees, or shade trees; or the eggs, pupæ, or larvæ of any insect injurious as aforesaid. [33 Stat. L. 1269.]

**SEC. 2. [Sending insect pests by mail prohibited.]** That any letter, parcel, box, or other package containing the gypsy moth, brown-tail moth, leopard moth, plum curculio, hop plant-louse, boll weevil, or any of them in a live state, or other insect in a live state which is notoriously injurious to cultivated crops, including vegetables, field crops, bush fruits, orchard

trees, forest trees, or shade trees, or any letter, parcel, box, or package which contains the eggs, pupæ, or larvæ of any insect injurious as aforesaid, whether sealed as first-class matter or not, is hereby declared to be non-mailable matter, except when mailed for scientific purposes under the regulations hereinafter provided for, and shall not be conveyed in the mails, nor delivered from any post-office, nor by any letter carrier, except when mailed for scientific purposes under the regulations hereinafter provided for; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, or cause the same to be taken from the mails for the purpose of retaining, circulating, or disposing of, or of aiding in the retention, circulation, or disposition of the same shall, for each and every offense, be fined, upon conviction thereof, not more than five thousand dollars or imprisoned at hard labor not more than five years, or both, at the discretion of the court: *Provided*, That nothing in this Act shall authorize any person to open any letter or sealed matter of the first-class not addressed to himself. [33 Stat. L. 1270.]

**SEC. 3. [Regulations for shipment.]** That it shall be the duty of the Secretary of Agriculture, and he is hereby authorized and directed to prepare and promulgate rules and regulations under which the insects covered by sections one and two of this Act may be mailed, shipped, transported, delivered, and removed, for scientific purposes, from one State or Territory into another State or Territory, or from the District of Columbia into a State or Territory, or from a State or Territory into the District of Columbia, and any insects covered by sections one and two of this Act may be so mailed, shipped, transported, delivered, and removed, for scientific purposes, under the rules and regulations of the Secretary of Agriculture: *Provided*, That the rules and regulations of the Secretary of Agriculture, in so far as they affect the method of mailing insects, shall be approved by the Postmaster-General, and nothing in this Act shall be construed to prevent any State from making and enforcing laws in furtherance of the purposes of this Act, prohibiting or regulating the admission into that State of insects from a foreign country. [33 Stat. L. 1270.]

**SEC. 4. [Penalties for violation of act.]** That any person, company, or corporation who shall knowingly violate the provisions of section one of this Act shall, for each offense, be fined, upon conviction thereof, not more than five thousand dollars or imprisoned at hard labor not more than five years, or both, at the discretion of the court. [33 Stat. L. 1270.]

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**An Act For preventing the manufacture, sale, or transportation of adulterated or misbranded Paris greens, lead arsenates, and other insecticides, and also fungicides, and for regulating traffic therein and for other purposes.**

[Act of April 26, 1910, ch. 191, 36 Stat. L. 331.]

**[SEC. 1.] [Manufacture of adulterated or misbranded articles unlawful—punishment for.]** That it shall be unlawful for any person to

manufacture within any Territory or the District of Columbia any insecticide, Paris green, lead arsenate, or fungicide which is adulterated or misbranded within the meaning of this Act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined not to exceed two hundred dollars for the first offense, and upon conviction for each subsequent offense be fined not to exceed three hundred dollars, or sentenced to imprisonment for not to exceed one year, or both such fine and imprisonment, in the discretion of the court. [36 Stat. L. 331.]

**Food and Drugs Act contrasted.**—In *United States v. Thirty Dozen Packages of Roach Food*, (D. C. Md. 1913) 202 Fed. 271, the court contrasting this act with the Food and Drugs Act, enacted June 30, 1906, ch. 3915 (see FOOD AND DRUGS), said: "The Insecticide Act contains 14 sections; the Food and Drugs Act, 13. The Insecticide Act contains a section providing that it shall be referred to as the Insecticide Act of 1910. There is no similar provision in the Food and Drugs Act. Otherwise the two enactments contain the same number

of sections, in precisely the same order, and in very large part in precisely the same words. Obviously the draftsman of the Insecticide Act took the Food and Drugs Act and copied it literally, except where alterations were necessary in order to adapt it to the purpose in view, or where he wished to make a definite change in a particular provision. From the changes which were so made, it is possible to gather something of the purpose of some of the new provisions in the later act."

**SEC. 2. [Shipment in interstate or foreign commerce prohibited — punishment for shipping, delivery, etc.—articles made for foreign purchasers.]** That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country, of any insecticide, or Paris green, or lead arsenate, or fungicide which is adulterated or misbranded within the meaning of this Act is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver, to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or any Territory of the United States any such adulterated or misbranded insecticide, or Paris green, or lead arsenate, or fungicide, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars, or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser; but if said articles shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act. [36 Stat. L. 331.]

**"Introduction."**—The statute does not cover a shipment of goods from one point to another point in the same state al-

though the shipment was by a route through other states. *United States v. Powers-Weightman-Rosengarten Co.*, (S. D.

N. Y. 1913) 211 Fed. 169, wherein the court said: "As I read the statute, 'introduction' means a bringing into another state of the prohibited article in such a way as that it may become a part of the general property within that state. Mere passing of the goods through other states en route to the state of destination does not make them part of the general property of those states."

**Pleading fraudulent intent.**—Absence of fraudulent intent on the part of the shipper is not a defense to proceedings under this act, therefore an allegation that the misbranding words were intended to convey a false meaning is immaterial. *United States v. Two Cases of Chloro-Naphtroleum Disinfectant*, (D. C. Md., 1914), 217 Fed. 477.

**SEC. 3. [Uniform regulations to be made for examinations, etc.]** That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of insecticides, Paris greens, lead arsenates, and fungicides manufactured or offered for sale in the District of Columbia or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country or intended for shipment to any foreign country, or which may be submitted for examination by the director of the experiment station of any State, Territory, or the District of Columbia (acting under the direction of the Secretary of Agriculture), or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country. [36 Stat. L. 331.]

**SEC. 4. [Examination by department of agriculture — notice if adulterated, etc.—hearings, etc.—publication.]** That the examination of specimens of insecticides, Paris greens, lead arsenates, and fungicides shall be made in the Department of Agriculture, by such existing bureau or bureaus as may be directed by the Secretary, for the purpose of determining from such examination whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens are adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid. [36 Stat. L. 332.]

**SEC. 5. [Prosecutions for violations.]** That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any director of experiment station or agent of any State, Territory, or the District of Columbia, under

authority of the Secretary of Agriculture, shall present satisfactory evidences of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided. [36 Stat. L. 332.]

**SEC. 6. [Definitions.]** That the term "insecticide" as used in this Act shall include any substance or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any insects which may infest vegetation, man or other animals, or households, or be present in any environment whatsoever. The term "Paris green" as used in this Act shall include the product sold in commerce as Paris green and chemically known as the aceto-arsenite of copper. The term "lead arsenate" as used in this Act shall include the product or products sold in commerce as lead arsenate and consisting chemically of products derived from arsenic acid ( $H_3AsO_4$ ) by replacing one or more hydrogen atoms by lead. That the term "fungicide" as used in this Act shall include any substance or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any and all fungi that may infest vegetation or be present in any environment whatsoever. [36 Stat. L. 332.]

**SEC. 7. [Adulterated articles.]** That for the purpose of this Act an article shall be deemed to be adulterated —

In the case of Paris green: First, if it does not contain at least fifty per centum of arsenious oxide; second, if it contains arsenic in water-soluble forms equivalent to more than three and one-half per centum of arsenious oxide; third, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

In the case of lead arsenate: First, if it contains more than fifty per centum of water; second, if it contains total arsenic equivalent to less than twelve and one-half per centum of arsenic oxid ( $As_2O_3$ ); third, if it contains arsenic in water-soluble forms equivalent to more than seventy-five one-hundredths per centum of arsenic oxid ( $As_2O_3$ ); fourth, if any substances have been mixed and packed with it so as to reduce, lower, or injuriously affect its quality or strength: *Provided, however,* That extra water may be added to lead arsenate (as described in this paragraph) if the resulting mixture is labeled lead arsenate and water, the percentage of extra water being plainly and correctly stated on the label.

In the case of insecticides or fungicides, other than Paris green and lead arsenate: First, if its strength or purity fall below the professed standard or quality under which it is sold; second, if any substance has been substituted wholly or in part for the article; third, if any valuable constituent of the article has been wholly or in part abstracted; fourth, if it is intended for use on vegetation and shall contain any substance or substances which, although preventing, destroying, repelling, or mitigating insects, shall be injurious to such vegetation when used. [36 Stat. L. 332.]

**SEC. 8. [Misbranded articles — application of term — misleading statements — statements required — inert ingredients.]** That the term "misbranded" as used herein shall apply to all insecticides, Paris greens, lead

arsenates, or fungicides, or articles which enter into the composition of insecticides or fungicides, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular, and to all insecticides, Paris greens, lead arsenates, or fungicides which are falsely branded as to the State, Territory, or country in which they are manufactured or produced.

That for the purpose of this Act an article shall be deemed to be misbranded —

In the case of insecticides, Paris greens, lead arsenates, and fungicides: First, if it be an imitation or offered for sale under the name of another article; second, if it be labeled or branded so as to deceive or mislead the purchaser, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package; third, if in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

In the case of insecticides (other than Paris greens and lead arsenates) and fungicides: First, if it contains arsenic in any of its combinations or in the elemental form and the total amount of arsenic present (expressed as per centum of metallic arsenic) is not stated on the label; second, if it contains arsenic in any of its combinations or in the elemental form and the amount of arsenic in water-soluble forms (expressed as per centum of metallic arsenic) is not stated on the label; third, if it consists partially or completely of an inert substance or substances which do not prevent, destroy, repel, or mitigate insects or fungi and does not have the names and percentage amounts of each and every one of such inert ingredients plainly and correctly stated on the label: *Provided, however,* That in lieu of naming and stating the percentage amount of each and every inert ingredient the producer may at his discretion state plainly upon the label the correct names and percentage amounts of each and every ingredient of the insecticide or fungicide having insecticidal or fungicidal properties, and make no mention of the inert ingredients, except in so far as to state the total percentage of inert ingredients present. [36 Stat. L. 333.]

**Misbranding.**—A manufacturer may not give to his product a name which indicates the presence in it in substantial quantities of a constituent when such is not the fact. Thus where a manufacturer put out an insecticide product labeled "Sulpho-naphthol" and the article did not contain any appreciable quantity of sulphur or any sulphur derivative, the court held that the product was misbranded, and that a decree of condemnation must be entered. Likewise where the same article was labeled "Water 7%, Insecticide 93%" and the product seized contained over 10% of water, the same rule was applied. *United States v. Two Cases of Sulpho-Naphthol*, (D. C. Md. 1914) 213 Fed. 519.

An "inert" substance as used in this section may include something which contributed to the effectiveness of insecticides, that is something which serves a useful purpose. *United States v. Thirty Dozen*

*Packages of Roach Food*, (D. C. Md. 1913) 202 Fed. 271, wherein the court said: "The claimant says that an inert substance within the meaning of the act is something which does not contribute to the effectiveness of insecticides—that is, something which serves no useful purpose therein. An insecticide containing such a substance, when compared volume for volume with another which did not, would be of inferior quality or strength. If the framer of the act had intended by the clause now under consideration to do nothing more than prevent the introduction of such valueless substances into insecticides, he had apt language before him in the model which he was using.

"Section 7 of the Food and Drugs Act declares that a food shall be deemed to be adulterated if any substance has been mixed and packed with it, so as to reduce or lower or injuriously affect its quality



or strength. Such a provision would apparently accomplish all that the claimant says was intended to be accomplished by the clause the construction of which is now in controversy. The lawmakers did not think it would in the case of insecticides, other than paris green and lead arsenates. They do provide in section 7 of the Insecticide Act that a Paris green or a lead arsenate shall be deemed to be adulterated if any substance has been mixed and packed with it, so as to reduce or lower or injuriously affect its quality or strength. They do not make such provision with reference to insecticides other than Paris green and lead arsenates. On the other hand, they do not make applicable to the two latter any such clause as that now under discussion.

"The lawmakers did not think it expedient or possible to say that any substance which, when mixed and packed with an insecticide, reduced or lowered its strength, was an adulterant. The explanation why it was not expedient or possible so to say is given by the claimant itself. In many insecticides, other than Paris green and lead arsenates, substances which do reduce and lower their strength are absolutely necessary, in order that they may effectively do the work for which they are intended. Such substances could not be declared adulterants. The problem is solved by requiring the shipper of such insecticides to tell the kinds and quantities of the substances therein contained which do not themselves prevent, destroy, repel, or mitigate insects. From the standpoint of the honest purchaser and shipper, there could be only one objection to this legislation. In some circumstances it might

result in the revelation of a trade secret. This objection was obviously taken into consideration by Congress. For the purpose of rendering such disclosures less probable or frequent, Congress gives the shipper an alternative. He may, if he will, instead of stating the kinds and proportions of inert substances so defined, confine himself to telling the total percentage of all such substances in his preparation; but, if he does, he must tell the specific kinds and proportions of the active poisons or repellents. It may be that in some cases to do one or the other will give valuable information as to trade secrets. Claimant says that in its case such will be the result of the enforcement upon it of the construction for which the government contends. Such arguments may well be addressed to Congress. They may, where it does not appear that the intention of Congress has been called to them, affect the construction which the courts may put upon the general language of an act. In this case, however, the clause in controversy itself shows that Congress had actually considered the extent to which it would go in compelling disclosures which might result in the revelation of trade secrets. Under its power to regulate commerce among the states, Congress had power to do what the government says it sought to do, and which I think it did do."

**Misbranding as affected by extent of deception.**—It is no defense to a violation of this act that a name, deceptive in itself, deceives only a few purchasers. *United States v. Two Cases of Chloro-Naptholeum Disinfectant*, (D. C. Md., 1914) 217 Fed. 477.

**SEC. 9. [Dealers — protection of guaranty by manufacturer, etc.—liability of guarantor.]** That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchased such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach in due course to the dealer under the provisions of this Act. [36 Stat. L. 334.]

**SEC. 10. [Original packages — seizure for transporting, etc., in interstate and foreign commerce — disposal of seized articles — conditional delivery to owner — procedure.]** That any insecticide, Paris green, lead arsenate, or fungicide that is adulterated or misbranded within the meaning of this Act and is being transported from one State, Territory, or District, to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or any Territory of the United States, or

if it be imported from a foreign country for sale, shall be liable to be proceeded against in any district court of the United States within the district wherein the same is found and seized for confiscation by a process of libel for condemnation.

And if such article is condemned as being adulterated or misbranded, within the meaning of this Act, the same shall be disposed of by destruction or sale as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction: *Provided, however,* That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act or the laws of any State, Territory, or District, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States. [36 Stat. L. 334.]

**SEC. 11. [Imported articles — examination of samples — exclusion if adulterated, etc.— destruction, etc.— provisional delivery to consignee.]** That the Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request, from time to time, samples of insecticides, Paris greens, lead arsenates, and fungicides which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture and have the right to introduce testimony; and if it appear from the examination of such samples that any insecticide, or Paris green, or lead arsenate, or fungicide offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction or [of] any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided,* That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further,* That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee. [36 Stat. L. 334.]

**SEC. 12. [Construction of terms, etc., used.]** That the term "Territory," as used in this Act, shall include the District of Alaska and the insular possessions of the United States. The word "person," as used in this Act, shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association, as well as that of the other person. [36 Stat. L. 335.]

**SEC. 13. [Title.]** That this Act shall be known and referred to as "The insecticide Act of 1910." [36 Stat. L. 335.]

**SEC. 14. [Effect.]** That this Act shall be in force and effect from and after the first day of January, nineteen hundred and eleven. [36 Stat. L. 335.]

#### IV. SEEDS, PLANTS, AND NURSERY STOCK.

**Sec. 527. [Seeds, etc., to be of best varieties.]** That purchase and distribution of vegetable, field, and flower seeds, plants, shrubs, vines, bulbs and cuttings shall be of the freshest and best obtainable varieties and adapted to general cultivation. [R. S.]

This section was amended to read as above by the Agricultural Appropriation Act of April 25, 1896. Formerly this section read as follows:

"Sec. 527. The purchase and distribution of seeds by the Department of Agriculture shall be confined to such seeds as are rare and uncommon to the country, or such as can be made more profitable by frequent changes from one part of our own country to another; and the purchase or propagation and distribution of trees, plants, shrubs, vines, and cuttings, shall be confined to such as are adapted to general cultivation and to promote the general interests of horticulture and agriculture throughout the United States."

The Agricultural Appropriation Acts for many years have contained provisions regulating the purchase of seeds, bulbs, etc., and the distribution thereof by congressional allotment, and it is questionable whether there is any permanency in the legislation on these subjects. The provision for the fiscal year ending June 30, 1916, is contained in the Agricultural Appropriation Act of March 4, 1915, ch. 144, which further provides, "That the Secretary of Agriculture, after due advertisement and on competitive bids, is authorized to award the contract for the supplying of printed packets and envelopes and the packeting, assembling, and mailing of the seeds, bulbs, shrubs, vines, cuttings, and plants, or any part thereof, for a period of not more than five years nor less than one year, if by such action he can best protect the interests of the United States." [38 Stat. L. 1094.]

**Construction of Appropriation Act.**—The Act making appropriations for the Department of Agriculture for the year ending June 30, 1897, authorized the department to pay \$130,000 for seed already put up in packages and labeled ready for distribution. 21 Op. Atty.-Gen. 372. See also for construction of Appropriation Act of March 2, 1895, 21 Op. Atty.-Gen. 162, 21 Op. Atty.-Gen. 55.

The appropriation which was made for

the purchase of seed for the year 1896 was held to be available for purchases made under joint resolution S. R. 43. 21 Op. Atty.-Gen. 321.

**Nature of seeds purchasable.**—The seeds purchased under the Appropriation Act of March 2, 1895, were held to be limited to those described in the above section 527 as it then stood. 24 Op. Atty.-Gen. 162. See also 21 Op. Atty.-Gen. 55.

[SEC. 1.] **[Tests of seeds for adulterations — publication of results.]**  
 \* \* \* For studying and testing commercial seeds, including the testing of samples of seeds of grasses, clover, or alfalfa, and lawn-grass seeds secured in the open market, and where such samples are found to be adulterated or misbranded the results of the tests shall be published, together with the names of the persons by whom the seeds were offered for sale. [38 Stat. L. 1092.]

This is from the Agricultural Appropriation Act of March 4, 1915, ch. 144. The Agricultural Appropriation Act of March 3, 1905, ch. 1405, provides that "The Secretary [of Agriculture] is hereby directed to obtain in the open market samples of seeds of grass, clover, or alfalfa, test the same, and if any such seeds are found to be adulterated or misbranded, or any seeds of Canada blue grass (*Poa compressa*) are obtained under any other name than Canada blue grass or *Poa compressa*, to publish the results of the tests, together with the names of the persons by whom the seeds were offered for sale." [33 Stat. L. 869.]

Identically similar provisions were contained in the Acts of March 3, 1903, ch. 1008, 32 Stat. L. 1154; April 23, 1904, ch. 1486, 33 Stat. L. 283. Somewhat similar provisions were contained in prior Acts.

**Construction and constitutionality.**—The provision of the Act of March 3, 1905, was ruled by the Attorney-General to be primarily a measure for the dissemination of useful information in regard to seeds, the

publication of the name of the seller being only an incidental matter. Viewed in this light it is not a regulation of commerce, and is constitutional. (1906) 25 Op. Atty.-Gen. 553.

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[SEC. 1.] **[Use of Potomac Park as testing grounds.]** That the Secretary of War is authorized to grant permission to the Department of Agriculture for the temporary occupation of such area or areas of Potomac Park, not exceeding a total of seventy-five acres in extent, as may not be needed in any one season for the reclamation or park improvement, the said areas to be used by the Department of Agriculture as testing grounds: *Provided*, That nothing herein contained shall be construed to change the essential character of the lands so used, which lands shall continue to be a public park, as provided in the Act of Congress approved March third, eighteen hundred and ninety-seven: *And provided further*, That said area or areas shall be vacated by the Department of Agriculture at the close of any season upon the request of the Secretary of War: *And provided further*, That the entire park shall remain under the charge of the Secretary of War. [30 Stat. L. 1378.]

The above provision is from the Act of March 3, 1899, ch. 458, entitled "An Act relative to the control of wharf property and certain public spaces in the District of Columbia."

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**Joint Resolution providing for the printing annually of franks required for sending out seed.**

[Res. No. 23 of May 19, 1902, 32 Stat. L. 741.]

**[Printing franks for sending out seed.]** That the Public Printer shall furnish to the Department of Agriculture such franks as the Secretary of Agriculture may require for sending out seeds on Congressional orders, the franks to have printed thereon the facsimile signatures of Senators.

Representatives, and Delegates, also the names of their respective States or Territories, and the words " United States Department of Agriculture, Congressional Seed Distribution ", or such other printed matter as the Secretary of Agriculture may direct; the franks to be of such size and style as may be prescribed by the Secretary of Agriculture; the expense of printing the said franks to be charged to the allotment for printing and binding for the two Houses of Congress. [32 Stat. L. 741.]

**An Act To regulate foreign commerce by prohibiting the admission into the United States of certain adulterated grain and seeds unfit for seeding purposes.**

[Act of August 24, 1912, ch. 382, 37 Stat. L. 506.]

[SEC. 1.] [Grain and seeds — importing adulterated, for seeding, prohibited — regulations to prevent.] That from and after six months after the passage of this Act the importation into the United States of seeds of alfalfa, barley, Canadian blue grass, Kentucky blue grass, awnless brome grass, buckwheat, clover, field corn, Kafir corn, meadow fescue, flax, millet, oats, orchard grass, rape, redtop, rye, sorghum, timothy, and wheat, or mixtures of seeds containing any of such seeds as one of the principal component parts, which are adulterated or unfit for seeding purposes under the terms of this Act, is hereby prohibited; and the Secretary of the Treasury and the Secretary of Agriculture shall, jointly or severally, make such rules and regulations as will prevent the importation of such seeds into the United States: *Provided, however,* That such seed may be delivered to the owner or consignee thereof under bond, to be recleaned in accordance with and subject to such regulations as the Secretary of the Treasury may prescribe, and when cleaned to the standard of purity specified in this Act for admission into the United States such seed may be released to the owner or consignee thereof after the screenings and other refuse removed from such seed shall have been disposed of in a manner prescribed by the Secretary of Agriculture: *Provided further,* That this Act shall not apply to the importation of barley, buckwheat, field corn, Kafir corn, sorghum, flax, oats, rye, or wheat not intended for seeding purposes, when shipped in bond through the United States or imported for the purpose of manufacture, but such shipment shall be subject to provisions of the Act of August fifth, nineteen hundred and nine. [37 Stat. L. 506.]

SEC. 2. [Adulterations.] That seed shall be considered adulterated within the meaning of this Act —

First. When seed of red clover contains more than three per centum by weight of seed of yellow trefoil, or any other seed of similar appearance to and of lower market value than seed of red clover.

Second. When seed of alfalfa contains more than three per centum by weight of seed of yellow trefoil, burr clover and sweet clover, singly or combined.

Third. When any kind or variety of the seeds, or any mixture described in section one of this Act, contains more than five per centum by weight of

seed of another kind or variety of lower market value and of similar appearance: *Provided*, That the mixture of the seed of white and alsike clover, red and alsike clover, or alsike clover and timothy, shall not be deemed an adulteration under this section. [37 Stat. L. 507.]

**SEC. 3. [Unfit for seeding.]** That seed shall be considered unfit for seeding purposes within the meaning of this Act —

First. When any kind or variety of clover or alfalfa seed contains more than one seed of dodder to five grams of clover or alfalfa seed, respectively.

Second. When any kind or variety of the seeds or any mixture described in section one of this Act contains more than three per centum by weight of seeds of weeds. [37 Stat. L. 507.]

**SEC. 4. [Penalty.]** That any person or persons who shall knowingly violate the provisions of this Act, shall be deemed guilty of a misdemeanor and shall pay a fine of not exceeding five hundred dollars and not less than two hundred dollars: *Provided*, That any person or persons who shall knowingly sell for seeding purposes seeds or grain which were imported under the provisions of this Act for the purpose of manufacture shall be deemed guilty of a violation of this Act. [37 Stat. L. 507.]

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[SEC. 1.] [Plants and plant products — terminal inspection by state — packages of such products mailed to persons in state subject to inspection — marking of packages required — penalty for violation — rules and regulations — postmaster general to make.] \* \* \* That hereafter when any State shall provide for terminal inspection of plants and plant products, and shall establish and maintain, at the sole expense of the State, such inspection at one or more places therein, the proper officials of said State may submit to the Secretary of Agriculture a list of plants and plant products and the plant pests transmitted thereby, that in the opinion of said officials should be subject to terminal inspection in order to prevent the introduction or dissemination in said State of pests injurious to agriculture. Upon his approval of said list, in whole or in part, the Secretary of Agriculture shall transmit the same to the Postmaster General, and thereafter all packages containing any plants or plant products named in said approved lists shall, upon payment of postage therefor, be forwarded by the postmaster at the destination of said package to the proper State official at the nearest place where inspection is maintained. If the plant or plant products are found upon inspection to be free from injurious pests, or if infected shall be disinfected by said official, they shall upon payment of postage therefor be returned to the postmaster at the place of inspection to be forwarded to the person to whom they are addressed; but if found to be infected with injurious pests and incapable of satisfactory disinfection the State inspector shall so notify the postmaster at the place of inspection, who shall promptly notify the sender of said plants or plant products that they will be returned to him upon his request and at his expense, or in default of such request that they will be turned over to the State authorities for destruction.

On and after the passage and approval of this Act it shall be unlawful for any person, firm, or corporation to deposit in the United States mails any package containing any plant or plant product addressed to any place within a State maintaining inspection thereof as herein defined, without plainly marking the package so that its contents may be readily ascertained by an inspection of the outside thereof. Whoever shall fail to so mark said packages shall be punished by a fine of not more than \$100.

The Postmaster General is hereby authorized and directed to make all needful rules and regulations for carrying out the purposes hereof. [38 Stat. L. 1113.]

The foregoing provisions are from the Agricultural Appropriation Act of March 4, 1915, ch. 144.

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**An Act To regulate the importation of nursery stock and other plants and plant products; to enable the Secretary of Agriculture to establish and maintain quarantine districts for plant diseases and insect pests; to permit and regulate the movement of fruits, plants, and vegetables therefrom, and for other purposes.**

[Act of August 20, 1912, ch. 308, 37 Stat. L. 315.]

[Sec. 1.] [Nursery stock—importing without permit, etc., unlawful—certificate of foreign inspection required.] That it shall be unlawful for any person to import or offer for entry into the United States any nursery stock unless an[d] until a permit shall have been issued therefor by the Secretary of Agriculture, under such conditions and regulations as the said Secretary of Agriculture may prescribe, and unless such nursery stock shall be accompanied by a certificate of inspection, in manner and form as required by the Secretary of Agriculture, of the proper official of the country from which the importation is made, to the effect that the stock has been thoroughly inspected and is believed to be free from injurious plant diseases and insect pests: *Provided*, That the Secretary of Agriculture shall issue the permit for any particular importation of nursery stock when the conditions and regulations as prescribed in this Act shall have been complied with: *Provided further*, That nursery stock may be imported for experimental or scientific purposes by the Department of Agriculture upon such conditions and under such regulations as the said Secretary of Agriculture may prescribe: *And provided further*, That nursery stock imported from countries where no official system of inspection for such stock is maintained may be admitted upon such conditions and under such regulations as the Secretary of Agriculture may prescribe. [37 Stat. L. 315.]

**SEC. 2. [Notifications of arrival at port of entry—forwarding without notification forbidden—inspection required.]** That it shall be the duty of the Secretary of the Treasury promptly to notify the Secretary of Agriculture of the arrival of any nursery stock at port of entry; that the person receiving such stock at port of entry shall, immediately upon entry and before such stock is delivered for shipment or removed from the port of

entry, advise the Secretary of Agriculture or, at his direction, the proper State, Territorial, or District official of the State or Territory or the District to which such nursery stock is destined, or both, as the Secretary of Agriculture may elect, of the name and address of the consignee, the nature and quantity of the stock it is proposed to ship, and the country and locality where the same was grown. That no person shall ship or offer for shipment from one State or Territory or District of the United States into any other State or Territory or District, any nursery stock imported into the United States without notifying the Secretary of Agriculture or, at his direction, the proper State, Territorial, or District official of the State or Territory or District to which such nursery stock is destined, or both, as the Secretary of Agriculture may elect, immediately upon the delivery of the said stock for shipment, of the name and address of the consignee, of the nature and quantity of stock it is proposed to ship, and the country and locality where the same was grown, unless and until such imported stock has been inspected by the proper official of a State, Territory, or District of the United States. [37 Stat. L. 316.]

**SEC. 3. [Marking, etc., required on goods entered.]** That no person shall import or offer for entry into the United States any nursery stock unless the case, box, package, crate, bale, or bundle thereof shall be plainly and correctly marked to show the general nature and quantity of the contents, the country and locality where the same was grown, the name and address of the shipper, owner, or person shipping or forwarding the same, and the name and address of the consignee. [37 Stat. L. 316.]

**SEC. 4. [Marking, etc., required in interstate shipments.]** That no person shall ship or deliver for shipment from one State or Territory or District of the United States into any other State or Territory or District any such imported nursery stock the case, box, package, crate, bale, or bundle whereof is not plainly marked so as to show the general nature and quantity of the contents, the name and address of the consignee, and the country and locality where such stock was grown, unless and until such imported stock has been inspected by the proper official of a State, Territory, or District of the United States. [37 Stat. L. 316.]

**SEC. 5. [Restriction on importing plants, etc., other than nursery stock.]** That whenever the Secretary of Agriculture shall determine that the unrestricted importation of any plants, fruits, vegetables, roots, bulbs, seeds, or other plant products not included by the term "nursery stock" as defined in section six of this Act may result in the entry into the United States or any of its Territories or Districts of injurious plant diseases or insect pests, he shall promulgate his determination, specifying the class of plants and plant products the importation of which shall be restricted and the country and locality where they are grown, and thereafter, and until such promulgation is withdrawn, such plants and plant products imported or offered for import into the United States or any of its Territories or Districts shall be subject to all the provisions of the foregoing sections of this Act: *Provided*, That before the Secretary of Agriculture shall promulgate his determination that the unrestricted importation of any plants,



fruits, vegetables, roots, bulbs, seeds, or other plant products not included by the term "nursery stock" as defined in section six of this Act may result in the entry into the United States or any of its Territories or Districts of injurious plant diseases or insect pests he shall, after due notice, give a public hearing, under such rules and regulations as he shall prescribe, at which hearing any interested party may appear and be heard, either in person or by attorney. [37 Stat. L. 316.]

**SEC. 6. ["Nursery stock" — definition of term.]** That for the purpose of this act the term "nursery stock" shall include all field-grown florists' stock, trees, shrubs, vines, cuttings, grafts, scions, buds, fruit pits and other seeds of fruit and ornamental trees or shrubs, and other plants and plant products for propagation, except field, vegetable, and flower seeds, bedding plants, and other herbaceous plants, bulbs, and roots. [37 Stat. L. 317.]

**SEC. 7. [Plant diseases and insect infestation — determination of existence in country or locality — importations prohibited after promulgation of determination — hearings, etc. — quarantine immediately effective.]** That whenever, in order to prevent the introduction into the United States of any tree, plant, or fruit disease or of any injurious insect, new to or not theretofore widely prevalent or distributed within and throughout the United States, the Secretary of Agriculture shall determine that it is necessary to forbid the importation into the United States of any class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products from a country or locality where such disease or insect infestation exists, he shall promulgate such determination, specifying the country and locality and the class of nursery stock or other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products which, in his opinion, should be excluded. Following the promulgation of such determination by the Secretary of Agriculture, and until the withdrawal of the said promulgation by him, the importation of the class of nursery stock or of other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products specified in the said promulgation from the country and locality therein named, regardless of the use for which the same is intended, is hereby prohibited; and until the withdrawal of the said promulgation by the Secretary of Agriculture, and notwithstanding that such class of nursery stock, or other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products be accompanied by a certificate of inspection from the country of importation, no person shall import or offer for entry into the United States from any country or locality specified in such promulgation, any of the class of nursery stock or of other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products named therein, regardless of the use for which the same is intended: *Provided*, That before the Secretary of Agriculture shall promulgate his determination that it is necessary to forbid the importation into the United States of the articles named in this section he shall, after due notice to interested parties, give a public hearing, under such rules and regulations as he shall prescribe, at which hearing any interested party may appear and be heard, either in person or by attorney: *Provided further*, That the quarantine

provisions of this section, as applying to the white-pine blister rust, potato wart, and the Mediterranean fruit fly, shall become and be effective upon the passage of this Act. [37 Stat. L. 317.]

Nursery stock, seeds, etc., within the prohibition of this section are permitted to be imported for experimental purposes by a provision of the Agricultural Appropriation Act of March 4, 1913, ch. 145, 37 Stat. L. 854, *infra*, p. 236.

**SEC. 8. [Interstate quarantine against plant diseases or insect infestation — shipments from quarantined localities forbidden — movements of nursery stock subject to conditions — rules for inspection, etc., to be issued — hearings, etc.]** That the Secretary of Agriculture is authorized and directed to quarantine any State, Territory, or District of the United States, or any portion thereof, when he shall determine the fact that a dangerous plant disease or insect infestation, new to or not theretofore widely prevalent or distributed within and throughout the United States, exists in such State or Territory or District; and the Secretary of Agriculture is directed to give notice of the establishment of such quarantine to common carriers doing business in or through such quarantined area, and shall publish in such newspapers in the quarantined area as he shall select notice of the establishment of quarantine. That no person shall ship or offer for shipment to any common carrier, nor shall any common carrier receive for transportation or transport, nor shall any person carry or transport from any quarantined State or Territory or District of the United States, or from any quarantined portion thereof, into or through any other State or Territory or District, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products specified in the notice of quarantine except as hereinafter provided. That it shall be unlawful to move, or allow to be moved, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from any quarantined State or Territory or District of the United States, or quarantined portion thereof, into or through any other State or Territory or District, in manner or method or under conditions other than those prescribed by the Secretary of Agriculture. That it shall be the duty of the Secretary of Agriculture to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, and method and manner of delivery and shipment of the class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from a quarantined State or Territory or District of the United States, or quarantined portion thereof, into or through any other State or Territory or District; and the Secretary of Agriculture shall give notice of such rules and regulations as hereinbefore provided in this section for the notice of the establishment of quarantine: *Provided*, That before the Secretary of Agriculture shall promulgate his determination that it is necessary to quarantine any State, Territory, or District of the United States, or portion thereof, under the authority given in this section, he shall, after due notice to interested parties, give a public hearing under such rules and regulations

as he shall prescribe, at which hearing any interested party may appear and be heard, either in person or by attorney. [37 Stat. L. 318.]

**SEC. 9. [Duty of Secretary of Agriculture.]** That the Secretary of Agriculture shall make and promulgate such rules and regulations as may be necessary for carrying out the purposes of this Act. [37 Stat. L. 318.]

**SEC. 10. [Punishment for violations.]** That any person who shall violate any of the provisions of this Act, or who shall forge, counterfeit, alter, deface, or destroy any certificate provided for in this Act or in the regulations of the Secretary of Agriculture, shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding one year, or both such fine and imprisonment, in the discretion of the court: *Provided*, That no common carrier shall be deemed to have violated the provisions of any of the foregoing sections of this Act on proof that such carrier did not knowingly receive for transportation or transport nursery stock or other plants or plant products as such from one State, Territory, or District of the United States into or through any other State, Territory, or District; and it shall be the duty of the United States attorneys diligently to prosecute any violations of this Act which are brought to their attention by the Secretary of Agriculture or which come to their notice by other means. [37 Stat. L. 318.]

**SEC. 11. ["Persons" to include corporations, etc.—corporations, etc., liable for acts of agents.]** That the word "person" as used in this Act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person. [37 Stat. L. 319.]

**SEC. 12. [Federal horticultural board established — composition.]** That for the purpose of carrying out the provisions of this Act there shall be appointed by the Secretary of Agriculture from existing bureaus and offices in the Department of Agriculture, including the Bureau of Entomology, the Bureau of Plant Industry, and the Forest Service, a Federal Horticultural Board consisting of five members, of whom not more than two shall be appointed from any one bureau or office, and who shall serve without additional compensation. [37 Stat. L. 319.]

**SEC. 13. [Appropriation.]** That there is hereby appropriated, out of the moneys in the Treasury not otherwise appropriated, to be expended as the Secretary of Agriculture may direct, for the purposes and objects of this Act, the sum of twenty-five thousand dollars. [37 Stat. L. 319.]

SEC. 14. [In effect October 1, 1912.] That this Act shall become and be effective from and after the first day of October, nineteen hundred and twelve, except as herein otherwise provided. [37 Stat. L. 319.]

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[SEC. 1.] [Imports permitted for experiments, etc.—nursery stock.] \* \* \* That hereafter any class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products of which the importation may be forbidden from any country or locality under the provisions of section seven of the plant quarantine Act approved August twentieth, nineteen hundred and twelve (Thirty-seventh Statutes, page three hundred and fifteen), may be imported for experimental or scientific purposes by the Department of Agriculture upon such conditions and under such regulations as the said Secretary of Agriculture may prescribe. [37 Stat. L. 854.]

This is from the Agricultural Appropriation Act of March 4, 1913, ch. 145. Section 7 of the Act of 1912 referred to is given, *supra*, p. 233.

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## V. STANDARD MEASURES AND GRADES.

**An Act To fix the standard barrel for fruits, vegetables, and other dry commodities.**

[Act of March 4, 1915, ch. 158, 38 Stat. L. 1186.]

[SEC. 1.] [Fruits, vegetables and other dry commodities — standard barrel adopted.] That the standard barrel for fruits, vegetables, and other dry commodities other than cranberries shall be of the following dimensions when measured without distention of its parts: Length of stave, twenty-eight and one-half inches; diameter of heads, seventeen and one-eighth inches; distance between heads, twenty-six inches; circumference of bulge, sixty-four inches, outside measurement; and the thickness of staves not greater than four-tenths of an inch: *Provided*, That any barrel of a different form having a capacity of seven thousand and fifty-six cubic inches shall be a standard barrel. The standard barrel for cranberries shall be of the following dimensions when measured without distention of its parts: Length of staves, twenty-eight and one-half inches; diameter of head, sixteen and one-fourth inches; distance between heads, twenty-five and one-fourth inches; circumference of bulge, fifty-eight and one-half inches, outside measurement; and the thickness of staves not greater than four-tenths of an inch. [38 Stat. L. 1186.]

Standard barrel for apples, see *infra*, p. 237.

SEC. 2. [Penalties for violation of act — barrels when not below standard — barrels shipped to foreign country.] That it shall be unlawful to sell, offer, or expose for sale in any State, Territory, or the District of Columbia, or to ship from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia or to a foreign

country, a barrel containing fruits or vegetables or any other dry commodity of less capacity than the standard barrels defined in the first section of this Act, or subdivisions thereof known as the third, half, and three-quarters barrel, and any person guilty of a willful violation of any of the provisions of this Act shall be deemed guilty of a misdemeanor and be liable to a fine not to exceed \$500, or imprisonment not to exceed six months, in the court of the United States having jurisdiction: *Provided, however,* That no barrel shall be deemed below standard within the meaning of this Act when shipped to any foreign country and constructed according to the specifications or directions of the foreign purchaser if not constructed in conflict with the laws of the foreign country to which the same is intended to be shipped. [38 Stat. L. 1186.]

**SEC. 3. [Reasonable variations in barrels permitted — prosecutions for offenses how begun — act not applicable to certain barrels.]** That reasonable variations shall be permitted and tolerance shall be established by rules and regulations made by the Director of the Bureau of Standards and approved by the Secretary of Commerce. Prosecutions for offenses under this Act may be begun upon complaint of local sealers of weights and measures or other officers of the several States and Territories appointed to enforce the laws of the said States or Territories, respectively, relating to weights and measures: *Provided, however,* That nothing in this Act shall apply to barrels used in packing or shipping commodities sold exclusively by weight or numerical count. [38 Stat. L. 1187.]

**SEC. 4. [Act when in force.]** That this Act shall be in force and effect from and after the first day of July, nineteen hundred and sixteen. [38 Stat. L. 1187.]

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**An Act To establish a standard barrel and standard grades for apples when packed in barrels, and for other purposes.**

[Act of August 3, 1912, ch. 273, 37 Stat. L. 250.]

**[SEC. 1.] [Apples — standard barrel established for — steel barrels.]** That the standard barrel for apples shall be of the following dimensions when measured without distention of its parts: Length of stave, twenty-eight and one-half inches; diameter of head, seventeen and one-eighth inches; distance between heads, twenty-six inches; circumference of bulge, sixty-four inches outside measurement, representing as nearly as possible seven thousand and fifty-six cubic inches: *Provided,* That steel barrels containing the interior dimensions provided for in this section shall be construed as a compliance therewith. [37 Stat. L. 250.]

**SEC. 2. [Grades established for apples in interstate, etc., commerce.]** That the standard grades for apples when packed in barrels which shall be shipped or delivered for shipment in interstate or foreign commerce, or which shall be sold or offered for sale within the District of Columbia or the Territories of the United States shall be as follows: Apples of one variety, which are well-grown specimens, hand picked, of good color for the variety,

normal shape, practically free from insect and fungous injury, bruises, and other defects, except such as are necessarily caused in the operation of packing, or apples of one variety which are not more than ten per centum below the foregoing specifications shall be "Standard grade minimum size two and one-half inches," if the minimum size of the apples is two and one-half inches in transverse diameter; "Standard grade minimum size two and one-fourth inches," if the minimum size of the apples is two and one-fourth inches in transverse diameter; or "Standard grade minimum size two inches," if the minimum size of the apples is two inches in transverse diameter. [37 Stat. L. 250.]

SEC. 3. [Branding of barrels.] That the barrels in which apples are packed in accordance with the provision of this Act may be branded in accordance with section two of this Act. [37 Stat. L. 251.]

SEC. 4. [Requirements for barrels — marking.] That all barrels packed with apples shall be deemed to be below standard if the barrel bears any statement, design, or device indicating that the barrel is a standard barrel of apples, as herein defined, and the capacity of the barrel is less than the capacity prescribed by section one of this Act, unless the barrel shall be plainly marked on end and side with words or figures showing the fractional relation which the actual capacity of the barrel bears to the capacity prescribed by section one of this Act. The marking required by this paragraph shall be in block letters of size not less than seventy-two point one-inch gothic. [37 Stat. L. 251.]

SEC. 5. [Misbranding — contents below standard — insufficient statements.] That barrels packed with apples shall be deemed to be misbranded within the meaning of this Act —

First. If the barrel bears any statement, design, or device indicating that the apples contained therein are "Standard" grade and the apples when packed do not conform to the requirements prescribed by section two of this Act.

Second. If the barrel bears any statement, design, or device indicating that the apples contained therein are "Standard" grade and the barrel fails to bear also a statement of the name of the variety, the name of the locality where grown, and the name of the packer or the person by whose authority the apples were packed and the barrel marked. [37 Stat. L. 251.]

SEC. 6. [Penalty for violations.] That any person, firm or corporation, or association who shall knowingly pack or cause to be packed apples in barrels or who shall knowingly sell or offer for sale such barrels in violation of the provisions of this Act shall be liable to a penalty of one dollar and costs for each such barrel so sold or offered for sale, to be recovered at the suit of the United States in any court of the United States having jurisdiction. [37 Stat. L. 251.]

SEC. 7. [In effect July 1, 1913.] That this Act shall be in force and effect from and after the first day of July, nineteen hundred and thirteen. [37 Stat. L. 251.]

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[SEC. 1.] [Establishing grades of cotton—furnishing official standard.] \* \* \* To enable the Secretary of Agriculture to establish a standard for the different grades of cotton, calling to his assistance for that purpose expert cotton classifiers, by fixing a standard of middling cotton and, using the same as a basis, establishing a standard of nine different grades to be designated middling fair, strict good middling, good middling, strict middling, middling, strict low middling, low middling, strict good ordinary, and good ordinary, which shall be the official standard of cotton classifications. And the Secretary of Agriculture is authorized and directed to prepare in practical form the standard of said grades and furnish the same upon request to any person, the cost thereof to be paid, when delivered, by the person requesting the same, and certified under the signature of the said Secretary and the seal of his Department [35 Stat. L. 256.]

This and the following paragraph are from the Agricultural Appropriation Act of March 23, 1908, ch. 192.

[Establishing grades of grain for export.] To enable the Secretary of Agriculture to establish and maintain, at such points as he may deem expedient, laboratories for the purpose of examining and reporting upon the nature, quality, and condition of any sample, parcel, or consignment of seed or grain, including rent and the employment of labor in the city of Washington and elsewhere; and the Secretary of Agriculture is authorized to report upon such samples, parcels, or consignments, from time to time, and the reports so made shall serve as a basis for the fixing of definite grades, and also for the issuance of certificates of inspection when requested by the consignor or consignee of any grain entering into foreign commerce. [35 Stat. L. 257.]

The same provision occurs in prior Agricultural Appropriation Acts, and appropriations to the same end are made in subsequent Acts, that of March 4, 1915, ch. 144, 38 Stat. L. 1092, being for the "investigating, the handling, grading, and transportation of grain, and the fixing of definite grades thereof."

## VI. AGRICULTURAL REPORTS AND LITERATURE.

[SEC. 1.] [Monthly crop reports—cotton crop condition reports.] \* \* \* That hereafter the monthly crop reports, which shall be gathered as far as practicable from practical farmers, and which shall be issued on or before the tenth of each month, shall embrace statements of the conditions of crops by States, in the United States, with such explanations, comparisons, and information as may be useful for illustrating the above matter, and that it shall be submitted to and officially approved by the Secretary of Agriculture before being issued or published: *Provided further*, That hereafter the condition reports of the cotton crop shall be issued on the same day in October each year as the first ginner's report of actual cotton ginned, as follows: [35 Stat. L. 1053.]

This is from the Agricultural Appropriation Act of March 4, 1909, ch. 301, 35 Stat. L. 1039. This provision, except for the word "hereafter" which renders it permanent, has occurred in previous years, as have provisions requiring a crop report to be issued on the tenth day of each month.

**An Act Authorizing the Secretary of Agriculture to issue certain reports relating to cotton.**

[*Act of May 27, 1912, ch. 135, 37 Stat. L. 118.*]

[SEC. 1.] [**Cotton statistics — report of acres in cultivation.**] That the Secretary of Agriculture be directed to cause the Bureau of Statistics of the Department of Agriculture to issue a report, on or about the first Monday in July of each year, showing by States and in total the number of acres of cotton then in cultivation in the United States. [37 Stat. L. 118.]

For the Act of July 22, 1912, ch. 249, authorizing the Director of the Census to collect and publish statistics of cotton, see CENSUS.

SEC. 2. [**Estimate of total production to be issued.**] That the Secretary of Agriculture shall cause the Bureau of Statistics of the Department of Agriculture to issue each year, immediately following the publication of the ginning report of the Census Bureau of December first, an estimate of the total production of cotton in the United States for the current crop year. [37 Stat. L. 118.]

For provisions relating to ginning report of Census Bureau, see CENSUS.

SEC. 3. [**Inconsistent laws repealed.**] That all Acts or parts of Acts inconsistent with the foregoing provisions be, and the same are hereby, repealed. [37 Stat. L. 118.]

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[**Report on field operations.**] That there be printed seventeen thousand copies of the Report on Field Operations of the Division of Soils, Department of Agriculture, for nineteen hundred, of which three thousand copies shall be for the use of the Senate, six thousand copies for the use of the House of Representatives, and eight thousand copies for the use of the Department of Agriculture; and that annually hereafter a similar report shall be prepared and printed, the edition to be the same as for the report herein provided. [31 Stat. L. 1462.]

This is from the joint resolution of Feb. 23, 1901.

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[SEC. 1.] [**Farmers' Bulletins — distribution.**] \* \* \* for the preparation, printing, and distribution of farmers' bulletins, which shall be adapted to the interests of the people of the different sections of the country, an equal proportion of four-fifths of which shall be delivered to or sent out under the addressed franks furnished by Senators, Representatives, and Delegates in Congress, as such Senators, Representatives, or Delegates in Congress shall direct: *Provided*, That the Secretary of Agriculture shall notify Senators, Representatives, and Delegates in Congress of the title and character of each such bulletin, with the total number to which each Senator, Representative, and Delegate may be entitled for such distribution: and on the face of the envelope inclosing said bulletins shall be



printed the title of each bulletin contained therein: *Provided further*, That all such bulletins included in the quotas of Senators, Representatives, or Delegates not called for on or before the thirty-first day of May in each fiscal year shall revert to the Secretary of Agriculture, and be available to him, either for miscellaneous distribution or in making up Congressional quotas for the next fiscal year. [34 Stat. L. 690.]

This is from the Agricultural Appropriation Act of June 30, 1906, ch. 3913. Similar provisions have appeared in the Appropriation Acts of previous years. Since this Act various appropriations of similar character have been made, but without the provisos.

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[SEC. 1.] [Card index of publications.] \* \* \* And hereafter the Secretary of Agriculture may furnish to such institutions or individuals as may care to buy them, copies of the card index of the publications of the Department and of other agricultural literature prepared by the library, and charge for the same a price covering the additional expense involved in the preparation of these copies. [35 Stat. L. 264.]

This is a provision of the Agricultural Appropriation Act of May 23, 1908, ch. 192. With the exception of the word "hereafter" this provision has occurred in previous Agricultural Appropriation Acts. As to card indexes of matters relating to experiment stations, see *supra*, p. 215.

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[SEC. 1.] [Subscriptions to publications.] \* \* \* That hereafter section thirty-six hundred and forty-eight of the Revised Statutes shall not apply to the subscriptions for publications for the Department of Agriculture, and the Secretary of Agriculture is authorized to pay in advance for any publications for the use of this department. [35 Stat. L. 1054.]

This provision is from the Agricultural Appropriation Act of March 4, 1909, ch. 301, 35 Stat. L. 1039, and has occurred in many previous Agricultural Appropriation Acts. The addition of the word "hereafter" in the provision as it appears above makes it permanent.

R. S., sec. 3648, above referred to, relates to the advances of public moneys. See the title PUBLIC MONIES.

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[SEC. 1.] [Report as to experiment stations, etc.] \* \* \* That hereafter there be prepared by the Department of Agriculture an annual report on the work and expenditures of the agricultural experiment stations established under the Act of Congress of March second, eighteen hundred and eighty-seven (Twenty-fourth Statutes at Large, page four hundred and forty), on the work and expenditures of the Department of Agriculture in connection therewith, and on the cooperative agricultural extension work and expenditures of the Department of Agriculture and of agricultural colleges under the Act of May eighth, nineteen hundred and fourteen, entitled "An Act to provide for cooperative agricultural extension work between the agricultural colleges in the several States receiving the benefits of an Act of Congress approved July second, eighteen hundred and sixty-two, and of Acts supplementary thereto, and the United States Department of Agriculture;" and that there be printed annually eight

thousand copies of said report, of which one thousand copies shall be for the use of the Senate, two thousand copies for the use of the House of Representatives, and five thousand copies for the use of the Department of Agriculture. [38 Stat. L. 1110.]

This is from the Agricultural Appropriation Act of March 4, 1915, ch. 144.

For the Act of March 2, 1887, ch. 314, above mentioned, see *supra*, p. 212.

For the Act of May 8, 1914, ch. 79, 38 Stat. L. 372, mentioned in the text, see the title **EDUCATION**.

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#### I. CIVIL GOVERNMENT.

**An Act To create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes.**

[*Act of Aug. 24, 1912, ch. 387, 37 Stat. L. 512.*]

[**SEC. 1.**] **Alaska Territory organized.**—That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall be and constitute the Territory of Alaska under the laws of the United States, the government of which shall be organized and administered as provided by said laws. [37 Stat. L. 512.]

The treaty of March 30, 1867, mentioned in the text is given in 15 Stat. L. 539.

The provisions of the section supersede those of R. S. sec. 1954, the Act of May 17, 1834, ch. 53, § 1, 33 Stat. L. 24, and the Act of June 6, 1900, ch. 786, § 1, 31 Stat. L. 321.

**Constitutionality of act.**—The earlier Act of May 17, 1884, was held not to be invalid because it applied only to the district of Alaska. It was said that Congress might legislate for each and any of the territories specially. *Nelson v. U. S.*, (1887) 30 Fed. 112.

**"Territory" as including Alaska.**—Alaska was held to be a territory entitled to two commissioners in the World's Columbian Commission. (1890) 19 Op. Atty.-Gen. 700.

**SEC. 2. Capital at Juneau.**—That the capital of the Territory of Alaska shall be at the city of Juneau, Alaska, and the seat of government shall be maintained there. [37 Stat. L. 512.]

By the Act of May 17, 1884, ch. 53, § 1, 23 Stat. L. 24, the temporary seat of government was established at Sitka, and by the Act of June 6, 1900, 31 Stat. L. 321, it was provided "that the seat of government shall remain at Sitka until suitable grounds and buildings thereon shall be obtained by purchase or otherwise at Juneau."

**Removal of seat of government.**—Under the Act of June 6, 1900, § 1, 31 Stat. L. 321, providing "that the seat of government shall remain at Sitka until suitable grounds and buildings thereon shall be obtained by purchase or otherwise at Juneau," the ownership and occupation by the United States of a court-house at Juneau, Alaska, by court officials, and the granting of permission by the judge of the first Alaskan judicial district to the governor and surveyor-general of Alaska to use two rooms of such building for offices, were held not to constitute such a compliance with the proviso as

would authorize the Secretary of the Interior to order the removal of the seat of government of Alaska from Sitka to Juneau. (1906) 25 Op. Atty.-Gen. 613.

But in (1906) 26 Op. Atty.-Gen. 3, it was held that the provision in the Act of June 22, 1906, 34 Stat. L. 416, appropriating \$5,000 for clerk hire, rent of office and quarters at Juneau, etc., superseded the legislation embraced in the Act of 1900 to the extent that the Secretary of the Interior was authorized to direct the removal of the seat of government of Alaska from Sitka to Juneau.

**SEC. 3. Constitution and laws of United States extended.**—That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: *Provided*, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: *Provided further*, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the

judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of the district courts of the United States. [37 Stat. L. 512.]

The laws establishing the executive and judicial departments in Alaska continued in force by the above section are embodied in the Act of June 6, 1900, ch. 786, *infra*, p. 260 and the various Acts supplementary thereto.

For the seal, fish, and game laws mentioned in this section, see *infra*, divisions VI, VII, and VIII.

For the Act of Jan. 27, 1905, ch. 277, as amended, mentioned in the text, see *infra*, p. 279.

**Authority of local legislature.**—In U. S. v. Wigger, (1914) 235 U. S. 276, 35 S. Ct. 42, 59 U. S. (L. ed.) 226, the court had under consideration the construction of the provisions in this section "that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by act of Congress." It was held that the above provision did not prevent the territorial legislature of Alaska from amending section 43 of Title II of the Alaska Code of Criminal Procedure, so as to permit the joinder in one indictment of several offenses of the same class. The court commenting on the provision said:

"In order to determine what laws were by his language preserved from interference at the hands of the local legislature a brief review is necessary.

"The territory in question having been ceded to the United States by the Emperor of Russia by treaty of March 30, 1867 (15 Stat. at L. 539), Congress in the following year extended to it certain of the laws of the United States, at the same time enacting that, until otherwise provided, violations of the act should be prosecuted in any district court of the United States in California or Oregon or in the district courts of Washington (Act of July 27, 1868, 15 Stat. at L. 240, 241, ch. 273, § 1). By Act of May 17, 1884, entitled 'An Act providing a civil government for Alaska' (23 Stat. at L. 24, ch. 53), the territory was declared to constitute a civil and judicial district; the appointment of a governor with executive authority was provided for, and by the 3d section it is enacted: 'There shall be, and hereby is, established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established by law.' Provision was made for the appointment of a district judge and four commissioners, whose jurisdiction and powers were prescribed, and for appellate review.

"By the Act of March 3, 1899, already mentioned (30 Stat. at L. 1253, ch. 429), Congress provided an elaborate Criminal

Code and Code of Criminal Procedure, of which title I contains 219 sections, defining crimes and offenses, and providing for their punishment, and title II contains 481 sections, dealing for the most part with proceedings for the punishment and prevention of the crimes defined in title I. By Act of June 6, 1900, entitled 'An Act making further provision for a civil government for Alaska, and for other purposes' (31 Stat. at L. 321, ch. 786), further provision was made, under title I, for the establishment of the executive and judicial departments in the territory. Title II contains 1048 sections, constituting a Code of Civil Procedure (31 Stat. at L. 333-494, ch. 786; Comp. Laws of Alaska, §§ 378-638). Title III contains 368 sections, and is called the Civil Code (31 Stat. at L. 494-552, ch. 786; Comp. Laws of Alaska, §§ 277-362). In the Code of Civil Procedure, a chapter (31 Stat. at L. 442, ch. 786, § 698 *et seq.*) is devoted to the courts of justice, and contains sections prescribing their jurisdiction, powers, and authority. By an act approved March 3, 1909, ch. 269, 35 Stat. L. 838, 839, § 2, the act of 1900 was amended with respect to the jurisdiction of the District Court.

"As already remarked, legislative power was first conferred upon the territory by the Act of Aug. 24, 1912, ch. 387, 37 Stat. L. 512. From the provision of this act 'That all laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress' the District Court, after a review of the other legislation to which attention has been called, drew the conclusion that the laws concerning procedure in actions prosecuted in the name of the United States and by its officers are an essential and integral part of the laws establishing the executive and judicial departments, and that therefore these can be amended or repealed by act of Congress. With this view we are unable to concur. It seems to us that by the language employed, Congress intended to draw a clear distinction between those laws by which the executive and judicial departments had been established in the territory and those minor regulations that had to do with practice and procedure. Those enactments by which Congress had provided for the appointment of executive and

judicial officers for the territory, and had marked out the powers, authority, and jurisdiction of each, and provided safeguards for their maintenance, are properly within the category of laws 'establishing' those departments. These laws, and not those merely regulating the procedure, were by the Act of 1912 continued in force until amended or repealed by Act of Congress. The section respecting the form of indictments was open to amendment by the territorial legislature, and the Act of April 26, 1913, passed for that purpose, is therefore valid."

**Taxes on distilled spirits.**—The Act of July 20, 1868 (15 Stat. L. 142), imposing taxes on distilled spirits, was a general act, and being passed after the cession, was in force in Alaska. *U. S. v. Seveloff*, (1872) 2 Sawy. 311, 27 Fed. Cas. No. 16,252.

**Extortion by customs officer.**—Section 12 of the Act of March 3, 1825 (4 Stat. L. 118), defining the crime of extortion under color of office, so far as officers of the cus-

toms were concerned, was an act relating to customs, and was therefore extended over Alaska. *U. S. v. Carr*, (1875) 3 Sawy. 302, 25 Fed. Cas. No. 14,730.

**Indian legislation.**—The Act of June 30, 1834 (4 Stat. L. 729) defining the boundaries of the "Indian Country," and providing for the regulation of trade and intercourse with Indian tribes therein, is a local act; and therefore it was not, *proprio vigore*, extended to Alaska upon its cession. *U. S. v. Seveloff*, (1872) 2 Sawy. 311, 27 Fed. Cas. No. 16,252. See also *Kie v. U. S.*, (1886) 27 Fed. 351. The act, however, was extended to Alaska, so far as the introduction and dispensation of spirituous liquors was concerned, by the Act of March 3, 1873 (17 Stat. L. 530). *In re Carr*, (1875) 3 Sawy. 316, 5 Fed. Cas. No. 2,432; *Waters v. Campbell*, (1876) 4 Sawy. 121, 29 Fed. Cas. No. 17,264; *In re Sah Quah*, (1886) 31 Fed. 327. See also *U. S. v. Seveloff*, (1872) 2 Sawy. 311, 27 Fed. Cas. No. 16,252.

**SEC. 4. The legislature.**—That the legislative power and authority of said Territory shall be vested in a legislature, which shall consist of a senate and a house of representatives. The senate shall consist of eight members, two from each of the four judicial divisions into which Alaska is now divided by Act of Congress, each of whom shall have at the time of his election the qualifications of an elector in Alaska, and shall have been a resident and an inhabitant in the division from which he is elected for at least two years prior to the date of his election. The term of office of each member of the senate shall be four years: *Provided*, That immediately after they shall be assembled in consequence of the first election they shall, by lot or drawing, be divided in each division into two classes; the seats of the members of the first class shall be vacated at the end of two years and the seats of the members of the second class shall be vacated at the end of four years, so that one member of the senate shall, after the first election, be elected biennially at the regular election from each division. The house of representatives shall consist of sixteen members, four from each of the four judicial divisions into which Alaska is now divided by Act of Congress. The term of office of each representative shall be for two years and each representative shall possess the same qualifications as are prescribed for members of the senate and the persons receiving the highest number of legal votes in each judicial division cast in said election for senator or representative shall be deemed and declared elected to such office: *Provided*, That in the event of a tie vote the candidates thus affected shall settle the question by lot. In case of a vacancy in either branch of the legislature the governor shall order an election to fill such vacancy, giving due and proper notice thereof. That each member of the legislature shall be paid by the United States the sum of fifteen dollars per day for each day's attendance while the legislature is in session, and mileage, in addition, at the rate of fifteen cents per mile for each mile from his home to the capital and return by the nearest traveled route. [37 Stat. L. 513.]

The four judicial divisions here mentioned were established by an Act of March 3, 1909, ch. 269, § 2, amending an Act of June 6, 1900, ch. 786, § 4, *infra*, p. 261.

**SEC. 5. Election of members of the legislature.**—That the first election for members of the Legislature of Alaska shall be held on the Tuesday next after the first Monday in November, nineteen hundred and twelve, and all subsequent elections for the election of such members shall be held on the Tuesday next after the first Monday in November biennially thereafter; that the qualifications of electors, the regulations governing the creation of voting precincts, the appointment and qualifications of election officers, the supervision of elections, the giving of notices thereof, the forms of ballots, the register of votes, the challenging of voters, and the returns and the canvass of the returns of the result of all such elections for members of the legislature shall be the same as those prescribed in the Act of Congress entitled "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, and all the provisions of said Act which are applicable are extended to said elections for members of the legislature, and shall govern the same, and the canvassing board created by said Act shall canvass the returns of such elections and issue certificates of election to each member elected to the said legislature; and all the penal provisions contained in section fifteen of the said Act shall apply to elections for members of the legislature as fully as they now apply to elections for Delegate from Alaska to the House of Representatives. [37 Stat. L. 513.]

For the Act of May 7, 1906, ch. 2083, here mentioned, see *infra*, p. 287.

**SEC. 6. Convening and sessions of legislature.**—That the Legislature of Alaska shall convene at the capitol at the city of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March every two years thereafter; but the said legislature shall not continue in session longer than sixty days in any two years unless again convened in extraordinary session by a proclamation of the governor, which shall set forth the object thereof and give at least thirty days' written notice to each member of said legislature, and in such case shall not continue in session longer than fifteen days. The governor of Alaska is hereby authorized to convene the legislature in extraordinary session for a period not exceeding fifteen days when requested to do so by the President of the United States, or when any public danger or necessity may require it. [37 Stat. L. 514.]

**SEC. 7. Organization of the legislature.**—That when the legislature shall convene under the law, the senate and house of representatives shall each organize by the election of one of their number as presiding officer, who shall be designated in the case of the senate as "president of the senate" and in the case of the house of representatives as "speaker of the house of representatives," and by the election by each body of the subordinate officers provided for in section eighteen hundred and sixty-one of the United States Revised Statutes of eighteen hundred and seventy-eight, and each of said subordinate officers shall receive the compensation provided in that section: *Provided*, That no person shall be employed for whom salary, wages, or compensation is not provided in the appropriation made by Congress. [37 Stat. L. 514.]

R. S. sec. 1861 mentioned in the text was repealed by an Act of June 19, 1878, ch. 329, § 1, 20 Stat. L. 193, which enacted a substitute therefor.

**SEC. 8. Enacting clause—Subject of Act.**—That the enacting clause of all laws passed by the legislature shall be “Be it enacted by the Legislature of the Territory of Alaska.” No law shall embrace more than one subject, which shall be expressed in its title. [37 Stat. L. 514.]

**SEC. 9. Legislative power—Limitations.**—The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents; nor shall the legislature grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the affirmative approval of Congress; nor shall the legislature pass local or special laws in any of the cases enumerated in the Act of July thirtieth, eighteen hundred and eighty-six; nor shall it grant private charters or special privileges, but it may, by general act, permit persons to associate themselves together as bodies corporate for manufacturing, mining, agricultural, and other industrial pursuits, and for the conduct of business of insurance, savings banks, banks of discount and deposit (but not of issue), loans, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wagon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association, but the authority embraced in this section shall only permit the organization of corporations or associations whose chief business shall be in the Territory of Alaska; no divorce shall be granted by the legislature, nor shall any divorce be granted by the courts of the Territory, unless the applicant therefor shall have resided in the Territory for two years next preceding the application, which residence and all causes for divorce shall be determined by the court upon evidence adduced in open court; nor shall any lottery or the sale of lottery tickets be allowed; nor shall the legislature or any municipality interfere with or attempt in anywise to limit the Acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States marshal or any of his deputies, or any constable or police officer, and destroyed; nor shall spirituous or intoxicating liquors be manufactured or sold, except under such regulations and restrictions as Congress shall provide; nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the Government; nor shall the Government of the Territory of Alaska or any political or municipal corporation or subdivision of the Territory make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall the Territory, or any municipal corporation therein, have power or authority to create or assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or of any municipal division thereof; nor to pledge the faith of the people of the same for any loan whatever, either directly or indirectly; nor to create, nor to assume, any indebtedness,

except for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be created or assumed in excess of the actual income of the Territory or municipality for that year, including as a part of such income appropriations then made by Congress, and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and applicable and not already pledged for prior indebtedness: *Provided*, That all authorized indebtedness shall be paid in the order of its creation; all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of property within the town in any one year: *Provided*, That the Congress reserves the exclusive power for five years from the date of the approval of this Act to fix and impose any tax or taxes upon railways or railway property in Alaska, and no acts or laws passed by the Legislature of Alaska providing for a county form of government therein shall have any force or effect until it shall be submitted to and approved by the affirmative action of Congress; and all laws passed, or attempted to be passed, by such legislature in said Territory inconsistent with the provisions of this section shall be null and void: *Provided further*, That nothing herein contained shall be held to abridge the right of the legislature to modify the qualifications of electors by extending the elective franchise to women. [37 Stat. L. 514.]

For the Act of July 30, 1886, ch. 818, mentioned in the text, see the title TERRITORIES.

**SEC. 10. Rules, quorum, and majority.**—That the senate and house of representatives shall each choose its own officers, determine the rules of its own proceedings not inconsistent with this Act, and keep a journal of its proceedings; that the ayes and noes of the members of either house on any question shall, at the request of one-fifth of the members present, be entered upon the journal; that a majority of the members to which each house is entitled shall constitute a quorum of such house for the conduct of business, of which quorum a majority vote shall suffice; that a smaller number than a quorum may adjourn from day to day and compel the attendance of absent members, in such manner and under such penalties as each house may provide; that for the purpose of ascertaining whether there is a quorum present the presiding officer shall count and report the actual number of members present. [37 Stat. L. 515.]

**SEC. 11. Legislator shall not hold other office.**—That no member of the legislature shall hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected and for one year after the expiration of such term; and no person holding a commission or appointment under the United States shall be a member of the legislature or shall hold any office under the government of said Territory. [37 Stat. L. 516.]



**SEC. 12. Exemptions of legislators.**—That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions. That the members of the legislature shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance upon the sessions of the respective houses, and in going to and returning from the same: *Provided*, That such privilege as to going and returning shall not cover a period of more than ten days each way, except in the second division, when it shall extend to twenty days each way, and the fourth division to fifteen days each way. [37 Stat. L. 516.]

**SEC. 13. Passage of laws.**—That a bill in order to become a law shall have three separate readings in each house, the final passage of which in each house shall be by a majority vote of all the members to which such house is entitled, taken by ayes and noes, and entered upon its journal. That every bill, when passed by the house in which it originated or in which amendments thereto shall have originated, shall immediately be enrolled and certified by the presiding officer and the clerk and sent to the other house for consideration. [37 Stat. L. 516.]

**SEC. 14. The veto power.**—That, except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the governor. That every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses, and shall thereupon be presented to the governor. If he approves it, he shall sign it and it shall become a law at the expiration of ninety days thereafter, unless sooner given effect by a two-thirds vote of said legislature. If the governor does not approve such bill, he may return it, with his objections, to the legislature. He may veto any specific item or items in any bill which appropriates money for specific purposes, but shall veto other bills, if at all, only as a whole. That upon the receipt of a veto message from the governor each house of the legislature shall enter the same at large upon its journal and proceed to reconsider such bill, or part of a bill, and again vote upon it by ayes and noes, which shall be entered upon its journal. If, after such reconsideration, such bill or part of a bill shall be approved by a two-thirds vote of all the members to which each house is entitled, it shall thereby become a law. That if the governor neither signs nor vetoes a bill within three days (Sundays excepted) after it is delivered to him, it shall become a law without his signature, unless the legislature adjourns sine die prior to the expiration of such three days. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature, by its adjournment, prevents the return of the bill, in which case it shall not be a law. [37 Stat. L. 516.]

**SEC. 15. Payment of legislative expenses.**—That there shall be annually appropriated by Congress a sum sufficient to pay the salaries of members and authorized employees of the Legislature of Alaska, the printing of the laws, and other incidental expenses thereof; the said sum shall

be disbursed by the governor of Alaska, under sole instructions from the Secretary of the Treasury, and he shall account quarterly to the Secretary for the manner in which the said funds shall have been expended; and no expenditure, to be paid out of money appropriated by Congress, shall be made by the governor or by the legislature for objects not authorized by the Acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects. [37 Stat. L. 516.]

**SEC. 16. Laws transmitted to President and printed.**—That the governor of Alaska shall, within ninety days after the close of each session of the Legislature of the Territory of Alaska, transmit a correct copy of all the laws and resolutions passed by the said legislature, certified to by the secretary of the Territory, with the seal of the Territory attached; one copy to the President of the United States, and one to the Secretary of State of the United States; and the legislature shall make provisions for printing the session laws and resolutions within ninety days after the close of each session and for their distribution to public officials and sale to the people of the Territory. [37 Stat. L. 517.]

**SEC. 17. Election of Delegates.**—That after the year nineteen hundred and twelve the election for Delegate from the Territory of Alaska, provided by "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, shall be held on the Tuesday next after the first Monday in November in the year nineteen hundred and fourteen, and every second year thereafter on the said Tuesday next after the first Monday in November, and all of the provisions of the aforesaid Act shall continue to be in full force and effect and shall apply to the said election in every respect as is now provided for the election to be held in the month of August therein: *Provided*, That the time for holding an election in said Territory for Delegate in Alaska to the House of Representatives to fill a vacancy, whether such vacancy is caused by failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by an act passed by the Legislature of the Territory of Alaska: *Provided further*, That when such election is held it shall be governed in every respect by the laws passed by Congress governing such election. [37 Stat. L. 517.]

The Act of May 7, 1906, ch. 2083, mentioned in the text, is given *infra*, p. 287.

The provisions of the text supersede those of the Act of May 7, 1906, ch. 2083, § 2, 34 Stat. L. 170, which regulated the first election of a delegate for Alaska.

**SEC. 18. Creating railroad commission.**—That an officer of the Engineer Corps of the United States Army, a geologist in charge of Alaska surveys, an officer in the Engineer Corps of the United States Navy, and a civil engineer who has had practical experience in railroad construction and has not been connected with any railroad enterprise in said Territory be appointed by the President as a commission hereby authorized and instructed to conduct an examination into the transportation question in the Territory of Alaska; to examine railroad routes from the seaboard to the coal fields and to the interior and navigable waterways; to secure surveys and other information with respect to railroads, including cost

of construction and operation; to obtain information in respect to the coal fields and their proximity to railroad routes; and to make report of the facts to Congress on or before the first day of December, nineteen hundred and twelve, or as soon thereafter as may be practicable, together with their conclusions and recommendations in respect to the best and most available routes for railroads in Alaska which will develop the country and the resources thereof for the use of the people of the United States: *Provided further*, That the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated to defray the expenses of said commission. [37 Stat. L. 517.]

For the "Alaska Railroad Act" of March 12, 1914, ch. 37, see *infra*, division V, *Railroads, Wagon Roads, Aërials and Tramways*.

SEC. 19. [Compilation of laws authorized.] That the Committee on Territories of the Senate and the Committee on Territories of the House of Representatives are hereby authorized, empowered, and directed to jointly codify, compile, publish, and annotate all the laws of the United States applicable to the Territory of Alaska, and said committees are jointly authorized to employ such assistance as may be necessary for that purpose; and the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to cover the expenses of said work, which shall be paid upon vouchers properly signed and approved by the chairmen of said committees. [37 Stat. L. 518.]

By the Act of May 17, 1884, ch. 53, § 11, 23 Stat. L. 27, the attorney-general was directed to compile certain laws relating to Alaska.

SEC. 20. Laws shall be submitted to Congress.—That all laws passed by the Legislature of the Territory of Alaska shall be submitted to the Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect. [37 Stat. L. 518.]

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[SEC. 1.] Government wharf in Alaska: \* \* \* For reconstructing or repairing and putting in safe and proper condition the wharf at Sitka, Alaska, five thousand dollars to be immediately available: *Provided*, That hereafter the Secretary of the Treasury be authorized to charge and fix the rates of dockage and wharfage to be paid by any private vessel or person allowed to use said wharf, the said receipts to be deposited with the Treasurer of the United States as a miscellaneous receipt derived from Government property; and the Secretary of the Treasury shall direct, by regulation or otherwise, by whom said wharfage and dockage receipts shall be collected. [29 Stat. L. 413.]

The above provision is from the Sundry Civil Appropriation Act of June 11, 1896, ch. 420. It is omitted from volume 2 of Supp. R. S.

A subsequent appropriation for repairs was made by the Act of March 3, 1915, ch. 75, § 1, *infra*, p. 299.

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**An Act making further provision for a civil government in Alaska, and for other purposes.**

[*Act of June 6, 1900, ch. 786, 31 Stat. L. 321.*]

**SEC. 2. [Governor — appointment, powers and duties.]** There shall be appointed for the district a governor, who shall reside therein during his term of office and be charged with the interests of the United States Government within the district. To the end aforesaid he shall have authority to see that the laws enacted for the district are enforced and to require the faithful discharge of their duties by the officials appointed to administer the same. He may also grant reprieves for offenses committed against the laws of the district or of the United States until the decision of the President thereon shall be made known. He shall be ex officio commander in chief of the militia of the district, and shall have power to call out the same when necessary to the due execution of the laws and to preserve the peace, and to cause all able-bodied citizens of the United States in the district to enroll and serve as such when the public exigency demands; and he shall perform generally in and over said district such acts as pertain to the office of governor of a Territory, so far as the same may be made or become applicable thereto. He shall, subject to the direction and approval of the Secretary of the Interior, advertise for and receive bids and, in behalf of the United States, contract from year to year with the responsible asylum or sanitarium west of the main range of the Rocky Mountains submitting the lowest bid for the care and custody of persons legally adjudged insane in said district of Alaska; the cost of advertising for bids, executing the contract, and caring for the insane to be paid, until otherwise provided by law, by the Secretary of the Treasury, out of any money in the Treasury not otherwise appropriated, on accounts and vouchers duly approved by the governor and the Secretary of the Interior. The governor shall from time to time inquire into the operations of any person, company, association, or corporation authorized by the United States, by contract or otherwise, to kill seal or other fur-bearing animals in the district, and any and all violations by such person, company, association, or corporation of the agreement with the United States under which the operations are being conducted, and shall annually report to Congress the result of such inquiries. He shall make an annual report, on the first day of October in each year, to the President of the United States, of his official acts and doings, and of the condition of the district, with reference to its resources, industries, population, and the administration of the civil government thereof. And the President of the United States shall have power to review and to confirm or annul any reprieves granted or other acts done by him. The governor may appoint and commission one or more notaries public for the district, and appointments of notaries public heretofore made by him are hereby legalized, and all acts performed by them by virtue of their notarial commissions shall be for all purposes as valid as though the governor had at the time full and complete legal authority to appoint the commission then. [31 Stat. L. 321.]

This is the second section of title I of the "Carter Act." Section 1 provided that the territory should constitute a civil and judicial district and located the seat of

government. It was superseded by the Act of Aug. 24, 1912, ch. 387, §§ 1 and 2, *supra*, p. 250.

The fifth sentence of the foregoing section relating to the care of the insane was superseded by the Act of Feb. 6, 1909, ch. 80, § 7, *infra*, p. 294.

The sixth sentence of this section relating to the killing of seals was in part superseded by the Act of April 21, 1910, ch. 183, *infra*, division VI, and supersedes a provision of the latter part of section 5 of the Act of May 17, 1884, ch. 53, 33 Stat. L. 25.

The provisions of the text supersede those of the Act of May 17, 1884, ch. 53, § 2, 23 Stat. L. 24, relating to the same subject.

**SEC. 3. [Surveyor-general.]** The surveyor-general of the district shall be ex officio secretary thereof, and as such shall be custodian of the district seal, which shall be provided by the Attorney-General. The surveyor-general, as ex officio secretary of the district, shall perform the official duties required by law to be performed by the secretary of a Territory of the United States, in so far as applicable to said district, and such other duties as may be required by law. [31 Stat. L. 322.]

**SEC. 4. [District courts established — judges — divisions, terms, etc.]**  
\* \* \* That there is hereby established a district court for the district of Alaska, with the jurisdiction of circuit and district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes; and four district judges shall be appointed for the district, each at an annual salary of seven thousand five hundred dollars, who shall during their terms of office reside in the divisions of the district to which they may be respectively assigned by the President. The court shall consist of four divisions, which shall also be recording divisions. Division numbered one shall consist of all that part of the district of Alaska lying east of the one hundred and forty-first meridian of west longitude. Division numbered two shall consist of all that territory lying west of a line commencing on the Arctic coast at the one hundred and forty-eighth meridian; thence extending south along the easterly watershed of the Colville River to a point on the Rocky Mountain divide between the headwaters of Colville River on the north and west and the waters of the Chandlar on the south; thence southwesterly along the divide between the waters of the Colville River, the Kotzebue Sound, and Norton Sound on the north and west and the waters of the Youkon on the south to the one hundred and sixty-first meridian of west longitude; thence along said meridian to the Kuskokwim River; thence southwesterly along the center of the channel of said Kuskokwim River to Bering Sea; the said division to include all the islands lying north of the fifty-ninth parallel of north latitude. Division numbered three shall consist of all that territory lying south and west of the line starting on the coast of the Gulf of Alaska at the one hundred and forty-first meridian of west longitude; thence northerly along said meridian to a point due east from Mount Kimball; thence west to summit of Mount Kimball; thence southwesterly along the southerly watershed of the headwaters of Tanana River; thence westerly along the divide between the waters of the Gulf of Alaska on the south and the waters of the Yukon on the north to the summit of Mount McKinley; thence continuing westerly along the divide between the waters of the Gulf of Alaska and Bristol Bay on the south and the waters of the Yukon and Kuskokwim on the north to the one hundred and fifty-ninth meridian of west longitude; thence northwesterly to the Kuskokwim River on the one hundred and

sixty-first meridian of west longitude; thence southwesterly along the center of said river to Bering Sea; said division to include the Alaska peninsula, the Aleutian Islands, and all islands along the coast of this district south and west of the said district and all lying south of the fifty-ninth parallel of north latitude. Division numbered four shall consist of all that part of the district of Alaska lying east of the second division and north of the third division. One general term of court shall be held each year at Juneau, and such additional terms at other places in the first division as the Attorney-General may direct. One general term of court shall be held each year at Nome, and such additional terms at other places in the second division as the Attorney-General may direct. One general term of court shall be held each year at Valdez, and such additional terms at other places in the third division as the Attorney-General may direct. One general term of court shall be held each year at Fairbanks, and such additional terms at other places in the fourth division as the Attorney-General may direct. Each of the judges is authorized and directed to hold such special terms of court as may be necessary for the public welfare or for the dispatch of the business of the court at such times and places in their respective districts as any of them, respectively, may deem expedient, or as the Attorney-General may direct; and each shall have authority to employ interpreters and to make allowances for the necessary expenses of his court, and to employ an official court stenographer at such compensation as shall be fixed by the Attorney-General. At least thirty days' notice shall be given by the judge, or the clerk, of the time and place of holding the several terms of the court. [35 Stat. L. 839.]

This section was amended to read as above given by section 2 of an Act of March 3, 1909, ch. 269, entitled "An Act to amend section eighty-six of an act to provide a government for the territory of Hawaii, to provide for additional judges, and for other judicial purposes." In this section as originally enacted provision was made for three district judges and three divisions of the court.

The provisions of the text supersede those of the Act of May 17, 1884, ch. 53, § 3, 23 Stat. L. 24, and likewise those of the Act of June 13, 1902, ch. 1082, 32 Stat. L. 385, which redivided the district of Alaska into three recording and judicial divisions. Section 7 of said Act of May 17, 1884, ch. 53, 23 Stat. L. 25, defining the powers of the district court, was likewise superseded by the text.

**Effect of amendment.**—"The Alaskan Code (June 6, 1900, 31 Stat. 321, 322, §§ 4 and 5, c. 786) created one District Court with three judges having general civil and criminal jurisdiction over the entire district, and authority to hold regular terms at Juneau, St. Michael's and Eagle City, and special terms at such times and places in the district as they or any of them might deem expedient. The Act of March 3, 1909 (35 Stat. 838, 839, c. 269), in providing for a fourth division did not contemplate an interruption of the functions of the judge throughout the entire district, nor did it destroy the unity of the District Court. But while preserving unimpaired the power of the court and judges, it fixed a new place at which the same District Court must be held. It did not create a new tribunal, with new officers, to be organized in a new political division, but it continued the jurisdiction and power of the judge to be exercised anywhere in Alaska. It did not

revoke his authority to summon jurors to attend at any session of the District Court, whether permitted to be held at Fairbanks under the Act of 1900 or required there to be held after July 1, under the Act of 1909. The principle involved is, in some of its aspects, like that considered in *Rosencrans v. United States*, (1897) 165 U. S. 257, 17 S. Ct. 302, 41 U. S. (L. ed.) 708, where it was said that "jurisdiction is co-extensive with district and no mere multiplication of places at which courts are to be held or mere creation of division nullifies it." *Matheson v. United States*, (1913) 227 U. S. 540, 33 S. Ct. 355, 57 U. S. (L. ed.) 631.

"Courts of the United States" as including District Court of Alaska.—In *McAllister v. U. S.*, (1891) 141 U. S. 174, 11 S. Ct. 949, 35 U. S. (L. ed.) 693, *affirming* (1887) 22 Ct. Cl. 318, it was held, construing the earlier Act of 1884, that the court established in Alaska was not one of the "courts of the United States"

within the meaning of section 1768 of the Revised Statutes of the United States which provided that "during any recess of the Senate, the President is authorized, in his discretion, to suspend any civil officer appointed by and with the advice and consent of the Senate, except judges of the courts of the United States."

**"General jurisdiction in criminal causes."**—A prosecution for murder, pending when the Act of March 3, 1899, ch. 429, 30 Stat. L. 1253, was passed establishing a criminal code and code of criminal procedure for Alaska, must, in view of the provision therein for the preservation of pending causes, be regarded as within the general jurisdiction in criminal cases conferred upon the District Court for the district of Alaska by this section, whether that court be one newly created by that act, which contains no provision for a transfer of pending causes, or be an existing tribunal continued thereby. *Bird v. U. S.*, (1902) 187 U. S. 118, 23 S. Ct. 42, 47 U. S. (L. ed.) 100.

**Court of last resort.**—The court established by the Act of 1884 was the court of last resort within the limits of the territory. It was, therefore, in every substantial sense, the Supreme Court of that territory, within the meaning of the 15th section of the Act of 1891, conferring jurisdiction on the Circuit Court of Appeals. *The Coquitlam v. U. S.*, (1896) 163 U. S. 346, 16 S. Ct. 1117, 41 U. S. (L. ed.) 184.

**Prohibition.**—In the case of *In re Cooper*, (1891) 138 U. S. 404, 11 S. Ct. 289, 34 U. S. (L. ed.) 993, which was an application presented to the United States Supreme Court for leave to file a petition for a writ of prohibition to the District Court of the United States for the District of Alaska in an admiralty proceeding, the court said: "We are of opinion, upon the preliminary question, that this court has jurisdiction to proceed in respect to the District Court of the United States for the District of Alaska, by way of prohibition, under section 688 of the Revised Statutes, and leave will therefore be given to file the petition for such writ and the accompanying suggestion." See also *In re Cooper*, (1892) 143 U. S. 472,

12 S. Ct. 453, 36 U. S. (L. ed.) 232, wherein the court, commenting on the decision above, said: "Section 688, Revised Statutes, provides: 'The Supreme Court shall have power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction.' And although we were of opinion when the application for the rule was made, and subsequently held (*McAllister v. United States*, 141 U. S. 174), that the District Court for Alaska was not one of the courts mentioned in Article III of the Constitution, declaring that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress shall from time to time establish, we nevertheless concluded that where the District Court of Alaska was acting as a District Court of the United States and, as such, proceeding in admiralty, it came within that section, and this court had power to issue the writ of prohibition to that court in a proper case; and as the questions involved could be, in our judgment, more satisfactorily presented upon a return, we granted the rule. *In re Cooper*, 138 U. S. 404."

**Terms.**—Formerly two terms of the District Court of Alaska were provided for in each year. *The Sylvia Handy*, (1892) 143 U. S. 513, 12 S. Ct. 464, 36 U. S. (L. ed.) 246.

**Transfer of cause to "adjoining state."**—In *Lewis v. Johnson*, (1898) 90 Fed. 673, it was held that Rev. Stat. secs. 601, 637, authorizing the transfer of a cause to a district of an "adjoining state" under certain circumstances, did not authorize the removal of an Alaskan cause to the state of Washington, as that was not an "adjoining state" within the meaning of the statute.

**Admiralty appeals.**—The Act of Feb. 16, 1875, relating to questions reviewable in admiralty appeals, is applicable to Alaskan appeals. *In re Cooper*, (1892) 143 U. S. 472, 12 S. Ct. 453, 36 U. S. (L. ed.) 232; *The Sylvia Handy*, (1892) 143 U. S. 513, 12 S. Ct. 464, 36 U. S. (L. ed.) 246.

**SEC. 5. [Jurisdiction of divisions, etc. — place of trial.]** The jurisdiction of each division of the court shall extend over the district of Alaska, but the court in which the action is pending may, on motion, change the place of trial in any action, civil or criminal, from one place to another place in the same division or to a designated place in another division in either of the following cases:

First. When there is reason to believe that an impartial trial can not be had therein;

Second. When the convenience of witnesses and the ends of justice would be promoted by the change;

Third. When from any cause the judge is disqualified from acting;

but in such event if the judge of another division will appear and try the action, no change of place of trial must be made;

Fourth. By the court, on its own motion, when, considering available means of travel, it appears that the defendant will be put to unnecessary expense and inconvenience if summoned to defend in the place or division in which the action has been commenced; and when it appears to the satisfaction of the court, or judge thereof, that an action has been commenced in a place or division remote from the residence of the defendant for the purpose of causing unnecessary expense or inconvenience, the place of trial shall be changed at the cost of the plaintiff, and such costs shall not be recovered from the defendant.

In any criminal prosecution the court shall change the place of trial where it appears to the satisfaction of the court that the defendant will not be prejudiced thereby and that the United States will be put to unnecessary expense in such criminal prosecution if the transfer is not made. [31 Stat. L. 323.]

**Jurisdiction throughout district.**—The court in each division is given jurisdiction throughout the district and an indictment returned in either division is not defective

because it fails to charge that the offense was committed in that particular division. *Griggs v. U. S.*, (1908) 158 Fed. 572.

**SEC. 6. [Clerks and commissioners — appointment and duties.]** The respective judges of the court shall appoint, and at pleasure remove, clerks and commissioners in and for the district, who shall have the jurisdiction conferred by law in any part thereof, but who shall, during their terms of office, each reside at the place in the district designated in the respective orders of appointment.

The commissioners shall be ex officio justices of the peace, recorders, and probate judges, and shall perform all the duties and exercise all the powers, civil and criminal, imposed or conferred on the United States commissioners by the general laws of the United States and the special laws applicable to the district.

They shall also have power to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty, which writs shall be made returnable before a district judge, and like proceedings shall be had thereon as if the same had been granted by the judge under the general laws of the United States in such cases.

The commissioners shall also have the powers of notaries public, and shall keep a memorandum of all deeds and other instruments of writing acknowledged before them and relating to the title to or transfer of property within the district, which memorandum shall be subject to public inspection.

And all records of instruments of writing hitherto made by any United States commissioner in the district of Alaska are hereby declared to be public records of such district and shall have the same force and effect as if recorded in conformity with the provisions of this Act.

The commissioners shall also keep a record of all fines and forfeitures received by them, and shall pay over the same quarterly to the clerk of the division of the district court in which they were appointed. [31 Stat. L. 323.]

Earlier provisions regulating the appointment of commissioners were contained in the Act of May 17, 1884, ch. 53, § 5, 23 Stat. L. 25, and were superseded by those of the text.



**Jurisdiction of commissioners.**—The former statute on the subject of commissioners (Act of May 17, 1884, ch. 53, § 5), read in part as follows: "Such commissioners shall exercise all the duties and powers, civil and criminal, now conferred on justices of the peace under the general laws of the state of Oregon, so far as the same may be applicable in said district, and may not be in conflict with this act or the laws of the United States."

As to application of the laws of Oregon under this section, see *Finn v. Hoyt*, (1892) 52 Fed. 83; *Ex p. Kie*, (1891) 46 Fed. 485; *Ex p. Emma*, (1891) 48 Fed. 211.

Another provision of section 5 read as follows: "They shall also have jurisdiction, subject to the supervision of the district judge, in all testamentary and probate matters, and for this purpose their courts shall be opened at stated terms and be courts of record, and be provided with

a seal for the authentication of their official acts." In *Ex p. Emma*, (1891) 48 Fed. 211, commissioners were held to have the jurisdiction in probate matters of the Oregon County Courts.

**Appeal from commissioners.**—By Act of May 17, 1884, ch. 53, § 7, 23 Stat. L. 24, it is provided that "an appeal shall lie in any case, civil or criminal, from the judgment of said commissioners to the said district court where the amount involved in any civil case is two hundred dollars or more, and in any criminal case where a fine of more than one hundred dollars or imprisonment is imposed, upon the filing of a sufficient appeal bond by the party appealing, to be approved by the court or commissioner."

As to appeal from commissioners to District Court, see *Decker v. Williams*, (1896) 73 Fed. 308, holding that the amount involved must be two hundred dollars or more.

**SEC. 7. [Clerks — duties — fees — moneys received, etc.]** That four clerks shall be appointed for the court, one of whom shall be assigned to each division thereof, and during his term of office shall reside at such place in the division as the Attorney-General may direct. Each clerk shall, in his division of the district, perform the duties required or authorized by law to be performed by clerks of United States courts in other districts, and such other duties as may be prescribed by the laws of the United States relating to the district of Alaska. He shall preserve copies of all laws applicable to the district and shall preserve all records and record all proceedings and official acts of his division of the court. He shall also collect and receive all moneys arising from the fees of his office, from licenses, fines, forfeitures, judgments, or on any other account authorized by law to be paid to or collected by him, and shall apply the same, except the money derived from licenses, to the incidental expenses of the proper division of the district court and the allowance thereof as directed in written orders, duly made and signed by the judge, and shall account for the same in detail, and for any balances on account thereof, under oath, quarterly, or more frequently if required, to the court, the Attorney-General, and the Secretary of the Treasury: *Provided*, That moneys accruing from violations of the customs laws, civil customs cases, or internal-revenue cases, moneys, not including costs, accruing from civil post-office suits, fines in criminal cases for violations of the postal laws, the net proceeds of sales of public property under section thirty-six hundred and eighteen, Revised Statutes as amended, and any other moneys the disposition of which is otherwise specially provided for by law, shall not be available for the expenses of the court, but shall be paid over or deposited as provided by law for other districts. And "after all payments ordered by the judge shall have been made, any balances remaining in the hands of the clerk shall be by him deposited to the credit of the United States and be covered into the Treasury of the United States at such times and under such rules and regulations as the Secretary of the Treasury may prescribe. The clerk shall be ex officio recorder of instruments as hereinafter provided and also register of wills for the division, and shall

establish secure offices for the safe-keeping of his official records where terms of his division of the court are held. He may appoint necessary deputies and employ other necessary clerical assistance to aid him in the expeditious discharge of the duties of his office, with the approval and at compensation to be fixed by the court or judge, subject to the approval of the Attorney-General. Any person so appointed or employed shall be paid by the clerk on the order of the judge, as other court expenses are paid." [35 Stat. L. 840.]

This section was amended to read as above given by section 3 of an Act of March 3, 1909, ch. 269, entitled "An Act to amend section eighty-six of an act to provide a government for the territory of Hawaii, to provide for additional judges, and for other purposes." The original section provided for the appointment of three clerks, one of whom should be assigned to each of the three divisions of the court then existing.

The provisions of the text as amended supersede those of the Act of May 17, 1884, ch. 53, § 4, 23 Stat. L. 24.

R. S. sec. 3618 mentioned in the text is given under the title PUBLIC MONIES.

**SEC. 8. [District attorneys.]** That four district attorneys shall be appointed for the district, one of whom shall be assigned to each division and shall reside at such place in the division as the Attorney-General shall direct. They shall each perform the duties required to be performed by United States district attorneys in other districts, and such other duties as may be required by law; and they shall each receive a salary of five thousand dollars per annum and shall not while in office accept retainers or engage in any other law business in the district than that pertaining to the duties of their office. The Attorney-General may, upon the recommendation of the district attorney, appoint and at pleasure remove one or more assistant district attorneys and one or more clerical assistants, who shall receive such compensation as the Attorney-General may fix, to be paid as other assistant United States district attorneys and clerical assistants are paid. In the case of the death or disability of a district attorney the judge may appoint a suitable person to fill the office until his successor is appointed and qualified or until the disability is removed. [35 Stat. L. 841.]

This section was amended to read as above given by section 4 of an Act of March 3, 1909, ch. 269, entitled "An Act to amend section eighty-six of an act to provide a government for the territory of Hawaii, to provide for additional judges, and for other judicial purposes." The original act provided for three district attorneys, one to be assigned to each of the three divisions of the district.

Prior provisions regulating the appointment of a district attorney were contained in the Act of May 17, 1884, ch. 53, § 4, 23 Stat. L. 24.

**SEC. 9. [Marshals — deputies.]** A marshal shall be appointed for each division of the district, and each marshal shall have authority and be required to appoint, subject to the approval of the Attorney-General, such deputy marshals as he may deem necessary for the efficient execution of the law and the orders of the court and of the commissioners appointed as herein provided.

That when in the opinion of the Attorney-General the public interest requires it, he may, on the recommendation of the marshal, which recommendation shall state the facts as distinguished from conclusions, showing necessity for the same, allow the marshals to employ necessary office deputies and clerical assistance, upon salaries to be fixed by the Attorney-General, from time to time, and paid as other officers of the court are paid.

When any of such office deputies is engaged in the service or attempted service of any writ, process, subpoena, or other order of the court, or when necessarily absent from the place of his regular employment upon official business, he shall be allowed his actual traveling expenses only, and his necessary and actual expenses for lodging and subsistence, not to exceed four dollars per day, and the necessary actual expenses in transporting prisoners, including necessary guard hire; and he shall make and render accounts thereof as provided for.

Each marshal shall have the general authority and powers and be subject to the obligations of United States marshals in the States and Territories. He shall be the executive officer of the court, and charged with the execution of all processes thereof and with the transportation and custody of prisoners and insane persons, and he shall be ex officio keeper of the jails and penitentiaries of the division of the district to which he may be assigned, and shall be responsible on his official bond for the acts of all deputy marshals appointed by him. In case of the death of a marshal the district judge shall appoint a suitable person to fill the vacancy until his successor is appointed and qualified. The persons so appointed shall give such bonds as the court may require.

The marshal shall deliver persons duly adjudged insane in the district to the authorities of such asylum or sanitarium as the governor, with the approval of the Secretary of the Interior, may designate, and for the service of process in connection with and the guarding and transportation of the insane he shall be compensated as in the case of prisoners.

The deputy marshals shall be ex officio constables and executive officers of the commissioners herein provided for, and shall have the powers and discharge the duties of United States deputy marshals, and also those of constables, under the laws of the United States applicable to said district. [31 Stat. L. 324.]

By the Appropriation Act of June 4, 1897, 30 Stat. L. 56, par. 14, the marshal was required to appoint one additional deputy marshal at each point where an additional commissioner should be located by the President. That provision is, however, obviously superseded by this section 9. The commissioners are now, according to section 6 of this Act, appointed by the judges instead of by the President as formerly.

Early provisions regulating the appointment and powers of marshals were contained in the Act of May 17, 1884, ch. 53, §§ 4 and 6, 23 Stat. L. 25.

Further provisions as to marshals are made by the Act of March 3, 1909, ch. 269, § 6, *infra*, p. 297. By the Alaska Code of Criminal Procedure, § 459, 32 Stat. L. 2, the bond of marshals may be increased.

So much of the text as relates to the care and custody of insane persons is now superseded. See the notes to section 2 of this Act, *supra*, p. 260.

**Liability of marshal for acts of deputy.**  
—The marshal is liable for the acts of his deputies in serving or executing the process issued by the commissioners. *Holden v. Williams*, (1896) 75 Fed. 798.

**Employment of U. S. troops in Alaska**  
for protection of life and property, see (1889) 19 Op. Atty-Gen. 368.

**SEC. 10. [Appointment of officers, terms, etc.]** The governor, surveyor-general, attorneys, judges, and the marshals provided for in this Act shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold their respective offices for the term of four years and until their successors are appointed and qualified, unless sooner removed by the President for cause.

The officers so appointed shall severally be entitled to receive annual compensation as follows:

The governor, the sum of five thousand dollars; the surveyor-general and ex officio secretary of the district, as full compensation, four thousand dollars; the judges, each the sum of five thousand dollars; each marshal, the sum of four thousand dollars; the clerks, each the sum of three thousand five hundred dollars; the district attorneys, each three thousand dollars, the salaries payable from the Treasury of the United States, as like officers are paid in other districts.

Each clerk shall collect all money arising from the fees of his office or on any other account authorized by law to be paid to or collected by him, and shall report the same and the disposition thereof in detail, under oath, quarterly, or more frequently if required, to the court, the Attorney-General, and the Secretary of the Treasury, and all public money received by him and his deputies for fees or on any other account shall be paid out by the clerk on the order of the court, duly made and signed by the judge, and any balance remaining in his hands after all payments ordered by the court shall have been made shall be by him covered into the Treasury of the United States at such times and under such rules and regulations as the Secretary of the Treasury may prescribe.

The clerk may employ necessary clerical help with the approval [of] and at compensation to be fixed by the court to aid him in the expeditious discharge of the business of his office. Any person so employed shall be paid by the clerk on the order of the court, as other court expenses are paid.

The governor, surveyor-general, marshals, judges, clerks of court, and district attorneys shall, in addition to their salaries, be paid their actual traveling and subsistence expenses when traveling in the discharge of their official duties. Accounts for such expenses shall be rendered and paid as are accounts of judges, marshals, clerks, and district attorneys for like expenses in other districts.

In case of the death, removal, resignation, or absence of the governor from the district, the surveyor-general as ex officio secretary of the district shall have, and he is hereby authorized and required to execute and perform, all the powers and duties of the governor during such vacancy or absence, or until another governor shall be appointed to fill such vacancy. [31 Stat. L. 325.]

The salaries of district judges are increased by the Act of March 3, 1909, ch. 269, amending section 4 of this Act, *supra*, p. 262. The salaries of district attorneys are increased by the Act of March 3, 1909, ch. 269, amending section 8 of this Act, *supra*, p. 266.

By the Legislative, Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141, § 1, 38 Stat. L. 1021, there was appropriated \$7,000 for the payment of the salary of the governor of Alaska.

The provisions of the text apparently supersede those of the Act of May 17, 1884, ch. 53, which read as follows:

"Sec. 9. That the governor, attorney, judge, marshal, clerk, and commissioners provided for in this act shall be appointed by the President of the United States, by and with the advice and consent of the Senate, and shall hold their respective offices for the term of four years, and until their successors are appointed and qualified. They shall severally receive the fees of office established by law for the several offices the duties of which have been hereby conferred upon them, as the same are determined and allowed in respect of similar offices under the laws of the United States, which fees shall be reported to the Attorney-General and paid into the Treasury of the United States. They shall receive respectively the following annual salaries. The governor, the sum of three thousand dollars; the attorney, the sum of two thousand five hundred dollars; the marshal, the sum of two thousand five hundred dollars; the judge, the sum of three thousand dollars; and the clerk, the sum of two thousand five hundred dollars, payable to them quarterly from the Treasury of the United States. The Dis-

district Judge, Marshal, and District Attorney shall be paid their actual, necessary expenses when traveling in the discharge of their official duties. A detailed account shall be rendered of such expenses under oath and as to the marshal and district attorney such account shall be approved by the judge, and as to his expenses by the Attorney-General. The commissioners shall receive the usual fees of United States commissioners and of justices of the peace for Oregon, and such fees for recording instruments as are allowed by the laws of Oregon for similar services, and in addition a salary of one thousand dollars each. The deputy marshals, in addition to the usual fees of constables in Oregon, shall receive each a salary of seven hundred and fifty dollars, which salaries shall also be payable quarterly out of the Treasury of the United States. Each of said officials shall, before entering on the duties of his office, take and subscribe an oath that he will faithfully execute the same, which said oath may be taken before the judge of said district or any United States district or circuit judge. That all officers appointed for said district, before entering upon the duties of their offices, shall take the oaths required by law[,] and the laws of the United States, not locally inapplicable to said district and not inconsistent with the provisions of this act are hereby extended thereto; but there shall be no legislative assembly in said district, nor shall any Delegate be sent to Congress therefrom. And the said clerk shall execute a bond, with sufficient sureties, in the penalty of ten thousand dollars, for the faithful performance of his duties, and file the same with the Secretary of the Treasury before entering on the duties of his office; And the commissioners shall each execute a bond, with sufficient sureties, in the penalty of three thousand dollars, for the faithful performance of their duties, and file the same with the clerk before entering on the duties of their office." [23 Stat. L. 26, 27.]

**Compensation of commissioners.**—The intent of section 9 was that a commissioner should receive the fees appropriate to the services performed where fees were authorized, and that his salary should cover other services. He was not entitled to fees as register of the land office. *Jewett v. U. S.*, (1892) 27 Ct. Cl. 519.

**Compensation of marshal.**—Under section 9 all fees received by a marshal in Alaska had to be paid into the treasury

of the United States. This rule applied to fees earned for services to the United States. *U. S. v. Hillyer*, (1893) 58 Fed. 678.

**National banks in Alaska.**—Under the above provision that the laws of the United States were extended to Alaska, the attorney-general ruled that national banks might be organized there. (1890) 19 Op. Atty-Gen. 678.

**SEC. 11. [Accounts of commissioners and deputy marshals.]** That an accurate detailed account of all fees earned and expenses incurred by commissioners and deputy marshals shall be prepared in duplicate quarterly, duly verified by the oath of the commissioner or deputy marshal rendering the account, and forwarded to the clerk for the proper division of the district court and approved by the judge thereof, if found to be in accordance with law. After approval by the judge the original of each such account shall be forwarded by the clerk to the Department of Justice for revision and the duplicate filed in the court. All net fees earned in excess of the sum of three thousand dollars per calendar year or in excess of that rate for a less period, by any commissioner or deputy marshal, shall be annually paid to the clerk of the proper division of the court to be available for incidental expenses of the district court of the proper division, such payment of such incidental expenses to be accompanied by a verified detailed statement of said clerk. [35 Stat. L. 841.]

This section was amended to read as above given by section 5 of an Act of March 3, 1909, ch. 269, entitled "An Act to amend section eighty-six of an act to provide a government for the territory of Hawaii, to provide for additional judges, and for other judicial purposes." The original section was as follows:

"SEC. 11. An accurate detailed account of all fees received and disbursements made by commissioners and deputy marshals shall be filed quarterly with the clerk for the proper division of the district court and approved by the judge thereof, if found to be in accordance with law; and all net fees received in excess of the sum of three thousand dollars per annum by any commissioner or deputy marshal shall be annually paid to the clerk of the proper division of the court and by him paid into the Treasury of the United States, such payment to be accompanied by a verified detailed statement of such deputy or commissioner." [31 Stat. L. 326.]

**SEC. 12 [Clerks' bonds.]** The clerks of the court shall each, before entering upon the duties of his office, execute a bond, with sufficient sureties, to be approved by the Secretary of the Treasury, or the court or a judge thereof, in the penalty of twenty thousand dollars, for the faithful performance of his official duties, and file the same with the Attorney-General; and each commissioner shall, before entering upon the duties of his office, execute a bond, with sufficient sureties, to be approved by the court, or a judge thereof, in the penalty of one thousand dollars, for the faithful performance of his official duties, and file the same with the clerk, who shall send a certified copy thereof to the Attorney-General. [*31 Stat. L. 326.*]

**SEC. 13. [Recording divisions and districts.]** The judges of the district, or a majority of them, shall, as soon as practicable after their appointment, meet, and by appropriate order, to be thereafter entered in each division of the court, divide the district into three recording divisions, designate the division of the court to supervise each, and also define the boundaries thereof by reference to natural objects and permanent landmarks or monuments, in such manner that the boundaries of each recording division can be readily determined and become generally known from such description, which order shall be given publicity in such manner by posting, publication, or otherwise as the judges or any division of the court may direct, the necessary expense of the publication of such order and description of the recording divisions to be allowed and paid as other court expenses.

At any regular or special term an order may be made by the court establishing one or more recording districts within the recording division under the supervision of such division of the court and defining the boundaries thereof by reference to natural objects and permanent landmarks or monuments, in such manner that the boundaries thereof can be readily determined.

The order establishing a recording district shall designate a commissioner to be *ex officio* recorder thereof, and shall also designate the place where the commissioner shall keep his recording office within the recording district:

*Provided*, The clerk of the court shall be *ex officio* recorder of all that portion of the recording division under the supervision of his division of the court not embraced within the limits of a recording district established, bounded, and described therein as authorized by this Act, and when any part of the division for which a clerk has been recording shall be embraced in a recording district, such clerk shall transcribe that portion of his records appertaining to such district and deliver the same to the commissioner designated as recorder thereof.

Whenever it appears to the satisfaction of the court that the public interests demand, or that the convenience of the people require, the court may change or modify the boundaries or discontinue a recording district or change the location of the recording office, or remove the commissioner acting as *ex officio* recorder, and appoint another commissioner to fill the office. [*31 Stat. L. 326.*]

The first paragraph of the foregoing section is superseded by an amendment to section 4 of this Act by an Act of March 3, 1909, ch. 269, § 2, given *supra*, p. 261, whereby the district is divided into four recording divisions.

**SEC. 14. [Record books, etc.]** The clerk as ex officio recorder must procure such books for records as the business of his office requires and such as may be required by the respective commissioners designated as recorders in his division of the court, but orders for the same must first be obtained from the court or the judge thereof. The respective officers acting as ex officio recorders shall have the custody [of] and must keep all the books, records, maps, and papers deposited in their respective offices, and where a recorder is removed or from any cause becomes unable to act, or a recording district is discontinued, the records and all books, papers, and property relating thereto shall be delivered to the clerk or such officer or person as the court or judge thereof may direct.

The record books procured by the clerk, as herein provided, shall be paid for by him, on the order of the court, out of any moneys in his hands, as other court expenses are paid. [31 Stat. L. 327.]

**SEC. 15. [What recorded.]** The respective recorders shall, upon the payment of the fees for the same prescribed by the Attorney-General, record separately, in large and well-bound separate books, in fair hand:

First. Deeds, grants, transfers, contracts to sell or convey real estate and mortgages of real estate, releases of mortgages, powers of attorney, leases which have been acknowledged or proved, mortgages upon personal property;

Second. Certificates of marriage and marriage contracts and births and deaths;

Third. Wills devising real estate admitted to probate;

Fourth. Official bonds;

Fifth. Transcripts of judgments which by law are made liens upon real estate;

Sixth. All orders and judgments made by the district court or the commissioners in probate matters affecting real estate which are required to be recorded;

Seventh. Notices and declaration of water rights;

Eighth. Assignments for the benefit of creditors;

Ninth. Affidavits of annual work done on mining claims;

Tenth. Notices of mining location and declaratory statements;

Eleventh. Such other writings as are required or permitted by law to be recorded, including the liens of mechanics, laborers and others:

*Provided*, Notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject-matter affected by the instrument is situated, and where the property or subject-matter is not situated in any established recording district the instrument affecting the same shall be recorded in the office of the clerk of the division of the court having supervision over the recording division in which such property or subject-matter is situated. [31 Stat. L. 327.]

For general regulations as to mining claims, etc., see *infra*, this title, division III, *Mineral Lands, Mines and Mining*.

**Recording location notice.**—This section does not require, but merely permits, the recording of notices of mining locations,

nor does it provide that the failure to record shall work a forfeiture of rights, and such forfeiture does not follow in the

absence of a well-established rule or custom of the miners of the district to that effect. *Sturtevant v. Vogel*, (1909) 167 Fed. 448.

"Within ninety days."—The provision for recording a location notice "within

ninety days" means that it shall be done "not beyond ninety days" from the date of discovery. A compliance with the act at any time before the last day has expired is within the statute. *Butler v. Good Enough Min. Co.*, (1901) 1 Alaska 246.

**SEC. 16. [Accounting for fees for unrecorded instruments.]** Any clerk or commissioner authorized to record any instrument who having collected fees for so doing fails to record such instrument shall account to his successor in office, or to such person as the court may direct, for all the fees received by him for recording any instrument on file and unrecorded at the expiration of his official term, or at the time he is required to transfer his records to another officer under the direction of the court. And any clerk or commissioner who fails, neglects, or refuses to so account for fees received and not actually earned by the recording of instrument[s] shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars, and imprisoned for not more than one year, or until the fees received and unearned as aforesaid shall have been properly accounted for and paid over by him, as hereinbefore provided. And in addition such fees may be recovered from such clerk or commissioner or the bondsmen of either, in a civil action which shall be brought by the district attorney, in the name of the United States, to recover the same; and the amount when recovered shall be by the court transferred to the successor in office of such recorder, who shall thereupon proceed to record the unrecorded instruments:

*Provided*, Miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, mill sites and affidavits of labor, not in conflict with this Act or the general laws of the United States; and nothing in this Act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder to act as such until a recorder therefor is appointed by the court:

*Provided further*, All records heretofore regularly made by the United States commissioner at Dyea, Skagway, and the recorder at Douglas City, not in conflict with any records regularly made with [by] the United States commissioner at Juneau, are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this Act. [31 Stat. L. 328.]

See the note to the preceding section.

**Miners' rules.**—The miners in an organized mining district cannot enact and enforce a rule or regulation in conflict with the laws of the United States, and any rule, regulation, or custom which undertakes to limit the time within which a

miner may file his notice of location to less than ninety days must be held to be repealed by section 15, *supra*. *Butler v. Good Enough Min. Co.*, (1901) 1 Alaska 246.

**SEC. 17. [Notaries public — residence — term of office.]** Every person appointed as a notary public must at the time of his appointment be



a resident of the district and must continue to reside therein during his term of office. Removal from the district vacates his office and is equivalent to resignation.

The term of office of a notary public shall be four years from and after the date of his commission, but he may be sooner removed by the governor for misconduct in office. [31 Stat. L. 328.]

**SEC. 18. [Notaries public — duties.]** It shall be the duty of a notary public —

First. When requested, to demand acceptance and payment of foreign, domestic, and inland bills of exchange, or promissory notes, and protest the same for nonacceptance and nonpayment, and to exercise such other powers and duties as by the law of nations and according to commercial usages or by the laws of any State, government, or country may be performed by notaries, and keep a record of such acts.

Second. To take acknowledgment or proof of powers of attorney, deeds, mortgages, grants, transfers, and other instruments of writing executed by any person and to give a certificate of such proof or acknowledgment indorsed or attached to the instrument.

Third. To take depositions and affidavits and administer oaths and affirmations in all matters incident to the duties of the office or to be used before any court, judge, or officer.

Fourth. When requested and upon payment of his fees therefor to make and give a certified copy of any record in his office.

Fifth. To provide and keep an official seal, upon which must be engraved the name of the district and the words "Notary Public," with the surname of the notary and at least the initials of his Christian name. [31 Stat. L. 328.]

**SEC. 19. [Protests of notaries, weight as evidence.]** The protest of a notary public under his hand and seal of a bill of exchange or promissory note for nonacceptance or nonpayment, stating the presentment for acceptance or payment and the nonacceptance or nonpayment thereof, the service of notice on any and all parties to such bill of exchange or promissory note and specifying the mode of giving such notice and the reputed place of residence of the party to such bill of exchange or promissory note and of the party to whom same was given and the post-office nearest thereto is prima facie evidence of the facts contained therein. [31 Stat. L. 329.]

**SEC. 20. [Notaries' records to be deposited with clerk of court.]** It shall be the duty of every notary public, on his resignation or removal from office or at the expiration of his term and in case of his [the] death of his legal representative, to forthwith deposit all the records kept by him in the office of the clerk of the division of the district court in which he resides, and on failure to do so the person so offending is liable in damages to any person injured thereby. [31 Stat. L. 329.]

**SEC. 21. [Duty of clerk as to records.]** It shall be the duty of each clerk aforesaid to receive and safely keep all records and papers of the notary in each case above named and to give attested copies of them under

his seal, for which he may demand such fees as by law may be allowed to the notaries, and such copies shall have the same effect as if certified by the notary. [31 Stat. L. 329.]

**SEC. 22. [Bond of notaries.]** Each notary must execute an official bond in the sum of one thousand dollars, which bond must be approved by the clerk of the division of the district court located nearest his residence. [31 Stat. L. 329.]

**SEC. 23. [Filing, etc., of bond.]** Each notary public, upon approval of his official bond, so soon as he has taken his official oath, must transmit such bond and oath, signed by him with his own proper signature to the office of the secretary of the district, whereupon the governor must issue a commission. [31 Stat. L. 329.]

**SEC. 24. [Liability of notary.]** For the official misconduct or neglect of a notary public, he and sureties on his official bond are liable to the parties injured thereby for all damages sustained. [31 Stat. L. 329.]

**SEC. 25. [Continuance in office of existing officials.]** The officers properly qualified and actually discharging official duties in the district at the time of the approval of this Act may continue to act in their respective official capacities until the expiration of the terms for which they were respectively appointed unless sooner removed. [31 Stat. L. 329.]

Section 26 of this Act, extending the mining laws of Alaska, is given *infra*, under division III, *Mineral Lands, Mines and Mining*.

Section 27, relating to lands of Indians or persons conducting Indian schools or missions, is given *infra*, under division IV, *Public Lands*.

Section 28 authorizing the Secretary of the Interior to make provision for the education of children in Alaska was superseded by the Act of Jan. 27, 1905, ch. 277, § 7, *infra*, p. 284.

Section 29 amends sections 363, 460, and 463 of the Alaska Code of Criminal Procedure, 30 Stat. L. 1325, 1336, 1338.

**SEC. 30. [Fees of officers not otherwise compensated.]** In case the law requires or authorizes any services to be performed or any act to be done by any official or person within the District of Alaska, and provides no compensation therefor, the Attorney-General may prescribe and promulgate a schedule of such fees, mileage, or other compensation as shall be by him deemed proper for each division of the court, and such schedule shall have the force and effect of law; and the Attorney-General may from time to time amend such schedule and promulgate the same as amended, and the schedule as amended and promulgated shall also have the force and effect of law. [31 Stat. L. 332.]

**SEC. 31. [Public buildings — sites.]** Any of the public buildings in the district not required for the customs service or military purposes may be used for court rooms and offices of the civil government; and the marshals of the district shall, each in his division, be the custodian of such buildings. Any division of the court may, where necessary, order the construction or repair of a jail building at the place or places where terms of the court are held, at a cost not to exceed three thousand dollars for each building, the same to be paid by the clerk as provided for the

payment of other allowances for the necessary expenses of the court; and any part or portion of the unappropriated public domain of the United States, embracing not more than four thousand square feet, to be taken in compact form, as near as may be practicable, may be set aside by order of the court as a jail site, which order shall describe the location of the ground selected, where unsurveyed by metes and bounds and by reference to natural objects and permanent monuments, in such manner that its boundaries and its location may be readily determined, a certified copy of which order of the court shall be by the clerk thereof transmitted to the Commissioner of the General Land Office, who shall cause the same to be noted on the records of his office, and thereafter the ground described shall be reserved from sale or other disposition, unless for good cause the court shall vacate the order of reservation or Congress shall otherwise direct, and the sentence of imprisonment in any criminal case shall be carried out by confinement in the penitentiary or jails herein provided for, or as provided in section fifty-five hundred and forty-six of the Revised Statutes of the United States.

Where a suitable court room is not available or can not be obtained at reasonable rental at the place or any of the places where terms of the court are held, the court may enter a like order of reservation and direct the construction of a suitable building where the sessions of the court may be held, the cost of such building not to exceed in any case the sum of five thousand dollars, the same to be paid and proceedings to reserve the land to be as in the case of the reservation of ground and construction of jail, as hereinbefore provided:

*Provided*, No court building or jail shall be constructed in any division of the district without authority from the Attorney-General, to whom the clerk shall furnish a verified account in detail of all expenditures made by him for buildings, repairs, or other purposes, together with his authority for each payment made. [31 Stat. L. 332.]

Earlier provisions were made for public buildings by the Act of May 17, 1884, ch. 53, § 10, 23 Stat. L. 27.

R. S. sec. 5546 above mentioned is given in the title PRISONS AND PRISONERS.

**SEC. 32. [Attorneys' admission fees — notaries' commission fees — use of fund.]** For each certificate issued to a member of the bar, authorizing him to practice law in the district, a fee of ten dollars shall be paid to the clerk of the court, which shall be by him promptly remitted to the secretary of the district, and at the same time the clerk shall advise the governor of such remittance. For each commission issued to a notary public a fee of ten dollars shall be paid to the secretary of the district. The fees received by the secretary under this section and under chapter seventy-four of title two shall be by him retained and kept in a fund to be known as the district historical library fund. The fund thus collected shall be disbursed on the order of the governor for the purpose of establishing and maintaining the district historical library and museum. The same shall embrace copies of all laws relating to the district, and all papers and periodicals published within the district, and such other matter of historical interest as the governor may consider valuable and appropriate for such collection. The collection shall also embrace such curios relating to the aborigines and the settlers as may be by the governor

deemed of historical importance. The collection thus made shall be described by the governor in the annual report of the governor to the Secretary of the Interior, and shall be by him kept in a secure place and turned over to his successor in office. The secretary of the district and the governor shall each annually account to the Secretary of the Interior for all receipts and disbursements in connection with such historical library and museum. [31 Stat. L. 333.]

Additional provision for the disposition of fees received by the secretary is made by section 2 of the Act of March 3, 1905, ch. 1497, *infra*, p. 286.

**SEC. 33. [Depository of publications of Government.]** The historical library and museum provided for in section thirty-two of this title is hereby made a designated depository of publications of the Government, and shall be supplied with one copy of each of said publications in the same manner as such publications are supplied to other depositories. [31 Stat. L. 333.]

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**An Act To authorize the appointment of road overseers and to create road districts in the district of Alaska, and for other purposes.**

[Act of April 27, 1904, ch. 1629, 33 Stat. L. 391.]

**[Appointment of road overseers and creation of road districts.]** That it shall be the duty of the commissioner in each precinct in the district of Alaska, on the first Monday in the month of April in each year, to appoint a road overseer for the precinct in which he resides, and create a road district in the inhabited part of said precinct, which said district shall not include incorporated cities and towns.

To fill all vacancies in the office of road overseer in his precinct.

To cause a record to be made defining the boundaries of said road district. [33 Stat. L. 391.]

**TERM OF OFFICE AND QUALIFICATION OF ROAD OVERSEERS.**

All road overseers shall hold office for one year and until their successors are appointed and qualified.

Every person appointed to the office of road overseer of any road district shall reside in the road district to which he has been appointed, and shall, within thirty days after he shall have been notified of his appointment, take and subscribe to an oath of office obligating himself to the faithful performance of the duties of his office, and shall forthwith cause such oath to be filed in the office of the commissioner of his precinct, and in case any such road overseer shall become nonresident of his road district, his office shall at once become vacant.

Each road overseer shall, before entering upon the duties of his office, execute a bond to the United States in a sum not less than double the amount of money which will probably come into his hands at any time during his term of office, with two or more sureties, the amount and sufficiency of the bond to be approved by the commissioner of the precinct, conditioned for the faithful discharge of the duties of his office, which bond shall be by him forthwith filed in the office of the commissioner and

ex officio recorder. The approval of such bond shall be indorsed thereon by the commissioner. [33 Stat. L. 391.]

#### DUTIES OF ROAD OVERSEER.

The duties of road overseer shall be such as may be prescribed by law.

Each road overseer shall keep an accurate account of all money received by virtue of his office and the manner in which the same has been disbursed, and to whom, and shall, on the last Saturday of March in each year, exhibit such account, together with his vouchers, to the commissioner for adjustment and settlement. Such account shall be in writing, verified by affidavit of the overseer that the same is in all respects a full and true account of all money received by him during the full term for which he should make settlement and the amounts expended and the manner in which they were expended.

If any person appointed to the office of road overseer, unless unable from disease or other infirmity to discharge the duties of such office, shall refuse or neglect to serve therein, he shall be liable to a fine of twenty-five dollars; but no person so appointed who shall have served for a term next preceding such appointment shall be liable to such fine for refusing to serve if he shall have given notice in writing of refusal to the commissioner within twenty days after having been notified of his appointment.

Every road overseer who shall, after the expiration of his term of office, neglect or refuse to deliver on demand to his successor in office, after such successor shall have been duly qualified according to law, all moneys, records, books, papers, or other property appertaining to such office shall be liable to a fine of not less than fifty nor more than five hundred dollars.

Road overseers of the different precincts are authorized, and it is made their duty, to warn out all male persons between eighteen and fifty years of age who have resided thirty days in the district of Alaska, who are capable of performing labor on roads or trails, and who are not a precinct charge, to perform two days' work of eight hours each in locating, constructing, or repairing public roads or trails, under the direction of the road overseer within whose precinct they may respectively reside, or furnish a substitute to do the same, or pay the sum of four dollars per day for two days' labor, and said road overseer shall receipt for the same and shall expend it in location, construction, or repairs on the public roads and trails within his precinct; and any moneys so received and not expended shall be paid over to his successor in office, who shall expend the same as above provided.

The overseer of roads and trails in each precinct shall give notice to persons residing in his precinct liable to or charged with a road or trail tax of the time and place and the kind of work expected to be performed on the road or trail, and may direct what implements such persons shall bring with which to perform such work.

Whenever it shall happen, in consequence of sickness or absence from home, or any other cause, that the two days' work aforesaid shall not be performed within the time specified in this Act, the overseer shall be authorized to require the performance of such work at any time prior to the first day of October then next ensuing; and in case any person shall neglect or refuse to do the two days' work, or furnish a substitute, or pay

in money the price of two days' labor, as provided in this Act, he shall be deemed guilty of a misdemeanor and shall be fined in the sum of ten dollars for each day refusing so to work upon conviction before any justice of the peace of the precinct.

If any person shall appear at the proper time and place as directed by the overseer and neglect or refuse to do a reasonable day's work according to his ability, he shall be liable the same as if he had neglected or refused to appear, or furnish a substitute, or pay the sum of money as provided herein.

Under the direction of the overseer, and at his discretion, the above road tax may be performed by one day's work, together with an able-bodied man, a two-horse team with wagon, or a dog team consisting of not less than five dogs and a sleigh, or a reindeer team of not less than two reindeer and sleigh or cart.

It shall be the duty of each road overseer to receipt to each person who performs labor on the public roads and trails of his precinct under the provisions of this Act for the amount of labor so performed, and no person shall be compelled to pay road tax except in one precinct in the district of Alaska during one calendar year.

Each road overseer shall, on or before the first day of April in each year, report to the commissioner of the precinct the names of all persons subject to the two days' road tax for the preceding year, the names of those who have worked out said tax, the names of those who have paid the said tax in money, and the names of those delinquent, and also all moneys received by him from all sources, and how expended, and the account of said road overseer of the work performed by himself, which report shall be approved by said commissioner before any final settlement shall be made with such road overseer.

Each and every road overseer who shall neglect or refuse to perform the several duties enjoined upon him by this Act, or who shall, under any pretense whatsoever, give or sign a receipt or certificate for labor performed or money paid, unless the labor shall have been performed or money paid prior to the signing or giving of such receipts or certificates, shall forfeit for every such offense not less than five nor more than fifty dollars, to be recovered by an action before any justice of the peace within the precinct where such overseer may reside, and it is hereby made the duty of every United States attorney or assistant to prosecute all offenses against the provisions of this Act not otherwise provided for. [33 Stat. L. 392.]

#### PER DIEM.

Road overseers shall be allowed four dollars per day for all services required by this Act and actually performed in their respective precincts, to be retained out of money paid said road overseers from persons paying money or fines in lieu of two days' labor, upon the certified statement of the overseers, approved by the commissioner of the precinct: *Provided*, That no overseer shall receive pay for more than ten days in any one year, and not until he has made the return as provided in the preceding section, in duplicate, one copy to be retained by the commissioner and one copy filed with the clerk of the district court in the division in which the said precinct is situated.

Any oath required to be taken by said overseer, acknowledgment of bond, or the filing or recording of any paper or plat authorized by this Act shall be free of cost to said overseer.

Upon application of road overseers it shall be the duty of the clerk of the district court to furnish copies of this Act and blank forms of notices warning persons to perform road work, receipts for road work, bond, and oath, and for overseer's report to commissioner, the expense of which shall be paid out of the fund for paying the incidental expenses of the court.

The Attorney-General of the United States is hereby directed to furnish clerks of the district court in the different judicial divisions of Alaska a sufficient number of copies of this Act and other road and trail laws that may now be upon the statutes relating to roads and trails in the district of Alaska for use of road overseers in each judicial division. [33 Stat. L. 393.]

Further provisions as to roads in Alaska are given *infra*, under the division V. *Railroads, Wagon Roads, Aërials and Tramways.*

A native Eskimo is such a male person work on the roads. U. S. v. Sitarangok, as may be warned out by the overseer to (1913) 4 Alaska 667.

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**An Act To provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the district of Alaska, and for other purposes.**

[Act of Jan. 27, 1905, ch. 277, 33 Stat. L. 616.]

SECTION 1. [Alaska fund — source and disposition.] That all moneys derived from and collected for liquor licenses, occupation or trade licenses, outside of the incorporated towns in the Territory of Alaska, shall be deposited in the Treasury Department of the United States, there to remain as a separate and distinct fund, to be known as the "Alaska fund," and to be wholly devoted to the purposes hereinafter stated in the Territory of Alaska. Twenty-five per centum of said fund, or so much thereof as may be necessary, shall be devoted to the establishment and maintenance of public schools in said Territory; ten per centum of said fund shall be, and is hereby, appropriated and authorized to be expended for the relief of persons in Alaska who are indigent and incapacitated through nonage, old age, sickness, or accident; and all the residue of said fund shall be devoted to the construction and maintenance of wagon roads, bridges, and trails in said Territory: *Provided*, That the clerk of the court of each judicial division of said Territory is authorized, and he is hereby directed, whenever considered necessary, to call upon the United States marshal of said judicial division to aid in the collection of said license moneys by designating regular or special deputies of his office to act as temporary license inspectors, and it shall be the duty of said United States marshal to render such aid; and the said regular or special deputies while actually engaged in the performance of this duty shall receive the same fees and allowances and be paid in the same manner as when performing their regular duties.

That at the end of each fiscal quarter the Secretary of the Treasury of the United States shall divide the amount of said ten per centum of said fund so received during the quarter just ended into four equal parts, and transmit to each of the four United States district judges in Alaska one of said equal amounts.

That each of said judges is hereby authorized to expend so much of the money received by him under this Act as may, in his discretion, be required for the relief of those persons in his division who are incapacitated through nonage, old age, sickness, or accident, and who are indigent and unable to assist and protect themselves: *Provided*, That each judge shall quarterly submit to the Secretary of the Treasury an itemized statement, with proper vouchers, of all expenditures made by him under this Act, and he shall at the time transmit a copy of said statement to the governor of the Territory: *Provided further*, That any unexpended balance remaining in the hands of any judge at the end of any quarter shall be returned to the Secretary of the Treasury of the United States, and by him deposited in the said "Alaska fund," and the said sum shall be subsequently devoted, first, to meeting any actual requirements for the care and relief of such persons as are provided for in this Act in any other division in said Territory wherein the amount allotted for that purpose has proved insufficient; and, second, if there shall be any remainder thereof, said remainder shall be devoted to the construction and maintenance of wagon roads, bridges, and trails in said Territory. [37 Stat. L. 728.]

This section, given above as amended by an Act of March 3, 1913, ch. 109, constitutes a part of the Act known as the "Nelson Act," the "Alaska Road Act" or the "Trail Act."

As originally enacted (33 Stat. L. 616), this section provided for a fund similar to that for which provision is made in the text: one-fourth of said fund, or so much thereof as should be necessary, to be devoted to the use of public schools; five per centum, or so much of said five per centum as might be needed, to be devoted to the care and maintenance of insane persons, and all the residue to the construction and maintenance of wagon roads, bridges, and trails.

By the Act of May 14, 1906, ch. 2458, 34 Stat. L. 192, the original section was amended by adding thereto a proviso similar to that at the end of the first paragraph of the text.

So much of said amended section as provided that five per centum of the license moneys collected outside of incorporated towns should be applied to the care of the insane was repealed by the Act of Feb. 6, 1909, ch. 80, § 7, 35 Stat. L. 601, and the said five per centum, or so much thereof as might be necessary, directed to be applied to the establishment and maintenance of public schools under the direction of the governor.

**Constitutionality.**—Under the original section it was held that Congress having undoubtedly the power by direct legislation to impose license taxes upon the residents of Alaska, providing that when collected they are paid to a treasurer of the territory and disbursed by him solely for the needs of the territory, the fact that they were ordered to be paid into the

treasury of the United States and not specifically appropriated to the expenses of the territory did not make such taxes unconstitutional when the sum total of these and all other revenue from the territory did not equal the cost and expense of maintaining its government. *Binns v. U. S.*, (1904) 194 U. S. 486, 24 S. Ct. 816, 48 U. S. (L. ed.) 1087.

**SEC. 2. [Construction of wagon roads — appointment of road commissioners — powers — maps — bids — disbursements — reimbursements.]** That there shall be a board of road commissioners in said district, to be composed of an engineer officer of the United States Army to be detailed and appointed by the Secretary of War, and two other officers of that



part of the Army stationed in said district and to be designated by the Secretary of War. The said engineer officer shall, during the term of his said detail and appointment, abide in said district. The said board shall have the power, and it shall be their duty, upon their own motion or upon petition, to locate, lay out, construct, and maintain wagon roads and pack trails from any point on the navigable waters of said district to any town, mining or other industrial camp or settlement, or between any such town, camps, or settlements therein, if in their judgment such roads or trails are needed and will be of permanent value for the development of the district; but no such road or trail shall be constructed to any town, camp, or settlement which is wholly transitory or of no substantial value or importance for mining, trade, agricultural, or manufacturing purposes. The said board shall prepare maps, plans, and specifications of every road or trail they may locate and lay out, and whenever more than twenty thousand dollars, in the aggregate, shall have to be expended upon the actual construction of any road or section of road designed to be permanent, contract for the work shall be let by them to the lowest responsible bidder, upon sealed bids, after due notice, under rules and regulations to be prescribed by the Secretary of War. The board may reject any bid if they deem the same unreasonably high or if they find that there is a combination among bidders. In case no responsible and reasonable bid can be secured, then the work may be carried on with material and men procured and hired by the board. The engineer officer of the board shall in all cases supervise the work of construction and see that the same is properly performed. As soon as any road or trail laid out by the board has been constructed and completed they shall examine the same and make a full and detailed report of the work done on the same to the Secretary of War, and in such report they shall state whether the road or trail has been completed conformably to the maps, plans, and specifications of the same. It shall be the duty of said board, as far as practicable, to keep in proper repair all roads and trails constructed under their supervision, and the same rules as to the manner in which the work of repair shall be done, whether by contract or otherwise, shall govern as in the case of the original construction of the road or trail. The cost and expenses of laying out, constructing, and repairing such roads and trails shall be paid by the Secretary of the Treasury, through the authorized disbursing officer of the board designated by the Secretary of War, out of the road and trail portion of said "Alaska fund" upon vouchers approved and certified by said board. The Secretary of the Treasury shall, at the end of each month, send by mail to each of the members of said board a statement of the amount available of said "Alaska fund" for the construction and repair of roads and trails, and no greater liability for construction or repair shall at any time be incurred by said board than the money available therefor at that time in said fund. The members of said board shall, in addition to their salaries, be reimbursed in the sums actually paid or incurred by them in traveling expenses in the performance of their duties, and shall be entitled to receive their actual expenses of living while serving as members of said board within the limits of the district and not stationed at a military post. [34 Stat. L. 192.]

This section was amended to read as above given by an Act of May 14, 1906, ch. 2458, § 2.

As originally enacted this section (33 Stat. L. 616) provided that the work was to

be let "whenever more than five thousand dollars in the aggregate shall have to be expended on the construction of any road or trail." As amended the amount is increased to twenty thousand dollars. The section was also amended by inserting after the words "shall be paid by the Secretary of the Treasury" near the end of the section, the words "through the authorized disbursing officer of the board designated by the Secretary of War."

In the original section, the last part thereof regulating the compensation of the members of the board provided that they should, in addition to their salaries, be entitled to receive their actual traveling expenses paid as incurred by them in the performance of their duties as members of the board.

**SEC. 3. [Governor made superintendent of public instruction — duties.]**

That the governor of the district of Alaska shall be ex officio superintendent of public instruction in said district, and as such shall have supervision and direction of the public schools in said district and shall prescribe rules and regulations for the examination and qualification of teachers, and shall make an annual report of the condition of the schools in the district to the Secretary of the Interior. [33 Stat. L. 617.]

**SEC. 4. [School districts in incorporated towns — officers — powers and duties.]** That the common council of the incorporated towns in said district shall have the power, and it shall be their duty, in their respective towns to establish school districts, to provide the same with suitable schoolhouses, and to maintain public schools therein and to provide the necessary funds for the schools; but such schools when established shall be under the supervision and control of a school board of three members, consisting of a director, a treasurer, and a clerk, to be elected annually by the vote of all adults who are citizens of the United States or who have declared their intention to become such and who are residents of the school district. The members of said board first elected shall hold their offices for the term of one, two, and three years, respectively, and until their successors are elected and qualified, and one member of such board shall be elected each year thereafter and shall hold his office for a period of three years and until his successor is elected and qualified; and they shall each, before entering upon the duties of their office, take an oath in writing to honestly and faithfully discharge the duties of their trust. In case a vacancy in the membership of said board occurs from death, resignation, removal, or other cause, such vacancy may be filled by a special election, upon ten days' notice, called by the remaining members of the board upon the petition of five qualified voters. All money available for school purposes, except for the construction and equipment of schoolhouses and the acquisition of sites for the same, shall be expended under the direction of said board, and the treasurer of said board shall be the custodian of said money, and he shall, before entering upon the duties of his office, give his bond, with sufficient sureties, to the school district, in such sum as the common council may direct, and subject to its approval, but not less than twice the amount that may come into his hands as treasurer, conditioned that he will honestly and faithfully disburse and account for all money that may come into his hands as such treasurer. The said board shall have the power to hire and employ the necessary teachers, to provide for heating and lighting the schoolhouse, and in general to do and perform everything necessary for the due maintenance of a proper school. [33 Stat. L. 1262.]

This section was amended to read as above given by an Act of March 3, 1905, ch. 1491. The amendment consisted in the addition of a one-year term for the members of

the school board first elected; the original section reading "for the term of two and three years respectively." The general powers of incorporated towns, both with reference to matters treated in the text and others, may be found in chapter 21 of the Civil Code, 31 Stat. L. 520.

**SEC. 5. [School districts outside of incorporated towns — establishment — elections — officers, etc.]** That the clerk of the district court shall have the power, and it shall be his duty, in the division to which he is appointed and in which he resides, upon petition as hereinafter specified, to establish by order in writing a school district at any camp, village, or settlement outside of the limits of any incorporated town, but such school district shall not embrace more than forty square miles of territory nor contain less than twenty resident white children between the ages of six and twenty years. The said petition shall specify as near as may be the location and boundary of the proposed school district, the number of people, the number of families, and the number of children between the ages of six and twenty years, resident therein, and such other material facts as tend to show the necessity for the establishment of the school district. Said petition shall be signed by not less than twelve persons of adult age who are citizens of the United States or have declared their intention to become such and who reside within the boundaries of the proposed school district. If the clerk of the court is satisfied that it is necessary and proper to grant such petition, he shall make an order in writing establishing the school district prayed for, describing the same and defining its boundaries, and he shall also in said order appoint three of the petitioners to supervise and give notice of the first election, and shall specify the time and place of the same. The original order shall remain on file in the records of the court, and a copy of the same shall be posted at three public places in the school district at least ten days before the election, and such posting shall be deemed a sufficient notice of such election. All persons qualified to sign said petition shall be qualified to vote at said election. The qualified voters of said school district shall at said election choose by a plurality vote a school board of three members, consisting of a clerk, a treasurer, and a director, who shall, before entering upon the duties of their trust, each take an oath in writing to honorably and faithfully discharge the duties of their office. In case a vacancy in the membership of said board occurs from death, resignation, removal, or other cause, such vacancy may be filled by a special election, upon ten days' notice, called by the remaining members of the board upon the petition of five qualified voters. The treasurer shall be the custodian of the moneys of the school district, and he shall, before entering upon the duties of his office, give his bond to the school district, with sufficient sureties, to be approved by the clerk of the court, and in such sum as he may direct, but not less than twice the amount of money that may come into his hands as treasurer, conditioned that he, the treasurer, will honestly and faithfully disburse and account for all the money that may come into his hands by virtue of his office. Said board shall have the power to build or rent the necessary schoolhouse or schoolroom, to equip the same with the necessary furniture and fixtures, to provide fuel and light, to hire and employ teachers, and in general to do and perform everything that may be necessary for the maintenance of a public school. The members of said board shall hold office for the term of one year and until their successors are elected and qualified. An annual

election shall be held each year, after the first election, for the election of members of said board. As soon as the members of said school board have been elected and qualified, they shall send to the clerk of the court and file in his office a certificate of their election under the hand and seal of the judges or supervisors of election, their oaths of office, and the bond of the treasurer, and the clerk of the court shall file said papers and carefully keep them as a part of the files and records of his office, and he shall at once send to the governor of the district of Alaska a certified copy of said papers, together with a certified copy of the order establishing the school district, and the governor shall duly file and preserve the same. The said board, as soon as they have complied with the requirements aforesaid, shall immediately report in writing to the governor the number of children in their school district between the ages of six and twenty years that intend to attend a public school, and the wages per month for which a teacher can be obtained; and after a school has been opened and maintained they shall, at the end of each school term, report to the governor in writing the length of the term, the wages paid the teacher, the total number of pupils in attendance, and the daily average of such attendance at such term. The governor shall assign and set apart to each school district established and organized under the provisions of this section a sum, not less than three hundred dollars nor more than one thousand dollars, in proportion to the number of pupils in the district, for the construction and equipment of a schoolhouse, which sum shall be paid by the Secretary of the Treasury to the treasurer of the school district upon the order and voucher of the governor out of that portion of the said Alaska fund set apart for the establishment and maintenance of public schools. The residue of said portion of said fund, or so much thereof as may be necessary, shall by the governor be apportioned among the several school districts established under the provisions of this section in amounts sufficient for each district to pay the wages of a teacher, together with the expense of fuel and light, for five months' school in each year. And the amounts so apportioned to each school district shall be paid to the treasurer of the district by the Secretary of the Treasury upon the order and voucher of the governor out of the said portion of said fund. [33 Stat. L. 617.]

**SEC. 6. [Reports of school board clerks.]** That the clerks of school districts in the incorporated towns shall, at the end of each school term, report to the governor in writing the length of the term, the wages paid the teacher, the number of pupils in attendance, and the average daily attendance during the term. [33 Stat. L. 619.]

**SEC. 7. [Separation of races.]** That the schools specified and provided for in this Act shall be devoted to the education of white children and children of mixed blood who lead a civilized life. The education of the Eskimos and Indians in the district of Alaska shall remain under the direction and control of the Secretary of the Interior, and schools for and among the Eskimos and Indians of Alaska shall be provided for by an annual appropriation, and the Eskimo and Indian children of Alaska shall have the same right to be admitted to any Indian boarding school as the Indian children in the States or Territories of the United States [33 Stat. L. 619.]

The Secretary of the Interior was required to make provision for the education of children in Alaska by the Act of May 17, 1884, ch. 53, § 13, 23 Stat. L. 27, and the Act of June 6, 1900, ch. 786, § 28, 31 Stat. L. 330, which were superseded by the provisions of the text.

SEC. 8. [Insane persons — commitment and care.] That commissioners appointed by the judges of the district court in the district of Alaska, pursuant to existing laws, shall, as ex officio probate judges and in the exercise of their probate jurisdiction, have the power, and it shall be their duty, in their respective districts, to commit, by warrant under their hands and seals, all persons adjudged insane in their districts to the asylum or sanitarium provided for the care and keeping of the insane of the district of Alaska. No person shall be adjudged insane or committed as such, except upon and pursuant to the following proceedings, to wit: Whenever complaint in writing is made by any adult person to a commissioner that there is an insane person at large in the commissioner's district, the commissioner shall at once cause such insane person to be taken into custody and to be brought before him, and he shall then immediately summon and impanel a jury of six male adults, residents of the district, to inquire, try, and determine whether the person so complained of is really insane. The members of said jury shall, before entering upon the discharge of their duty, each take an oath to diligently inquire, justly try, and a true verdict render, touching the mental condition of the person charged with being insane. Before entering upon such trial the commissioner shall appoint some suitable person to appear for and represent in the proceeding the person complained of as insane. And in case there is a physician or surgeon in the vicinity who can be procured, the commissioner shall cause such surgeon or physician to examine the person alleged to be insane, and after such examination to testify under oath before the jury in respect to the mental condition of said person. The commissioner shall preside at said hearing and trial. All witnesses that may be offered shall be heard and shall be permitted to testify under oath in said matter, and after having heard all the evidence the said jury shall retire to agree upon a verdict, and if the jury unanimously, by their verdict in writing, find that the said person so charged with being insane as aforesaid is really and truly insane and that he ought to be committed to the asylum or sanitarium aforesaid, and the commissioner approves such finding, he shall enter a judgment adjudging the said person to be insane and adjudging that he be at once conveyed to and thereafter properly and safely kept in the said asylum or sanitarium until duly discharged therefrom by law. The commissioner shall thereupon, under his hand and seal, issue his warrant, with a copy of said judgment attached, for the commitment of said insane person to the asylum or sanitarium aforesaid, which warrant shall be delivered to the marshal of the division in which said proceedings are held, and shall direct said marshal to safely keep and deliver said insane person to said asylum or sanitarium, and the said marshal, for the service of process in connection with and the guarding and transportation of the insane, shall be compensated from the same source and in the same manner as in the case of prisoners convicted of crime. The commissioner, the jurymen, and the witnesses in said proceeding shall be entitled to the same compensation and mileage as in civil actions. And all the compensation, mileage, fees, and all other expenses and outlays incident to said proceed-

ings shall be audited and allowed by the district judge of the division in which said proceedings are pending and had, and when so audited and allowed shall be paid by the clerk of the court in such division as the incidental expenses of the court are by him paid and from the same fund. [33 Stat. L. 619.]

Further provisions as to the care of insane persons were made by the Act of Feb. 6, 1909, ch. 80, § 7, *infra*, p. 294. And see the notes to said section.

By an Act of June 25, 1910, ch. 424, 36 Stat. L. 852, provisions were made for a temporary detention hospital for the insane.

**Jury trial.**—This section does not require a jury trial in an action to have a person declared insane and a guardian appointed for his property and person. *White v. Martin*, (1905) 2 Alaska 471.

**SEC. 9. [Repeal.]** That all Acts and parts of Acts inconsistent with this Act are, to the extent of such inconsistency, hereby repealed. [33 Stat. L. 620.]

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[SEC. 1.] **[Alaska fund — appropriation for.]** \* \* \* That the moneys described as the "Alaska fund," in section one of "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the district of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, be, and the same are hereby, appropriated out of the Treasury of the United States for the uses and purposes in said Act mentioned. [33 Stat. L. 1170.]

This is from the Sundry Civil Appropriation Act of March 3, 1905, ch. 1483. The Act of Jan. 27, 1905, ch. 277, § 1, is given as amended, *supra*, p. 279.

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**An Act To further prescribe the duties of the secretary of the district of Alaska, and for other purposes.**

[Act of March 3, 1905, ch. 1497, 33 Stat. L. 1265.]

[SEC. 1.] **[Fees to be paid secretary — amount.]** That in case the law requires or authorizes any service to be performed or any act to be done by the secretary of the district of Alaska and there is no provision of law requiring the payment of a fee for such service by the person for whose benefit the same is performed, the Secretary of the Interior may prescribe such fees for said service as he may deem proper. [33 Stat. L. 1265.]

This section supersedes in part section 30 of the Act of June 6, 1900, ch. 786, set out *supra*, p. 274.

**SEC. 2. [Alaska Historical Library and Museum to have fees.]** That all fees received by the secretary of the district of Alaska as such secretary, from every source whatsoever, shall be disbursed, on the order of the governor of the district of Alaska, for the benefit of the Alaska Historical Library and Museum, as provided in section thirty-two, chapter one, title one, of an Act approved June sixth, nineteen hundred, entitled "An Act making further provision for a civil government for Alaska, and for

other purposes;" and all such receipts and disbursements shall be accounted for in the manner prescribed in said section. [33 Stat. L. 1266.]

The Act of June 6, 1900, ch. 786, § 32, above mentioned, is given *supra*, p. 275.

**SEC. 3. [Bond of secretary.]** That the secretary of the district of Alaska, before entering upon the duties of said office, shall execute a bond with sufficient sureties, to be approved by the Secretary of the Interior, and in such penal sum as the Secretary of the Interior may prescribe, conditioned upon the safe-keeping, faithful disbursement, and proper accounting for all moneys from whatsoever source which may come into his hands as such secretary. [33 Stat. L. 1266.]

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**Joint Resolution Authorizing assignment of pay of teachers and other employees in the Bureau of Education in Alaska.**

[Res. of March 21, 1906, No. 10, 34 Stat. L. 824.]

**[Teachers and employees in Bureau of Education — assignment of pay.]** That the Secretary of the Interior be, and he is hereby, authorized to permit teachers and other employees of the United States Bureau of Education employed in Alaska to make assignments of their pay, under such regulations as he may prescribe, during such time as they may be in the employ of the Bureau of Education in Alaska; and the Secretary of the Interior is further authorized, in his discretion, under such regulations as he may prescribe, to reimburse school-teachers in Alaska for expenses incurred by them in the discharge of their duties and paid from their personal funds. [34 Stat. L. 824.]

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**An Act Providing for the election of a Delegate to the House of Representatives from the Territory of Alaska.**

[Act of May 7, 1906, ch. 2083, 34 Stat. L. 169.]

**[SEC. 1.] [Delegate to be elected — qualifications — compensation.]** That the people of the Territory of Alaska shall be represented by a Delegate in the House of Representatives of the United States, chosen by the people thereof in the manner and at the time hereinafter prescribed, and who shall be known as the Delegate from Alaska. Such Delegate shall at the time of his election have been for seven years a citizen of the United States, and shall be an inhabitant and qualified voter of the district of Alaska, and shall be not less than twenty-five years of age, and when duly chosen and qualified shall possess the same powers and privileges and be entitled to the same rate of compensation as the Delegates in the House of Representatives from the Territories of the United States: *Provided, however,* That such Delegate, in lieu of all other allowances, shall, in addition to his salary, receive the sum of one thousand five hundred dollars

per annum, which shall cover all mileage and other expenses except stationery allowance and compensation for clerk hire. [34 Stat. L. 169.]

Section 2 of this Act related to the first election for a delegate and prescribed the time for subsequent elections. It was superseded by the Act of Aug. 24, 1912, ch. 387, § 17, *supra*, p. 258.

**SEC. 3. [Voting qualifications.]** That all male citizens of the United States twenty-one years of age and over who are actual and bona fide residents of Alaska, and who have been such residents continuously during the entire year immediately preceding the election, and who have been such residents continuously for thirty days next preceding the election in the precinct in which they vote, shall be qualified to vote for the election of a Delegate from Alaska. [34 Stat. L. 170.]

**SEC. 4. [Election districts in towns — officers — polls, etc. — notices.]** That each incorporated town in the district of Alaska shall constitute an election district, and where the population of such town exceeds one thousand inhabitants the common council may, in their discretion, at least thirty days before the election, divide the district into two or more voting precincts and define the boundaries of each precinct; and the said common council shall also appoint, at least thirty days before the election, three judges of election and two clerks for each voting precinct, all of whom shall be qualified voters of the precinct; and no more than two judges and one clerk shall belong to the same political party. The common council shall also, at least thirty days before the date of the election, provide a suitable polling place for each voting precinct and give due notice of the election by posting a written or printed notice in three public places in each precinct, specifying the time and place of the election, and in case there are one or more newspapers of general circulation published in the town, then a copy of said notice shall also be published in one of such newspapers at least once a week for two consecutive weeks next prior to the date of the election. [34 Stat. L. 170.]

**SEC. 5. [Election districts outside of towns — commissioners' duties — voting precincts — minimum number of voters — election notice — judges of election.]** That all of the territory in each recording district now existing or hereafter created situate outside of an incorporated town shall, for the purposes of this act, constitute one election district; that in each year in which a Delegate is to be elected the commissioner in each of said election districts shall, at least thirty days before the date of said first election, and at least sixty days before the date of each subsequent election, issue an order and notice, signed by him and entered in his records in a book to be kept by him for that purpose, in which said order and notice he shall —

First. Divide his election district into such number of voting precincts as may in his judgment be necessary or convenient, defining the boundaries of each precinct by natural objects and permanent monuments or landmarks, as far as practicable, and in such manner that the boundaries of each can be readily determined and become generally known from such description, specify a polling place in each of said precincts, and give to



each voting precinct an appropriate name by which the same shall thereafter be designated: *Provided, however,* That no such voting precinct shall be established with less than thirty qualified voters resident therein; that the precincts established as aforesaid shall remain as permanent precincts for all subsequent elections, unless discontinued or changed by order of the commissioner of that district.

Second. Give notice of said election, specifying in said notice, among other things, the date of such election, the boundary of the voting precincts as established, the location of the polling place in the precinct, and the hours between which said polling places will be open.

Said order and notice shall be given publicly by said commissioner by posting copies of the same at least twenty days before the date of said first election, and at least thirty days before the date of each subsequent election. Said copies shall be posted as follows: One at the office of the commissioner in said district, and three copies to be posted in three conspicuous public places in each of said voting precincts as established, one of which shall be the designated polling place in each precinct; and said commissioner shall also mail a certified copy of said order and notice to the governor of Alaska at his official residence. That at least thirty days prior to the date of the holding of such election the commissioners shall select, notify, and appoint from among the qualified electors in each voting precinct three judges of election for said precinct, no more than two of whom shall be of the same political party. Said commissioner shall notify all of said judges of election of their appointment as such, so that each and all of them shall receive said notice at least ten days before the date of the election. [34 Stat. L. 171.]

SEC. 6. [Election board — duties — oath — administering oaths to voters — clerks of election outside of towns — duties.] That the judges of election of each voting precinct shall constitute the election board for said precinct and shall supervise and have charge of the election therein. They shall secure and provide a place for holding the election and a suitable ballot box. They shall pass upon the qualification of the voter and, if he be found qualified, receive and deposit his ballot in the ballot box, and shall canvass and make a return of the votes cast, as hereinafter provided. That the members of said election board in each precinct, before entering upon the duties of their office, shall each severally take an oath, which shall be reduced to writing, before an officer qualified to administer oaths, to honestly, faithfully, and promptly perform the duties of their positions; and if no officer qualified to administer oaths be present or available, then any one of said duly appointed or selected judges of election may administer the necessary oath to said other two judges, and he shall afterwards in turn be sworn by one of them. That each of said judges shall have authority to administer any oath to the voter necessary or proper under this act, and said judges shall have equal authority; and in case of any question or disagreement over any matter during the course of said election the decision of the majority of said judges shall govern. That two of the three judges of election in each voting precinct, outside of incorporated towns, to be selected by a majority of said judges shall also perform the duties of clerks of election for that precinct; the two judges performing the duties of clerks shall be of different political parties; it

shall be the duty of the clerks at each voting precinct to make a full written record of such election as held in that precinct, and each of them shall keep a correct duplicate register and enter therein the names of the voters and the fact that they have voted, or have offered to vote and were refused, and a brief statement of the reasons for said refusal. [34 Stat. L. 171.]

**SEC. 7. [Watchers at polls — rights allowed.]** That each of the candidates for the office of Delegate herein provided for, at any election held hereunder, shall be entitled to one watcher at each voting precinct, who shall be permitted to be present within the place of voting at such precinct, and in some place therein where he may at all times be in full view of every act done. Such watcher shall have the right to be so present at all times from the opening of the polls until the ballots are finally counted and the result certified by the election board. Each watcher shall be required to present to the election board proper credentials, signed by the candidate he represents, showing him to be the duly authorized watcher for such person. [34 Stat. L. 172.]

**SEC. 8. [Filling vacancies on election day.]** That in case any of the judges of election selected as herein provided for any precinct shall fail to appear and qualify at the time and place designated for the election for which they shall be appointed, then, in that event, the qualified voters present may, by a majority viva voce vote, select a suitable person or persons to fill the vacancy or vacancies in said election board; and the person or persons so selected shall qualify and serve on said election board, with the same powers and in the same manner as if appointed as hereinbefore provided. [34 Stat. L. 172.]

**SEC. 9. [Voting hours — ballots, form, etc. — casting ballots — register of votes.]** That the election boards herein provided for shall keep the several polling places open for the reception of votes from eight o'clock antemeridian until seven o'clock postmeridian on the day of election. The voting at said election shall be by printed or written ballot. The ballot at said first election shall be substantially in the following form:

“ FOR DELEGATE FROM ALASKA.

“ For the short term (here insert the name of the person voted for).

“ For the long term (here insert the name of the person voted for).”

At all elections after said first election the ballot shall be substantially in the following form:

“ FOR DELEGATE FROM ALASKA.

“(Here insert the name of the person voted for.)”

Such ballot shall be folded by the voter so as not to disclose the vote, and by him handed to any one of the judges of election, who shall immediately, in the presence of the voter and of all the members of the election board, deposit the same, folded as aforesaid, in the ballot box, where the same shall remain untouched until the polls are closed. At the time the

ballot is so deposited the clerks of election shall each of them enter in his duplicate register the name of the voter and the fact that he has voted. [34 Stat. L. 172.]

**SEC. 10. [Challenges — oath required — acceptance or rejection — penalty for false swearing.]** That any person offering to vote may be challenged by any election officer or any other person entitled to vote at the same polling place, or by any duly appointed watcher, and when so challenged, before being allowed to vote he shall make and subscribe to the following oath: "You do solemnly swear (or affirm, as the case may be) that you are twenty-one years of age and a citizen of the United States; that you are an actual and bona fide resident of Alaska, and have been such resident during the entire year immediately preceding this election, and have been a resident in this voting precinct for thirty days next preceding this election, and that you have not voted at this election," and further naming the place from which the voter came immediately prior to living in the precinct in which he offers to vote, and giving the length of time of his residence in the former place. And when he has made such an affidavit he shall be allowed to vote; but if any person so challenged shall refuse or fail to take such oath and sign such affidavit, then his vote shall be rejected; and any person swearing falsely in any such affidavit shall be guilty of perjury and shall, upon conviction thereof, suffer punishment as is prescribed by law for persons guilty of perjury. [34 Stat. L. 172.]

**SEC. 11. [Canvass of votes cast — certificates in duplicate — certified copy — preservation of documents.]** That the election board at each polling place, as soon as the polls are closed, shall immediately publicly proceed to open the ballot box and count and canvass the votes cast, and they shall thereupon, under their hands and seals, make out in duplicate a certificate of the result of said election, specifying the number of votes, in words and figures, cast for each candidate, and they shall then immediately carefully and securely seal up in one envelope one of said duplicate certificates and one of the registers of voters, all the ballots cast, and all affidavits made, and mail such envelope, with said papers inclosed, at the nearest post-office by registered mail, if possible, duly addressed to the governor of Alaska at his place of residence, with the postage prepaid thereon. The other duplicate certificate and register of voters, with the oaths of the judges of election, the judges of election shall at once seal up in an envelope addressed to the clerk of the district court for the division in which the precinct is situate, at his place of residence, with the postage thereon prepaid, and deposit the same in the nearest post-office, by registered mail, if possible. And the said clerk shall, as soon as he receives the said duplicate certificate, at once make out and duly mail to the governor of Alaska a certified copy of such certificate. The clerks of the district courts for the various divisions of Alaska and the governor of Alaska shall each retain and carefully preserve all such documents received by them until the end of the term for which the Delegate chosen has been elected. [34 Stat. L. 173.]

**SEC. 12. [Territorial canvassing board — canvass of result — certified copy of certificate — declaration of result.]** That the governor, the surveyor-general, and the collector of customs for Alaska shall constitute a

canvassing board for the Territory of Alaska to canvass and compile in writing the vote specified in the certificates of election returned to the governor from all the several election precincts as aforesaid. The said canvassing board shall commence the performance of its duties at the office of the governor within ten days after the third Tuesday of October in each year in which an election is held under and by virtue of this act, and shall continue with such work from day to day until the same is completed; and said canvass shall be publicly made. In case it shall appear to said board that no election return as hereinbefore prescribed has been received by the governor from any precinct in which an election has been held, the said board may accept in place thereof the certified copy of the certificate of election for such precinct received from the clerk of the court, and may canvass and compile the same with the other election returns. Said board, upon the completion of said canvass, shall declare the person who has received the greatest number of votes for Delegate to be the duly elected Delegate from Alaska for the term for which he has been so elected and shall issue and deliver to him in writing under their hands and seal a certificate of his election. [34 Stat. L. 173.]

**SEC. 13. [Fees — publication in newspapers — posting notices in polling places — rental — election officers.]** That each newspaper in Alaska, authorized to publish the notice of election provided for herein, and having published the same according to law, shall be entitled to receive therefor not more than ten dollars for the entire publications of any one election; that each commissioner in the Territory of Alaska is authorized to contract for the proper posting of all elections notices, as provided herein, in each voting precinct created in his said election district, and that not more than the sum of ten dollars shall be allowed at each election for the posting of said notices in any one voting precinct in Alaska; that not more than ten dollars at each election shall be allowed for the rental of a proper polling place in each voting precinct in Alaska; that each of the judges of election who shall qualify and serve as such in any precinct on said election day and each of the clerks of election in an incorporated town shall be entitled to a compensation of five dollars for all services performed. [34 Stat. L. 174.]

**SEC. 14. [Payment of expenses — audit.]** That the compensation for said newspaper publications, the proper posting of said notices, the rental of said polling places, the fees of the judges and clerks of election in each precinct, together with the cost of securing a ballot box and the cost of necessary postage and stationery, shall be certified with proper vouchers and receipts attached by the various election officials to the judge of the district court in the said judicial division in which said voting precinct is situate, and the same shall be audited by said judge and shall be paid by the clerk of the court of said division out of the same fund and in the same manner as the incidental expenses of said district court are paid. [34 Stat. L. 174.]

**SEC. 15. [Penalties — for illegal voting, etc. — intimidation, bribery, etc. — changing returns, etc. — neglect of duty, etc., by officers — jurisdiction.]** That any person who, by any means, shall hinder, delay, prevent, or obstruct any other person from qualifying himself to vote or from

lawfully voting at any election herein provided for, or who shall knowingly personate and vote or attempt to vote in the name of any other person, or who shall vote more than once at the same election, or shall vote at a place where or at a time when he may not lawfully be entitled to vote, or shall do any unlawful act to secure an opportunity to vote, for himself or for any other person, or who, by or through any force, threat, intimidation, bribery, reward or offer thereof, unlawfully vote himself or procures another to vote, or prevents or induces another to refrain from exercising his right of suffrage, or induces by any means any officer of an election to do any unlawful act or omit to do his duty in any manner, or who, directly or indirectly, in any manner shall fraudulently change or cause to be changed the returns or the true and lawful result of any election hereunder or shall attempt to do the same, or who shall delay, cause to be delayed, or connive at the delay of election returns in any manner or attempt to do so, shall be guilty of a crime, and upon the conviction thereof shall be punished by a fine of not more than five hundred dollars nor less than one hundred dollars, or imprisoned not more than three years, or both, in the discretion of the court, and pay the costs of the prosecution; and every officer of an election held hereunder who neglects to perform or violates any duty imposed upon him as such officer, or knowingly does any unauthorized act with the intent to affect the election or the result thereof, or who shall permit, make, or connive at any false count or certificate of election, or who shall conceal, withhold, destroy, or willfully delay the returns of election, or connive at the same being done, or who shall aid, counsel, or procure any person to do or attempt to do any act made a crime hereinbefore, or shall attempt to do any of the acts hereinbefore mentioned, shall be guilty of a crime, and upon conviction thereof shall be punished by a fine of not less than two hundred dollars nor more than one thousand dollars, or by imprisonment of not more than five years, or both, in the discretion of the court, and shall pay all costs of the prosecution; and jurisdiction of all such matters is hereby conferred upon the district court of Alaska. [34 Stat. L. 174.]

SEC. 16. [Effect.] That this act shall take effect upon its passage. [34 Stat. L. 175.]

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SEC. 14. [Bonded warehouse privileges for exportations to British Columbia or Northwest Territory.] That under rules and regulations to be prescribed by the Secretary of the Treasury, the privilege of entering goods, wares, and merchandise in bond or of placing them in bonded warehouses at any of the ports in the District of Alaska, and of withdrawing the same for exportation to any place in British Columbia or the Northwest Territory without payment of duty, is hereby granted to the Government of the Dominion of Canada and its citizens or citizens of the United States and to persons who have declared their intention to become such whenever and so long as it shall appear to the satisfaction of the President of the United States, who shall ascertain and declare the fact by proclamation, that corresponding privileges have been and are being granted by the Government of the Dominion of Canada in respect of goods, wares and

merchandise passing through the territory of the Dominion of Canada to any point in the District of Alaska from any point in said District. [30 Stat. L. 415.]

This is from an Act of May 14, 1908, ch. 299, entitled "An Act extending the homestead laws and providing for right of way for railroads in the District of Alaska and for other purposes." See, in general, the title CUSTOMS DUTIES.

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**SEC. 7. [Insane persons — care of.]** \* \* \* That the Secretary of the Interior shall hereafter, as in his judgment may be deemed advisable, advertise for and receive bids for the care and custody of persons legally adjudged insane in the district of Alaska, and in behalf of the United States shall contract, for one or more years, as he may deem best, with a responsible asylum or sanitarium west of the main range of the Rocky Mountains submitting the lowest and best responsible bid for the care and custody of persons legally adjudged insane in said district of Alaska, the cost of advertising for bids, executing the contract, and caring for the insane to be paid from appropriations to be made for such service upon estimates to be submitted to Congress annually. [35 Stat. L. 601.]

The foregoing part of section 7, and the following sections 10 to 18, inclusive, are from an Act of Feb. 6, 1909, ch. 80, entitled "An Act relating to affairs in the Territories." It supersedes similar provisions contained in the Act of April 28, 1904, ch. 1773, 33 Stat. L. 526. It likewise supersedes the second paragraph of section 9 of the Act of June 6, 1900, ch. 786, given *supra*, p. 266.

The first part of this section repealed a part of the Act of Jan. 27, 1905, ch. 277, § 1, and was superseded by the subsequent amendment of said section to read as given *supra*, p. 279.

**SEC. 10. [License for practice of medicine.]** That it shall be unlawful for any person to practice medicine or surgery, or any of the departments thereof, within the Territory of Alaska, until he or she shall have first obtained a license therefor as hereinafter in this Act prescribed. [35 Stat. L. 603.]

**SEC. 11. [Requirements.]** That no person shall receive a license to practice medicine or surgery, or any of the departments thereof, within the Territory of Alaska until he or she shall have, first, submitted a diploma issued by some legally chartered medical school authorizing the holder thereof to practice medicine or surgery, the requirements for graduation of which medical school shall have been at the time of granting said diploma in no particular less than those prescribed by the Association of American Medical Colleges for that year, or, second, submitted proof of having practiced medicine or surgery, or both, for a period of not less than three successive years continuously prior to the passage of this Act and within the jurisdiction of one of the judicial districts of Alaska. [35 Stat. L. 603.]

**SEC. 12. [Applications.]** That any person desiring to obtain a license to practice medicine or surgery within the Territory of Alaska shall first make application therefor to the clerk of the court of the district in which he desires to practice. The application shall be in writing, and shall state

the name of the applicant, his age, his residence, the name and location of the college whence his diploma issued, the length of time, if at all, he has practiced medicine, and where, giving specifically the names of places wherein he has so practiced medicine. The application shall be accompanied by the diploma of the applicant, or duly authenticated copy, as must also an affidavit setting forth that he or she is the person therein named, and that the diploma was procured in the regular manner after the regular course of study prescribed by the medical school granting the same, without fraud or misrepresentation. [35 Stat. L. 604.]

**SEC. 13. [License to resident practitioners — requirements.]** That any applicant for license to practice medicine or surgery within the Territory of Alaska, not in possession of the credentials specified in section three of this Act, may obtain a license at the discretion of the clerk of the district court to whom he applies upon furnishing a properly attested statement, to wit: That he or she is a bona fide resident of Alaska, and has been engaged in the practice of medicine exclusively within the Territory of Alaska for a period of not less than three successive years immediately prior to the passage of this Act. The application shall be accompanied by the written recommendation of three bona fide residents of the judicial district wherein the applicant desires to practice, one of whom must be a physician holding a license under section three of this Act, and shall state in a general way applicant's character and professional ability. [35 Stat. L. 604.]

**SEC. 14. [Recording license, etc.]** That every person receiving a license to practice medicine or surgery within the Territory of Alaska shall have such license recorded in the office of the clerk of the court of the district wherein he is practicing, or proposes to practice, within thirty days from date of issuance. And when such licentiate moves into another district for the purpose of continuing the practice of medicine, he shall first file for record with the clerk of the court of the district to which he moves a certified copy of the license. [35 Stat. L. 604.]

**SEC. 15. [Prima facie evidence of practice — emergency cases — commissioned medical officers, etc.]** That any person shall be regarded as practicing medicine within the meaning of this Act who shall within the Territory of Alaska append the letters M. D. to his name, or who shall prescribe or administer or make known his ability or willingness to prescribe or administer drugs, medicines, electricity, magnetism, hydrotherapy, or perform any operation or manipulation, or apply any apparatus or appliance for the cure, alleviation, correction, or reduction of any human disease, ill, deformity, defect, wound, or injury, including midwifery for hire, fee, compensation, or reward, promised, offered, or accepted, directly or indirectly. The doing of any of the acts of this section above mentioned shall be taken to be prima facie evidence on the part of the person so doing to represent himself or herself as engaged in the practice of medicine or surgery or both. But nothing in this Act shall be so construed as to inhibit service in case of emergency, medical or surgical relief of natives of Alaska by employees of the Bureau of Education, or to the domestic

administration of family remedies, nor to legally qualified dentists when engaged exclusively in the practice of dentistry. Nor shall this Act apply to any commissioned medical officer in the United States Army or Marine-Hospital Service or Bureau of Education in the discharge of his professional duties, or to any ship's doctor attached to any vessel plying or operating in Alaska. [35 Stat. L. 604.]

**SEC. 16. [Recording licenses, etc.—fee.]** That applications for license to practice medicine within the Territory of Alaska shall be recorded by the clerk of the district court in which they are presented within five days of date of presentation. Said record shall specify under which section of this Act the license be issued, if issued, and the date thereof. The record containing said applications shall be accessible to the public during office hours of the clerk of the court for inspection. A fee of ten dollars shall accompany each application for license. [35 Stat. L. 604.]

**SEC. 17. [Penalty for violation.]** That every person who shall practice, or shall attempt to practice medicine within the meaning of this Act without having first obtained a license therefor as prescribed in this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for not less than thirty nor more than one hundred days, or by both fine and imprisonment, and each day of such practice shall constitute a distinct and separate offense. [35 Stat. L. 605.]

**SEC. 18. [Disposition of funds.]** That all moneys collected from licenses or fines under this Act shall be disposed of in the manner already provided for by law applicable to the Territory of Alaska. [35 Stat. L. 605.]

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**An Act Authorizing the Attorney-General to appoint as special peace officers such employees of the Alaska school service as may be named by the Secretary of the Interior.**

[Act of March 3, 1909, ch. 266, 35 Stat. L. 837.]

**[School employees as special peace officers — authorized to arrest — summary arrests — trials — fees — expenses.]** That the Attorney-General shall have power to appoint, in his discretion, any person employed in the Alaska school service who may be designated by the Secretary of the Interior as a special peace officer of the division of the district of Alaska in which such person resides; and such special peace officer shall have authority to arrest, upon warrant duly issued, any native of the district of Alaska charged with the violation of any of the provisions of the Criminal Code of Alaska (Act March third, eighteen hundred and ninety-nine, second supplement Revised Statutes, page one thousand and three) or any amendment thereof, or any white man charged with the violation of any of said provisions to the detriment of any native of the district of Alaska; and such peace officer shall also have authority to



make such arrests, without warrant, for a crime committed or attempted in his presence, or when the person arrested has committed a felony, although not in his presence, or when a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it; and any person so arrested shall be taken, in accordance with such rules and regulations as may be prescribed by the Attorney-General, and without unnecessary delay, before a United States commissioner or other judicial officer for trial: *Provided, however,* That no person so appointed shall be entitled to any fees or emoluments of any character whatsoever for performing any of the services herein mentioned, but may be allowed, in the discretion of the Attorney-General, expenses actually and necessarily incurred in connection with such services. [35 Stat. L. 837.]

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SEC. 6. [Four marshals authorized.] That four United States marshals shall be appointed for the district, one of whom shall be assigned to each division, and shall reside at such place in the division as the Attorney-General shall direct. [35 Stat. L. 841.]

This and the following sections 8 and 10 are from an Act of March 3, 1900, ch. 269, entitled "An Act To amend section eighty-six of an Act to provide a government for the Territory of Hawaii, to provide for additional judges, and for other judicial purposes." Sections 2, 3, 4, and 5, respectively, constitute amendments to the Act of June 6, 1900, ch. 786, *supra*, p. 260, and are there inserted. Section 7 amends section 728 of the Alaska Code of Civil Procedure. Section 9 amends section 771 of the Alaska Code of Civil Procedure.

Other provisions for the appointment and duties of marshals were made by the Act of June 6, 1900, ch. 786, § 9, *supra*, p. 266.

SEC. 8. [Terms of present officers not affected — officers in third division — assignments.] That nothing in this Act shall be construed to limit or terminate the term of office of any of the judges, district attorneys, or marshals now serving in Alaska; but each shall serve out the term for which he was appointed unless sooner removed. The judge, district attorney, and marshal now serving in the third division of said district shall hereafter have their residence and hold their respective offices in the fourth division created by this Act: *Provided,* That the President may, in his discretion, change the assignment of any of said officers from one division to another. [35 Stat. L. 842.]

SEC. 10. [Modification of time for court transmitting accounts allowed.] That when, in the opinion of the Attorney-General, it will be impossible for the accounts of any court official or other person whose accounts pertain to the United States courts in Alaska to be transmitted to the Department of Justice within the period prescribed by law, the Attorney-General may modify, as he may deem proper, any requirement of law concerning the time when such accounts shall be rendered and transmitted. [35 Stat. L. 842.]

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[SEC. 1.] [Reindeer — disposal of.] All reindeer owned by the United States in Alaska shall, as soon as practicable, be turned over to missions

in or natives of Alaska, to be held and used by them under such conditions as the Secretary of the Interior shall prescribe. The Secretary of the Interior may authorize the sale of surplus male reindeer and make regulations for the same. The proceeds of such sale shall be turned into the Treasury of the United States. [35 Stat. L. 990.]

This is from the Sundry Civil Appropriation Act of March 4, 1909, ch. 299.

The same provision occurs in the Sundry Civil Appropriation Act of May 27, 1908, ch. 200, 35 Stat. L. 351.

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[SEC. 1.] **[Expenditures of school funds — supervision.]** \* \* \* All expenditures of money appropriated herein for school purposes in Alaska for schools other than those for the education of white children under the jurisdiction of the governor thereof shall be under the supervision and direction of the Commissioner of Education and in conformity with such conditions, rules, and regulations as to conduct and methods of instruction and expenditure of money as may from time to time be recommended by him and approved by the Secretary of the Interior. [38 Stat. L. 648.]

This is from the Sundry Civil Appropriation Act of Aug. 1, 1914, ch. 223. Similar provisions have occurred in prior appropriation acts.

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**An Act To amend an Act entitled "An Act creating a legislative assembly in the Territory of Alaska and conferring legislative power thereon, and for other purposes," approved August twenty-fourth, nineteen hundred and twelve.**

[Act of Aug. 29, 1914, ch. 292, 38 Stat. L. 710.]

**[Power of courts to enforce statutes — legislative power — costs of prosecutions.]** That nothing in that Act of Congress entitled "An Act creating a legislative assembly in the Territory of Alaska and conferring legislative power thereon, and for other purposes," approved August twenty-fourth, nineteen hundred and twelve, shall be so construed as to prevent the courts now existing or that may be hereafter created in said Territory from enforcing within their respective jurisdictions all laws passed by the legislature within the power conferred upon it, the same as if such laws were passed by Congress, nor to prevent the legislature passing laws imposing additional duties, not inconsistent with the present duties of their respective offices, upon the governor, marshals, deputy marshals, clerks of the district courts, and United States commissioners acting as justices of the peace, judges of probate courts, recorders, and coroners, and providing the necessary expenses of performing such duties, and in the prosecuting of all crimes denounced by Territorial laws the costs shall be paid the same as is now or may hereafter be provided by Act of Congress providing for the prosecution of criminal offenses in said Territory, except that in prosecutions growing out of any revenue law

passed by the legislature the costs shall be paid as in civil actions and such prosecutions shall be in the name of the Territory. [38 Stat. L. 710.]

The Act of Aug. 24, 1912, here amended, is given *supra*, p. 250.

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[SEC. 1.] [Repairs to government wharf at Sitka.] For repairs and preservation of \* \* \* Government wharves and piers under the control of the Treasury Department, together with the necessary dredging adjacent thereto, buildings and wharf at Sitka, Alaska, and the Secretary of the Treasury may, in renting said wharf, require that the lessee shall make all necessary repairs thereto. [38 Stat. L. 829.]

This is from the Sundry Civil Appropriation Act of March 3, 1915, ch. 75.

A prior appropriation for this purpose was made by the Act of June 11, 1896, ch. 420, § 1, *supra*, p. 259.

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## II. CIVIL AND PENAL LAWS.

The Penal Laws and the Code of Criminal Procedure for the district (now territory) of Alaska were provided by the Act of March 3, 1899, ch. 429, titles I and II, 30 Stat. L. 1253.

The Code of Civil Procedure and the Civil Code were provided by the Act of June 6, 1900, ch. 786, titles II and III, 31 Stat. L. 333. See the title TERRITORIES.

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## III. MINERAL LANDS, MINES, AND MINING.

SEC. 13. [Native-born Canadians — mining rights.] That native-born citizens of the Dominion of Canada shall be accorded in said District of Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules, and regulations; but no greater rights shall be thus accorded than citizens of the United States or persons who have declared their intention to become such may enjoy in said District of Alaska;

and the Secretary of the Interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect. [30 Stat. L. 415.]

This is from the Act of May 14, 1898, ch. 299, entitled "An Act extending the homestead laws and providing for a right of way for railroads in the District of Alaska and for other purposes." The first section of this Act, as amended by an Act of March 3, 1903, ch. 1002, and sections 10, 11, and 12, are given *infra*, this title, under the subdivision *Public Lands*, p. 316. Sections 2 to 9 inclusive are given *infra*, this title, under the subdivision *Railroads, Wagon Roads, Aerials and Tramways*, p. 330. Section 14 of this Act is given *supra*, under the subdivision *Civil Government*, p. 293.

So much of the above section as terms Alaska a "District" was superseded by the reorganization of Alaska as a territory by the Act of Aug. 24, 1912, ch. 387, § 1, *supra*, p. 250.

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**SEC. 26. [Mining laws extended to Alaska — regulation of mining.]** The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the District of Alaska:

*Provided*, That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law:

*Provided further*, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of War authorizing any person or persons, corporation or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of War may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation, and the reservation of a roadway sixty feet wide, under the tenth section of the Act of May fourteenth, eighteen hundred and ninety-eight, entitled "An Act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," shall not apply to mineral lands or town sites. [31 Stat. L. 329.]

This is from an Act of June 8, 1900, ch. 786, entitled "An Act making further provision for a civil government for Alaska, and for other purposes." The other sections of this Act are given *supra*, this title, under the subdivision *Civil Government*, p. 260. Section 10 of the Act of May 14, 1898, mentioned in this section, is given *infra*, under the subdivision *Public Lands*, p. 320.

The laws of the United States relating to mining claims were previously extended to Alaska by the Act of May 17, 1884, ch. 53, § 8, 23 Stat. L. 26.

**Mineral laws extended to Alaska.**—By a similar provision in the Act of May 17, 1884, ch. 53, 23 Stat. L. 24, it was held that its effect was to extend the mineral laws of the United States to Alaska. *Meydenbauer v. Stevens*, (1897) 78 Fed. 787. "Mineral laws" as amending section 2339 of Revised Statutes—section 2339 of Revised Statutes included by this sec-

tion.—Section 2339 of the Revised Statutes has been classified as and considered by the courts and law writers to be one of the mineral laws of the United States ever since its enactment, and as such was extended by this provision to Alaska. *McFarland v. Alaska Perseverance Min. Co.*, (1907) 3 Alaska 308.

**An Act To extend the coal land laws to the district of Alaska.**

[*Act of June 6, 1900, ch. 796, 31 Stat. L. 658.*]

[**Coal-land laws extended to Alaska.**] That so much of the public land laws of the United States are hereby extended to the district of Alaska as relate to coal lands, namely, sections twenty-three hundred and forty-seven to twenty-three hundred and fifty-two, inclusive, of the Revised Statutes. [*31 Stat. L. 658.*]

So much of the text as designates Alaska as a district was superseded by the reorganization thereof as a territory by the Act of Aug. 24, 1912, ch. 387, § 1, *supra*, p. 250.

For R. S. secs. 2347 to 2352 inclusive, above mentioned, see the title MINERAL LANDS, MINES AND MINING.

This Act was amended by the Act of April 28, 1904, ch. 1772, *infra*, this page.

**An Act To amend an Act entitled "An Act to extend the coal-land laws to the district of Alaska," approved June sixth, nineteen hundred.**

[*Act of April 28, 1904, ch. 1772, 33 Stat. L. 525.*]

[**SEC. 1.**] [**Coal-land entries — location — boundaries — filing notice.**]

That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this Act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same. [*33 Stat. L. 525.*]

For the Act of June 6, 1900, ch. 796, mentioned in the title of this Act, see *supra*, p. 301.

"The single object of Congress in the Act of 1904 was to provide for the sale of coal lands which had not been surveyed. The provisions for the sale of such coal lands, in or out of Alaska, which had been surveyed, so that entries could be made 'by legal subdivision,' had already been covered by the general law which had been extended to Alaska. The conditions in Alaska were but temporary. When the coal land there should be brought under the system of surveys which prevailed in the better settled parts of the country, the

Act of 1904 would cease to be operative, having nothing to which it could apply. The legislation, read in the light of the situation and of the uniform policy which had so long prevailed of prohibiting more than one entry to one person, makes it plain that Congress did not intend to except the unsurveyed coal lands of Alaska from the operation of the restrictions which attached to the sale of the surveyed coal lands in Alaska and elsewhere." *United States v. Munday*, (1911) 222 U. S. 175, 32 S. Ct. 53, 56 U. S. (L. ed.) 149.

**SEC. 2. [Procedure for obtaining patent.]** That such locator or locators, or their assigns, who are citizens of the United States, shall receive

a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor-general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: *Provided*, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district. [33 Stat. L. 525.]

**Payment pending protest.**—The payment required by this section, to be made by locators of Alaska coal lands, as a condition precedent to patent therefor, need not be made, in cases where protest is filed, until after the termination of the protest. (1910) 28 Op. Atty-Gen. 448.

**SEC. 3. [Adverse claims—proceedings.]** That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein. [33 Stat. L. 525.]

The time for filing certain adverse claims was extended by the Act of June 7, 1910, ch. 265, *infra*, p. 305.

**SEC. 4. [Continuance of existing laws.]** That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this Act shall continue and be in full force in the district of Alaska. [33 Stat. L. 526.]

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## **An Act To amend the laws governing labor or improvements upon mining claims in Alaska.**

[Act of March 2, 1907, ch. 2559, 34 Stat. L. 1243.]

**[SEC. 1.] [Annual improvements, required on claims—affidavits—forfeiture.]** That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed

or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be *prima facie* evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this Act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statu[t]es are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed. [34 Stat. L. 1243.]

The requirement as to annual improvements was suspended during the year 1913, with respect to certain claims on the Seward Peninsula, by the Act of Dec. 1, 1913, ch. 39, 38 Stat. L. 235.

Where provisions of this Act are irreconcilable with section 2324 of the Revised Statutes, which was made applicable to Alaska by an Act passed June 6, 1900, 31 Stat. L. 321, sec. 26 (see *supra*, p. 300), section 2324 is necessarily repealed by implication. *Thatcher v. Brown*, (C. C. A. 9th Cir. 1911) 190 Fed. 708, wherein the court said: "It will be seen that by both the acts (R. S. 2324 and this section) the annual assessment work is required to be done 'during' the year. But by the former act a failure to complete such work within the year, while rendering the ground open to relocation, was not declared to work a forfeiture of the locator's rights; on the contrary, he, together with his heirs, assigns, or legal representatives, was expressly given the right to resume work upon the claim after such failure to complete it, provided no other location be made in the meantime. By its Act of March 2, 1907, however, Congress, while conferring upon locators in Alaska a privilege not given by section 2324 of the Revised Statutes, to wit, a provision permitting Alaskan locators to file for record

an affidavit showing the performance of the required annual assessment work, which affidavit should be *prima facie* evidence of such performance, expressly declared that, upon the failure of the locator or owner of any such claim in Alaska to comply with the provisions of the act as to the performance of work and improvements, 'such claim shall become forfeited and open to location by others as if no location of the same had ever been made.'

"It is true that the Act of March 2, 1907, contains no express repeal of any previous provision of the statutes, and it is also true that implied repeals are not favored. Still the courts are not at liberty to ignore a purpose to repeal clearly indicated by irreconcilable provisions. Here we have an old mining statute, made applicable to Alaska by the Act of June 6, 1900, expressly providing that while a failure on the part of the locator to complete the required annual assessment work would render the ground covered by the location open to relocation, yet such work might be resumed by the locator or his legal representatives, provided no other

location had intervened, and then a later act to amend the law upon the subject in so far as mining claims in Alaska are concerned, which in terms declares that upon the failure of the locator to perform the required amount of work upon the claim within the year 'such claim shall become forfeited and open to location by others as if no location of the same had ever been made.'

"Both acts expressly require \$100 worth of work or improvements to be done or made on or for the benefit of each claim during each year. But the consequences of a failure to complete such work or im-

provements within the year are differently declared, and such differences are irreconcilable. In the earlier act such failure is not declared to end the locator's right; but he is thereby given the right to resume the work after the expiration of the year, provided there has been no other location meanwhile. By the later Act no such permission is accorded, and there is therein an express declaration that such failure works a forfeiture of the claim. To that extent the prior law, so far as it affects claims in Alaska, was necessarily repealed by the later one."

SEC. 2. [Fee.] That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded. [34 Stat. L. 1243.]

### **An Act To encourage the development of coal deposits in the Territory of Alaska.**

[Act of May 28, 1908, ch. 211, 35 Stat. L. 424.]

[SEC. 1.] [Development of coal deposits — consolidation of claims — limit of acreage.] That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the Secretary of the Interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations by including in a single claim, location, or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated and for this purpose such persons, their heirs or assigns, may form associations or corporations who may perfect entry of and acquire title to such lands in accordance with the other provisions of law under which said locations were originally made: *Provided*, That no corporation shall be permitted to consolidate its claims under this Act unless seventy-five per centum of its stock shall be held by persons qualified to enter coal lands in Alaska. [35 Stat. L. 424.]

**Locations made in good faith.**—The benefits of the Act authorizing the consolidation of claims or locations of coal lands in Alaska can be shared only by persons who made such locations in good faith—that is, honestly and lawfully—prior to Nov. 16, 1906, in their own interests individually, without fraud, collusion, or deceit, or any purpose to violate any provision of the law. Therefore if it can be shown that agreements or arrangements for transferring entries to a company or corporation were entered into by locators

of coal lands in Alaska after they had made their locations in good faith and in their own interest alone, such locations may, under the provisions of this Act, lawfully pass to entry and patent in accordance with the terms of said Act; but if such agreements or arrangements were entered into prior to such locations being made, the locations do not come within the provisions of the Act and cannot be lawfully passed to entry and patent. (1909) 27 Op. Atty.-Gen. 412.



**SEC. 2. [Preference right to purchase product for army and navy reserved.]** That the United States shall, at all times, have the preference right to purchase so much of the product of any mine or mines opened upon the lands sold under the provisions of this Act as may be necessary for the use of the Army and Navy, and at such reasonable and remunerative price as may be fixed by the President; but the producers of any coal so purchased who may be dissatisfied with the price thus fixed shall have the right to prosecute suits against the United States in the Court of Claims for the recovery of any additional sum or sums they may claim as justly due upon such purchase. [35 Stat. L. 424.]

**SEC. 3. [Unlawful trust, etc., forbidden—forfeiture.]** That if any of the lands or deposits purchased under the provisions of this Act shall be owned, leased, trustee, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever so that they form part of, or in any way effect any combination, or are in anywise controlled by any combination in the form of an unlawful trust, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, or of any holding of such lands by any individual, partnership, association, corporation, mortgage, stock ownership, or control, in excess of two thousand five hundred and sixty acres in the district of Alaska, the title thereto shall be forfeited to the United States by proceedings instituted by the Attorney-General of the United States in the courts for that purpose. [35 Stat. L. 424.]

**SEC. 4. [Patents—Recitals.]** That every patent issued under this Act shall expressly recite the terms and conditions prescribed in sections two and three hereof. [35 Stat. L. 424.]

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**An Act Extending the time in which to file adverse claims and institute adverse suits against mineral entries in the district of Alaska.**

[Act of June 7, 1910, ch. 265, 36 Stat. L. 459.]

**[Time extended for filing adverse claims.]** That in the district of Alaska adverse claims authorized and provided for in sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six, United States Revised Statutes, may be filed at any time during the sixty days period of publication or within eight months thereafter, and the adverse suits authorized and provided for in section twenty-three hundred and twenty-six, United States Revised Statutes, may be instituted at any time within sixty days after the filing of said claims in the local land office. [36 Stat. L. 459.]

Prior provisions fixing the time for filing adverse claims were made by the Act of April 28, 1904, ch. 1772, § 3, *supra*, p. 302.

For R. S. secs. 2325, 2326 mentioned in the text, see the title MINERAL LANDS, MINES AND MINING.

So much of the above section as terms Alaska a "district" was superseded by the reorganization thereof as a territory by the Act of Aug. 24, 1912, ch. 387, § 1, *supra*, p. 250.

**An Act To create, establish, and enforce a miner's labor lien in the Territory of Alaska, and for other purposes.**

[*Act of June 25, 1910, ch. 422, 36 Stat. L. 848.*]

[SEC. 1.] **[Miner's labor lien — persons entitled.]** That every miner or other laborer who shall labor in or upon any mine or mining ground for another in the Territory of Alaska in digging, thawing, conveying, hoisting, piling, cleaning up, or any other kind of work in producing any mineral-bearing sands, gravels, earth, or rock, gold or gold dust, or other minerals, or shall aid or assist therein by his labor as cook, engineer, fireman, or in cutting and delivering wood used in said work, or in work in any like capacity in producing the dump, shall, where his labor directly aided in such production, have a lien upon the dump or mass of mineral-bearing sands, gravels, earth, or rocks, and all gold and gold dust, or other minerals therein, and all gold and gold dust extracted therefrom, for the full amount of wages for all the time which he was so employed as such laborer in producing the said dump, within one year next preceding his ceasing to labor thereon; and to the extent of the labor of the said miner or other laborer actually employed or expended thereon, within one year next prior to ceasing to labor thereon, the said lien shall be prior to and preferred over any deed, mortgage, bill of sale, attachment, conveyance, or other claim, whether the same was made or given prior to such labor or not: *Provided*, That this preference shall not apply to any such deed, mortgage, bill of sale, attachment, conveyance, or other claim given in good faith and for value prior to the approval of this Act. [*36 Stat. L. 848.*]

This is known as the "Miners' Labor Lien Act."

SEC. 2. **[Claim of lien to be filed — form.]** That every laborer, within ninety days after the completion of the performance of the work or labor mentioned in the foregoing section who shall claim the benefit thereof, must, personally or by some other person for him, file for record in the recording precinct where the labor was performed a claim of lien containing a statement of his demand under oath, substantially in the following form:

**NOTICE OF LABOREE'S LIEN.**

Territory of Alaska, ——— precinct, ss:

———, claimant, against ———, defendant.

Notice is hereby given that ———, claimant, claims a lien upon (describing the dump or mass of mineral-bearing sands, gravels, earth, or rock, and its location with reasonable certainty) in the ——— precinct, in the Territory of Alaska, for labor performed in (digging, and so forth; describe the work). That the name of the owner or reputed owner of the said property is ———, and that ——— is the owner or reputed owner of the mine or mining ground from which the dump or mass of mineral-bearing sands, gravels, earth, or rock and the minerals therein were extracted, and that ——— employed claimant to perform such work and labor upon the following terms and conditions (state substance of contract, if any, or reasonable value); that said contract has been faithfully performed and fully complied with on the part of the

claimant, who performed labor thereunder aforesaid for the period of \_\_\_\_\_ days; that said labor was performed between the \_\_\_\_\_ day of \_\_\_\_\_ and the \_\_\_\_\_ day of \_\_\_\_\_, and the rendition of said service was closed on the \_\_\_\_\_ day of \_\_\_\_\_, and ninety days have not elapsed since that time; that the amount of claimant's demand for said service is \_\_\_\_\_; that no part thereof has been paid (except the sum of \_\_\_\_\_ dollars), and there is now due and remaining unpaid thereon, after deducting all just credits and offsets, the sum of \_\_\_\_\_ dollars, in which amount he claims a lien upon said property.

\_\_\_\_\_,  
Claimant.

Territory of Alaska, \_\_\_\_\_ precinct, ss:

\_\_\_\_\_, being first duly sworn, on oath deposes and says, that I am the claimant (or if by some other person state the fact) named in the foregoing claim; that I have heard the same read, know the contents thereof, and believe the same to be true.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_,  
[Officer's title.]  
[36 Stat. L. 848.]

**SEC. 3. [Recording — fees.]** That the recorder must record every claim filed under the provisions of this Act in books kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the following fees and none other: For filing, ten cents; for recording, one dollar; for indexing, fifteen cents for each name. [36 Stat. L. 849.]

**SEC. 4. [Time to bring actions.]** That no lien provided for in this Act shall bind any property for a longer period than ninety days after the claim has been filed, unless an action be commenced within that time to enforce the same. [36 Stat. L. 849.]

**SEC. 5. [Jurisdiction.]** That the action for the foreclosure of the lien provided for in this Act shall be begun either in the district court or in the justice's court in the precinct where the lien was filed and the justices of the peace in Alaska are hereby given full jurisdiction in the foreclosure of such liens under the provisions of this Act, and shall also have such other jurisdiction and power as is now conferred on them by law in aid of the enforcement of this Act, and the provisions of section seven hundred and twenty-three of chapter seventy-one of the Code of Civil Procedure now in force in Alaska shall be applicable to the jurisdiction intended to be conferred by this Act. [36 Stat. L. 849.]

**SEC. 6. [Amendments allowed before action.]** That no mistake, informality, or mere matter of form or lack of statement, either in the lien notice or pleadings, shall be ground for dismissal or unnecessary delay in the action to foreclose the lien, but the lien notice and pleadings may be amended at any time before judgment, and section ninety-two of chapter

eleven of the Code of Civil Procedure now in force in Alaska shall apply to such amendments: *Provided*, That if it be shown that a material statement or averment has been omitted or misstated, it shall be ground for a reasonable delay or continuance to give the defendant a reasonable opportunity to meet it upon amendment. [36 Stat. L. 849.]

**SEC. 7. [Process — appearance — posting notice — adverse claimants — effect.]** That the claimant may file the original or a certified copy of the notice of lien in the district or justice's court as the statement of his case, and thereupon the court or justice shall issue the usual summons directed to the defendant or defendants, which summons, together with a copy of the lien notice, shall, by any officer authorized to serve process, be served upon the defendant or defendants, as provided in sections nine hundred and fifty and nine hundred and fifty-one of chapter ninety-two of the Code of Civil Procedure now in force in Alaska. The summons shall require the defendant or defendants to appear before such court or justice at a time and a place to be named therein, not less than six nor more than twenty days from the date thereof, to answer the demand of the claimant in the said lien notice, or judgment for want of an answer will be taken against them. Service by publication may be had pursuant to sections forty-seven and forty-eight of chapter four of said Code of Civil Procedure. The officer serving the summons shall also immediately post a copy of said lien notice in a conspicuous place on the dump or mass of mineral-bearing sands, gravels, earth, or rock, and gold and gold dust, and other minerals therein upon which the lien is filed, and from the moment of posting the lien notice the dump or mass of mineral-bearing sands, gravels, earth, and rock, and gold and gold dust, and other minerals therein shall be in the custody and under the control of the officer. All persons who claim any interest therein in opposition to the lien claimant may come in and answer and set up and defend their said claims, but no claim or claims of any owner, lessee, or other adverse defendant shall bar the lien claimant from recovering the sum due him for actual labor in producing the said dump or mass of mineral-bearing sands, gravels, earth, or rock, or gold and gold dust, or other minerals. [36 Stat. L. 850.]

**SEC. 8. [Joining of parties — consolidation — court allowances — waiver of right to lien void.]** That any number of persons claiming liens under this Act may join in the same action, and when separate actions are commenced the court may consolidate them. The court shall also allow, as a part of the costs, the moneys paid for filing, recording, and indexing the notice of lien, the sum of five dollars for drawing the same, and a reasonable attorney's fee for each person claiming a lien, not to exceed ten per centum of the amount of the lien established on judgment. Any contract or agreement or any waiver of any kind made or signed by any minor [*sic*] or laborer whereby it is sought to waive or abandon his right to file a lien under this Act, or any agreement for an extended time of payment whereby the same end is sought, shall to that extent be null and void as against public policy. [36 Stat. L. 850.]

**SEC. 9. [Execution of judgment — sales — extracting minerals — disposal of proceeds.]** That in such action judgment must be rendered in favor of each person having a laborer's lien for the amount due him, and the court shall order the dump or mass of mineral-bearing sands, gravels, earth, or rock, and the gold and gold dust, and other minerals therein subject to the lien to be sold by the marshal in the same manner that personal property is sold on execution; or the court may, upon a showing that it is necessary to do so to preserve the property from loss or waste, by order require the marshal to wash up or extract the gold and gold dust or other mineral from the said mineral-bearing sands, gravels, earth, or rock; or the court may, by order, allow the defendant or defendants or any party interested to wash up and extract the said mineral, in the presence of the marshal or deputy marshal or special officer, who shall take the gold or gold dust or other minerals as it is washed up and extracted and return the same into court, and it shall be immediately paid out as follows: First, the cost of cleaning up or extracting the gold or gold dust or other minerals shall be paid; second, the court costs shall be paid; and, third, the judgment or judgments so rendered in favor of the lien claimants shall be paid; and if there is not sufficient gold or gold dust, or other minerals, or sufficient moneys obtained from the sale of the property to pay all claims in full, the court shall apportion the proceeds to the payment of such judgments pro rata: *Provided*, That no part of any such proceeds shall be paid upon any claim or judgment to any person who did not actually perform labor in producing the dump or the proceeds thereof until all such preferred claims are paid in full. [36 Stat. L. 850.]

**SEC. 10. [Appeal — disposition of metal pending appeal.]** That an appeal may be taken from a final judgment of a justice of the peace in actions instituted under this Act to the district court, in the manner provided in chapter ninety-seven of the Code of Civil Procedure now in force in Alaska, and upon such appeal being perfected the dump or mass of mineral-bearing sands, gravels, earth and rock, gold and gold dust, or other minerals shall be washed up by the marshal or any party mentioned in section nine of this Act as the district court may direct, and all the gold or gold dust or other mineral so washed up shall be paid into the registry of the district court there to await the final judgment on appeal: *Provided*, That the gold or gold dust or other mineral in excess of the amount of the judgment, including an additional amount equal to the probable accruing costs on appeal and two years' interest at the legal rate, shall after the expiration of ninety days from the time it was paid into the registry of the district court, be released to the owners upon a showing that no liens have been filed against it. The defendant or defendants, or any one or more of them, may deposit cash in lieu of the gold or gold dust on the dump, which shall remain in the custody of the law until the final judgment, and shall then be applied in payment of the judgment or judgments rendered on each lien claims, and costs, and interest. [36 Stat. L. 851.]

**SEC. 11. [Liability for buying minerals, etc., posted.]** That any person or persons who shall, after the copy of the notice of lien is posted upon

any dump or mass of mineral-bearing sands, gravels, earth or rock, gold and gold dust, or other mineral, as provided in this Act, and with knowledge of such notice of lien, buy, purchase, wash up, remove, destroy, or carry away all or any part or portion of the same, or the gold or gold dust therein, or who shall render it difficult, uncertain, or impossible to identify the gold or gold dust or other mineral obtained therefrom, shall be liable to the lien holder for the full amount of his judgment and costs; and any person who shall take and carry away all or any part or portion of said dump of mineral-bearing sands, gravels, earth or rock, or the gold or gold dust or other minerals therefrom, after the same shall come into the custody of the officer, shall be guilty of a crime and shall be punished as for the larceny of a like amount; and any district attorney in Alaska is specially required to immediately cause a warrant to be issued for the arrest of any such person or persons and to prosecute them according to law. [36 Stat. L. 851.]

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**An Act To modify and amend the mining laws in their application to the Territory of Alaska, and for other purposes.**

[Act of Aug. 1, 1912, ch. 269, 37 Stat. L. 242.]

**[SEC. 1.] [Association placer-mining claims limited — assessment required.]** That no association placer-mining claim shall hereafter be located in Alaska in excess of forty acres, and on every placer-mining claim hereafter located in Alaska, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, including the year of location, for each and every twenty acres or excess fraction thereof. [37 Stat. L. 242.]

**SEC. 2. [Location by attorneys — restriction.]** That no person shall hereafter locate any placer-mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer-mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer-mining claims for any one principal or association during any calendar month, and no placer-mining claim shall hereafter be located in Alaska except under the limitations of this Act. [37 Stat. L. 243.]

**SEC. 3. [Number of locations limited — ownership.]** That no person shall hereafter locate, cause or procure to be located, for himself more than two placer-mining claims in any calendar month: *Provided*, That one or both of such locations may be included in an association claim. [37 Stat. L. 243.]

**SEC. 4. [Area of claims.]** That no placer-mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width. [37 Stat. L. 243.]

SEC. 5. [**Effect of violations.**] That any placer-mining claim attempted to be located in violation of this Act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made. [37 Stat. L. 243.]

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**An Act To provide for the leasing of coal lands in the Territory of Alaska, and for other purposes.**

[Act of Oct. 20, 1914, ch. 330, 38 Stat. L. 741.]

[SEC. 1.] [**Coal lands—surveys.**] That the Secretary of the Interior be, and hereby is, authorized and directed to survey the lands of the United States in the Territory of Alaska known to be valuable for their deposits of coal, preference to be given first in favor of surveying lands within those areas commonly known as the Bering River, Matanuska, and Nenana coal fields, and thereafter to such areas or coal fields as lie tributary to established settlements or existing or proposed rail or water transportation lines: *Provided*, That such surveys shall be executed in accordance with existing laws and rules and regulations governing the survey of public lands. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$100,000 for the purpose of making the surveys herein provided for, to continue available until expended: *Provided*, That any surveys heretofore made under the authority or by the approval of the Department of the Interior may be adopted and used for the purposes of this Act. [38 Stat. L. 741.]

This is known as the "Alaska Coal Lands Act."

SEC. 2. [**Partial reservation of lands by government.**] That the President of the United States shall designate and reserve from use, location, sale, lease, or disposition not exceeding five thousand one hundred and twenty acres of coal-bearing land in the Bering River field and not exceeding seven thousand six hundred and eighty acres of coal-bearing land in the Matanuska field, and not to exceed one-half of the other coal lands in Alaska: *Provided*, That the coal deposits in such reserved areas may be mined under the direction of the President when, in his opinion, the mining of such coal in such reserved areas, under the direction of the President, becomes necessary, by reason of an insufficient supply of coal at a reasonable price for the requirements of Government works, construction and operation of Government railroads, for the Navy, for national protection, or for relief from monopoly or oppressive conditions. [38 Stat. L. 742.]

SEC. 3. [**Unreserved lands leased.**] That the unreserved coal lands and coal deposits shall be divided by the Secretary of the Interior into leasing blocks or tracts of forty acres each, or multiples thereof, and in such form as in the opinion of the Secretary will permit the most economical mining of the coal in such blocks, but in no case exceeding two thousand five hundred and sixty acres in any one leasing block or tract; and thereafter, the Secretary shall offer such blocks or tracts and the coal, lignite, and associated minerals therein for leasing, and may award leases thereof

through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, to any person above the age of twenty-one years who is a citizen of the United States, or to any association of such persons, or to any corporation or municipality organized under the laws of the United States or of any State or Territory thereof: *Provided*, That a majority of the stock of such corporation shall at all times be owned and held by citizens of the United States: *And provided further*, That no railroad or common carrier shall be permitted to take or acquire through lease or permit under this Act any coal or coal lands in excess of such area or quantity as may be required and used solely for its own use, and such limitation of use shall be expressed in all leases or permits issued to railroads or common carriers hereunder: *And provided further*, That any person, association, or corporation qualified to become a lessee under this Act and owning any pending claim under the public-land laws to any coal lands in Alaska may, within one year from the passage of this Act, enter into an arrangement with the Secretary of the Interior by which such claim shall be fully relinquished to the United States; and if in the judgment of the Secretary of the Interior, the circumstances connected with such claim justify so doing, the moneys paid by the claimant or claimants to the United States on account of such claim shall, by direction of the Secretary of the Interior, be returned and paid over to such person, association, or corporation as a consideration for such relinquishment.

All claims of existing rights to any of such lands in which final proof has been submitted and which are now pending before the Commissioner of the General Land Office or the Secretary of the Interior for decision shall be adjudicated within one year from the passage of this Act. [38 Stat. L. 742.]

**SEC. 4. [Lessees, when entitled to additional lands.]** That a person, association, or corporation holding a lease of coal lands under this Act may, with the approval of the Secretary of the Interior and through the same procedure and upon the same terms and conditions as in the case of an original lease under this Act, secure a further or new lease covering additional lands contiguous to those embraced in the original lease, but in no event shall the total area embraced in such original and new leases exceed in the aggregate two thousand five hundred and sixty acres.

That upon satisfactory showing by any lessee to the Secretary of the Interior that all of the workable deposits of coal within a tract covered by his or its lease will be exhausted, worked out, or removed within three years thereafter, the Secretary of the Interior may, within his discretion, lease to such lessee an additional tract of land or coal deposits, which, including the coal area remaining in the original lease, shall not exceed two thousand five hundred and sixty acres, through the same procedure and under the same competitive conditions as in case of an original lease. [38 Stat. L. 742.]

**SEC. 5. [Consolidation of leases.]** That, subject to the approval of the Secretary of the Interior, lessees holding under leases small blocks or areas may consolidate their said leases or holdings so as to include in a single holding not to exceed two thousand five hundred and sixty acres of contiguous lands. [38 Stat. L. 743.]



**SEC. 6. [Quantity of land covered by lease — forfeiture of interests.]**

That each lease shall be for such leasing block or tract of land as may be offered or applied for, not exceeding in area two thousand five hundred and sixty acres of land, to be described by the subdivisions of the survey, and no person, association, or corporation, except as hereinafter provided, shall be permitted to take or hold any interest as a stockholder or otherwise in more than one such lease under this Act, and any interest held in violation of this proviso shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction, except that any such ownership and interest hereby forbidden which may be acquired by descent, will, judgment, or decree may be held for two years, and not longer, after its acquisition. [38 Stat. L. 743.]

**SEC. 7. [Violations of Act — punishment.]**

That any person who shall purchase, acquire, or hold any interest in two or more such leases, except as herein provided, or who shall knowingly purchase, acquire, or hold any stock in a corporation having an interest in two or more such leases, or who shall knowingly sell or transfer to one disqualified to purchase, or except as in this Act specifically provided, disqualified to acquire, any such interest, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding \$1,000: *Provided*, That any such ownership and interest hereby forbidden which may be acquired by descent, will, judgment, or decree may be held two years after its acquisition and not longer, and in case of minority or other disability such time as the court may decree. [38 Stat. L. 743.]

**SEC. 8. [Directors, etc., of corporation — punishment for violations of Act.]** That any director, trustee, officer, or agent of any corporation holding any interest in such a lease who shall, on behalf of such corporation, act in the purchase of any interest in another lease, or who shall knowingly act on behalf of such corporation in the sale or transfer of any such interest in any lease held by such corporation to any corporation or individual holding any interest in any such a lease, except as herein provided, shall be guilty of a felony and shall be subject to imprisonment for a term of not exceeding three years and a fine of not exceeding \$1,000. [38 Stat. L. 743.]

**SEC. 8a. [Restraint of trade — forfeiture of leases.]** If any of the lands or deposits leased under the provisions of this Act shall be subleased, trustee, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, entered into by the lessee, or of any holding of such lands by any individual, partnership, association, corporation, or control, in excess of two thousand five hundred and sixty acres in the Territory of Alaska, the lease thereof shall be forfeited by appropriate court proceedings. [38 Stat. L. 743.]

**SEC. 9. [Royalties — terms of leases — net profits.]** That for the privilege of mining and extracting and disposing of the coal in the lands covered by his lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall not be less than two cents per ton, due and payable at the end of each month succeeding that of the shipment of the coal from the mine, and an annual rental, payable at the beginning of each year, on the lands covered by such lease, at the rate of twenty-five cents per acre for the first year thereafter, fifty cents per acre for the second, third, fourth, and fifth years, and \$1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases may be for periods of not more than fifty years each, subject to renewal, on such terms and conditions as may be authorized by law at the time of such renewal. All net profits from operation of Government mines, and all royalties and rentals under leases as herein provided, shall be deposited in the Treasury of the United States in a separate and distinct fund to be applied to the reimbursement of the Government of the United States on account of any expenditures made in the construction of railroads in Alaska, and the excess shall be deposited in the fund known as The Alaska Fund, established by the Act of Congress of January twenty-seventh, nineteen hundred and five, to be expended as provided in said last-mentioned Act. [38 Stat. L. 744.]

The Act of Jan. 27, 1905, mentioned in this section, is given, with amendments thereto, *supra*, p. 279.

**SEC. 10. [Limited licenses.]** That in order to provide for the supply of strictly local and domestic needs for fuel the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue to any applicant qualified under section three of this Act a limited license or permit granting the right to prospect for, mine, and dispose of coal belonging to the United States on specified tracts not to exceed ten acres to any one person or association of persons in any one coal field for a period of not exceeding ten years, on such conditions not inconsistent with this Act as in his opinion will safeguard the public interest, without payment of royalty for the coal mined or for the land occupied: *Provided*, That the acquisition of [or] holding of a lease under the preceding sections of this Act shall be no bar to the acquisition, holding, or operating under the limited license in this section permitted. And the holding of such a license shall be no bar to the acquisition or holding of such a lease or interest therein. [38 Stat. L. 744.]

**SEC. 11. [Reservations in leases — easements.]** That any lease, entry, location, occupation, or use permitted under this Act shall reserve to the Government of the United States the right to grant or use such easements in, over, through, or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the same or other coal lands by or under authority of the Government and for other purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within

such lease under existing law or laws hereafter enacted in so far as said surface is not necessary for use by the lessee in extracting and removing the deposits of coal therein. If such reservation is made, it shall be so determined before the offering of such lease.

That the said Secretary during the life of the lease is authorized to issue such permits for easements herein provided to be reserved, and to permit the use of such other public lands in the Territory of Alaska as may be necessary for the construction and maintenance of coal washeries or other works incident to the mining or treatment of coal, which lands may be occupied and used jointly or severally by lessees or permittees, as may be determined by said Secretary. [38 Stat. L. 744.]

**SEC. 12. [Assignments, etc., of leases.]** That no lease issued under authority of this Act shall be assigned or sublet except with the consent of the Secretary of the Interior. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property, and for the safety and welfare of the miners and for the prevention of undue waste, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions securing the workers complete freedom of purchase, requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to secure fair and just weighing or measurement of the coal mined by each miner, and such other provisions as are needed for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare. [38 Stat. L. 744.]

**SEC. 13. [Adverse claims.]** That the possession of any lessee of the land or coal deposits leased under this act for all purposes involving adverse claims to the leased property shall be deemed the possession of the United States, and for such purposes the lessee shall occupy the same relation to the property leased as if operated directly by the United States. [38 Stat. L. 745.]

**SEC. 14. [Breach of terms of lease — forfeiture.]** That any such lease may be forfeited and canceled by appropriate proceeding in a court of competent jurisdiction whenever the lessee fails to comply with any provision of the lease or of general regulations promulgated under this Act; and the lease may provide for the enforcement of other appropriate remedies for breach of specified conditions thereof. [38 Stat. L. 745.]

**SEC. 15. [Scope of Act — pending proceedings — no lease of lands adversely claimed.]** That on and after the approval of this Act no lands in Alaska containing deposits of coal withdrawn from entry or sale shall be disposed of or acquired in any manner except as provided in this Act: Provided, That the passage of this Act shall not affect any proceeding now pending in the Department of the Interior, and any such proceeding may

be carried to a final determination in said department notwithstanding the passage hereof: *Provided, further*, That no lease shall be made, under the provisions hereof, of any land, a claim for which is pending in the Department of the Interior at the date of the passage of this Act, until and unless such claim is finally disposed of by the department adversely to the claimant. [38 Stat. L. 745.]

SEC. 16. [Statements, etc., under oath — false oaths.] That all statements, representations, or reports required, unless otherwise specified, by the Secretary of the Interior under this Act shall be upon oath and in such form and upon such blanks as the Secretary of the Interior may require, and any person making false oath, representation, or report shall be subject to punishment as for perjury. [38 Stat. L. 745.]

SEC. 17. [Authority of Secretary of Interior.] That the Secretary of the Interior is authorized to prescribe the necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act. [38 Stat. L. 745.]

SEC. 18. [Repeal of conflicting Acts.] That all Acts and parts of Acts in conflict herewith are hereby repealed. [38 Stat. L. 745.]

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#### IV. PUBLIC LANDS.

SEC. 8. [Missionary stations.] \* \* \* That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. [23 Stat. L. 26.]

This is a part of section 8 of an Act of May 17, 1884, ch. 53, entitled "An Act providing a civil government for Alaska." The remainder of this Act has long been superseded by subsequent Acts passed for the same purpose.

See the Act of March 3, 1891, ch. 561, § 14, *infra*, p. 318, and the Act of June 6, 1900, ch. 786, § 27, *infra*, p. 324.

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SEC. 11. [Town sites, how entered.] That until otherwise ordered by Congress lands in Alaska may be entered for town-site purposes, for the several use and benefit of the occupants of such town sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be;

And when such entries shall have been made the Secretary of the Interior shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the town site, including the survey of the land into lots, according to the spirit and intent of said section twenty-three hundred

and eighty-seven of the Revised Statutes, whereby the same results would be reached as though the entry had been made by a county judge and the disposal of the lots in such town site and the proceeds of the sale thereof had been prescribed by the legislative authority of a State or Territory:

*Provided*, That no more than six hundred and forty acres shall be embraced in one townsite entry. [26 Stat. L. 1099.]

This section 11, and the following sections 12, 13, 14, and 15, are from the Act of March 3, 1891, ch. 561, entitled "An Act to repeal timber culture laws and for other purposes."

**Acquisition of town site title.**—Under this and the three following sections the legal title to town lots can only be acquired from the town site trustee. *McGrath v. Valentine*, (1909) 167 Fed. 473.

**Conclusiveness of trustee's decision.**—Under this section and regulations promulgated thereunder providing for the disposition of town site lots in Alaska, and authorizing the trial of conflicting claims before the trustee on notice with an appeal to the Commissioner of the General Land Office, and from his decision to the Secretary of the Interior, the decision of the trustee is final, in the absence of fraud, accident, or mistake, with reference to all questions of fact arising in such proceeding, except as the same may be reversed by the Commissioner of the General Land Office or the Secretary of the Interior. *Miller v. Margerie*, (1907) 149 Fed. 694. See also *McGrath v. Valentine*, (1909) 167 Fed. 473.

**Right of locators within town site.**—The right of locators within an alleged town site, not shown to have been entered for that purpose, is at most a mere possessory right with the privilege of regularly entering the town site in the future, if the citizens so desire, and is insufficient on which to base a suit to remove a cloud on title. *Ripinsky v. Hinchman*, (1910) 181 Fed. 786.

**Abandonment of possession.**—In *Gordon v. Ross-Higgins Co.*, (1908) 162 Fed. 637, it appeared that the plaintiff staked

out a lot in the mining camp of Fairbanks, Alaska, and built a log cabin thereon in which he resided for some three months, and then left and did not return for three years. He left some tools, a stove, etc., in the cabin, and asked two different persons to look after the property for him, but neither of them took possession of or occupied the same. No steps had been taken to locate a town site at Fairbanks, and there was no law under which titles were recorded, but books were kept for the benefit of settlers in which locations were recorded, and plaintiff's was recorded therein. About a year after he left, other persons located the lot and went into possession, which was continuous thereafter; their rights having been subsequently acquired in good faith by defendants, who with their grantors had made valuable improvements on the property. It was held that plaintiff's acts amounted to an abandonment of the lot, and that he was not an occupant or in possession and had no right therein which could ripen into a title under the town site law at the time of its location by defendants' predecessor in interest, or which would support an action to recover the property from them.

**Judicial notice.**—This section extends the town site law to Alaska and the court will take notice of it in an action to quiet title brought by one in possession of a lot on public lands in Alaska. *Foss v. Dam*, (1901) 1 Alaska 346.

**SEC. 12. [Purchases for trade or manufacture.]** That any citizen of the United States twenty-one years of age, and any association of such citizens, and any corporation incorporated under the laws of the United States, or of any State or Territory of the United States now authorized by law to hold lands in the Territories now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per acre:

*Provided*, That in case more than one person, association or corporation shall claim the same tract of land the person, association or corporation having the prior claim by reason of possession and continued occupation

shall be entitled to purchase the same; but the entry of no person, association, or corporation shall include improvements made by or in possession of another prior to the passage of this act. [26 Stat. L. 1100.]

This and the following section are in effect superseded by the Act of May 14, 1898, ch. 299, § 10, *infra*, p. 320.

**Prior possession as entitling one to possessory action.**—Possession based upon a claim of use for purposes of trade and residence is founded upon sufficient title to maintain a possessory action under the

code, either by ejectment or suit to quiet title, as the fact of possession or want of it determines. *Foss v. Dam*, (1901) 1 Alaska 346.

**SEC. 13. [Surveys—making—payment.]** That it shall be the duty of any person, association, or corporation entitled to purchase land under this act to make an application to the United States marshal, ex officio surveyor-general of Alaska, for an estimate of the cost of making a survey of the lands occupied by such person, association, or corporation, and the cost of the clerical work necessary to be done in the office of the said United States marshal, ex officio surveyor-general; and on the receipt of such estimate from the United States marshal, ex officio surveyor-general, the said person, association, or corporation shall deposit the amount in a United States depository, as is required by section numbered twenty-four hundred and one, Revised Statutes, relating to deposits for surveys.

That on the receipt by the United States marshal, ex officio surveyor-general, of the said certificates of deposit, he shall employ a competent person to make such survey, under such rules and regulations as may be adopted by the Secretary of the Interior, who shall make his return of his field notes and maps to the office of the said United States marshal, ex officio surveyor-general; and the said United States marshal, ex officio surveyor-general, shall cause the said field notes and plats of such survey to be examined, and, if correct, approve the same, and shall transmit certified copies of such maps and plats to the office of the Commissioner of the General Land Office.

That when the said field notes and plats of said survey shall have been approved by the said Commissioner of the General Land Office, he shall notify such person, association, or corporation, who shall then, within six months after such notice, pay to the said United States marshal, ex officio surveyor-general, for such land, and patent shall issue for the same. [26 Stat. L. 1100.]

See the note to the preceding section 12 of this Act.

As originally enacted the Act of May 17, 1884, ch. 53, § 8, 23 Stat. L. 26, stated that the marshal provided for by that Act should be *ex officio* surveyor-general of the district. This provision was stricken out by an Act of July 24, 1897, ch. 14, § 1, 30 Stat. L. 215; section 2 of which Act, given *supra*, p. 319, provided for the appointment of a surveyor-general.

**SEC. 14. [What lands reserved from entry.]** That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands belonging to the United States which shall contain coal or the precious metals, or any town site, or which shall be occupied by the United States for public purposes, or which shall be reserved for such purposes, or to which the natives of Alaska have prior rights by virtue of actual occupation, or which shall be selected by the United States Commissioner of Fish and Fisheries on the island of Kadiak and Afognak for the purpose of establishing fish-culture stations.

And all tracts of land not exceeding six hundred and forty acres in any one tract now occupied as missionary stations in said district of Alaska are hereby excepted from the operation of the last three preceding sections of this act.

No portion of the islands of the Pribylov Group or the Seal Islands of Alaska shall be subject to sale under this act;

And the United States reserves, and there shall be reserved in all patents issued under the provisions of the last two preceding sections the right of the United States to regulate the taking of salmon and to do all things necessary to protect and prevent the destruction of salmon in all the waters of the lands granted frequented by salmon. [26 Stat. L. 1100.]

See the note to section 12 of this Act.

So far as this section refers to the "district" of Alaska, it is superseded by the organization thereof as a territory by the Act of Aug. 24, 1912, ch. 387, *supra*, p. 250.

**Effect of reservation by government of fish culture station.**—Any rights acquired under sections 12 and 13 of this Act, by settlement upon and survey of public lands in Alaska, is terminated by the proclamation of the President that the land in question is reserved for the purpose of establishing a fish culture station, in accordance with the declaration of this section that the provisions of the last two preceding sections shall not be so construed as to warrant the sale of any lands belonging to the United States which shall be reserved for public purposes or selected

for fish culture stations. *Russian-American Packing Co. v. U. S.*, (1905) 199 U. S. 570, 26 S. Ct. 157, 50 U. S. (L. ed.) 314.

The value of improvements made on public lands in Alaska by a mere trespasser, occupying the land without a shadow of title, cannot be recovered from the United States upon the selection of the land in question by the government, in accordance with this section, for a fish culture station. *Russian-American Packing Co. v. U. S.*, (1905) 199 U. S. 570, 26 S. Ct. 157, 50 U. S. (L. ed.) 314.

**SEC. 15. [Annette Islands reserved for natives.]** That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior. [26 Stat. L. 1101.]

See the note to section 12 of this Act.

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**An Act To amend section eight of the Act entitled "An Act providing a civil government for Alaska," approved May seventeenth, eighteen hundred and eighty-four, to create the office of surveyor-general for Alaska, and for other purposes.**

[Act of July 24, 1897, ch. 14, 30 Stat. L. 215.]

**SEC. 2. [Surveyor-general.]** That there shall be appointed by the President, by and with the advice and consent of the Senate, a surveyor-general for the District of Alaska, embracing one surveying district. [30 Stat. L. 215.]

Section 1 of this Act constituted an amendment to the Act of May 17, 1884, ch. 53, § 8, 23 Stat. L. 26, which was superseded by the various subsequent acts providing for the civil government of Alaska.

Section 4 of this Act created two land districts in Alaska. It was superseded by the Act of May 14, 1898, ch. 299, § 12, *infra*, p. 323.

So much of the text as refers to Alaska as a "district" was superseded by the organization thereof as a territory by the Act of Aug. 24, 1912, ch. 387, *supra*, p. 250.

**SEC. 3. [Salary.]** That the surveyor-general of Alaska shall receive a salary at the rate of two thousand dollars per annum. [30 Stat. L. 215.]

See the note to section 2 of this Act.

By the Legislative, Executive and Judicial Appropriation Act of March 4, 1915, ch. 141, § 1, 38 Stat. L. 1034, there was appropriated \$4,000 for the salary of the surveyor-general of Alaska.

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**SEC. 10. [Purchases for trade or manufacture, etc., reserved lands — adverse claims — procedure.]** That any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation incorporated under the laws of the United States or of any State or Territory now authorized by law to hold lands in the Territories, hereafter in the possession of and occupying public lands in the District of Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land for any one person, association, or corporation, at two dollars and fifty cents per acre, upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry, such tract of land not to include mineral or coal lands, and ingress and egress shall be reserved to the public on the waters of all streams, whether navigable or otherwise:

*Provided*, That no entry shall be allowed under this Act on lands abutting on navigable water of more than eighty rods:

*Provided further*, That there shall be reserved by the United States a space of eighty rods in width between tracts sold or entered under the provisions of this Act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore,

and that the Secretary of the Interior may grant the use of such reserved lands abutting on the water front to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or under the laws of any State or Territory, for landings, and wharves, with the provision that the public shall have access to and proper use of such wharves, and landings, at reasonable rates of toll to be prescribed by said Secretary,

and a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway:

*Provided further*, That in case more than one person, association, or corporation shall claim the same tract of land, the person, association, or corporation having the prior claim, by reason of actual possession and continued occupation in good faith, shall be entitled to purchase the same, but where several persons are or may be so possessed of parts of the tract applied for the same shall be awarded to them according to their respective interests:

*Provided further*, That all claims substantially square in form and lawfully initiated, prior to January twenty-first, eighteen hundred and ninety-eight, by survey or otherwise, under sections twelve and thirteen of the



Act approved March third, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, Chapter five hundred and sixty-one), may be perfected and patented upon compliance with the provisions of said Act, but subject to the requirements and provisions of this Act, except as to area, but in no case shall such entry extend along the water front for more than one hundred and sixty rods:

*And provided further*, That the Secretary of the Interior shall reserve for the use of the natives of Alaska suitable tracts of land along the water front of any stream, inlet, bay, or sea shore for landing places for canoes and other craft used by such natives:

*Provided*, That the Annette, Pribilof Islands, and the islands leased or occupied for the propagation of foxes be excepted from the operation of this Act.

That all affidavits, testimony, proofs and other papers provided for by this Act and by said Act of March third, eighteen hundred and ninety-one, or by any departmental or Executive regulation thereunder, by depositions or otherwise, under commission from the register and receiver of the land office, which may have been or may hereafter be taken and sworn to anywhere in the United States, before any court, judge, or other officer authorized by law to administer an oath, shall be admitted in evidence as if taken before the register and receiver of the proper local land office.

And thereafter such proof, together with a certified copy of the field notes and plat of the survey of the claim, shall be filed in the office of the surveyor-general of the District of Alaska, and if such survey and plat shall be approved by him, certified copies thereof, together with the claimant's application to purchase, shall be filed in the United States land office in the land district in which the claim is situated, whereupon, at the expense of the claimant, the register of such land office shall cause notice of such application to be published for at least sixty days in a newspaper of general circulation published nearest the claim within the District of Alaska,

and the applicant shall at the time of filing such field notes, plat, and application to purchase in the land office, as aforesaid, cause a copy of such plat, together with the application to purchase, to be posted upon the claim, and such plat and application shall be kept posted in a conspicuous place on such claim continuously for at least sixty days,

and during such period of posting and publication or within thirty days thereafter any person, corporation, or association, having or asserting any adverse interest in, or claim to, the tract of land or any part thereof sought to be purchased, may file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within the District of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of the court. [30 Stat. L. 413.]

This and the following two sections are from an Act of May 14, 1898, ch. 299, entitled "An Act extending the homestead laws, and providing a right of way for railroads in the District of Alaska, and for other purposes." Section 1 of this Act, as amended by an Act of March 3, 1903, ch. 1002, is given *infra*, p. 325. Sections 2 to 9 inclusive are given *infra*, this title, under the subdivision *Railroads, Wagon Roads, Aërials and Tramways*. By section 26 of an Act of June 6, 1900, *infra*, p. 300, the

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Miller v. Blackitt, (1891) 47 Fed. 547; Haltern v. Emmons, (1890) 46 Fed. 452.

Russian grants before the cession have been recognized. Callsen v. Hope, (1896) 75 Fed. 758. But Russian government property became the property of the United States. Kinkead v. U. S., (1893) 150 U. S. 483, 14 S. Ct. 172, 37 U. S. (L. ed.) 1152.

By this provision all persons in peaceable possession are guaranteed the right ultimately to acquire a perfect title. Young v. Goldsteen, (1899) 97 Fed. 303.

The only titles that could be held under this section were those arising by reason of possession. Malony v. Adsit, (1899) 175 U. S. 281, 20 S. Ct. 115, 44 U. S. (L. ed.) 163. Littoral rights are the same as in ownership of fee. Lewis v. Johnson, (1896) 76 Fed. 476.

No intention on the part of Congress to permit rights to public lands in Alaska to be initiated by a settlement made after the enactment of this Act can be gathered from the first proviso of this section, especially when considered with the last clause of the section that "nothing contained in this Act shall be construed to put in force in said district the general land laws," and with the provision of section 12, for the appointment of a com-

mission to report the facts to enable Congress to determine what limitations or conditions should be imposed when the land laws should be extended to the district. Russian-American Packing Co. v. U. S., (1905) 199 U. S. 570, 26 S. Ct. 157, 50 U. S. (L. ed.) 314.

Commissioners for transfer under treaty of cession were not empowered to decide questions of ownership or title. Kinkead v. U. S., (1893) 150 U. S. 483, 14 S. Ct. 172, 37 U. S. (L. Ed.) 1152.

Foreign Indians have no right to go on lands under this section. (1877) 18 Op. Atty.-Gen. 559.

The general land laws were not applicable to Alaska, by virtue of this section, though the government recognizes and sanctions the actual possession and use of public land in Alaska by any Indian or other person. Martin v. Burford, (1910) 181 Fed. 922.

As to the status and rights of Indians in Alaska generally, see *In re Carr*, (1875) 3 Sawy. 316, 5 Fed. Cas. No. 2432; *Waters v. Campbell*, (1876) 4 Sawy. 121, 29 Fed. Cas. No. 17,264; *U. S. v. Seveloff*, (1872) 2 Sawy. 311, 27 Fed. Cas. No. 16,252; *In re Can-ah-couqua*, (1837) 29 Fed. 687; *In re Sah Quah*, (1886) 31 Fed. 327.

**SEC. 27. [Indians in possession — missionary stations.]** The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, and the land, at any station not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in the section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong, and the Secretary of the Interior is hereby directed to have such lands surveyed in compact form as nearly as practicable and patents issued for the same to the several societies to which they belong; but nothing contained in this Act shall be construed to put in force in the district the general land laws of the United States. [31 Stat. L. 330.]

This is from the Act of June 6, 1900, ch. 786, making further provisions for the civil government of Alaska. The other sections of this Act are given *supra*, p. 260.

So far as the text designates Alaska as a "district" it was superseded by the Act of Aug. 24, 1912, ch. 387, *supra*, p. 250, which reorganized the district as a territory.

[SEC. 1.] [Land districts and offices.] \* \* \* That on and after June first, nineteen hundred and two, the number of land offices and land districts in the district of Alaska is hereby reduced to one, the location of which shall be fixed by the President. [32 Stat. L. 20.]

The above provision is from the Urgent Deficiencies Appropriation Act of Feb. 14, 1902, ch. 17.

See the Act of May 14, 1898, ch. 299, § 12, *supra*, p. 323. Additional land districts were created by the Act of March 2, 1907, ch. 2537, *infra*, p. 328.

**An Act To amend section one of the Act of Congress approved May fourteenth, eighteen hundred and ninety-eight, entitled "An Act extending the homestead laws and providing for a right of way for railroads in the district of Alaska."**

*[Act of March 3, 1903, ch. 1002, 32 Stat. L. 1028.]*

**[Homestead laws extended to Alaska — allotment — procedure.]** That all the provisions of the homestead laws of the United States not in conflict with the provisions of this Act, and all rights incident thereto, are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior;

and no indemnity, deficiency, or lieu land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law;

and provided further that no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right;

and provided further that no location of scrip, selection, or right along any navigable or other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located by means of any such scrip or otherwise;

and provided further that no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof:

*Provided,* That no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims; and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district;

and no patent shall issue hereunder until all the requirements of sections twenty-two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof except as to commuted lands as herein provided:

*And it is further provided,* That every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the district of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations hereof, be entitled to enter three hundred and twenty acres or a less quantity of unappropriated public land in said district of Alaska.

If any of the land so settled upon, or to be settled upon, is unsurveyed, then the land settled upon, or to be settled upon, must be located in a rectangular form, not more than one mile in length, and located by north and south lines run according to the true meridian; that the location so made

shall be marked upon the ground by permanent monuments at each of the four corners of the said location, so that the boundaries of the same may be readily and easily traced;

that the record of said location shall, within ninety days from the date of settlement, be filed for record in the recording district in which the land is situated. Said record shall contain the name of the settler, the date of the settlement, and such a description of the land settled upon, by reference to some natural object or permanent monument, as will identify the same;

and, if after the expiration of the said period of five years or at such date as the settler may desire to commute the public surveys of the United States have not been extended over the land located, a patent shall nevertheless issue for the land included within the boundaries of said location as thus recorded, upon proof to be submitted to the register and receiver of the proper land office, upon proof that he is a citizen of the United States, and upon the further proof required by section twenty-two hundred and ninety-one of the Revised Statutes of the United States as heretofore and herein amended, and under the procedure in the obtaining of patents to the unsurveyed lands of the United States, as provided for by section ten of the Act hereby amended, and under such rules and regulations as shall be prescribed by the Secretary of the Interior as hereinbefore provided, without the payment of any purchase price or other charges, except the ordinary office fees and commissions of the register and receiver except one dollar and twenty-five cents per acre on land commuted:

*And provided always*, That no title shall be obtained hereunder to any of the mineral or coal lands of the district of Alaska:

*And it is further provided*, That the right of any homestead settler to transfer any portion of the land so settled upon, as provided by section twenty-two hundred and eighty-eight of the Revised Statutes of the United States, shall be restricted and limited within the district of Alaska as follows: For church, cemetery, or school purposes to five acres, and for the right of railroads across such homestead to one hundred feet in width on either side of the center line of said railroad; and all contracts by the settler made before his receipt of patent from the Government, for the conveyance of the land homesteaded by him or her, except as herein provided, shall be held null and void. [32 Stat. L. 1028.]

The Act of May 14, 1898, ch. 299, § 1, mentioned in the title of the foregoing Act was as follows:

[SEC. 1.] That the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights, are hereby extended to the District of Alaska, subject to such regulations as may be made by the Secretary of the Interior;

and no indemnity, deficiency, or lieu lands pertaining to any land grant whatsoever originating outside of said District of Alaska shall be located within or taken from lands in said District:

*Provided*, That no entry shall be allowed extending more than eighty rods along the shore of any navigable water,

and along such shore a space of at least eighty rods shall be reserved from entry between all such claims, and that nothing herein contained shall be so construed as to authorize entries to be made, or title to be acquired, to the shore of any navigable waters within said District:

*And it is further provided*, That no homestead shall exceed eighty acres in extent. [30 Stat. L. 409.]

For R. S. secs. 2288, 2291, 2292, and 2305, mentioned in the text, see the title PUBLIC LANDS.

Section 10 of the Act of May 14, 1898, ch. 299, mentioned in the text is given *supra*, p. 320.

"The intention of the amendment was to increase the quantity of land which might be taken as a homestead in Alaska, to subject unsurveyed lands to homestead settlement and patent, and to require that the boundaries of a homestead claim be plainly marked on the ground. That was substantially all that was accomplished by the amendment. There is no ground for the contention that by virtue of the provision requiring a homestead settler to furnish proof under the procedure for obtaining patents to surveyed lands of the United States as provided for by section 10 of the Act of May 14, 1898 (see p. 320) one who has a mining location in conflict with a homestead claim is required to bring a suit to quiet title before the decision of his adverse claim which is filed and pending in the land office. The amendment makes section 10 of the prior Act applicable to proof of homesteads on unsurveyed lands as well as those on surveyed lands, and with that exception leaves its purport and meaning unchanged. In brief, the law under the amendment is what it was before, so far as it directs that a suit would be brought to quiet title. If a person, association, or corporation in the occupation of land for the purpose of trade, manufacture, or productive industry claims by right of occupation land whether surveyed or unsurveyed which is included in a homestead settlement, he must at the appropriate time bring a suit to determine in a court the questions on which his right of occupation depends. The jurisdiction of the land office to determine contests between locators of mining claims and homestead settlers remains

as it was before." *Nelson v. Brownell*, (C. C. A. 9th Cir. 1912) 193 Fed. 641.

**Homestead entry along shore.**—There is nothing in the above section authorizing the reservation of a roadway above high-water mark. *Dalton v. Hazelet*, (1910) 182 Fed. 561; *Alaska Cent. R. Co. v. Dooley*, (1910) 4 Alaska 184.

The "shore" of navigable water is the ground lying between ordinary high-water and low-water mark. *Dalton v. Hazelet*, (1910) 182 Fed. 561.

**Rights of riparian owner.**—While the owner or locator of lands in Alaska which border upon navigable or tidal waters has, under the general law, the right of access to such waters for the purpose of navigation, he can acquire no right or title in the soil below high-water mark, and he can have therefore no right of possession upon which he can base an action against an intruder whom he charges with interfering with and obstructing him in the erection and use of a structure upon the shore below such high-water mark. He may have, however, a right of action against an intruder who places obstacles on the shore that prevent him from having access to the navigable waters. *Columbia Canning Co. v. Hampton*, (1908) 161 Fed. 60.

**Right of fishery.**—An owner or claimant of lands in Alaska which border on navigable waters, having no right to the shore lands, has no exclusive right of fishery in such waters, nor to erect and maintain a fish trap either on the shore between high and low water mark, or in the adjacent deep waters, to the exclusion of others. *Columbia Canning Co. v. Hampton*, (1908) 161 Fed. 60.

### **An Act Authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska.**

[Act of May 17, 1906, ch. 2469, 34 Stat. L. 197.]

[**Homestead allotments to natives.**] That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres. [34 Stat. L. 197.]

**An Act To provide for the creation of additional land districts in the district of Alaska.**

[*Act of March 2, 1907, ch. 2537, 34 Stat. L. 1232.*]

[SEC. 1.] [**Nome and Fairbanks districts, created.**] That there are hereby created two additional land districts, the boundaries of which shall be designated by the President, in the district of Alaska, to be known as the Nome land district and the Fairbanks land district, with the land offices located, respectively, at Nome, Alaska, and Fairbanks, Alaska. [34 Stat. L. 1232.]

For the prior laws relating to land districts, see the Act of May 14, 1898, ch. 299, § 12, *supra*, p. 323, and the Act of Feb. 14, 1902, ch. 17, § 1, *supra*, p. 324.

Alaska was organized as a territory by the Act of Aug. 24, 1912, ch. 387, *supra*, p. 250.

SEC. 2. [**Registers and receivers—clerks of court and marshals to act.**] That the clerks of the district courts of Nome and Fairbanks shall respectively be ex-officio registers of the land offices at Nome and Fairbanks and the marshals of the said courts at Nome and Fairbanks shall be ex-officio receivers of public moneys for the Nome and Fairbanks land districts. Said officers shall perform the several duties of register of the land office and receiver of public moneys for the land districts with all the powers incident to such offices to the same extent as now performed by the register of the land office and the receiver of public moneys at Juneau, Alaska. [34 Stat. L. 1232.]

SEC. 3. [**Fees, etc.—surplus—salary.**] That the said officers shall, in addition to their present compensation as clerk or marshal as provided by law, receive all the fees and commissions allowed by law for their services as registers of land offices and receivers of public moneys for land districts under the land laws: *Provided*, That any fees or commissions in excess of one thousand five hundred dollars per annum received by either such officials shall be paid into the Treasury of the United States: *Provided*, That no other salary than aforesaid shall be paid such registers and receivers. [34 Stat. L. 1232.]

SEC. 4. [**Surveys—approval.**] That the surveyor-general of the district of Alaska, under the direction of the Secretary of the Interior, shall furnish the receivers of said land offices a sufficient quantity of numbers to be used in the different classes of official surveys that may be made in said Nome and Fairbanks land districts to meet the requirements thereof, and upon application by any person desiring to have an official survey made the receivers shall furnish a number or numbers for such survey or surveys, together with an order directing a qualified deputy surveyor to make the same, and such application, order, and the fee required to be paid to the surveyor-general in the district of Alaska shall be transmitted to the surveyor-general: *Provided*, That all surveys thus made shall be approved by the surveyor-general as at present. [34 Stat. L. 1232.]

SEC. 5. [**Effect.**] That this Act shall take effect and be in force from and after July first, nineteen hundred and seven. [34 Stat. L. 1232.]

**An Act To reserve lands to the Territory of Alaska for educational uses,  
and for other purposes.**

[*Act of March 4, 1915, ch. 181, 38 Stat. L. 1214.*]

[SEC. 1.] [Public lands — reservation for educational uses — leases — mineral lands.] That when the public lands of the Territory of Alaska are surveyed, under direction of the Government of the United States, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved from sale or settlement for the support of common schools in the Territory of Alaska; and section thirty-three in each township in the Tanana Valley between parallels sixty-four and sixty-five north latitude and between the one hundred and forty-fifth and the one hundred and fifty-second degrees of west longitude (meridian of Greenwich) shall be, and the same is hereby, reserved, from sale or settlement for the support of a Territorial agricultural college and school of mines when established by the Legislature of Alaska upon the tract granted in section two of this Act: *Provided*, That where settlement with a view to homestead entry has been made upon any part of the sections reserved hereby before the survey thereof in the field, or where the same may have been sold or otherwise appropriated by or under the authority of any Act of Congress, or are wanting or fractional in quantity, other lands may be designated and reserved in lieu thereof in the manner provided by the Act of Congress of February twenty-eighth, eighteen hundred and ninety-one (Twenty-sixth Statutes, page seven hundred and ninety-one): *Provided further*, That the Territory may, by general law, provide for leasing said land in area not to exceed one section to any one person, association, or corporation for not longer than ten years at any one time: *And provided further*, That if any of said sections, or any part thereof, shall be of known mineral character at the date of acceptance of survey thereof, the reservation herein made shall not be effective or applicable, but the entire proceeds or income derived by the United States from such sections sixteen and thirty-six and such section thirty-three in each township in the Tanana Valley area hereinbefore described, and the minerals therein, together with the entire proceeds or income derived from said reserved lands, are hereby appropriated and set apart as separate and permanent funds in the Territorial treasury, to be invested and the income from which shall be expended only for the exclusive use and benefit of the public schools of Alaska or of the agricultural college and school of mines, respectively, in such manner as the legislature of Alaska may by law direct. [38 Stat. L. 1214.]

SEC. 2. [Lands in Fairbanks section reserved for same uses — vested rights of persons not disturbed.] That section numbered six, in township numbered one south of the Fairbanks base line and range numbered one west of the Fairbanks meridian; section numbered thirty-one, in township numbered one north of the Fairbanks base line and range numbered one west of the Fairbanks meridian; section numbered one, in township numbered one south of the Fairbanks base line and range numbered two west of the Fairbanks meridian; and section numbered thirty-six, in township numbered one north of the Fairbanks base line and range numbered two west of the Fairbanks meridian, be, and the same are hereby, granted to

the Territory of Alaska, but with the express condition that they shall be forever reserved and dedicated to use as a site for an agricultural college and school of mines: *Provided*, That nothing in this Act shall be held to interfere with or destroy any legal claim of any person or corporation to any part of said lands under the homestead or other law for the disposal of the public lands acquired prior to the approval of this Act: *Provided further*, That so much of the said land as is now used by the Government of the United States as an agricultural experiment station may continue to be used for such purpose until abandoned for that use by an order of the President of the United States or by Act of Congress. [38 Stat. L. 1215.]

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## V. RAILROADS, WAGON ROADS, AËRIALS, AND TRAMWAYS.

SEC. 2. [Right of way to railroads — mineral rights — title to tide lands — posting of charges.] That the right of way through the lands of the United States in the District of Alaska is hereby granted to any railroad company, duly organized under the laws of any State or Territory or by the Congress of the United States, which may hereafter file for record with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the center line of said road;

also the right to take from the lands of the United States adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad;

also the right to take for railroad uses, subject to the reservation of all minerals and coal therein, public lands adjacent to said right of way for station buildings, depots, machine shops, side tracks, turn-outs, water stations, and terminals, and other legitimate railroad purposes, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road, excepting at terminals and junction points, which may include additional forty acres, to be limited on navigable waters to eighty rods on the shore line, and with the right to use such additional ground as may in the opinion of the Secretary of the Interior be necessary where there are heavy cuts or fills:

*Provided*, That nothing herein contained shall be so construed as to give to such railroad company, its lessees, grantees, or assigns the ownership or use of minerals, including coal, within the limits of its right of way, or of the lands hereby granted:

*Provided further*, That all mining operations prosecuted or undertaken within the limits of such right of way or of the lands hereby granted shall, under rules and regulations to be prescribed by the Secretary of the Interior, be so conducted as not to injure or interfere with the property or operations of the road over its said lands or right of way.

And when such railway shall connect with any navigable stream or tide water such company shall have power to construct and maintain necessary piers and wharves for connection with water transportation, subject to the supervision of the Secretary of the Treasury:



*Provided*, That nothing in this Act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said District, or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said District.

The term "navigable waters," as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high-water mark.

That all charges for the transportation of freight and passengers on railroads in the District of Alaska shall be printed and posted as required by section six of an Act to regulate commerce as amended on March second, eighteen hundred and eighty-nine, and such rates shall be subject to revision and modification by the Secretary of the Interior. [30 Stat. L. 409.]

This section and the following sections 3 to 9 inclusive are from an Act of May 14, 1898, ch. 299, entitled "An Act extending the homestead laws, and providing for the right of way for railroads in the District of Alaska, and for other purposes." The first section of this Act, as amended by the Act of March 3, 1903, ch. 1002, is given *supra*, p. 325. Sections 10, 11, and 12, relating to public lands, are given *supra*, this title, in the subdivision *Public Lands*. Section 13, relating to mining rights, is given *supra*, this title, under the subdivision *Mineral Lands, Mines and Mining*. Section 14, relating to bonded warehouses, is given *supra*, this title, under the subdivision *Civil Government*.

**Prior claim as preventing railroad from getting right of way.**—Where, prior to a survey, certain oil claims had been located on the public land in controversy in Alaska, such claims, if valid, withdrew the land from entry, so that a railroad company could not obtain a right of way over the same under this section. *Alaska Pac. R., etc., Co. v. Copper River, etc., R. Co.*, (1908) 160 Fed. 862.

**Easement over tidelands.**—Where a

railroad company is empowered under this Act to build whatever piers, docks and wharves are necessary to connect the railroad with the navigable waters of Alaska, there is granted to the railroad corporation such an easement over tidelands as is necessary to enable such corporation to connect its railroad with water transportation facilities. *Dalton v. Katalla Co.*, (1911) 4 Alaska 410.

**SEC. 3. [Restrictions on right to pass through canyon—regulation of charges.]** That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade; and the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any tramway, wagon road, or other public highway now located therein, nor prevent the location through the same of any such tramway, wagon road, or highway where such tramway, wagon road, or highway may be necessary for the public accommodation;

and where any change in the location of such tramway, wagon road, or highway is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such tramway, wagon road, or highway, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road or tramway:

*Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile, and that where the space is limited the United States district court shall require the road first constructed to allow any other railroad or tramway to pass over its track or tracks through such canyon, pass, or defile on such equitable basis as the said court may prescribe; and all shippers shall be entitled to equal accommodations as to the movement of their freight and without discrimination in favor of any person or corporation:

*Provided*, That nothing herein shall be construed as depriving Congress of the right to regulate the charges for freight, passengers, and wharfage. [30 Stat. L. 410.]

**SEC. 4. [Condemnation of right of way — preliminary survey.]** That where any company, the right of way to which is hereby granted, shall in the course of construction find it necessary to pass over private lands or possessory claims on lands of the United States, condemnation of a right of way across the same may be made in accordance with section three of the Act entitled "An Act to amend an Act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,'" approved July second, eighteen hundred and sixty-four:

*Provided further*, That any such company, by filing with the Secretary of the Interior a preliminary actual survey and plat of its proposed route, shall have the right at any time within one year thereafter, to file the map and profile of definite location provided for in this Act, and such preliminary survey and plat shall, during the said period of one year from the time of filing the same, have the effect to render all the lands on which said preliminary survey and plat shall pass subject to such right of way. [30 Stat. L. 410.]

**Prerequisites to acquisition of right of way.**—A railroad acquires no right of way until the preliminary survey and plat shall have been named and probably filed. Such preliminary survey and plat reserves the rights of the company for one year

thereafter and protects the company during the year within which it has to make its definite location only in so far as the right of way is fixed by the preliminary survey and plat. *Steele v. Tanana Mines R. Co.*, (1905) 2 Alaska 451.

**SEC. 5. [Filing maps — effect of failure to file.]** That any company desiring to secure the benefits of this Act shall, within twelve months after filing the preliminary map of location of its road as hereinbefore prescribed, whether upon surveyed or unsurveyed lands, file with the register of the land office for the district where such land is located a map and profile of at least a twenty-mile section of its road or a profile of its entire road if less than twenty miles, as definitely fixed;

and shall thereafter each year definitely locate and file a map of such location as aforesaid of not less than twenty miles additional of its line of road until the entire road has been thus definitely located, and upon approval thereof by the Secretary of the Interior the same shall be noted upon the records of said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way:

*Provided*, That if any section of said road shall not be completed within one year after the definite location of said section so approved, or if the map of definite location be not filed within one year as herein required, or if the entire road shall not be completed within four years from the filing of the map of definite location, the rights herein granted shall be forfeited as to any such uncompleted section of said road, and thereupon shall revert to the United States without further action or declaration, the notation of such uncompleted section upon the records of the land office shall be canceled, and the reservations of such lands for the purposes of said right of way, stations, and terminals shall cease and become null and void without further action. [30 Stat. L. 410.]

Upon making and filing the definite map of location, the right of way fixed therein excludes any further disposition of the land except subject to that right of way. *Steele v. Tanana Mines R. Co.*, (1905) 2 Alaska 451.

**Validity of mortgages.**—In *Washington Trust Co. v. Dunaway*, (1909) 169 Fed. 37, it appeared that the Council City & Solomon River Railroad Company, under its then corporate name, filed its preliminary map of location under this Act in 1903, and afterward commenced the actual construction of its road. In 1905 it executed a mortgage on all of its property then owned or to be thereafter acquired

to secure bonds to be used for construction purposes, which mortgage was recorded as required by the Act. It had not at that time complied with the provision requiring the filing of map and profile of definite survey, but the time for doing so and for completion of its road was afterward extended by special Act of Congress, with which it complied. It was held that having in view the purpose of the legislation to encourage the building of roads, the mortgage was within the scope of its provisions and constituted a valid lien on the company's property.

**SEC. 6. [Wagon roads — wire rope, aerial, or other tramways — map of location — tolls — priorities — mortgages — liens.]** That the Secretary of the Interior is hereby authorized to issue a permit, by instrument in writing, in conformity with and subject to the restrictions herein contained, unto any responsible person, company, or corporation, for a right of way over the public domain in said District, not to exceed one hundred feet in width, and ground for station and other necessary purposes, not to exceed five acres for each station for each five miles of road, to construct wagon roads and wire rope, aerial, or other tramways,

and the privilege of taking all necessary material from the public domain in said District for the construction of such wagon roads or tramways,

together with the right, subject to supervision and at rates to be approved by said Secretary, to levy and collect toll or freight and passenger charges on passengers, animals, freight, or vehicles passing over the same for a period not exceeding twenty years,

and said Secretary is also authorized to sell to the owner or owners of any such wagon road or tramway, upon the completion thereof, not to exceed twenty acres of public land at each terminus at one dollar and twenty-five cents per acre, such lands when located at or near tide water not to extend more than forty rods in width along the shore line and the title thereto to be upon such expressed conditions as in his judgment may be necessary to protect the public interest, and all minerals, including coal, in such right of way or station grounds shall be reserved to the United States:

*Provided*, That such lands may be located concurrently with the line of such road or tramway, and the plat or preliminary survey and the map

of definite location shall be filed as in the case of railroads and subject to the same conditions and limitations:

*Provided further*, That such rights of way and privileges shall only be enjoyed by or granted to citizens of the United States or companies or corporations organized under the laws of a State or Territory; and such rights and privileges shall be held subject to the right of Congress to alter, amend, repeal, or grant equal rights to others on contiguous or parallel routes.

And no right to construct a wagon road on which toll may be collected shall be granted unless it shall first be made to appear to the satisfaction of the Secretary of the Interior that the public convenience requires the construction of such proposed road, and that the expense of making the same available and convenient for public travel will not be less on an average than five hundred dollars per mile:

*Provided*, That if the proposed line of road in any case shall be located over any road or trail in common use for public travel, the Secretary of the Interior shall decline to grant such right of way, if, in his opinion, the interests of the public would be injuriously affected thereby.

Nor shall any right to collect toll upon any wagon road in said District be granted or inure to any person, corporation, or company until it shall be made to appear to the satisfaction of said Secretary that at least an average of five hundred dollars per mile has been actually expended in constructing such road; and all persons are prohibited from collecting or attempting to collect toll over any wagon road in said District, unless such person or the company or person for whom he acts shall at the time and place the collection is made or attempted to be made possess written authority, signed by the Secretary of the Interior, authorizing the collection and specifying the rates of toll:

*Provided*, That accurate printed copies of said written authority from the Secretary of the Interior, including toll, freight, and passenger charges thereby approved, shall be kept constantly and conspicuously posted at each station where toll is demanded or collected. And any person, corporation, or company collecting or attempting to collect toll without such written authority from the Secretary of the Interior, or failing to keep the same posted as herein required, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined for each offense not less than fifty dollars nor more than five hundred dollars, and in default of payment of such fine and costs of prosecution shall be imprisoned in jail not exceeding ninety days, or until such fine and costs of prosecution shall have been paid.

That any person, corporation, or company qualified to construct a wagon road or tramway under the provisions of this Act that may heretofore have constructed not less than one mile of road, at a cost of not less than five hundred dollars per mile, or one-half mile of tramway at a cost of not less than five hundred dollars; shall have the prior right to apply for such right of way and for lands at stations and terminals and to obtain the same pursuant to the provisions of this Act over and along the line hitherto constructed or actually being improved by the applicant, including wharves connected therewith. That if any party to whom license has been granted to construct such wagon road or tramway shall, for the period of one year, fail, neglect, or refuse to complete the same, the rights herein granted shall be forfeited as to any such uncompleted section of said wagon road or

tramway, and thereupon shall revert to the United States without further action or declaration, the notation of such uncompleted section upon the records of the land office shall be canceled, and the reservations of such lands for the purposes of said right of way shall cease and become null and void without further action.

And if such road or tramway shall not be kept in good condition for use, the Secretary of the Interior may prohibit the collection of toll thereon pending the making of necessary repairs.

That all mortgages executed by any company acquiring a right of way under this Act, upon any portion of its road that may be constructed in said District of Alaska, shall be recorded with the Secretary of the Interior, and the record thereof shall be notice of their execution, and shall be a lien upon all the rights and property of said company as therein expressed, and such mortgage shall also be recorded in the office of the secretary of the District of Alaska and in the office of the secretary of the State or Territory wherein such company is organized:

*Provided*, That all lawful claims of laborers, contractors, subcontractors, or material men, for labor performed or material furnished in the construction of the railroad, tramway, or wagon road shall be a first lien thereon and take precedence of any mortgage or other lien. [30 Stat. L. 411.]

Record of mortgage.—The provision in this section regarding the recording of mortgages on railroads contemplates a mortgage on the road as an entirety, including right of way, roadbed, track, rolling stock, and appurtenant property, and the general provisions of the Alaska Code of June 6, 1900, §§ 314, 315, 31 Stat. L.

343, requiring chattel mortgages to be recorded in the precinct where the mortgagor resides and where the property is, and to be renewed each year, do not apply to such a railroad mortgage nor repeal the special provisions for its recording. *Washington Trust Co. v. Dunaway*, (1909) 169 Fed. 37.

SEC. 7. [Act not applicable to lands in reservation, etc.] That this act shall not apply to any lands within the limits of any military, park, Indian, or other reservation unless such right of way shall be provided for by Act of Congress. [30 Stat. L. 412.]

SEC. 8. [Right to repeal—assignment of right of way.] That Congress hereby reserves the right at any time to alter, amend, or repeal this Act or any part thereof;

and the right of way herein and hereby authorized shall not be assigned or transferred in any form whatever prior to the construction and completion of at least one-fourth of the proposed mileage of such railroad, wagon road, or tramway, as indicated by the map of definite location, except by mortgages or other liens that may be given or secured thereon to aid in the construction thereof:

*Provided*, That where within ninety days after the approval of this Act, proof is made to the satisfaction of the Secretary of the Interior that actual surveys, evidenced by designated monuments, were made, and the line of a railroad, wagon road or tramway located thereby, or that actual construction was commenced on the line of any railroad, wagon road or tramway, prior to January twenty-first, eighteen hundred and ninety-eight, the rights to inure hereunder shall, if the terms of this Act are complied with as to such railroad, wagon road or tramway, relate back to the

date when such survey or construction was commenced; and in all conflicts relative to the right of way or other privilege of this Act the person, company or corporation having been first in time in actual survey or construction, as the case may be, shall be deemed first in right. [30 Stat. L. 412.]

SEC. 9. [Requisites of map.] That the map and profile of definite location of such railroad, wagon road, or tramway, to be filed as hereinbefore provided, shall, when the line passes over surveyed lands, indicate the location of the road by reference to section or other established survey corners, and where such line passes over unsurveyed lands the location thereon shall be indicated by courses and distances and by references to natural objects and permanent monuments in such manner that the location of the road may be readily determined by reference to descriptions given in connection with said profile map. [30 Stat. L. 413.]

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**An Act To authorize the President of the United States to locate, construct, and operate railroads in the Territory of Alaska, and for other purposes.**

[Act of March 12, 1914, ch. 37, 38 Stat. L. 305.]

[SEC. 1.] [Railroads — construction and operation by government — leases — telegraphs and telephones — disposal of public domain.] \* \* \* That the President of the United States is hereby empowered, authorized, and directed to adopt and use a name by which to designate the railroad or railroads and properties to be located, owned, acquired, or operated under the authority of this Act; to employ such officers, agents, or agencies, in his discretion, as may be necessary to enable him to carry out the purposes of this Act; to authorize and require such officers, agents, or agencies to perform any or all of the duties imposed upon him by the terms of this Act; to detail and require any officer or officers in the Engineer Corps in the Army or Navy to perform service under this Act; to fix the compensation of all officers, agents, or employees appointed or designated by him; to designate and cause to be located a route or routes for a line or lines of railroad in the Territory of Alaska not to exceed in the aggregate one thousand miles, to be so located as to connect one or more of the open Pacific Ocean harbors on the southern coast of Alaska with the navigable waters in the interior of Alaska, and with a coal field or fields so as best to aid in the development of the agricultural and mineral or other resources of Alaska, and the settlement of the public lands therein, and so as to provide transportation of coal for the Army and Navy, transportation of troops, arms, munitions of war, the mails, and for other governmental and public uses, and for the transportation of passengers and property; to construct and build a railroad or railroads along such route or routes as he may so designate and locate, with the necessary branch lines, feeders, sidings, switches, and spurs; to purchase or otherwise acquire all real and personal property necessary to carry out the purposes of this Act; to exercise the power of eminent domain in acquiring property for such use,

which use is hereby declared to be a public use, by condemnation in the courts of Alaska in accordance with the laws now or hereafter in force there; to acquire rights of way, terminal grounds, and all other rights; to purchase or otherwise acquire all necessary equipment for the construction and operation of such railroad or railroads; to build or otherwise acquire docks, wharves, terminal facilities, and all structures needed for the equipment and operation of such railroad or railroads; to fix, change, or modify rates for the transportation of passengers and property, which rates shall be equal and uniform, but no free transportation or passes shall be permitted except that the provisions of the interstate commerce laws relating to the transportation of employees and their families shall be in force as to the lines constructed under this Act; to receive compensation for the transportation of passengers and property, and to perform generally all the usual duties of a common carrier by railroad; to make and establish rules and regulations for the control and operation of said railroad or railroads; in his discretion, to lease the said railroad or railroads, or any portion thereof, including telegraph and telephone lines, after completion under such terms as he may deem proper, but no lease shall be for a longer period than twenty years, or in the event of failure to lease, to operate the same until the further action of Congress: *Provided*, That if said railroad or railroads, including telegraph and telephone lines, are leased under the authority herein given, then and in that event they shall be operated under the jurisdiction and control of the provisions of the interstate commerce laws; to purchase, condemn, or otherwise acquire upon such terms as he may deem proper any other line or lines of railroad in Alaska which may be necessary to complete the construction of the line or lines of railroad designated or located by him: *Provided*, That the price to be paid in case of purchase shall in no case exceed the actual physical value of the railroad; to make contracts or agreements with any railroad or steamship company or vessel owner for joint transportation of passengers or property over the road or roads herein provided for, and such railroad or steamship line or by such vessel, and to make such other contracts as may be necessary to carry out any of the purposes of this Act; to utilize in carrying on the work herein provided for any and all machinery, equipment, instruments, material, and other property of any sort whatsoever used or acquired in connection with the construction of the Panama Canal, so far and as rapidly as the same is no longer needed at Panama, and the Isthmian Canal Commission is hereby authorized to deliver said property to such officers or persons as the President may designate, and to take credit therefor at such percentage of its original cost as the President may approve, but this amount shall not be charged against the fund provided for in this Act.

The authority herein granted shall include the power to construct, maintain, and operate telegraph and telephone lines so far as they may be necessary or convenient in the construction and operation of the railroad or railroads as herein authorized and they shall perform generally all the usual duties of telegraph and telephone lines for hire.

That it is the intent and purpose of Congress through this Act to authorize and empower the President of the United States, and he is hereby fully authorized and empowered, through such officers, agents, or agencies as he may appoint or employ, to do all necessary acts and things in addition

to those specially authorized in this Act to enable him to accomplish the purposes and objects of this Act.

The President is hereby authorized to withdraw, locate, and dispose of, under such rules and regulations as he may prescribe, such area or areas of the public domain along the line or lines of such proposed railroad or railroads for town-site purposes as he may from time to time designate.

Terminal and station grounds and rights of way through the lands of the United States in the Territory of Alaska are hereby granted for the construction of railroads, telegraph and telephone lines authorized by this Act, and in all patents for lands hereafter taken up, entered or located in the Territory of Alaska there shall be expressed that there is reserved to the United States a right of way for the construction of railroads, telegraph and telephone lines to the extent of one hundred feet on either side of the center line of any such road and twenty-five feet on either side of the center line of any such telegraph or telephone lines, and the President may, in such manner as he deems advisable, make reservation of such lands as are or may be useful for furnishing materials for construction and for stations, terminals, docks, and for such other purposes in connection with the construction and operation of such railroad lines as he may deem necessary and desirable. [38 Stat. L. 305.]

This is known as the "Alaska Railroad Act."

**SEC. 2. [Amount of expenditures.]** That the cost of the work authorized by this Act shall not exceed \$35,000,000, and in executing the authority granted by this Act the President shall not expend nor obligate the United States to expend more than the said sum; and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$1,000,000 to be used for carrying out the provisions of this Act, to continue available until expended. [38 Stat. L. 307.]

**SEC. 3. [Disposition of moneys derived from sales, etc., of public property — earnings of railroads, telegraphs and telephones.]** That all moneys derived from the lease, sale, or disposal of any of the public lands, including townsites, in Alaska, or the coal or mineral therein contained, or the timber thereon, and the earnings of said railroad or railroads, together with the earnings of the telegraph and telephone lines constructed under this Act, above maintenance charges and operating expenses, shall be paid into the Treasury of the United States as other miscellaneous receipts are paid, and a separate account thereof shall be kept and annually reported to Congress. [38 Stat. L. 307.]

**SEC. 4. [Reports to President — transmission to Congress.]** That the officers, agents, or agencies placed in charge of the work by the President shall make to the President annually, and at such other periods as may be required by the President or by either House of Congress, full and complete reports of all their acts and doings and of all moneys received and expended in the construction of said work and in the operation of said work or works and in the performance of their duties in connection therewith. The annual reports herein provided for shall be by the President transmitted to Congress. [38 Stat. L. 307.]



**An Act To levy and collect an income tax on railroads in Alaska, and for other purposes.**

[*Act of July 18, 1914, ch. 187, 38 Stat. L. 517.*]

**[Railroads — tax on gross annual income — repeal of license tax.]**

That in addition to the normal income tax of one per centum on net income there shall be levied and collected one per centum on the gross annual income of all railroad corporations doing business in Alaska, on business done in Alaska, which shall be computed and collected in the manner provided in the Act of Congress, approved October third, nineteen hundred and thirteen, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the proceeds of which tax when collected shall be paid to the treasurer of Alaska and be applicable to general Territorial purposes. So much of the provisions of the Act of Congress approved March third, eighteen hundred and ninety-nine, entitled "An Act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district," or Acts amendatory thereof as impose a license tax of \$100 per mile per annum on railroads operated in Alaska is hereby repealed, and all penalties for nonpayment thereof are hereby remitted. [38 Stat. L. 517.]

For the provisions of the Act of Oct. 3, 1913, ch. 16, mentioned in the text, see the title INTERNAL REVENUE.

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**VI. SEALS AND OTHER FUR-BEARING ANIMALS.**

**Sec. 1956. [Killing of fur-bearing animals prohibited.]** No person shall kill any otter, mink, marten, sable, or fur seal, or other fur-bearing animal, within the limits of Alaska Territory or in the waters thereof; and every person guilty thereof shall, for each offense, be fined not less than two hundred nor more than one thousand dollars or imprisoned not more than six months, or both; and all vessels, their tackle, apparel, furniture, and cargo found engaged in violation of this section shall be forfeited; but the Secretary of Commerce and Labor shall have power to authorize the killing of any such mink, marten, sable, fur seal, or other fur-bearing animal under such regulations as he may prescribe; and it shall be the duty of the Secretary of Commerce and Labor to prevent the killing of any fur seal except as authorized by law and to provide for the execution of the provisions of this section until it is otherwise provided by law. [R. S.]

This section was amended to read as above given by an Act of April 21, 1910, ch. 183, § 4, 36 Stat. L. 327. As originally enacted the section was as follows:

"No person shall kill any otter, mink, marten, sable, or fur-seal, or other fur-bearing animal within the limits of Alaska Territory, or in the waters thereof; and every person guilty thereof shall, for each offense, be fined not less than two hundred nor more than one thousand dollars, or imprisoned not more than six months, or both; and all vessels, their tackle, apparel, furniture and cargo, found engaged in violation of this section shall be forfeited; but the Secretary of the Treasury shall have power to authorize the killing of any such mink, marten, sable, or other fur-bearing animal,

except fur-seals, under such regulation as he may prescribe; and it shall be the duty of the Secretary to prevent the killing of any fur-seal, and to provide for the execution of the provisions of this section until it is otherwise provided by law; nor shall he grant any special privileges under this section." Act of July 27, 1808, ch. 273, 15 Stat. L. 241.

As here noted, this section was re-enacted in the Alaska Penal Laws as section 173, ch. 12. By said Act of April 21, 1910, ch. 183, § 4, both this section and said section 173 were amended to read as given in the text.

By the Act of March 2, 1889, ch. 415, § 3, 25 Stat. L. 1009, this section was further amended by being extended to include the dominion of the United States in the waters of Bering Sea, and the President was authorized to proclaim a warning against violating the provisions of said section. This Act was superseded by the Act of Aug. 24, 1912, ch. 373, *infra*, p. 345.

The words "and Labor," wherever they occur in this and the following sections, were superseded by the Act of March 4, 1913, ch. 141, 37 Stat. L. 736, creating a Department of Labor and designating the Secretary of Commerce and Labor as the Secretary of Commerce.

**Killing of fur seals unlawful.**—The killing of fur seals anywhere within the boundaries defined by the treaty of March 30, 1867, whereby Alaska was ceded to the United States, is unlawful; and "vessels found within said boundaries, engaged in that business, are subject to seizure and condemnation as forfeited to the United States." The *James G. Swan*, (1892) 50 Fed. 108.

**Courts do not discuss political questions.**

—A vessel was seized by a United States vessel acting under orders from the government, within the entrance of Cook's Inlet, as determined by a line drawn from Cape Douglas to Point Bede, for contravening the above section. It was held that the presumption is that such orders "were given in the assertion on the part of this government of territorial jurisdiction over these waters;" and "it is not the province of courts to participate in the discussion of the questions arising out of this claim of jurisdiction or dominion, for they are of a political nature and not judicial." The *Kodiak*, (1892) 53 Fed. 126. To same effect see The *James G. Swan*, (1892) 50 Fed. 108; and see *In re Cooper*, (1892) 143 U. S. 472, 12 S. Ct. 453, 36 U. S. (L. ed.) 232.

In The *Alexander*, (1894) 60 Fed. 914, the vessel seized was held, upon the evidence, to have been within Alaskan waters and liable to forfeiture under the above section.

Under the arbitration treaty between the United States and Great Britain, it was decided that the United States does not possess exclusive jurisdiction in Bering Sea waters beyond the regularly recognized three-mile limit; nor does it have, outside of the three-mile limit, any right of property in, or right of protection

over, the fur seals which frequent American islands. It follows therefrom that the words "in the waters thereof," as used in the above section, and the words "dominion of the United States in the waters of Bering Sea," in the amendment thereto, must be construed to mean the waters within three miles from the shores of Alaska. The *La Ninfa*, (C. C. A. 1896) 75 Fed. 513.

A vessel which is not used or employed in the actual killing of fur seal is not violating this section; the fact that the masters or owners intend and are preparing so to employ her, not sufficing to constitute the offense, provided, from whatever cause, no seals were killed. The *Ocean Spray*, (1876) 4 Sawy. 105, 18 Fed. Cas. No. 10,412.

**Killing by natives.**—In The *Kodiak*, (1892) 53 Fed. 126, a fur company was held not to have contravened the regulations of the Secretary of the Treasury prohibiting the killing of seals by all others than natives, by allowing the natives who did the killing to live on its vessel, furnishing such natives with an outfit, and buying the skins of them. And see generally as to the privileges of Indian natives, The *James G. Swan*, (1892) 50 Fed. 108.

**Forfeiture of vessel equipped for hunting sea otter.**—See The *Alexander*, (1894) 60 Fed. 914.

The District Court of Alaska has admiralty jurisdiction over the forfeiture of vessels for violation of this section. *In re Cooper*, (1892) 143 U. S. 472, 12 S. Ct. 453, 36 U. S. (L. ed.) 232.

**Liability of sureties upon bond given for release of vessel seized,** see *U. S. v. Moseley*, (1881) 8 Fed. 88.

**Sec. 1957. [What courts have jurisdiction of offenses.]** Until otherwise provided by law, all violations of this chapter, and of the several laws hereby extended to the Territory of Alaska and the waters thereof, committed within the limits of the same, shall be prosecuted in any district court of the United States in California or Oregon, or in the district courts of Washington; and the collector and deputy collectors appointed for Alaska Territory, and any person authorized in writing by either of them.

or by the Secretary of the Treasury, shall have power to arrest persons and seize vessels and merchandise liable to fines, penalties, or forfeitures under this and the other laws extended over the Territory, and to keep and deliver the same to the marshal of some one of such courts; and such courts shall have original jurisdiction, and may take cognizance of all cases arising under this act and the several laws hereby extended over the Territory, and shall proceed therein in the same manner and with the like effect as if such cases had arisen within the district or Territory where the proceedings are brought. [R. S.]

Act of July 27, 1868, ch. 273, 15 Stat. L. 241.

"This chapter," as used in the foregoing text, refers to chapter 3 of title XXIII of the Revised Statutes, the provisions of which have nearly all been repealed or superseded.

**Sec. 1958. [Remission of fines, etc.]** In all cases of fine, penalty, or forfeiture, embraced in the act approved March 3, 1797, ch. 13, or mentioned in any act in addition to or amendatory of such act, that have occurred or may occur in the collection district of Alaska, the Secretary of the Treasury is authorized, if in his opinion the fine, penalty, or forfeiture was incurred without willful negligence or intention of fraud, to ascertain the facts in such manner and under such regulations as he may deem proper without regard to the provisions of the act above referred to, and upon the facts so to be ascertained, he may exercise all the power of remission conferred upon him by that act, as fully as he might have done had such facts been ascertained under and according to the provisions of that act. [R. S.]

Act of July 27, 1868, ch. 273, 15 Stat. L. 242. See the notes to the preceding section.

**Sec. 1959. [Pribilof Islands made a special reservation—landing, etc., on, unlawful.]** The Pribilof Islands, including the islands of Saint Paul and Saint George, Walrus and Otter Islands, and Sea Lion Rock, in Alaska, are declared a special reservation for government purposes; and until otherwise provided by law it shall be unlawful for any person to land or remain on any of those islands, except through stress of weather or like unavoidable cause or by the authority of the Secretary of Commerce and Labor; and any person found on any of those islands contrary to the provisions hereof shall be summarily removed and shall be deemed guilty of a misdemeanor, punishable by fine not exceeding five hundred dollars or by imprisonment not exceeding six months, or by both fine and imprisonment; and it shall be the duty of the Secretary of Commerce and Labor to carry this section into effect. [R. S.]

This section was amended to read as above by section 5 of an Act of April 21, 1910, ch. 183, 36 Stat. L. 327, entitled "An Act to protect the seal fisheries of Alaska, and for other purposes." And the same section amended section 176 of the Alaska Penal Code (30 Stat. L. 1280). The original section was as follows:

"The Islands of Saint Paul and Saint George, in Alaska, are declared a special reservation for Government purposes; and until otherwise provided by law it shall be unlawful for any person to land or remain on either of those islands, except by the authority of the Secretary of the Treasury; and any person found on either of those islands contrary to the provisions hereof shall be summarily removed; and it shall be the duty of the Secretary of War to carry this section into effect." Res. of March 3, 1869, No. 22, 15 Stat. L. 348.

As to the Secretary of Commerce and Labor, see the note to R. S. sec. 1956, *supra*, p. 340.

**Sec. 1960. [Restrictions on killing seals on Pribilof Islands.]** It shall be unlawful to kill any fur seal upon the Pribilof Islands, or in the waters adjacent thereto, except under the authority of the Secretary of Commerce and Labor, and it shall be unlawful to kill such seals by the use of firearms or by other means tending to drive the seals away from those islands; but the natives of the islands shall have the privilege of killing such young seals as may be necessary for their own food and clothing, and also such old seals as may be required for their own clothing and for the manufacture of boats for their own use; and the killing in such cases shall be limited and controlled by such regulations as may be prescribed by the Secretary of Commerce and Labor. [R. S.]

This section, and with it section 177 of the Alaska Penal Laws, were amended to read as above given by the Act of April 21, 1910, ch. 183, § 6, 36 Stat. L. 327. The original section was as follows:

"It shall be unlawful to kill any fur-seal upon the islands of Saint Paul and Saint George, or in the waters adjacent thereto, except during the months of June, July, September, and October in each year; and it shall be unlawful to kill such seals at any time by the use of firearms, or by other means tending to drive the seals away from those islands; but the natives of the islands shall have the privilege of killing such young seals as may be necessary for their own food and clothing during other months, and also such old seals as may be required for their own clothing, and for the manufacture of boats for their own use; and the killing in such cases shall be limited and controlled by such regulations as may be prescribed by the Secretary of the Treasury." Act of July 1, 1870, ch. 189, 16 Stat. L. 180.

As to the Secretary of Commerce and Labor, see the note to R. S. sec. 1956, *supra*, p. 340.

**Sec. 1961. [Killing of certain seal prohibited.]** It shall be unlawful to kill any female seal or any seal less than one year old at any season of the year, except as above provided; and it shall also be unlawful to kill any seal in the waters adjacent to the Pribilof Islands, or on the beaches, cliffs, or rocks where they haul up from the sea to remain; and every person who violates the provisions of this or the preceding section shall be punished for each offense by a fine of not less than two hundred dollars nor more than one thousand dollars or by imprisonment not more than six months, or by both such fine and imprisonment; and all vessels, their tackle, apparel, and furniture, whose crews are found engaged in the violation of either this or the preceding section shall be forfeited to the United States. [R. S.]

This section, as well as section 178 of the Alaska Penal Laws, was amended to read as above given by the Act of April 21, 1910, ch. 183, § 7, 36 Stat. L. 328. Originally the section was as follows:

"It shall be unlawful to kill any female seal, or any seal less than one year old, at any season of the year, except as above provided; and it shall also be unlawful to kill any seal in the waters adjacent to the islands of Saint Paul and Saint George, or on the beaches, cliffs, or rocks where they haul up from the sea to remain; and every person who violates the provisions of this or the preceding section shall be punished for each offense by a fine of not less than two hundred dollars nor more than one thousand dollars, or by imprisonment not more than six months, or by both such fine and imprisonment; and all vessels, their tackle, apparel, and furniture, whose crews are found engaged in the violation of either this or the preceding section, shall be forfeited to the United States." Act of July 1, 1870, ch. 189, 16 Stat. L. 180.

**Sections 1962-1972 repealed.**—R. S. sec. 1962 limited for twenty years the number of seals which could be killed for their skins. R. S. secs. 1963-1972 inclusive provided for the leasing of the right to take seals. These sections were repealed by the Act of April 21, 1910, ch. 183, § 10, 32 Stat. L. 328, the repeal to take effect May 1, 1910.

**Sec. 1973. [Agent and assistants to manage seal fisheries.]** The Secretary of the Treasury is authorized to appoint one agent and three assistant agents, who shall be charged with the management of the seal fisheries in Alaska, and the performance of such other duties as may be assigned to them by the Secretary of the Treasury. [R. S.]

Act of March 5, 1872, ch. 31, 17 Stat. L. 35.

This and the following section have not been repealed, but are apparently superseded by the various appropriation acts. The Sundry Civil Appropriation Act for the fiscal year 1915 provides for two agents and caretakers at a salary of \$2,000 each (Act Aug. 1, 1914, ch. 223, § 1, 38 Stat. L. 661). And see the notes to the following section.

**Sec. 1974. [Their pay, etc.]** The agent shall receive the sum of ten dollars each day, one assistant agent the sum of eight dollars each day, and two assistant agents the sum of six dollars each day while so employed; and they shall also be allowed their necessary traveling expenses in going to and returning from Alaska, for which expenses vouchers shall be presented to the proper accounting officers of the Treasury, and such expenses shall not exceed in the aggregate six hundred dollars each in any one year. [R. S.]

Act of March 5, 1872, ch. 31, 17 Stat. L. 35.

See the note to R. S. sec. 1973, given above. The Sundry Civil Appropriation Act of July 31, 1876, ch. 246, contained the following provision: " \* \* \* that the two assistant agents whose salaries as fixed by law at two thousand one hundred and ninety dollars each per annum, shall be discontinued from and after the first day of October eighteen hundred and seventy-six." [19 Stat. L. 118.]

**Sec. 1975. [Not to be interested in right to take seals.]** Such agents shall never be interested, directly or indirectly, in any lease of the right to take seals, nor in any proceeds or profits thereof, either as owner, agent, partner, or otherwise. [R. S.]

Act of March 5, 1872, ch. 31, 17 Stat. L. 35.

**Sec. 1976. [Agents may administer certain oaths and take testimony.]** Such agents are empowered to administer oaths in all cases relating to the service of the United States, and to take testimony in Alaska for the use of the Government in any matter concerning the public revenues. [R. S.]

Act of March 5, 1872, ch. 31, 17 Stat. L. 35.

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[Sec. 1.] **[St. Paul Island — price for fox skins.]** Saint Paul Island \* \* ; and the Secretary of the Treasury is hereby required to fix a reasonable price to be paid the natives of said island for blue fox skins secured by them. [28 Stat. L. 391.]

The above is from the Sundry Civil Appropriation Act of Aug. 18, 1894, ch. 301.

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[Sec. 1.] **[Investigation of seal life on Pribilof Island and Bering Sea.]** \* \* \* And the Commissioner of Fisheries is authorized and

required to investigate, under the direction of the Secretary of the Treasury, and when so requested and report annually to him regarding the conditions of seal life upon the rookeries of the Pribilof Island; and he is also directed to continue the inquiries relative to the life history and migrations of the fur seals frequenting the waters of Bering Sea. \* \* [27 Stat. L. 585.]

The above is from the Sundry Civil Appropriation Act of March 3, 1893, ch. 208.

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**An Act To protect the seal fisheries of Alaska and for other purposes.**

[Act of April 21, 1910, ch. 183, 36 Stat. L. 326.]

[SEC. 1.] [Seal fisheries on Pribilof Islands — regulations.] That the Secretary of Commerce and Labor shall have power to authorize the killing of fur seals and the taking of sealskins on the Pribilof Islands, in Alaska, under regulations established by him prescribing the manner in which such killing shall be done and limiting the number of seals to be killed, whenever he shall determine that such killing is necessary or desirable and not inconsistent with the preservation of the seal herd: *Provided, however,* That under such authority the right of killing fur seals and taking sealskins shall be exercised by officers, agents, or employees of the United States appointed by the Secretary of Commerce and Labor, and by the natives of the Pribilof Islands under the direction and supervision of such officers, agents, or employees, and by no other person: *And provided further,* That male seals only shall be killed and that not more than ninety-five per centum of three-year-old male seals shall be killed in any one year. [36 Stat. L. 326.]

This is known as the "Seal Fisheries Act."

Sections 4, 5, 6, and 7 of this Act amended R. S. secs. 1956, 1959, 1960 and 1961 and are embodied in these sections as given *supra*, p. 339, *et seq.*

Section 8 of this Act amended the Act of Dec. 29, 1897, ch. 3, § 1, 30 Stat. L. 226, which, as amended, was superseded by the Act of Aug. 24, 1912, ch. 373, *infra*, p. 345.

The Secretary of Commerce and Labor was designated the Secretary of Commerce by the Act of March 4, 1913, ch. 141, 37 Stat. L. 736.

See the Act of Aug. 24, 1912, ch. 373, *infra*, p. 345, section 11 of which suspended the killing of seals on the Pribilof Islands for five years.

SEC. 2. [Sales.] That any and all sealskins taken under the authority conferred by the preceding section shall be sold by the Secretary of Commerce and Labor in such market, at such times, and in such manner as he may deem most advantageous; and the proceeds of such sale or sales shall be paid into the Treasury of the United States: *Provided,* That the directions of this section, relating to the disposition of sealskins and the proceeds thereof, shall be subject to the provisions of any treaty hereafter made by the United States for the protection of seal life. [36 Stat. L. 326.]

See the notes to section 1 of this Act.

SEC. 3. [Employment of Pribilof natives.] That whenever seals are killed and sealskins taken on any of the Pribilof Islands the native inhabitants of said islands shall be employed in such killing and in curing the

skins taken, and shall receive for their labor fair compensation, to be fixed from time to time by the Secretary of Commerce and Labor, who shall have the authority to prescribe by regulation the manner in which such compensation shall be paid to the said natives or expended or otherwise used in their behalf and for their benefit. [36 Stat. L. 327.]

See the notes to section 1 of this Act.

**SEC. 9. [Additional officers, authorized — purchase of right of present lessee, etc.— maintenance of depots, etc.— food, etc., to natives.]** That the Secretary of Commerce and Labor shall have authority to appoint such additional officers, agents, and employees as may be necessary to carry out the provisions of this Act and the laws of the United States relating to the seal fisheries of Alaska, to prescribe their duties and to fix their compensation; he shall likewise have authority to purchase from the present lessee of the right to take seals on the islands of Saint Paul and Saint George, at a fair valuation to be agreed upon, the warehouses, salt houses, boats, launches, lighters, horses, mules, wagoes, and other property of the said lessee on the islands of Saint Paul and Saint George, including the dwellings of the natives of said islands; he shall likewise have authority to establish and maintain depots for provisions and supplies on the Pribilof Islands and to provide for the transportation of such provisions and supplies from the mainland of the United States to the said islands by the charter of private vessels or by the use of public vessels of the United States which may be placed at his disposal by the President; and he shall likewise have authority to furnish food, shelter, fuel, clothing, and other necessities of life to the native inhabitants of the Pribilof Islands and to provide for their comfort, maintenance, education, and protection. [36 Stat. L. 328.]

See the notes to section 1 of this Act.

The words "and Labor" in the text were superseded by the Act of March 4, 1913, ch. 141, 37 Stat. L. 736, creating a Department of Labor and designating the Secretary of Commerce and Labor as the Secretary of Commerce.

**SEC. 10. [Effect — appropriation.] \* \* \*** The provisions of this Act shall take effect from and after the first day of May, nineteen hundred and ten; and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred and fifty thousand dollars for carrying into effect the provisions of this Act. [36 Stat. L. 328.]

The first part of the foregoing section repealed R. S. secs. 1962-1972 inclusive, as noted, *supra*, p. 342.

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**An Act To give effect to the convention between the Governments of the United States, Great Britain, Japan, and Russia for the preservation and protection of the fur seals and sea otter which frequent the waters of the north Pacific Ocean, concluded at Washington July seventh, nineteen hundred and eleven.**

[Act of Aug. 24, 1912, ch. 373, 37 Stat. L. 499.]

**[SEC. 1.] [Killing, etc., seals or sea-otter in north Pacific Ocean forbidden.]** That no citizen of the United States, nor person owing duty of

obedience to the laws or the treaties of the United States, nor any of their vessels, nor any vessel of the United States, nor any person belonging to or on board of such vessel, shall kill, capture, or pursue, at any time or in any manner whatever, any fur seal in the waters of the north Pacific Ocean north of the thirtieth parallel of north latitude and including the seas of Bering, Kamchatka, Okhotsk, and Japan; nor shall any such person or vessel kill, capture, or pursue sea otter in any of the waters mentioned beyond the distance of three miles from the shore line of the territory of the United States. [37 Stat. L. 499.]

This is the first section of the "Pelagic Sealing Act." Immediately preceding the foregoing section was the following preamble:

"Whereas the plenipotentiaries of the United States, Great Britain, Japan, and Russia did, on the seventh day of July, anno Domini nineteen hundred and eleven, enter into a convention for the preservation and protection of the fur seals and sea otter which frequent the waters of the north Pacific Ocean, which convention was subsequently ratified by the Governments of the United States, Great Britain, Japan, and Russia and the exchange of ratifications thereof was effected on the twelfth day of December, nineteen hundred and eleven: Now, therefore," etc.

The treaty in pursuance of which this Act was made is set out in 37 Stat. L. 1538.

This Act supersedes the Act of Dec. 29, 1897, ch. 3, 30 Stat. L. 226, as amended by the Act of April 21, 1910, ch. 183, § 8, 36 Stat. L. 238.

The provisions of this Act also superseded those of the Act of April 6, 1892, ch. 57, 28 Stat. L. 52, being "An Act to give effect to the award rendered by the Tribunal of Arbitration, at Paris, under the treaty between the United States and Great Britain, concluded at Washington, February twenty-ninth, eighteen hundred and ninety-two, for the purpose of submitting to arbitration certain questions concerning the preservation of the fur seals," as amended by the Act of April 24, 1894, ch. 63, 28 Stat. L. 64. Said Act of April 6, 1894, ch. 57, superseded the prior Act of Feb. 21, 1893, ch. 150, 27 Stat. L. 472.

The statute of Great Britain, passed to carry out the provisions of said award of the Tribunal of Arbitration, is given in Law Reports, The Statutes 57 Victoria.

This Act also supersedes the Act of June 5, 1894, ch. 91, 28 Stat. 85, which was supplementary to the Act of April 6, 1894, ch. 57, previously cited.

R. S. sec. 1956, *supra*, p. 339, was also superseded in part by this Act.

In addition to the provisions of this Act, see the Act of April 21, 1910, ch. 183, *supra*, p. 344, and the various sections of the Revised Statutes given under this subdivision.

**SEC. 2. [Equipping, etc., vessels—use of ports, etc.—vessels excluded.]** That no citizen of the United States, nor person above described in the first section, shall equip, use, or employ, or furnish aid in equipping, using, or employing, or furnish supplies to any vessel used or employed, or to be used or employed, in carrying on or taking part in pelagic sealing or in sea-otter hunting in said waters, nor shall any of their vessels nor any vessel of the United States be so used or employed; and no person or vessel shall use any of the ports or harbors of the United States, or any part of the territory of the United States, for any purposes whatsoever connected with the operations of pelagic sealing or sea-otter hunting in the waters named in the first section of this Act; and no vessel which is engaged or employed, or intended to be engaged or employed, for or in connection with pelagic sealing or sea-otter hunting in such waters shall use any of the ports or harbors or any part of the territory of the United States for any purpose whatsoever. [37 Stat. L. 500.]

See the notes to section 1 of this Act.

**SEC. 3. [Killing by natives.]** That the provisions of the first and second sections of this Act shall not apply to Indians, Aleuts, or other



aborigines dwelling on the American coast of the waters mentioned in the first section of this Act who carry on pelagic sealing in canoes or undecked boats propelled wholly by paddles, oars, or sails, and not transported by or used in connection with other vessels, and manned by not more than five persons each, in the way hitherto practiced by the said Indians, Aleuts, or other aborigines, and without the use of firearms: *Provided, however,* That the exception made in this section shall not apply to Indians, Aleuts, or other aborigines in the employment of other persons or who shall kill, capture, or pursue fur seals or sea otters under contract to deliver the skins to any person. [37 Stat. L. 500.]

See the notes to section 1 of this Act.

**SEC. 4. [Importing illegally taken skins.]** That the importation or bringing into territory of the United States, by any person whatsoever, of skins of fur seals or sea otters taken in the waters mentioned in the first section of this Act, or of skins identified as those of the species known as *Callorhinus alascanus*, *Callorhinus ursinus*, and *Callorhinus kurilensis*, or belonging to the American, Russian, or Japanese herds, whether raw, dressed, dyed, or manufactured, except such as have been taken under the authority of the respective parties to said convention, to which the breeding grounds of such herds belong, and have been officially marked and certified as having been so taken, is hereby prohibited; and all such articles imported or brought in after this Act shall take effect shall not be permitted to be exported, but shall be seized and forfeited to the United States. [37 Stat. L. 500.]

See the notes to section 1 of this Act.

**SEC. 5. [Regulations to be made by the President.]** That the President shall have power to make regulations to carry this Act and the said convention into effect, and from time to time to add to, modify, amend, or revoke such regulations, as in his judgment may seem expedient. It shall be the duty of the Secretary of Commerce and Labor, under the direction of the President, to see that the said convention, the provisions of this Act, and the regulations made thereunder are executed and enforced; and all officers of the United States engaged in the execution and enforcement of this Act are authorized and directed to cooperate with the proper officers of any of the other parties to the said convention in taking such measures as may be appropriate and available under the said convention, this Act, or the regulations made thereunder for the purpose of preventing pelagic sealing as in this Act prohibited. [37 Stat. L. 500.]

See the notes to section 1 of this Act.

**SEC. 6. [Punishment for violations.]** That every person guilty of a violation of any of the provisions of said convention, or of this Act, or of any regulation made thereunder, shall, for each offense, be fined not less than two hundred dollars or more than two thousand dollars, or imprisoned not more than six months, or both; and every vessel, its tackle, apparel, furniture, and cargo, at any time used or employed in violation of this

Act, or of the regulations made thereunder, shall be forfeited to the United States. [37 Stat. L. 501.]

See the notes to section 1 of this Act.

**Intent.**— Under a similar section in the Act of April 6, 1894, it was held that forfeiture took place regardless of any question of intent on the part of any owner of the vessel or her equipage or cargo or any part thereof, or any interest therein. *The James G. Swan*, (1896) 77 Fed. 473.

**SEC. 7. [Vessels presumed to be violating law, etc.]** That if any vessel shall be found within the waters to which this Act applies, having on board fur-seal skins or sea-otter skins, or bodies of seals or sea otters, or apparatus or implements for killing or taking seals or sea otter, it shall be presumed that such vessel was used or employed in the killing of said seals or sea otters, or that said apparatus or implements were used in violation of this Act, until the contrary is proved to the satisfaction of the court, in so far as such vessel, apparatus, and implements are subject to the jurisdiction of the United States. [37 Stat. L. 501.]

See the notes to section 1 of this Act.

**SEC. 8. [Prosecutions — venue.]** That any violation of the said convention, or of this Act, or of the regulations thereunder, may be prosecuted either in the district court of Alaska, or in any district court of the United States in California, Oregon, or Washington. [37 Stat. L. 501.]

See the notes to section 1 of this Act.

**SEC. 9. [Guard or patrol of waters — seizure and search of vessels.]** That it shall be the duty of the President to cause a guard or patrol to be maintained in the waters frequented by the seal herd or herds and sea otter, in the protection of which the United States is especially interested, composed of naval or other public vessels of the United States designated by him for such service; and any officer of any such vessel engaged in such service and any other officers duly designated by the President may search any vessel of the United States, in port, or in territorial waters of the United States, or on the high seas, when suspected of having violated, or being about to violate, the provisions of said convention, or of this Act, or of any regulation made thereunder, and may seize such vessel and the officers and crew thereof and bring them into the most accessible port of the Territory or of any of the States mentioned in the eighth section of this Act for trial. [37 Stat. L. 501.]

See the notes to section 1 of this Act.

**SEC. 10. [Seizure outside of territorial jurisdiction — delivery to proper officials — seizures by other than United States officers — proclamation to issue.]** That any vessel or person described in the first section of this Act offending or being about to offend against the prohibitions of the said convention, or of this Act, or of the regulations made thereunder, may be seized and detained by the naval or other duly commissioned officers of any of the parties to the said convention other than the United States, except within the territorial jurisdiction of one of the other of said parties, on condition, however, that when such vessel or person is so seized and detained

by officers of any party other than the United States such vessel or person shall be delivered as soon as practicable at the nearest point to the place of seizure, with the witnesses and proofs necessary to establish the offense so far as they are under the control of such party, to the proper official of the United States, whose courts alone shall have jurisdiction to try the offense and impose the penalties for the same: *Provided, however,* That the said officers of any party to said convention other than the United States shall arrest and detain vessels and persons, as in this section specified, only after such party, by appropriate legislation or otherwise, shall have authorized the naval or other officers of the United States duly commissioned and instructed by the President to that end to arrest, detain, and deliver to the proper officers of such party vessels and subjects under the jurisdiction of that Government offending against said convention or any statute or regulation made by that Government to enforce said convention. The President of the United States shall determine by proclamation when such authority has been given by the other parties to said convention, and his determination shall be conclusive upon the question; and such proclamation may be modified, amended, or revoked by proclamation of the President whenever, in his judgment, it is deemed expedient. [37 Stat. L. 501.]

See the notes to section 1 of this Act.

**SEC. 11. [Killing fur seals on Pribilof Islands suspended for five years — exemptions.]** That from and after the approval of this Act all killing of fur seals on the Pribilof Islands, or anywhere within the jurisdiction of the United States in Alaska, shall be suspended for a period of five years, and shall be, and is hereby, declared to be unlawful; and all punishments and penalties heretofore enacted for the illegal killing of fur seals shall be applicable and inflicted upon offenders under this section: *Provided,* That this prohibition shall not apply to the annual killing on the Pribilof Islands of such male seals as are needed to supply food, clothing, and boat skins for the natives on the islands, as is provided for in article eleven of said convention; the skins of all seals so used for food shall be preserved and annually sold by the Government, and proceeds of such annual sales shall be covered into the Treasury of the United States: *Provided further,* That at the expiration of the said five years' suspension of all commercial killing as above provided, said killing may be resumed under authority of the Secretary of Commerce and Labor: *Provided, however,* That the number of three-year-old males selected from among the finest and most perfect seals of that age found on the hauling grounds, to be reserved for breeding purposes, in each year ending August first, shall not be fewer than the following: In nineteen hundred and seventeen, and in each year thereafter until nineteen hundred and twenty-six, inclusive, five thousand. The Secretary of Commerce and Labor, or his authorized agents, shall have authority to receive on behalf of the United States any and all fur-seal skins taken as provided in the thirteenth and fourteenth articles of said convention and tendered for delivery by the Governments of Japan and Great Britain in accordance with the terms of said articles; and all skins which are or shall become the property of the United States from any source whatsoever shall be sold by the Secretary of Commerce and Labor in such

market, at such times, and in such manner as he may deem most advantageous; and the proceeds of such sale or sales shall be paid into the Treasury of the United States. The Secretary of Commerce and Labor shall likewise have authority to deliver to the authorized agents of the Canadian Government and the Japanese Government the skins to which they are entitled under the provisions of the tenth article of said convention; to pay to Great Britain and Japan such sums as they are entitled to receive, respectively, under the provisions of the eleventh article of said convention; to retain such skins as the United States may be entitled to retain under the provisions of the eleventh article of said convention; and to do or perform, or cause to be done or performed, any and every act which the United States is authorized or obliged to do or perform by the provisions of the tenth, eleventh, thirteenth, and fourteenth articles of said convention; and to enable the Secretary of Commerce and Labor to carry out the provisions of the said eleventh article there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of four hundred thousand dollars. [37 Stat. L. 502.]

See the notes to section 1 of this Act.

By Res. of Feb. 24, 1915, No. 7, it was provided: "That the Secretary of Commerce be, and he hereby is, authorized to postpone the sale of all skins now in possession of the Government, taken from seals killed on the Pribilof Islands for food purposes, under section eleven of the Act of August twenty-fourth, nineteen hundred and twelve, until such time as, in his discretion, he shall deem advisable; and the proceeds of such sale shall be covered into the Treasury of the United States." [38 Stat. L. 1222.]

**SEC. 12. ["Pelagic sealing" defined — "person" construed.]** That the term "pelagic sealing" where used in this Act shall be taken to mean the killing, capturing, or pursuing in any manner whatsoever of fur seals while the same are in the water. The word "person" where used in this Act shall extend and be applied to partnerships and corporations. [37 Stat. L. 502.]

See the notes to section 1 of this Act.

**SEC. 13. [Effect and duration.]** That this Act shall take effect immediately, and shall continue in force until the termination of the said convention. [37 Stat. L. 502.]

## VII. FISH AND FISHERIES.

[SEC. 1.] **[Agent and assistant agent — appointment and salary.]**  
 \* \* \* For the protection of the salmon fisheries of Alaska, including salaries of one agent, at two thousand five hundred dollars, and one assistant agent, at two thousand dollars, to be appointed by the President, by and with the advice and consent of the Senate, and to be in lieu of any and all agents or inspectors now authorized by law for this purpose, seven thousand dollars. [33 Stat. L. 478.]

This is from the Sundry Civil Appropriation Act of April 28, 1904, ch. 1762.

The Sundry Civil Appropriation Act of June 4, 1897, provided for one agent and one assistant agent. This superseded the Act of June 9, 1896, ch. 387, § 4, 29 Stat. L. 317, providing for an inspector and two assistant inspectors, which latter section was, however, re-enacted by section 182, ch. 12, of the Alaska Penal Code (30 Stat. L. 1281).

Additional employees were authorized by the Act of June 26, 1906, ch. 3547, § 12, *supra*, p. 357.

The Sundry Civil Appropriation Act of June 23, 1913, ch. 3, § 1, 38 Stat. L. 63, made provisions for an agent, an inspector, and two assistant agents.

### **An Act To prohibit aliens from fishing in the waters of Alaska.**

[Act of June 14, 1906, ch. 3299, 34 Stat. L. 263.]

[SEC. 1.] [Fishing in waters of, by aliens, except with rod, etc., prohibited — sale of fish to aliens permitted — alien labor may be employed.] That it shall be unlawful for any person not a citizen of the United States, or who has declared his intention to become a citizen of the United States, and is not a bona fide resident therein, or for any company, corporation, or association not organized or authorized to transact business under the laws of the United States or under the laws of any State, Territory, or district thereof, or for any person not a native of Alaska, to catch or kill, or attempt to catch or kill, except with rod, spear, or gaff, any fish of any kind or species whatsoever in any of the waters of Alaska under the jurisdiction of the United States: *Provided, however,* That nothing contained in this Act shall prevent those lawfully taking fish in the said waters from selling the same, fresh or cured, in Alaska or in Alaskan waters, to any alien person, company, or vessel then being lawfully in said waters: *And provided further,* That nothing contained in this Act shall prevent any person, firm, corporation, or association lawfully entitled to fish in the waters of Alaska from employing as laborers any aliens who can now be lawfully employed under the existing laws of the United States, either at stated wages or by piecework, or both, in connection with Alaskan fisheries, or with the canning, salting or otherwise preserving of fish. [34 Stat. L. 263.]

No treaty rights are affected by this Act, but if they were the Act would not be void, as the power of Congress to enact laws for subsequent observance is not restricted by prior treaties with foreign nations. The *Tokai Maru*, (C. C. A. 9th Cir. 1911) 190 Fed. 450, wherein the court said: "The remaining defensive argument is that by the first and second articles of the treaty between Japan and the United States, concluded November 24, 1894, proclaimed March, 1895 (29 Stat. L. 848), the officers and crew of this schooner are given the same rights in Alaskan waters, with reference to fishing, as are given to our own citizens [and] that statutes which discriminate against aliens, in violation of their treaty rights, are void. *In re Ah Chong*, (C. C.) 2 Fed. 733; *In re Tiburico Parrot*, (C. C.) 2 Fed. 481; *Yick Wo v. Hopkins*, 118 U. S. 356 (6 Sup. Ct. 1064) 30 U. S. (L. ed.) 220; The authorities here cited do no more than affirm the fundamental principle that state laws and municipal ordinances may not override national treaties; and they give no sanction to an argument questioning the validity of a national law. The power of Congress to enact laws for subsequent

observance is not restricted by prior treaties with foreign nations. The *Chinese Exclusion Case*, 130 U. S. 581, 9 Sup. Ct. 623, 32 U. S. (L. ed.) 1068. Moreover the articles of the treaty referred to contain no allusion to fishing privileges, and do not purport to grant any right to sea rovers to resort to American fishing grounds for the purpose of taking fish for their own consumption or for any purpose whatever."

Fishing by aliens to supply their personal need for food is prohibited by this section. The *Tokai Maru*, (C. C. A. 9th Cir. 1911) 190 Fed. 450.

Alien employees.—The words "in connection with Alaskan fisheries" do not limit the right to employ labor in connection with the preservation of fish. The words refer to work or labor performed in connection with the fisheries, and any sort of labor, in connection with the taking of fish from the place that is defined as a fishery, is excepted from the denunciation of the Act. Aliens therefore are allowed to fish as employees in connection with fisheries. *U. S. v. Miyata*, (1911) 4 Alaska 436.

**SEC. 2. [Penalty for violations.]** That every person, company, corporation, or association found guilty of a violation of any provision of this Act or of any regulation made thereunder shall, for each offense, be fined not less than one hundred dollars nor more than five hundred dollars, which fine shall be a lien against any vessel or other property of the offending party or which was used in the commission of such unlawful act. Every vessel used or employed in violation of any provision of this Act or of any regulation made thereunder shall be liable to a fine of not less than one hundred dollars nor more than five hundred dollars, and may be seized and proceeded against by way of libel in any court having jurisdiction of the offense. [34 Stat. L. 264.]

The ship's "company" includes the captain and crew, and the section authorizes the imposition of a single fine against the company in addition to the fine imposed

against the vessel as a distinct entity. The Tokai Maru, (C. C. A. 9th Cir. 1911) 190 Fed. 450.

**SEC. 3. [Prosecution.]** That the violation of any provision of this Act or of any regulation made thereunder may be prosecuted in any United States district court of Alaska, California, Oregon, or Washington. [34 Stat. L. 264.]

**Jurisdiction.**—It is clear that the provisions of section 3 do not curtail the jurisdiction of the justice's court; that the intention and effect of that section were to give the courts of other jurisdictions, into which offending vessels might flee, power to try parties accused of the violation of the law and not to deprive the courts of Alaska of jurisdiction in the district in which the crime was committed, for such vessels might not only leave the

territory of Alaska and be brought into the districts of California, Oregon and Washington, but they might pass from the division in Alaska in which the offense had been committed into other divisions of the district of Alaska; therefore it is provided that any United States District Court of Alaska may entertain jurisdiction. The Tokai Maru, (1911) 4 Alaska 311.

**SEC. 4. [Seizures and arrests.]** That the collector of customs of the district of Alaska is hereby authorized to search and seize every foreign vessel and arrest every person violating any provision of this Act or any regulation made thereunder, and the Secretary of Commerce and Labor shall have power to authorize officers of the Navy and of the Revenue-Cutter Service and agents of the Department of Commerce and Labor to likewise make such searches, seizures, and arrests. If any foreign vessel shall be found within the waters to which this Act applies, having on board fresh or cured fish and apparatus or implements suitable for killing or taking fish, it shall be presumed that the vessel and apparatus were used in violation of this Act until it is otherwise sufficiently proved. And every vessel, its tackle, apparatus, or implements so seized shall be given into the custody of the United States marshal of either of the districts mentioned in section three of this Act, and shall be held by him subject to the proceedings provided for in section two of this Act. The facts in connection with such seizure shall be at once reported to the United States district attorney for the district to which the vessel so seized shall be taken, whose duty it shall be to institute the proper proceedings. [34 Stat. L. 264.]

The Secretary of Commerce and Labor was designated the Secretary of Commerce by the Act of March 4, 1913, ch. 141, 37 Stat. 1. 736.

**SEC. 5. [Enforcement of regulations — existing treaties, etc., not affected.]** That the Secretary of Commerce and Labor shall have power to make rules and regulations not inconsistent with law to carry into effect the provisions of this Act. And it shall be the duty of the Secretary of Commerce and Labor to enforce the provisions of this Act and the rules and regulations made thereunder, and for that purpose he may employ, through the Secretary of the Treasury and the Secretary of the Navy, the vessels of the United States Revenue-Cutter Service and of the Navy: *Provided, however,* That nothing contained in this Act shall be construed as affecting any existing treaty or convention between the United States and any foreign power. [34 Stat. L. 264.]

As to the Secretary of Commerce and Labor see the note to the preceding section 4 of this Act.

### **An Act for the protection and regulation of the fisheries of Alaska.**

[Act of June 26, 1906, ch. 3547, 34 Stat. L. 478.]

**[SEC. 1.] [Salmon, etc., canneries — license tax on products — collection.]** That every person, company, or corporation carrying on the business of canning, curing, or preserving fish or manufacturing fish products within the territory known as Alaska, ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, or in any of the waters of Alaska over which the United States has jurisdiction, shall, in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said business and output as follows: Canned salmon, four cents per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton. The payment and collection of such license taxes shall be under and in accordance with the provisions of the Act of March third, eighteen hundred and ninety-nine, entitled "An Act to define and punish crimes in the district of Alaska, and to provide a code of criminal procedure for the district," and amendments thereto. [34 Stat. L. 478.]

This is known as the "Alaska Salmon Fisheries Act." The provisions of this Act supersede those of the Act of June 9, 1896, ch. 387, 29 Stat. L. 316, which amended the Act of March 2, 1889, ch. 415, 25 Stat. L. 109, and which were re-enacted as ch. 12 of the Alaska Penal Laws (30 Stat. L. 1279).

**Applicability of Oregon laws.**—The Act of March 2, 1889, was intended by Congress to cover the whole question relating to the protection of salmon in the waters of Alaska, and repealed any laws of the state of Oregon upon that subject which

had been in force in said territory, so far as such territory was concerned; and therefore fishing for salmon on Sunday in the waters of Alaska was not illegal. *Nelson v. Pyramid Harbor Packing Co.*, (1892) 4 Wash. 689, 30 Pac. 1096.

**SEC. 2. [Private hatcheries — exemption from taxation in proportion to fry liberated — procedure to obtain exemption.]** That the catch and pack of salmon made in Alaska by the owners of private salmon hatcheries operated in Alaska shall be exempt from all license fees and taxation of every nature at the rate of ten cases of canned salmon to every one thousand

red or king salmon fry liberated, upon the following conditions: That the Secretary of Commerce and Labor may from time to time, and on the application of the hatchery owner shall, within a reasonable time thereafter, cause such private hatcheries to be inspected for the purpose of determining the character of their operations, efficiency, and productiveness, and if he approve the same shall cause notice of such approval to be filed in the office of the clerk or deputy clerk of the United States district court of the division of the district of Alaska wherein any such hatchery is located, and shall also notify the owners of such hatchery of the action taken by him. The owner, agent, officer, or superintendent of any hatchery the effectiveness and productiveness of which has been approved as above provided shall, between the thirtieth day of June and the thirty-first day of December of each year, make proof of the number of salmon fry liberated during the twelve months immediately preceding the thirtieth day of June, by a written statement under oath. Such proof shall be filed in the office of the clerk or deputy clerk of the United States district court of the division of the district of Alaska wherein such hatchery is located, and when so filed shall entitle the respective hatchery owners to the exemption as herein provided; and a false oath as to the number of salmon fry liberated shall be deemed perjury and subject the offender to all the pains and penalties thereof. Duplicates of such statements shall also be filed with the Secretary of Commerce and Labor. It shall be the duty of such clerk or deputy clerk in whose office the approval and proof heretofore provided for are filed to forthwith issue to the hatchery owner, causing such proofs to be filed, certificates which shall not be transferable and of such denominations as said owner may request (no certificate to cover fewer than one thousand fry), covering in the aggregate the number of fry so proved to have been liberated; and such certificates may be used at any time by the person, company, corporation, or association to whom issued for the payment pro tanto of any license fees or taxes upon or against or on account of any catch or pack of salmon made by them in Alaska; and it shall be the duty of all public officials charged with the duty of collecting or receiving such license fees or taxes to accept such certificates in lieu of money in payment of all license fees or taxes upon or against the pack of canned salmon at the ratio of one thousand fry for each ten cases of salmon. No hatchery owner shall obtain the rebates from the output of any hatchery to which he might otherwise be entitled under this Act unless the efficiency of said hatchery has first been approved by the Secretary of Commerce and Labor in the manner herein provided for. [34 Stat. L. 478.]

The Secretary of Commerce and Labor was designated the Secretary of Commerce by the Act of March 4, 1913, ch. 141, 37 Stat. L. 736.

**SEC. 3. [Stationary obstructions for taking salmon in waters, unlawful.]** That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than five hundred feet, or within five hundred yards of the mouth of any red-salmon stream where the same is less than five hundred feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning



grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. [34 Stat. L. 479.]

As to the Secretary of Commerce and Labor see the note to section 2 of this Act.

This section is cited in *Barron v. Alexander*, (1912) 4 Alaska 591.

**SEC. 4. [Restriction on nets, seines, etc.]** That it shall be unlawful to lay or set any drift net, seine, set net, pound net, trap, or any other fishing appliance for any purpose except for purposes of fish culture, across or above the tide waters of any creek, stream, river, estuary, or lagoon, for a distance greater than one-third the width of such creek, stream, river, estuary, or lagoon, or within one hundred yards outside of the mouth of any red-salmon stream where the same is less than five hundred feet in width. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance. [34 Stat. L. 479.]

**SEC. 5. [Weekly close season for taking salmon — night seining in small streams prohibited — release of obstructions, etc., during close season.]** That it shall be unlawful to fish for, take, or kill any salmon of any species in any manner or by any means except by rod, spear, or gaff, in any of the waters of Alaska over which the United States has jurisdiction, except Cook Inlet, the Delta of Copper River, Bering Sea, and the waters tributary thereto, from six o'clock postmeridian of Saturday of each week until six o'clock antemeridian of the Monday following, or to fish for, or catch, or kill in any manner or by any appliances except by rod, spear, or gaff, any salmon in any stream of less than one hundred yards in width in Alaska between the hours of six o'clock in the evening and six o'clock in the morning of the following day of each and every day of the week. Throughout the weekly close season herein prescribed the gate, mouth, or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the "heart" of such traps on each side next to the "pot" shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes. [34 Stat. L. 479.]

**SEC. 6. [Spawn grounds to be set aside — close season authorized — notices required — not applicable to artificially stocked streams.]** That the Secretary of Commerce and Labor may, in his discretion, set aside any streams or lakes as preserves for spawning grounds, in which fishing may be limited or entirely prohibited; and when, in his judgment, the results of fishing operations in any stream, or off the mouth thereof, indicate that the number of salmon taken is larger than the natural production of salmon in such stream, he is authorized to establish close seasons or to limit or prohibit fishing entirely for one year or more within such stream or within five hundred yards of the mouth thereof, so as to permit salmon to increase: *Provided, however*, That such power shall be exercised only after all persons interested shall be given a hearing, of which due notice must be given

by publication; and where the interested parties are known to the Department they shall be personally notified by a notice mailed not less than thirty days previous to such hearing. No order made under this section shall be effective before the next calendar year after same is made: *And provided further*, That such limitations and prohibitions shall not apply to those engaged in catching salmon who keep such streams fully stocked with salmon by artificial propagation. [34 Stat. L. 480.]

As to the Secretary of Commerce and Labor see the note to section 2 of this Act.

SEC. 7. **[Canning prohibited forty-eight hours after killing.]** That it shall be unlawful to can or salt for sale for food any salmon more than forty-eight hours after it has been killed. [34 Stat. L. 480.]

SEC. 8. **[Wanton waste of fish unlawful.]** That it shall be unlawful for any person, company, or corporation wantonly to waste or destroy salmon or other food fishes taken or caught in any of the waters of Alaska. [34 Stat. L. 480.]

SEC. 9. **[False branding prohibited — terms permitted.]** That it shall be unlawful for any person, company, or corporation canning, salting, or curing fish of any species in Alaska to use any label, brand, or trade-mark which shall tend to misrepresent the contents of any package of fish offered for sale: *Provided*, That the use of the terms "red," "medium red," "pink," "chum," and so forth, as applied to the various species of Pacific salmon under present trade usages shall not be deemed in conflict with the provisions of this Act when used to designate salmon of those known species. [34 Stat. L. 480.]

SEC. 10. **[Annual reports of fish establishments.]** That every person, company, and corporation engaged in catching, curing, or in any manner utilizing fishery products, or in operating fish hatcheries in Alaska, shall make detailed annual reports thereof to the Secretary of Commerce and Labor, on blanks furnished by him, covering all such facts as may be required with respect thereto for the information of the Department. Such reports shall be sworn to by the superintendent, manager, or other person having knowledge of the facts, a separate blank form being used for each establishment in cases where more than one cannery, saltery, or other establishment is conducted by a person, company, or corporation, and the same shall be forwarded to the Department at the close of the fishing season and not later than December fifteenth of each year. [34 Stat. L. 480.]

As to the Secretary of Commerce and Labor see the note to section 2 of this Act.

SEC. 11. **[Provisions applicable to all species of fish.]** That the catching or killing, except with rod, spear, or gaff, of any fish of any kind or species whatsoever in any of the waters of Alaska over which the United States has jurisdiction, shall be subject to the provisions of this Act, and the Secretary of Commerce and Labor is hereby authorized to make and establish such rules and regulations not inconsistent with law as may be necessary to carry into effect the provisions of this Act. [34 Stat. L. 480.]

As to the Secretary of Commerce and Labor see the note to section 2 of this Act.

**SEC. 12. [Enforcement — officers authorized.]** That to enforce the provisions of this Act and such regulations as he may establish in pursuance thereof, the Secretary of Commerce and Labor is authorized and directed to depute, in addition to the agent and assistant agent of salmon fisheries now provided by law, from the officers and employees of the Department of Commerce and Labor, a force adequate to the performance of all work required for the proper investigation, inspection, and regulation of the Alaskan fisheries and hatcheries, and he shall annually submit to Congress estimates to cover the cost of the establishment and maintenance of fish hatcheries in Alaska, the salaries and actual traveling expenses of such officials, and for such other expenditures as may be necessary to carry out the provisions of this Act. [34 Stat. L. 480.]

As to the Secretary of Commerce and Labor see the note to section 2 of this Act. Provisions for an agent and assistant agent were made by the Act of April 28, 1904, ch. 1762, § 1, *supra*, p. 350.

**SEC. 13. [Punishment for violations — vessels, etc.]** That any person, company, corporation, or association violating any provision of this Act or any regulation established in pursuance thereof shall, upon conviction thereof, be punished by a fine not exceeding one thousand dollars or imprisonment at hard labor for a term of not more than ninety days, or by both such fine and imprisonment, at the discretion of the court; and in case of the violation of any of the provisions of section four of this Act and conviction thereof a further fine of not more than two hundred and fifty dollars per diem may, at the discretion of the court, be imposed for each day such obstruction is maintained. And every vessel or other apparatus or equipment used or employed in violation of any provision of this Act, or of any regulation made thereunder, may be seized by order of the Secretary of Commerce and Labor, and shall be held subject to the payment of such fine or fines as may be imposed. [34 Stat. L. 481.]

As to the Secretary of Commerce and Labor see the note to section 2 of this Act.

**SEC. 14. [Prosecutions.]** That the violation of any provision of this Act may be prosecuted in any district court of Alaska or any district court of the United States in the States of California, Oregon, or Washington. And it shall be the duty of the Secretary of Commerce and Labor to enforce the provisions of this Act and the rules and regulations made thereunder. And it shall be the duty of the district attorney to whom any violation is reported by any agent or representative of the Department of Commerce and Labor to institute proceedings necessary to carry out the provisions of this Act. [34 Stat. L. 481.]

As to the Secretary of Commerce and Labor see the note to section 2 of this Act.

**SEC. 15. [Inconsistent laws repealed.]** That all Acts or parts of Acts inconsistent with the provisions of this Act are, so far as inconsistent, hereby repealed. [34 Stat. L. 481.]

**SEC. 16. [Effect.]** That this Act shall take effect and be in force from and after its passage. [34 Stat. L. 481.]

### VIII. GAME LAWS.

**An Act To amend an Act entitled "An Act for the protection of game in Alaska, and for other purposes," approved June seventh, nineteen hundred and two.**

[*Act of May 11, 1908, ch. 162, 35 Stat. L. 102.*]

[SEC. 1.] **[Protection of game — game defined — exemptions.]** From and after the passage of this Act the wanton destruction of wild game animals or wild birds, except eagles, ravens, and cormorants, the destruction of nests and eggs of such birds, or the killing of any wild birds, other than game birds, except eagles, for the purposes of selling the same or the skins or any part thereof, except as hereinafter provided, is hereby prohibited.

**GAME DEFINED.**—The term "game animals" shall include deer, moose, caribou, mountain sheep, mountain goats, brown bear, sea lions, and walrus. The term "game birds" shall include water fowl, commonly known as ducks, geese, brant, and swans; shore birds, commonly known as plover, snipe, and curlew, and the several species of grouse and ptarmigan.

**EXEMPTIONS.**—Nothing in this Act shall affect any law now in force in Alaska relating to the fur seal, sea otter, or any fur-bearing animal or prevent the killing of any game animal or bird for food or clothing at any time by natives, or by miners or explorers, when in need of food; but the game animals or birds so killed during close season shall not be shipped or sold. [35 Stat. L. 102.]

Immediately preceding the foregoing section was the following provision: "That an Act entitled 'An Act for the protection of game in Alaska, and for other purposes,' approved June seventh, nineteen hundred and two, be amended to read as follows:" etc.

The prior Act of June 7, 1902, ch. 1037, 32 Stat. L. 327, was amended and entirely superseded by this Act.

By the Alaska Penal Laws, ch. 44, § 463, 31 Stat. L. 332, the eggs of certain wild birds are protected.

**SEC. 2. Season.**—That it shall be unlawful for any person in Alaska to kill any wild game animals or birds, except during the season hereinafter provided: North of latitude sixty-two degrees, brown bear may be killed at any time; moose, caribou, sheep, walrus, and sea lions from August first to December tenth, both inclusive; south of latitude sixty-two degrees, moose, caribou, and mountain sheep from August twentieth to December thirty-first, both inclusive; brown bear from October first to July first, both inclusive; deer and mountain goats from April first to February first, both inclusive; grouse, ptarmigan, shore birds, and waterfowl from September first to March first, both inclusive: *Provided*, That no caribou shall be killed on the Kenai Peninsula before August twentieth, nineteen hundred and twelve: *And provided further*, That the Secretary of Agriculture is hereby authorized, whenever he shall deem it necessary for the preservation of game animals or birds, to make and publish rules and regulations prohibiting the sale of any game in any locality modifying the close seasons hereinbefore established, providing different close seasons for different parts of Alaska, placing further restrictions and limitations on the killing of such animals or birds in any given locality, or prohibiting killing entirely for a period not exceeding two years in such locality. [35 Stat. L. 102.]

**SEC. 3. Number.**— That it shall be unlawful for any person to kill any female or yearling moose or for any one person to kill in any one year more than the number specified of each of the following animals: Two moose, one walrus or sea lion, three caribou, three mountain sheep, three brown bear, or to kill or have in his possession in any one day more than twenty-five grouse or ptarmigan or twenty-five shore birds or waterfowl.

**GUNS AND BOATS.**— That it shall be unlawful for any person at any time to hunt with dogs any of the game animals specified in this Act; to use a shotgun larger than number ten gauge, or any gun other than that which can be fired from the shoulder; or to use steam launches or any boats other than those propelled by oars or paddles in the pursuit of game animals or birds. [35 Stat. L. 103.]

**SEC. 4. Sale.**— That it shall be unlawful for any person or persons at any time to sell or offer for sale any hides, skins, or heads of any game animals or game birds in Alaska, or to sell, offer for sale, or purchase, or offer to purchase, any game animals or game birds, or parts thereof, during the time when the killing of such animals or birds is prohibited: *Provided*, That it shall be lawful for dealers having in possession game animals or game birds legally killed during the open season to dispose of the same within fifteen days after the close of said season. [35 Stat. L. 103.]

**SEC. 5. Licenses.**— That it shall be unlawful for any nonresident of Alaska to hunt any of the game animals protected by this Act, except deer and goats, without first obtaining a hunting license, or to hunt on the Kenai Peninsula without a registered guide, and such license shall not be transferable and shall be valid only during the calendar year in which issued. Each applicant shall pay a fee of one hundred dollars for such license, unless he be a citizen of the United States, in which case he shall pay a fee of fifty dollars. Each license shall be accompanied by coupons authorizing the shipment of two moose if killed north of latitude sixty-two degrees, four deer, three caribou, three mountain sheep, three goats, and three brown bear, or any part of said animals, but no more of any one kind.

A resident of Alaska desiring to export heads or trophies of any of the game animals mentioned in this Act shall first obtain a shipping license, for which he shall pay a fee of forty dollars, permitting the shipment of heads or trophies of one moose, if killed north of latitude sixty-two degrees, four deer, two caribou, two sheep, two goats, and two brown bear, but no more of any one kind; or a shipping license, for which he shall pay a fee of ten dollars, permitting the shipment of a single head or trophy of caribou or sheep; or a shipping license, for which he shall pay a fee of five dollars, permitting the shipment of a single head or trophy of any goat, deer, or brown bear. Any person wishing to ship moose killed south of latitude sixty-two degrees must first obtain a special shipping license, for which he shall pay a fee of one hundred and fifty dollars, permitting the shipment of one moose, or any part thereof. Not more than one general license and two special moose licenses shall be issued to any one person in one year: *Provided*, That before any trophy shall be shipped from Alaska under the provisions of this Act the person desiring to make such shipment shall first make and file with the customs office at the port where such shipment is to be made an affidavit to the effect that he has not violated any of the

provisions of this Act; that the trophy which he desires to ship has not been bought or purchased and has not been sold and is not being shipped for the purpose of being sold, and that he is the owner of the trophy which he desires to ship, and if the trophy is that of moose, whether the animal from which it was taken was killed north or south of latitude sixty-two degrees: *Provided further*, That any resident of Alaska prior to September first, nineteen hundred and eight, may without permit or license ship any head or trophy of any of the game animals herein mentioned upon filing an affidavit with the customs office at the port where such shipment is to be made that the animal from which said head or trophy was taken was killed prior to the passage of this Act. Any affidavit required by the provisions of this Act may be subscribed and sworn to before any customs officer or before any officer competent to administer an oath.

The governor of Alaska is hereby authorized to issue licenses for hunting and shipping big game. On issuing a license he shall require the applicant to state whether the heads or trophies to be obtained or shipped under said license will pass through the ports of entry at Seattle, Washington, Portland, Oregon, or San Francisco, California, and he shall forthwith notify the collector of customs at the proper port of entry as to the name of the holder of the license and the name and address of the consignee. All proceeds from licenses, except one dollar from each fee, which shall be retained by the clerk issuing the license to cover the cost of printing and issue, shall be paid into the Treasury of the United States as miscellaneous receipts; the amount necessary for the enforcement of this Act shall be estimated for annually by the Agricultural Department and appropriated for including the employment and salaries to be paid to game wardens herein authorized. And the governor shall annually make a detailed and itemized report to the Secretary of Agriculture, in which he shall state the number and kind of licenses issued, the money received, which report shall also include a full statement of all trophies exported and all animals and birds exported for any purpose.

And the governor of Alaska is further authorized to employ game wardens, to make regulations for the registration and employment of guides, and fix the rates for licensing guides and rates of compensation for guiding. Every person applying for a guide license shall, at the time of making such application, make and file with the person issuing such license an affidavit to the effect that he will obey all the conditions of this Act and of the regulations thereunder, that he will not violate any of the game laws or regulations of Alaska, and that he will report all violations of such laws and regulations that come to his knowledge. Any American citizen or native of Alaska, of good character, upon compliance with the requirements of this Act, shall be entitled to a guide license. Any guide who shall fail or refuse to report any violation of this Act, or who shall himself violate any of the provisions of this Act, shall have his license revoked, and in addition shall be liable to the penalty provided in section seven of this Act, and shall be ineligible to act as guide for a period of five years from the date of conviction. [35 Stat. L. 103.]

**SEC. 6. [Shipments of wild game.]** That it shall be unlawful for any persons, firm, or corporation, or their officers or agents, to deliver to any common carrier, or for the owner, agent, or master of any vessel, or for

any other person, to receive for shipment or have in possession with intent to ship out of Alaska, any wild birds, except eagles, or parts thereof, or any heads, hides, or carcasses of brown bear, caribou, deer, moose, mountain sheep, or mountain goats, or parts thereof, unless said heads, hides, or carcasses are accompanied by the required license or coupon and by a copy of the affidavit required by section five of this Act: *Provided*, That nothing in this Act shall be construed to prevent the collection of specimens for scientific purposes, the capture or shipment of live animals and birds for exhibition or propagation, or the export from Alaska of specimens under permit from the Secretary of Agriculture, and under such restrictions and limitations as he may prescribe and publish.

It shall be the duty of the collector of customs at Seattle, Portland, and San Francisco to keep strict account of all consignments of game animals received from Alaska, and no consignment of game shall be entered until due notice thereof has been received from the governor of Alaska or the Secretary of Agriculture, and found to agree with the name and address on the shipment. In case consignments arrive without licenses they shall be detained for sixty days, and if a license be not then produced said consignments shall be forfeited to the United States and shall be delivered by the collector of customs to the United States marshal of the district for such disposition as the court may direct. [35 Stat. L. 104.]

Every variety of the brown bear species within the district of Alaska is included in this section, whereas section 2 of the Act of June 7, 1902, protected only the

large brown bear of Kodiak Island and the Kenai Peninsula. *Mosses v. Willis*, (1912) 4 Alaska 492.

**SEC. 7. Penalties.**— That any person violating any of the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall forfeit to the United States all game or birds in his possession, and all guns, traps, nets, or boats used in killing or capturing said game or birds, and shall be punished for each offense by a fine of not more than two hundred dollars or imprisonment not more than three months, or by both such fine and imprisonment, in the discretion of the court. Any person making any false or untrue statements in any affidavit required by this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall forfeit to the United States all trophies in his possession, and shall be punished by a fine in any sum not more than two hundred dollars or imprisonment not more than three months, or by both such fine and imprisonment, in the discretion of the court.

**ENFORCEMENT.**— It is hereby made the duty of all marshals and deputy marshals, collectors or deputy collectors of customs, all officers of revenue cutters, and all game wardens to assist in the enforcement of this Act. Any marshal, deputy marshal, or warden in or out of Alaska may arrest without warrant any person found violating any of the provisions of this Act or any of the regulations herein provided, and may seize any game, birds, or hides, and any traps, nets, guns, boats, or other paraphernalia used in the capture of such game or birds and found in the possession of said person in or out of Alaska, and any collector or deputy collector of customs, or warden, or licensed guide, or any person authorized in writing by a marshal shall have the power above provided to arrest persons found violating this Act or said regulations and seize said property without warrant to keep and deliver the same to a marshal or a deputy marshal. It shall be the duty

of the Secretary of the Treasury, upon request of the governor or Secretary of Agriculture, to aid in carrying out the provisions of this Act. [35 Stat. L. 105.]

SEC. 8. **[Repeal.]** That all Acts or parts of Acts in conflict with the provisions of this Act are hereby repealed. [35 Stat. L. 105.]

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**An Act For the protection of game in the Territory of Alaska.**

[Act of March 4, 1911, ch. 280, 36 Stat. L. 1360.]

**[Open season for game birds extended.]** That from and after the passage of this Act it shall be lawful to kill grouse, ptarmigan, shore birds, and waterfowl from September first to March first, both inclusive, anywhere in the Territory of Alaska. [36 Stat. L. 1360.]

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**ALCOHOL**

See INTERNAL REVENUE



# ALIENS

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*Pensions*, see *PENSIONS*.

*Importation of Immoral Aliens*, see *WHITE SLAVE TRAFFIC*.

## I. ALIEN ENEMIES:

**Sec. 4067. [Removal of alien enemies.]** Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upward, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed, as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety. [R. S.]

Act of July 6, 1798, ch. 66, 1 Stat. L. 577.

**Authority of President.**—This section gives the President unlimited authority. He alone is authorized to direct the conduct to be observed on the part of the United States toward such alien enemies, and to prescribe the manner and degree of restraint to which they should be subject. There is no law or usage which requires an order of the President to be

under seal. *Lockington v. Smith*, (1817) 1 Pet. C. C. 466, 15 Fed. Cas. No. 8,448.

**Legal status of aliens.**—The legal status and obligations of aliens differ from those of citizens, in that aliens are liable, if the public peace calls for it, to internment and to executive surveillance under this section. (1857) 8 Op. Atty.-Gen. 499.

**Sec. 4068. [Time for removal.]** When an alien who becomes liable as an enemy, in the manner prescribed in the preceding section, is not chargeable with actual hostility, or other crime against the public safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation or government of which he is a native citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality. [R. S.]

Acts of July 6, 1798, 1 Stat. L. 577; July 6, 1812, 2 Stat. L. 794.

**Orders may be issued by the department of state** or by that of the commissary-general, under the President's direction. *Lockington v. Smith*, (1817) 1 Pet. C. C. 466, 15 Fed. Cas. No. 8,448; (1855) 7 Op. Atty.-Gen. 453.

**The marshals of the several districts** are the proper officers to execute the orders of the President under this Act. *Lockington v. Smith*, (1817) 1 Pet. C. C. 466, 15 Fed. Cas. No. 8,448.

**Sec. 4069. [Jurisdiction of United States courts over alien enemies.]** After any such proclamation has been made, the several courts of the United States, having criminal jurisdiction, and the several justices and

judges of the courts of the United States, are authorized, and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or justice; and after a full examination and hearing on such complaint, and sufficient cause appearing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed. [R. S.]

Act of July 6, 1798, 1 Stat. L. 577.

**Sec. 4070. [Duties of marshal in removing alien enemies.]** When an alien enemy is required by the President, or by order of any court, judge, or justice, to depart and to be removed, it shall be the duty of the marshal of the district in which he shall be apprehended to provide therefor, and to execute such order in person, or by his deputy, or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President, or of the court, judge, or justice ordering the same, as the case may be.

Act of July 6, 1798, 1 Stat. L. 578.

## II. HOLDING AND OWNING REAL ESTATE.

**An Act To better define and regulate the rights of aliens to hold and own real estate in the Territories.**

[Act of March 2, 1897, ch. 363, 29 Stat. L. 618.]

[SEC. 1.] **[Alien ownership in Territories prohibited.]** That no alien or person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States in the manner provided by law, shall acquire title to or own any land in any of the Territories of the United States except as hereinafter provided: *Provided*, That the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer. [29 Stat. L. 618.]

This is the first section of the "Aliens' Real Estate Ownership Act." Immediately preceding the provisions of the text was a provision: "That an Act entitled 'An Act to restrict the ownership of real estate in the Territories to American citizens, and so forth,' approved March third, eighteen hundred and eighty-seven, except so far as it affects real estate in the District of Columbia, be, and the same is hereby, amended so as to read as follows."

Section 1 in the original Act of March 3, 1887, read as follows: "That it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not

created by or under the laws of the United States or of some State or Territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the Territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created: *Provided*, That the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty shall continue to exist so long as such treaties are in force, and no longer." [24 Stat. L. 476.]

This latter Act had previously been amended by the Act of March 9, 1888, ch. 30, 1 Supp. R. S. 582, by providing that it shall not apply to or operate in the District of Columbia, so far as it relates to the ownership of legations or residences by representatives of foreign governments or attachés thereof.

**Effect of legislation.**—The Act of 1887 prohibiting aliens who have not declared their intention to become citizens to thereafter acquire, hold or own real estate or any interest therein, in the District of Columbia or any of the territories, except by inheritance or for a debt previously contracted, unless such privilege is conferred by treaty, impliedly recognized an existing right in aliens to so acquire real estate. *Geofroy v. Riggs*, (1890) 133 U. S. 258, 10 S. Ct. 295, 33 U. S. (L. ed.) 642.

**Treaty in conflict with state statute.**—The treaty power of the United States extends to the protection to be afforded aliens owning property in the United States and to the manner in which it may be transferred, devised or inherited, and where there is a conflict between a treaty made by this government with a foreign nation, providing for the right of an alien to hold property, and a statute of a state wherein the property is situated, in such case the state statute is suspended during the treaty or the period provided for therein. *Geofroy v. Riggs*, (1890) 133 U. S. 258, 10 S. Ct. 295, 33 U. S. (L. ed.) 642, wherein the court, construing a reciprocal convention with France, said: "This article by its terms suspended during the existence of the treaty the provisions of the common law of Maryland and of the statutes of that state, so far as they prevented citizens of France from taking by inheritance from citizens of the United States property real or personal situated therein." See also *Blythe v. Hinckley*, 180 U. S. 333, 21 S. Ct. 390, 45 U. S. (L. ed.) 557. On the question whether the United States has the power to regulate testamentary dispositions or laws of inheritance of aliens, in reference to property within the states, see *Frederickson v. Louisiana*, (1859) 23 How. 445, 16 U. S. (L. ed.) 577.

**Mining property.**—The provisions of the Act of 1887 were held to apply to mines. (1887) 19 Op. Atty-Gen. 26. But aliens were allowed to advance money to develop mining property or to contract with American owners to work mines by personal contracts for hire or by *bona fide* leases for a reasonable time. (1869) 13 Op. Atty-Gen. 26.

**Location of mining claim by alien.**—The fact that a mining claim is located by an alien does not render the location illegal or void, but, at most, it is only voidable at the instance of the government; and a subsequent declaration of intention to become a citizen by a locator, or one having an interest in the claim, prior to the inception of any adverse rights, relates back to the date of the location or acquisition of the alien's interest and validates the transaction. *Shea v. Nilima*, (1904) 133 Fed. 209.

So likewise it has been held that a deed of a mining claim from an original locator to an alien operates as a transfer of the claim to such alien grantee, subject to question as to his incapacity to take by reason of his alienage, by the government only. *Manuel v. Wulff*, (1894) 152 U. S. 505, 14 S. Ct. 651, 38 U. S. (L. ed.) 532. See also *O'Reilly v. Campbell*, (1886) 116 U. S. 418, 6 S. Ct. 421, 29 U. S. (L. ed.) 669; *Hammer v. Garfield Min., etc., Co.*, (1889) 130 U. S. 291, 9 S. Ct. 548, 32 U. S. (L. ed.) 964.

**Agreement to locate claims.**—An agreement between two aliens to acquire or locate mining claims in Alaska for their joint benefit is not void; nor does the fact of their alienage prevent one who subsequently declared his intention to become a citizen from enforcing the contract by recovering his interest in a claim located in the name of the other pursuant to such agreement. *Shea v. Nilima*, (1904) 133 Fed. 209.

**SEC. 2. [Exceptions.]** That this Act shall not apply to land now owned in any of the Territories of the United States by aliens, which was acquired on or before March third, eighteen hundred and eighty-seven, so long as it is held by the then owners, their heirs or legal representatives, nor to any alien who shall become a bona fide resident of the United States, and any alien who shall become a bona fide resident of the United States, or shall

have declared his intention to become a citizen of the United States in the manner provided by law, shall have the right to acquire and hold lands in either of the Territories of the United States upon the same terms as citizens of the United States: *Provided*, That if any such resident alien shall cease to be a bona fide resident of the United States then such alien shall have ten years from the time he ceases to be such bona fide resident in which to alienate such lands. This Act shall not be construed to prevent any persons not citizens of the United States from acquiring or holding lots or parcels of lands in any incorporated or platted city, town, or village, or in any mine or mining claim, in any of the Territories of the United States. [29 Stat. L. 618.]

Section 2 of the original Act of March 3, 1887, read as follows: "SEC. 2. That no corporation or association more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own any real estate hereafter acquired in any of the Territories of the United States or of the District of Columbia." [24 Stat. L. 477.]

SEC. 3. [How aliens may acquire lands.] That this Act shall not prevent aliens from acquiring lands or any interests therein by inheritance or in the ordinary course of justice in the collection of debts, nor from acquiring liens on real estate or any interest therein, nor from lending money and securing the same upon real estate or any interest therein; nor from enforcing any such lien, nor from acquiring and holding title to such real estate, or any interest therein, upon which a lien may have heretofore or may hereafter be fixed, or upon which a loan of money may have been heretofore or hereafter made and secured: *Provided, however*, That all lands so acquired shall be sold within ten years after title shall be perfected in him under said sale or the same shall escheat to the United States and be forfeited as hereinafter provided. [29 Stat. L. 618.]

Section 3 of the original Act of March 3, 1887, read as follows: "SEC. 3. That no corporation other than those organized for the construction or operation of railways, canals, or turnpikes shall acquire, hold, or own more than five thousand acres of land in any of the Territories of the United States; And no railroad, canal, or turnpike corporation shall hereafter acquire, hold, or own lands in any Territory, other than as may be necessary for the proper operation of its railroad, canal, or turnpike, except such lands as may have been granted to it by act of Congress. But the prohibition of this section shall not affect the title to any lands now lawfully held by any such corporation." [24 Stat. L. 477.]

**Title by inheritance.**—There is a plain implication in the Act of 1887 that property in the District of Columbia and in the territories may be acquired by aliens

by inheritance under existing laws. *Geoffroy v. Riggs*, (1890) 133 U. S. 258, 10 S. Ct. 295, 33 U. S. (L. ed.) 642.

SEC. 4. [Alien may convey before suit.] That any alien who shall hereafter hold lands in any of the Territories of the United States in contravention of the provisions of this Act may nevertheless convey his title thereto at any time before the institution of escheat proceedings as hereinafter provided: *Provided, however*, That if any such conveyance shall be made by such alien, either to an alien or to a citizen of the United States, in trust and for the purpose and with the intention of evading the provisions of this Act, such conveyance shall be null and void, and any such lands so conveyed shall be forfeited and escheat to the United States. [29 Stat. L. 618.]

Section 4 of the original Act of March 3, 1887, read as follows: "SEC. 4. That all property acquired, held, or owned in violation of the provisions of this act shall be forfeited to the United States, and it shall be the duty of the Attorney-General to enforce every such forfeiture by bill in equity or other proper process. And in any suit or proceeding that may be commenced to enforce the provisions of this act, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights either of the United States or of the parties concerned in any such proceeding arising out of the matters in this act mentioned." [24 Stat. L. 477.]

The act permits an alien to sell any lands in the territory before escheat proceedings if the lands are held by him against the prohibition of the statute, and to receive the proceeds of such lands if sold in escheat proceedings. *Tornanses v. Melsing*, (C. C. A. 1901) 109 Fed. 710.

SEC. 5. [Forfeiture of lands unlawfully held — escheat suits.] That it shall be the duty of the Attorney-General of the United States, when he shall be informed or have reason to believe that land in any of the Territories of the United States are being held contrary to the provisions of this Act, to institute or cause to be instituted suit in behalf of the United States in the district court of the Territory in the district where such land or a part thereof may be situated, praying for the escheat of the same on behalf of the United States to the United States: *Provided*, That before any such suit is instituted the Attorney-General shall give or cause to be given ninety days' notice by registered letter of his intention to sue, or by personal notice directed to or delivered to the owner of said land, or the person who last rendered the same for taxation, or his agent, and to all other persons having an interest in such lands of which he may have actual or constructive notice.

In the event personal notice can not be obtained in some one of the modes above provided, then said notice shall be given by publication in some newspaper published in the county where the land is situate, and if no newspaper is published in said county then the said notice shall be published in some newspaper nearest said county. [29 Stat. L. 619.]

**Statute not self-executing.**— Under the Act of 1887 it was held that the statute is not self-executing and until the attorney-general has enforced a forfeiture the title of an alien is not subject to attack by others. *Johnson v. Elkins*, (1893) 1 App. Cas. (D. C.) 430.

SEC. 6. [Sale on judgment of escheat — dismissal of suit.] That if it shall be determined upon the trial of any such escheat proceedings that the lands are held contrary to the provisions of this Act, the court trying said cause shall render judgment condemning such lands and shall order the same to be sold as under execution; and the proceeds of such sale, after deducting costs of such suit, shall be paid to the clerk of such court so rendering judgment, and said fund shall remain in the hands of such clerk for one year from the date of such payment, subject to the order of the alien owner of such lands, or his heirs or legal representatives; and if not claimed within the period of one year, such clerk shall pay the same into the treasury of the Territory in which the lands may be situated, for the benefit of the available school fund of said Territory: *Provided*, That the defendant in any such escheat proceedings may, at any time before final judgment, suggest and show to the court that he has conformed with the law, either becoming a bona fide resident of the United States, or by declaring his intention of becoming a citizen of the United States, or by the

doing or happening of any other act which, under the provisions of this Act, would entitle him to hold or own real estate, which being admitted or proved, such suit shall be dismissed on payment of costs and a reasonable attorney fee to be fixed by the court. [29 Stat. L. 619.]

**SEC. 7. [District of Columbia excepted — public lands not affected.]** That this Act shall not in any manner be construed to refer to the District of Columbia, nor to authorize aliens to acquire title from the United States to any of the public lands of the United States or to in any manner affect or change the laws regulating the disposal of the public lands of the United States. And the Act of which this Act is an amendment shall remain in force and unchanged by this Act so far as it refers to or affects real estate in the District of Columbia. [29 Stat. L. 619.]

**Application in District of Columbia.**—The Act of March 3, 1887, for which this Act is a substitute, was amended by the Act of March 9, 1888, 25 Stat. L. 45, ch. 30, by providing that "the same shall not apply to or operate in the District of Columbia, so far as relates to the ownership of legations, or the ownership of residences by representatives of foreign Governments, or attaches thereof."

The privilege of ownership of lands in the District of Columbia was extended to aliens by the Act of Feb. 23, 1905, ch. 733, § 1, *infra*, p. 369.

**SEC. 8. [Repeal.]** That all laws and parts of laws so far as they conflict with the provisions of this Act are hereby repealed. [29 Stat. L. 619.]

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**An Act To amend the Act entitled "An Act to better define and regulate the rights of aliens to hold and own real estate in the Territories," approved March second, eighteen hundred and ninety-seven.**

[Act of Feb. 23, 1905, ch. 733, 33 Stat. L. 733.]

**[SEC. 1.] [Alien ownership of lands in District of Columbia.]** That the Act entitled "An Act to better define and regulate the rights of aliens to hold and own real estate in the Territories," approved March second, eighteen hundred and ninety-seven, be, and the same is hereby, amended so as to extend to aliens the same rights and privileges concerning the acquisition, holding, owning, and disposition of real estate in the District of Columbia as by that Act are conferred upon them in respect of real estate in the Territories of the United States. [33 Stat. L. 733.]

The provisions here amended are set out *supra*, p. 365.

**SEC. 2. [Repeal.]** That all laws and parts of laws so far as they conflict with the provisions of this Act are hereby repealed. [33 Stat. L. 733.]

## **AMBASSADORS**

**See DIPLOMATIC AND CONSULAR OFFICERS**

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## **AMERICAN NATIONAL RED CROSS**

**See CHARITIES**

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## **AMERICAN REPUBLICS**

**See STATE DEPARTMENT**



# ANIMALS

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## I. IMPORTATION OF ANIMALS.

**SEC. 6. [Importation of diseased animals prohibited — penalties.]** That the importation of neat cattle, sheep, and other ruminants, and swine, which are diseased or infected with any disease, or which shall have been exposed to such infection within sixty days next before their exportation, is hereby prohibited; and any person who shall knowingly violate the foregoing provision shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding three years, and any vessel or vehicle used in such unlawful importation with the knowledge of the master or owner of said vessel or vehicle that such importation is diseased or has been exposed to infection as herein described, shall be forfeited to the United States. [26 Stat. L. 416.]

This and the following sections 7, 8, 9, and 10, are from an Act of Aug. 30, 1890, ch. 839, entitled "An Act for an inspection of meats for exportation, prohibiting the importation of adulterated articles of food or drink, and authorizing the President to make proclamation in certain cases, and for other purposes."

For sections 1 to 5 of this Act, which deal with adulterated food and drink, see the title IMPORTS AND EXPORTS.

The admission of tick-infested cattle from Mexico was regulated by the Act of March 4, 1911, ch. 238, § 1, *infra*, p. 376.

**SEC. 7. [Quarantine of imported animals.]** That the Secretary of Agriculture be, and is hereby, authorized, at the expense of the owner, to place and retain in quarantine all neat cattle, sheep, and other ruminants, and all swine, imported into the United States, at such ports as he may designate for such purpose, and under such conditions as he may by regulation prescribe, respectively, for the several classes of animals above described; and for this purpose he may have and maintain possession of all lands, buildings, animals, tools, fixtures, and appurtenances now in use for the quarantine of neat cattle, and hereafter purchase, construct, or rent as may be necessary, and he may appoint veterinary surgeons, inspectors, officers, and employees by him deemed necessary to maintain such quarantine, and provide for the execution of the other provisions of this act. [26 Stat. L. 416.]

See the note to section 6 of this Act *supra*.

As to quarantine districts generally see subdivision III of this title, *infra*, p. 390.

**Food and attendance for quarantined cattle.**—Under this section the Secretary of Agriculture may adopt and enforce regulations requiring that food and attendance be provided to quarantined cattle

by the owners. The secretary may hold such cattle until the expenses are repaid and sell them upon failure or refusal to repay within a reasonable time. (1895) 21 Op. Atty-Gen. 193.

**SEC. 8. [No importation except at quarantine ports — slaughter of infected animals.]** That the importation of all animals described in this act into any port in the United States, except such as may be designated by the Secretary of Agriculture, with the approval of the Secretary of the Treasury, as quarantine stations, is hereby prohibited; And the Secretary of Agriculture may cause to be slaughtered such of the animals named in this act as may be, under regulations prescribed by him, adjudged to be infected with any contagious disease, or to have been exposed to infection so as to be dangerous to other animals; And that the value of animals

so slaughtered as being so exposed to infection but not infected may be ascertained by the agreement of the Secretary of Agriculture and owners thereof, if practicable; otherwise, by the appraisal by two persons familiar with the character and value of such property, to be appointed by the Secretary of Agriculture, whose decision, if they agree, shall be final; otherwise, the Secretary of Agriculture shall decide between them, and his decision shall be final; and the amount of the value thus ascertained shall be paid to the owner thereof out of money in the Treasury appropriated for the use of the Bureau of Animal Industry; but no payment shall be made for any animal imported in violation of the provisions of this act. If any animal subject to quarantine according to the provisions of this act are brought into any port of the United States where no quarantine station is established the collector of such port shall require the same to be conveyed by the vessel on which they are imported or are found to the nearest quarantine station, at the expense of the owner. [26 Stat. L. 416.]

See the notes to section 6 of this Act *supra*.

**Slaughter of animals.**—The above language authorizing the slaughter of infected animals is permissive and not mandatory. The secretary may slaughter sheep adjudged to be infected with a contagious disease or exposed to infection, and in making compensation he is limited to those which were exposed to infection but not then infected. (1899) 22 Op. Atty.-Gen. 390.

Congress intended that the exposed ani-

mals imported in violation of the Act are to be slaughtered as well as the others. The authority of the department to seize and slaughter the animals without compensation is doubtful. The secretary is to adopt and enforce regulations for adjudging whether the animals are diseased or have been so exposed as to be dangerous and to slaughter if his judgment approves of such a course. (1897) 21 Op. Atty.-Gen. 460.

**SEC. 9. [Importation of all animals suspended by proclamation.]** That whenever, in the opinion of the President, it shall be necessary for the protection of animals in the United States against infectious or contagious diseases, he may, by proclamation, suspend the importation of all or any class of animals for a limited time, and may change, modify, revoke, or renew such proclamation, as the public good may require; and during the time of such suspension the importation of any such animals shall be unlawful. [26 Stat. L. 416.]

See the notes to section 6 of this Act *supra*.

**SEC. 10. [Inspection of all imported animals—disposal of animals, etc.]** That the Secretary of Agriculture shall cause careful inspection to be made by a suitable officer of all imported animals described in this act, to ascertain whether such animals are infected with contagious diseases or have been exposed to infection so as to be dangerous to other animals, which shall then either be placed in quarantine or dealt with according to the regulations of the Secretary of Agriculture; and all food, litter, manure, clothing, utensils, and other appliances that have been so related to such animals on board ship as to be judged liable to convey infection shall be dealt with according to the regulations of the Secretary of Agriculture; \* \* \* [26 Stat. L. 417.]

See the notes to section 6 of this Act *supra*.

The latter part of this section relates to the inspection of animals intended for export, and the disinfection of vessels, and is given *infra*, p. 394.

[SEC. 1.] **[Admission of tick-infested cattle.]** \* \* \* The Act of August thirtieth, eighteen hundred and ninety, is hereby amended so as to authorize the Secretary of Agriculture, within his discretion, and under such joint regulations as may be prescribed by the Secretary of Agriculture and the Secretary of the Treasury, to permit the admission of tick-infested cattle from Mexico into that part of Texas below the southern cattle quarantine line; [36 Stat. L. 1240.]

This is a provision of the Agricultural Appropriation Act of March 4, 1911, ch. 238. The Act of August 30, 1890, referred to is given *supra*, p. 374.

H. Subsection 1. **[Importation of neat cattle and hides.]** That the importation of neat cattle and the hides of neat cattle from any foreign country into the United States is prohibited: *Provided*, That the operation of this section shall be suspended as to any foreign country or countries, or any parts of such country or countries, whenever the Secretary of the Treasury shall officially determine, and give public notice thereof, that such importation will not tend to the introduction or spread of contagious or infectious diseases among the cattle of the United States; and the Secretary of the Treasury is hereby authorized and empowered, and it shall be his duty, to make all necessary orders and regulations to carry this section into effect, or to suspend the same as herein provided, and to send copies thereof to the proper officers in the United States and to such officers or agents of the United States in foreign countries as he shall judge necessary. [38 Stat. L. 195.]

This and the following paragraph are from the Underwood Tariff Act of Oct. 3, 1913, ch. 16, § IV, and supersede similar provisions in R. S. secs. 2493, 2494, 2495; the Act of Aug. 8, 1894, ch. 238, § 1, 28 Stat. L. 269, the Act of April 23, 1897, ch. 1, § 1, 30 Stat. L. 7, and the Act of July 24, 1897, ch. 11, 30 Stat. L. 210.

By the Tariff Act of Oct. 3, 1913, ch. 16, § 1, par. 397, 38 Stat. L. 153, provision is made for the importation free of duty of pure-bred animals for breeding purposes. See the title CUSTOMS DUTIES.

H. Subsection 2. **[Punishment for violations.]** That any person convicted of a willful violation of any of the provisions of the preceding subsection shall be fined not exceeding \$500, or imprisoned not exceeding one year, or both, in the discretion of the court. [38 Stat. L. 195.]

See the notes to the preceding paragraph.

## II. TRANSPORTATION OF ANIMALS.

**An Act To provide for the safe transport and humane treatment of export cattle from the United States to foreign countries, and for other purposes.**

[Act of March 3, 1891, ch. 521, 26 Stat. L. 833.]

[SEC. 1.] **[Accommodations for export cattle.]** That the Secretary of Agriculture is hereby authorized to examine all vessels which are to carry export cattle from the ports of the United States to foreign countries, and to prescribe by rules and regulations or orders the accommodations which

said vessels shall provide for export cattle, as to space, ventilation, fittings, food and water supply and such other requirements as he may decide to be necessary for the safe and proper transportation and humane treatment of such animals. [26 Stat. L. 833.]

As to transportation of diseased live stock by railroads or vessels see section 6 of the Act of May 29, 1884, establishing a Bureau of Animal Industry, *infra*, p. 406.

As to transportation of animals on passenger vessels see CARRIERS.

As to transportation of game see PENAL LAWS.

**SEC. 2. [Penalties for violations.]** That whenever the owner, owners, or master of any vessel carrying export cattle shall wilfully violate or cause or permit to be violated any rule, regulation or order made pursuant to the foregoing section the vessel in respect of which such violation shall occur may be prohibited from again carrying cattle from any port of the United States for such length of time, not exceeding one year, as the Secretary of Agriculture may direct, and such vessel shall be refused clearance from any port of the United States accordingly. [26 Stat. L. 833.]

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**An Act To prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States Revised Statutes.**

[Act of June 29, 1906, ch. 3594, 34 Stat. L. 607.]

**[SEC. 1.] [Transportation of animals — time limit for continuous confinement — extension of time — unloading sheep.]** That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: *Provided*, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been

confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided*, That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours. [34 Stat. L. 607.]

This is the first section of the "Live Stock Transportation Act."

Provisions similar to those of this section were contained in R. S. sec. 4386 repealed by section 5 of this Act, *infra*, p. 390.

**Constitutionality.**—This statute comes within the constitutional right of Congress. *U. S. v. New York Cent., etc., R. Co.*, (1907) 156 Fed. 249.

The provision of this section authorizing the shipper of cattle or the person accompanying them to extend the time of their confinement to thirty-six hours, is not such a delegation of legislative powers as would render the law unconstitutional. *Southern Pac. Co. v. U. S.*, (1909) 171 Fed. 380.

In *U. S. v. Boston, etc., R. Co.*, (1883) 15 Fed. 209, the court held that the provisions of sections 4386 to 4390 of the Revised Statutes, which were substantially similar to the present Act, were directly within the terms of the Constitution, which confers upon Congress the power to regulate commerce among the several states. The statute "imposes regulations upon a particular class of traffic between states, and declares in what manner and upon what conditions it shall be carried on. The statute cannot be any the less within the constitutional authority of Congress because its object is to require the humane treatment of live animals when in course of transportation as articles of commerce from one state to another."

**Purpose of statute.**—The primary purpose of the Act, as exhibited by its title, is to prevent cruelty to animals in transit, its declared intent being to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon certain contingencies therein stated, and to make sure that cattle confined in cars shall not go without water, etc., for more than thirty-six hours. The duty of seeing to compliance with these requirements is placed upon the carrier. *U. S. v. Oregon R., etc., Co.*, (1908) 163 Fed. 640; *U. S. v. Philadelphia, etc., R. Co.* (E. D. Pa. 1915) 223 Fed. 206; *Atchison, etc., R. Co. v. Hill*, (Tex. 1914) 171 S. W. 1028.

*Under the common law* the carrier was free to exercise its own judgment as to when stock being transported by it should be fed and watered, subject only to the requirement that this should be done at reasonable intervals, and that the needs of the stock should not be unreasonably neglected. But when Congress enacted

the federal twenty-eight hour law, this was a legislative direction that an interstate carrier could keep cattle on board cars without feed or water for twenty-eight hours, and if requested by the shipper, they could be kept for twelve hours longer than that. *Kent v. Chicago, etc., R. Co.*, (1915) 189 Mo. App. 424, 176 S. W. 1105.

**What law governs.**—To the extent that this Act fixes the duties and liabilities of the shipper and carrier in interstate transportation, it is obviously controlling, and displaces any state law on the subject. *Gilliland v. Southern R. Co.*, (1910) 85 S. C. 26, 67 S. E. 20, 137 A. S. R. 861, 27 L. R. A. (N. S.) 1106.

The statute does not abrogate the common-law liability for the negligent confinement of animals during their transportation. *Durrett v. Chicago, etc., R. Co.*, (N. M. 1915) 146 Pac. 962, wherein it appeared that on the trial below in an action to recover damages occasioned to cattle shipped over the defendant railroad, the court gave the following instruction to the jury: "The court instructs the jury that the law imposes upon a common carrier, such as the defendant, the duty to furnish reasonable facilities and opportunities to care for, feed, water, and tend to stock during transportation; and if you believe from the evidence in this case that, when the shipment in question arrived at Tucumcari, it was necessary for the safety of said cattle that they be unloaded and fed and watered, and that the defendant did not have at said place and at said time proper means and facilities for so doing, and that, by reason thereof, said stock was damaged, then you should allow the plaintiff such damages as he has sustained, unless you further find that the plaintiff, by his acts and conduct, waived such unloading, watering, feeding, etc." On appeal, the defendant urged that this instruction was erroneous because the shipment was an interstate shipment controlled by the federal statute which fixes the time cattle can be kept in transit by the railway company at twenty-eight hours. Holding that the instruction was proper the court said: "A brief excerpt from 4 R. C. L. § 451, disposes of this contention: 'The object of the federal



statute being to prohibit the confinement of animals longer than the time specified, the statute is not a grant of privilege to the carrier authorizing it to confine the stock for the period of time therein mentioned, irrespective of the question of negligence in so doing. The question of negligence, as to such confinement, is still left as at common law, notwithstanding the statute."

**Instructions.**—In a common-law action for damages based on a negligent delay in the shipment of cattle an instruction based on a cause of action given by the federal twenty-eight hour law is erroneous, being wholly beyond the scope of the pleadings. *McFall v. Chicago, etc., R. Co.*, (1914) 181 Mo. App. 142, 168 S. W. 341.

**Interstate and intrastate.**—It has been held that section 4386 of the Revised Statutes, superseded by the present substantially similar Act, related only to interstate carriers. Thus in *U. S. v. Louisville, etc., R. Co.*, (1883) 18 Fed. 480, the court said: "It is intended by this law to affect only those companies whose roads form a part of a line of roads over which animals are conveyed, extending from one state to another. If the line lies wholly within the territorial limits of any state, then this would be a matter not given to Congress by the Constitution; this act of the national legislature would not apply, and we would have to look to state legislation for relief."

In *U. S. v. Boston, etc., R. Co.*, (1883) 15 Fed. 209, the court said: "A railroad company in this state, whose road forms part of a line of road over which live animals are conveyed from another state to points in this state, and which receives from its connecting roads to be transported in this state animals which have been brought from another state, is engaged in interstate commerce, and as such is within the terms of the Act of Congress."

A railroad company operating a line of railroad over which cattle, sheep, swine, and other animals are conveyed from one or more states to other states, has not violated the provisions of this section where the alleged violation consisted in the unlawful confinement of swine in a shipment from one point within the state to another within it, over a line entirely within the state. *U. S. v. East Tennessee, etc., R. Co.*, (1882) 13 Fed. 642. See also *Gulf, etc., R. Co. v. Gray*, (Tex. Civ. App. (1894) 24 S. W. 837, reversed in part (1894) 87 Tex. 312, 28 S. W. 280.

**Extraterritorial operation.**—This Act, though construed to apply to interstate shipments from one state to another through a foreign country, is not objectionable as extraterritorial in operation, since the offense is complete by continued confinement only after the statutory time has expired; it being immaterial that a

part of the time has been consumed by transportation in a foreign country. *U. S. v. Lehigh Valley R. Co.*, (1911) 184 Fed. 971; *Grand Trunk Ry. Co. of Canada v. U. S.*, (C. C. A. 2d Cir. 1911) 191 Fed. 803.

**Liability of receivers.**—Receivers are specifically enumerated among the classes of persons who are liable under this enactment. The former statute, section 4386 Revised Statutes, did not enumerate receivers, and it was held under that section that as the statute was penal the courts could not, in this class of cases, attribute inadvertence or oversight to the legislature when enumerating the classes subjected to the penal enactment, nor depart from the settled meaning of words or phrases in order to bring persons not named within the supposed purpose of the statute and that consequently they were not within the letter of the statute and not necessarily within its purpose or spirit. It did not follow, however, under such construction of the statute, that it would be without operation where railroads were in the hands of receivers. The owners and custodians of the stock would still remain subject to the punishment prescribed. *U. S. v. Harris*, (1900) 177 U. S. 305, 20 S. Ct. 609, 44 U. S. (L. ed.) 780.

**Connecting carrier.**—There has been some diversity in the decisions of the various districts as to whether or not the "twenty-eight hour law," respecting the interstate shipment of live stock, admits of the construction that the length of time consumed in the transportation by the antecedent carrier can be carried over and charged to the connecting carrier, who independently does not run over the twenty-eight or thirty-six hours' time without unloading, feeding and watering. In *U. S. v. Stockyards Terminal Co.*, (1909) 172 Fed. 452, it was held that where the initial carrier of live stock has been subjected to the penalty imposed by this Act for confining live stock longer than permitted without unloading, rest, water, and feeding, in a second action against a connecting carrier to recover for the same confinement, the first twenty-eight hours or thirty-six hours which were necessarily included in the first action cannot be counted against the defendant or the connecting line.

In *Northern Pac. Terminal Co. v. U. S.*, (1911) 184 Fed. 603, it appeared that the defendant, a terminal railroad company, received a car load of horses from a connecting railroad company, which had transported them in interstate commerce. Such carrier had kept them confined in the car for more than twenty-eight hours without unloading for rest, water, and feeding, in violation of the twenty-eight hour law, and was indicted and fined therefor. The defendant received them for transportation over its line for some 1,300 feet to stockyards, and moved them to

such yards with all speed possible, and there unloaded them for rest, water, and feed. It was held that defendant was not chargeable with violation of the statute, but that, on the contrary, its action aided in giving effect to its object and purpose.

But in *U. S. v. Lehigh Valley R. Co.*, (1911) 184 Fed. 971, it was held that where animals have been confined for the entire statutory period before being delivered to a connecting carrier, it is not necessary that a new period equal to the statutory time must again expire before the connecting carrier can be held guilty of violating the Act; the liability being complete on the connecting carrier's continuing the transportation toward the destination except to transport them to the yards at the junction point to unload them, under the provision that, in estimating the confinement, the time consumed in loading and unloading shall not be considered, but the time during which they have been confined on connecting roads is to be included.

So also in *U. S. v. Northern Pac. Terminal Co.*, (1911) 186 Fed. 947, it was held that where a terminal company's railroad formed a part of a continuous line of interstate transportation over which live stock was transported, and the animals had been confined in the cars without being unloaded for food, water, and rest for a period longer than that prescribed by the twenty-eight hour law before being delivered to the terminal company for transportation to the stockyards for unloading, the terminal company could not relieve itself from liability for continuing such transportation on the ground that it found the cattle so confined at a place where they could not be unloaded except by being taken to the stockyards, nor, except in exceptional cases, because its violation of the law would subserve a humane purpose; the terminal company being under no obligation to accept the cattle from its connecting carrier under such circumstances.

Similarly, in *United States v. Delaware, etc., R. Co.*, (N. D. N. Y. 1915) 220 Fed. 944, it appeared that a car load of horses came to the defendant, after the horses had been confined without rest, food or water for eight and one-half hours in excess of the statutory period of thirty-six hours, to which provision of the law it was subject, and of this fact the defendant had knowledge. After the lapse of two and one-half hours it unloaded the horses at its nearest point for performing this service for rest, food and water. It was conceded that the actual running time of the car from the point at which it was received by the defendant to the nearest unloading point, exclusive of necessary switching movement, was one hour and five minutes. The court held that the defendant was guilty of a wilful though

unintentional violation of the statute. And to the same effect see *U. S. v. Delaware, etc., R. Co.*, (N. D. N. Y. 1913) 206 Fed. 513. See also *U. S. v. Oregon Short Line R. Co.*, 160 Fed. 526.

Likewise, under the former statute, section 4386, it was held that in computing the time of confinement, the period during which the animals were confined by the initial carrier prior to their delivery to the connecting carrier must be included. *U. S. v. Louisville, etc., R. Co.*, (1883) 18 Fed. 480.

It has been held under the former statute, section 4386, that the refusal of the first connecting carrier to receive a shipment of cattle from the first carrier did not relieve the first carrier from liability for failure to comply with the provisions of the statute, when, by reason of such refusal, the cattle were kept on the cars, on its own road, more than twenty-eight hours without being unloaded, fed, and watered; and this was so notwithstanding the terms of the shipping contract relieving it of liability beyond the line of its own road. Its duty did not cease with a tender of the cars to the next carrier. *Texas, etc., R. Co. v. Berchfield*, (1898) 19 Tex. Civ. App. 288, 46 S. W. 900.

**Liability of connecting carrier for delay of terminal company.**—The duty of a connecting carrier is not discharged until it has been imposed upon the carrier next in order, and where a terminal company employed by the connecting carrier to transfer a shipment to a succeeding carrier, fails to unload the stock within the time required by the statute, the connecting carrier is liable for such violation. In such a case the terminal company is a mere agency or instrumentality which the connecting carrier uses to perform its transportation duties. *U. S. v. Union Pac. R. Co.*, (C. C. A. 8th Cir. 1914) 213 Fed. 332.

**Liability of terminal company for delay of connecting carrier.**—In *St. Louis Merchants' Bridge Terminal R. Co. v. United States*, (C. C. A. 7th Cir. 1913) 209 Fed. 600; it appeared that the plaintiff, a terminal railroad company whose line connected with the eastern terminus of a through line in the city of St. Louis, and made the only connection between such terminus and the nearest stockyards where live stock could be unloaded, accepted from such connecting carrier cars of cattle which had already been confined for a longer time than permitted by this act, and moved them with all reasonable dispatch to such yards where they were unloaded. The court held that such acceptance on the part of the terminal carrier did not make it a party to the violation of this Act by the connecting carrier and that its action was a recognition of the

purpose of the statute, the alleviation of the condition of dumb animals in transit, rather than a violation.

**Initial and connecting carrier both in fault.**—A judgment against a connecting carrier for a violation of the statute is not a good defense to an action against the initial carrier who also was delinquent. Where the initial carrier violates the statute, and incurs the penalty thereunder, and the connecting carrier receives the shipment and continues its movement in interstate commerce toward its destination without unloading for rest, food and water, such connecting carrier commits an independent act of offense against the statute. In such case each carrier is liable to an action, not for the same offense, but each for a separate act constituting a violation of the statute, and a verdict and judgment against the one and payment thereof in no way exonerates the other from its liability for its independent act of violation. *U. S. v. New York Cent., etc., R. Co.*, (N. D. N. Y. 1915) 221 Fed. 1000.

**A judgment against an initial carrier for a violation of the statute is not a good defense to an action against the connecting carrier who was also delinquent.** *New York Cent., etc., R. Co. v. U. S.*, (C. C. A. 2d Cir. 1913) 203 Fed. 953.

**Knowledge of initial carrier imputed to connecting carrier.**—In *New York Cent. & H. R. R. Co. v. United States*, (C. C. A. 2d Cir. 1913) 203 Fed. 953, the court said: "Two cars loaded with horses were shipped from Girard, Kan., consigned to shippers' order at the defendant's stockyard in East Buffalo. The routing was via the St. Louis & San Francisco Railroad Company to Kansas City, thence by the Wabash Railroad Company through Missouri, Indiana, Iowa, Michigan, and Canada, to Black Rock, Buffalo, where the cars were received by the defendant to be transported to destination, a distance of seven miles. The Wabash Company did not unload the horses for food, water and rest between Peru, Ind., and Black Rock, a period of 38 hours and 55 minutes. The defendant occupied 3 hours and 35 minutes in transporting the cars to destination in East Buffalo.

"The United States instituted these two actions to recover of the defendant a penalty of \$500 for each car for violation of Act of June 29, 1906, 34 Stat. 607.

"The complaint alleged that the defendant was not prevented from complying with the act by storm or other accidental and unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight, but knowingly and wilfully failed to unload the horses in transit as aforesaid.

"The defendant filed answers, which alleged that it received the cars at Black

Rock from its connecting carrier, the Wabash Railroad Company, without knowing the time the horses had been confined, and transported them within the usual and reasonable time to destination in East Buffalo. . . .

"At the trial a jury was duly waived and the cause submitted to the court. The parties stipulated that the facts stated in the complaint were true; also that the time of confinement of the horses had been extended from 28 to 36 hours, the defendant reserving the right to show that when it received the cars it did not know that the horses had been confined longer than the law allowed; also to prove that, if it had refused to transport the cars, they would have had to go back to Michigan, a trip taking from 15 to 20 hours, before the horses could have been unloaded, because, being carried in bond, they could not be unloaded in Canada; also to prove that the usual time for transporting live stock from Black Rock to the stockyards was from 1½ hours to 5 hours, depending upon circumstances.

"The first question is: Did the defendant act knowingly in the transportation of the cars; that is, did it know when the horses had been last unloaded? Relying, no doubt, upon the proposition that the burden of proof lay upon the government, the defendant gave no evidence at all upon the subject. But we think it was bound to make reasonable inquiry as to this fact. The humane purpose of the law would be frequently frustrated if the government were compelled to prove facts directly and often exclusively within the knowledge of the carrier. When the government had proved that the time had long elapsed within which the horses should have been unloaded, knowledge of that fact was properly imputed by Judge Hazel to the defendant, in the absence of any evidence from it that it had made reasonable inquiry and could not ascertain the fact.

"The next question is: Did the defendant act wilfully in the premises; that is, unnecessarily disregard the provisions and purpose of the law? Obviously it did the best thing for the horses in taking them to the stockyard in East Buffalo. The time it could properly use in so doing would depend upon whether the period of confinement had or had not expired. Knowledge of the fact that it had expired being imputed to the defendant, it was bound to transport them as quickly as possible. *Prima facie* 3 hours and 35 minutes was an unreasonable time to move the cars seven miles. The only testimony the defendant offered upon the subject was the opinion of two freight conductors that, in view of the condition of the belt line in getting ready for grade crossing improvements, the time actually occupied was reasonable. This was entirely insufficient. The facts should have been stated,

so that the court might determine whether the time was reasonable or not."

It is for the jury to say whether a delay in unloading was caused through accident or unavoidable cause, and whether the defendant exercised due diligence and foresight in an endeavor to prevent the delay. *Oregon-Washington R. & Nav. Co. v. United States*, (C. C. A. 9th Cir. 1913) 205 Fed. 337.

**"Other animals"—horses and mules.**—It was held, under section 4386, that the words "other animals" were sufficiently comprehensive to embrace horses and mules. "The statute was not intended to apply only to such animals as are intended for food, to secure the people from consuming diseased animal food, but its object was to prevent cruelty and injury to animals that were shipped long distances upon cars or boats, by requiring that they should be unloaded, watered, fed, and allowed to rest at stated intervals. It is a humane rather than a sanitary regulation." *Chesapeake, etc., R. Co. v. American Exch. Bank*, (1896) 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

**Carrier as an insurer.**—If the pens provided by the carrier are properly equipped, so that the sheep may be properly fed, watered, and rested, he has discharged his full duty, unless it is made to appear that the surrounding conditions were such that the carrier should have anticipated that the sheep would probably be molested, and thus not afforded proper rest. If such is not the law, then the carrier is made an absolute insurer of the safety of the sheep while unloaded for food, rest, and water, regardless of the fact that by the exercise of reasonable diligence he did not know, and could not have discovered, the threatened danger to which the sheep might be exposed. *Beckman v. Southern Pac. Co.*, (1911) 39 Utah 472, 118 Pac. 118.

**Liability to shipper for injuries to stock.**—In *Gilliland v. Southern R. Co.*, (1910) 83 S. C. 26, 67 S. E. 20, 137 A. S. R. 861, 27 L. R. A. (N. S.) 1106, it was held that in the absence of federal decisions on the question, this Act, which is substantially the same as the state statute regulating shipments of stock within the state, must be given the same construction and effect, and the carrier of an interstate shipment be held liable for injuries resulting from its failure to supply proper shelter and protection when stock are unloaded to be fed and watered.

**Equipment of stock pens.**—This Act does not require a carrier to maintain any particular kind of equipment of its stock pens, permanent or otherwise, except in so far as to render them suitable for the humane purpose of properly feeding, watering, and resting the particular shipment of stock unloaded into them. *U. S. v. St. Louis, etc., R. Co.*, (1910) 177 Fed. 205.

**Under the former statute, section 4386,** it was held to be the duty of a railroad company, in carrying on interstate shipment of animals, not only to unload the same within the periods mentioned in the statutes, but to provide facilities reasonably sufficient and suitable for watering and feeding the animals and for allowing them an opportunity for rest. *St. Louis, etc., R. Co. v. Piburn*, (1911) 30 Okla. 262, 120 Pac. 923.

**Negligence of employees no defense.**—It is no defense to an action for "knowingly and wilfully" violating this statute that the defendant made rules requiring its employees to comply with the same, and that its failure to do so was through the negligence of an employee and in violation of its rules. *U. S. v. Atlantic Coast Line R. Co.*, (1909) 173 Fed. 764.

**Due diligence and foresight.**—The measure of due diligence and foresight required by this section is that diligence and foresight which persons of ordinary prudence and care commonly exercise under similar circumstances. And the due diligence and foresight which condition the anticipation and avoidance of the other accidental or unavoidable causes described in this law is that degree of diligence and foresight which reasonably prudent and careful men ordinarily exercise under similar circumstances. *Chicago, B. & Q. R. Co. v. United States*, (C. C. A. 8th Cir. 1912) 194 Fed. 342.

**Authority to request extension of time.**—There is a legal presumption that one to whom an owner of animals has intrusted their possession and control for delivery to a railroad company for shipment, and who actually delivers and ships them, is authorized by the owner to make the request specified in this law, and to do any other usual act relevant to such a transaction. A railroad company is justified in relying upon this presumption, and cannot be held to have violated the law knowingly and wilfully because it confines animals more than twenty-eight and less than thirty-six hours in reliance upon this presumption, without notice or knowledge of any defect in the authority of the agent. *Wabash R. Co. v. U. S.*, (1910) 178 Fed. 5.

**Sufficiency of request.**—(a) A legal request under this Act may be made by the authorized agent of the owner, or by the person in custody of the particular shipment. (b) Such a request may be printed, engraved, or stamped and partly in handwriting. (c) A legal request may be made on or in a railroad form separate and apart from a printed bill of lading or other railroad form than one which contains the request alone. (d) Such a request may be made before the transportation of the shipment commences. (e) Such a request may be made although it is not induced by any unforeseen contingency that arises after the transportation commences. *Wabash R. Co. v. U. S.*,

(1910) 178 Fed. 5; *Atchison, etc., R. Co. v. U. S.*, (1910) 178 Fed. 12; *Missouri, etc., R. Co. v. U. S.*, (1910) 178 Fed. 15; *Mobile, etc., R. Co. v. U. S.*, (C. C. A. 7th Cir. 1913) 209 Fed. 603.

**Request for each shipment.**—To justify confinement for a longer term than twenty-eight hours the shipper must file a written request for each shipment, and may not file a single general request applicable to all future shipments of his cattle. *U. S. v. Pere Marquette R. Co.*, (1909) 171 Fed. 586.

**Under the former statute**, section 4386, R. S., it was held that where a special contract between the shipper and the carrier relieves the carrier of the duty, in the first instance, of feeding and watering at such points as it furnished reasonable facilities to the shipper to do so, in the absence of such facilities at any point the carrier would be liable for any damage resulting from the failure to feed and water. *Ft. Worth, etc., R. Co. v. Daggett*, (1894) 87 Tex. 322, 28 S. W. 525.

It was also held under this statute that it was the duty of the railroad company to unload and feed and water stock, without a request from the person in charge of it, if he failed to do it. *Brockway v. American Exp. Co.*, (1897) 168 Mass. 257, 47 N. E. 87.

**Waiver of statutory provisions by control or otherwise.**—The statute imposes upon the carrier the primary duty of seeing that the stock is not confined in cars longer than the prescribed period, for the command of the statute is, "Thou shalt not" fail to do the thing required; and, while the carrier may arrange with the shipper or the person in charge for unloading, the company cannot thereby shift the burden, and the responsibility for unloading in time still rests with it. *Oregon-Washington R. & Nav. Co. v. United States*, (C. C. A. 9th Cir. 1913) 205 Fed. 337.

This law positively prohibits the confinement of animals for a period longer than twenty-eight consecutive hours, save only that by special agreement and written request of the owner the time of confinement may be extended to thirty-six hours. The extreme limit, therefore, to which the wishes of the owner become relevant, is thirty-six hours. An agreement, therefore, for a confinement beyond that time, is a contract to do that which the law says may not be done, and is void and nonenforceable as a defense to the action for damages to animals transported. *Webster v. Union Pac. R. Co.*, (D. C. Colo. 1912) 200 Fed. 597.

The Twenty-eight Hour Act is for the prevention of cruelty to animals, and not primarily for the benefit of the owners but is restrictive of their rights, and cannot be waived, except in the manner and upon the contingencies provided in the act. *U. S. v. Delaware, etc., R. Co.*,

(N. D. N. Y. 1915) 220 Fed. 944; *Cleveland, etc., R. Co. v. Hayes*, (1913) 151 Ind. 87, 102 N. E. 34, 103 N. E. 839; (1914) 104 N. E. 581.

A carrier cannot by contract relieve itself of the statutory duty to care for animals in its possession. *U. S. v. Philadelphia, etc., R. Co.*, (E. D. Pa. 1915) 223 Fed. 206.

**Estimating confinement.**—"In estimating the confinement, so as to determine whether or not the statute has been violated, we always come backwards from the unloading in question, and ascertain when the cattle were last before unloaded for rest, food, and water, or shipped, and when reloaded. Commencing our reckoning of time at that point, we go forward to the time when next unloaded for rest, food, and water, and if we find that the cattle were confined for more than twenty-eight hours, or more than thirty-six hours in case of consent by the owner or person in charge, and also find that unloading was not prevented by storm, or by other accidental or unavoidable causes, we have a completed violation of the law." *U. S. v. New York Cent., etc., R. Co.*, (N. D. N. Y. 1915) 221 Fed. 1000.

The time consumed in loading and unloading stock is not to be considered as a part of their confinement in the cars permitted by the Twenty-eight Hour Law. *U. S. v. Northern Pac. Terminal Co.*, (1911) 186 Fed. 947.

**Compliance with statute as defense to delay in delivery.**—Where the person in charge refused to sign the thirty-six-hour release, and cattle were shipped from Arkansas through Missouri to East St. Louis, and upon arrival at a point in Arkansas it became apparent that the shipment could not be carried to destination within the prescribed twenty-eight hours, and it was unlawful to unload such cattle in Missouri, the carrier was not negligent in unloading the cattle at the Arkansas point reached, resulting in a delay in their delivery at destination, where the only train which they could have been shipped on, which passed through the place of feeding after a lapse of the five-hour period, was a slow train which reached destination at the same time as did the faster train upon which they were carried. *St. Louis, etc., R. Co. v. Davenport*, (1910) 97 Ark. 82, 133 S. W. 186.

"Stopping a shipment of cattle to feed them in compliance with the Interstate Commerce Act excuses delay in delivery caused thereby; but, if negligent delay causes the unloading of the cattle to comply with said law, then it would not excuse." *Lay v. Chicago, etc., R. Co.*, (1911) 157 Mo. App. 467, 138 S. W. 884.

A delay caused solely by defendant's compliance with the provisions of the Twenty-eight Hour Law cannot be actionable, since it should be regarded as the result of the performance of a duty

imposed by law. *Hickey v. Chicago, etc., R. Co.*, (1913) 174 Mo. App. 408, 160 S. W. 24.

In an action by a shipper against an interstate carrier for damages for delay in a shipment of cattle the defendant has the right to have the jury instructed that in determining the matter of delay complained of the period required by this section for the purpose of feeding and watering and resting the cattle in pens should not be included. *Kansas City, etc., R. Co. v. Moore*, (Tex. 1912) 149 S. W. 302.

**Violation of statute as negligence.**—In an action for loss and shrinkage of live stock shipped over the defendant's railroad, evidence of a violation of this statute, and that it contributed to the injury complained of, constitutes evidence of negligence, and is sufficient to entitle the plaintiff to go to the jury on the question of negligence. *Chicago, etc., R. Co. v. Simpson*, (Wyo. 1915) 151 Pac. 902.

In an action by a shipper of animals against a carrier for damages for injuries to the animals during transit a showing that the defendant violated this section and that the injuries resulted therefrom amounts to a showing of negligence *per se* and makes the carrier liable. *Atchison, etc., R. Co. v. Hill*, (Tex. 1914) 171 S. W. 1028.

**"Contingencies hereinbefore stated."**—The phrase "contingencies hereinbefore stated" as used in this section includes both the case where the carrier was prevented from unloading by storm or other accidental or unavoidable causes and the contingency of the owner's having filed a written request extending the time of confinement to thirty-six hours. *U. S. v. Pere Marquette R. Co.*, (1909) 171 Fed. 586.

**Construction of second proviso.**—The meaning of the second proviso of this section regarding sheep is that if the twenty-eight-hour limit expires at night, the transit may be continued to a suitable place for unloading, without the consent of the owner or custodian, except that in no case shall the thirty-six-hour limit be exceeded. *Southern Pac. Co. v. U. S.*, (1909) 171 Fed. 360; *U. S. v. Atchison, etc., R. Co.*, (1911) 185 Fed. 105.

The words "in the nighttime," with reference to the unloading of sheep, mean the period between the termination of daytime on the evening of one day and the earliest dawn of the next morning. *U. S. v. Southern Pac. Co.*, (1907) 157 Fed. 459.

The meaning of this express provision is that where the twenty-eight-hour period expires in the nighttime, the carrier is authorized to continue the confinement of sheep for thirty-six hours, even without the shipper's consent, but not longer than thirty-six hours as declared by the proviso. Where the thirty-six-hour period will expire in the nighttime, the carrier should unload during the preceding day. *U. S. v. Atchison, etc., R. Co.*, (1908) 166 Fed. 160.

**Termination of liability.**—The carrier's liability terminates on complete delivery of the animals being made to the consignee. But what constitutes a complete delivery depends on the particular facts in each case. For example, it has been held that a delivery of cars containing animals on the consignees' private siding was not a complete delivery where they were not placed opposite the consignees' runway, which afforded the only means for loading and unloading live stock to and from cars on the siding. *U. S. v. Philadelphia, etc., R. Co.*, (E. D. Pa. 1915) 223 Fed. 202.

**"Storm or other accidental or unavoidable cause."**—The statute renders the carrier excusable for confining the stock in cars more than the prescribed period of time, if prevented from unloading "by storm or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." *Oregon-Washington R. & Nav. Co. v. United States*, (C. C. A. 9th Cir. 1913) 205 Fed. 337.

An "accidental or unavoidable cause" which cannot be avoided by the exercise of due diligence and foresight within the meaning of this law is a cause which reasonably prudent and careful men, under like circumstances, do not and would not ordinarily anticipate, and the effects of which under similar circumstances they do not and would not ordinarily avoid. *U. S. v. Southern Pac. Co.*, (1907) 157 Fed. 459; *Chicago, B. & Q. R. Co. v. United States*, (C. C. A. 8th Cir. 1912) 194 Fed. 342.

In *Chicago, B. & Q. R. Co. v. United States*, (C. C. A. 8th Cir. 1912) 194 Fed. 342, it appeared that a train load of seventeen cars of sheep started at five o'clock in the morning to make a run which ordinarily requires eleven hours. The train and its drawbars were inspected and found in good condition that morning. In order to unload the sheep in time, it was necessary to make the run in twelve hours. The train was delayed about two hours by the breaking of a drawbar and chain of a train which met and passed it, by the slipping of a knuckle in the coupler which separated it into two parts, and by the pulling out of two drawbars in its cars, which made it necessary to draw the two parts of the train upon a side track and recouple them. Upon its arrival the company dragged the sheep out of two of the cars in the dark within the thirty-six hours, but left fifteen of the cars unloaded until the next morning after the expiration of the thirty-six hours. It was held there was no substantial evidence that the company wilfully violated the law, and there was substantial evidence that it was prevented from unloading the sheep within the thirty-six hours by accidental or unavoidable causes which could not be

anticipated or avoided by the exercise of due diligence and foresight.

But conditions reasonably to be anticipated from past experience and breakdowns en route, resulting from negligent operation or omission to furnish properly equipped and inspected engines and cars, are not accidental or unavoidable causes which cannot be anticipated and avoided by due diligence and foresight. *U. S. v. Atchison, etc., R. Co.*, (1908) 166 Fed. 180.

Under the former statute, section 4386, R. S., it was held, in an action against a transportation company for keeping live stock confined on the cars for a longer period than twenty-eight consecutive hours, without unloading for rest, food, and water, that it was no defense that such confinement had been caused by an accident to the train, due to negligence. The court said: "This and the following sections must be construed together, and the carrier may be said to have 'knowingly and willingly' failed to comply with the requirements of the law, if the accident was one which might have been avoided by due care; the carrier must be taken to have contemplated the reasonable consequences of his own negligence. To avail himself of the excuses of 'storm or other accidental causes,' it must appear that the consequences could not have been avoided or mitigated by the exercise of diligence. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, because 'his own negligence is the last link in the chain of cause and effect, and in law the proximate cause' of failure to comply with the law." *Newport News, etc., Val. Co. v. U. S.*, (C. C. A. 1894) 61 Fed. 488; *Chesapeake, etc., R. Co. v. American Exch. Bank*, (1896) 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

So where horses were shipped from St. Louis to Augusta and had been on board the train about twenty-six hours when the train arrived at ashville, the fact that the stockyards of the company were on fire when the train reached Nashville was no excuse for attaching the cars to another train which proceeded through to Chattanooga, resulting in keeping the stock on board the cars for over forty hours without rest or food or water. It was the duty of the railroad company (under the contract with the shipper, that the shipper's employee in charge should unload, feed, and water the stock) to afford the person in charge, and having care of the animals, an opportunity to unload the same upon their arrival at Nashville, or at some other place, within the period of twenty-eight hours. *Nashville, etc., R. Co. v. Heggie*, (1890) 86 Ga. 210, 12 S. E. 363, 22 A. S. R. 453.

**Owner's right of action.**—Under the former statute it was held that the provisions of section 4386, R. S., and follow-

ing sections, imposed a duty on the railroad company for the benefit of the owners, and that failure to perform such duty constituted actionable negligence at the suit of an owner who was injured thereby. The court said: "Nor does the fact that a penalty is imposed for breach of such duty take the place of a civil action based on the negligence, unless such penalty be given to the injured party in satisfaction for the injury." *Burns v. Chicago, etc., R. Co.*, (1899) 104 Wis. 646, 80 N. W. 927; *Nashville, etc., R. Co. v. Heggie*, (1890) 86 Ga. 210, 12 S. E. 363, 22 A. S. R. 453.

It is a well-settled principle of law that one state cannot enforce the penal laws of another state or country, but, in order to come within the scope of that principle, the action or suit must be in the nature of a proceeding in favor of the state whose laws have been violated. One of the objects of this section was to prevent loss to the owners of live stock which would result from its being carried long distances by common carriers without food, water, and rest; and an owner of live stock has the right to recover from the carrier the damages caused, if any, by its violation of the statute, and, having such right, he could bring his action in the state court. *Chesapeake, etc., R. Co. v. American Exch. Bank*, (1896) 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

Though in an action brought in the state court to recover damages for the death of two horses and injury to several others while being transported over defendant's railroad, the Supreme Court of the state, in reply to the contention of the plaintiff that by section 4386 R. S. a definite rule for the transportation of animals is created, said: "With this rule and its enforcement the courts of the state are no way concerned." *Illinois Cent. R. Co. v. Peterson*, (1891) 68 Miss. 454, 10 So. 43, 14 L. R. A. 550.

In an action by the owner of stock for damages resulting from a failure of the carrier to comply with the provisions of this section, the petition, in order to state a liability of the defendant, should show that the case is not within the statutory exceptions (1) that the delay was caused by the storm or other accidental causes, or (2) that the cars were such as to allow proper feeding, watering, space, and opportunity to rest. *Hale v. Missouri Pac. R. Co.*, (1893) 36 Neb. 266, 54 N. W. 517.

In an action brought to recover damages resulting from the delay in transportation of a carload of cattle, it appeared that the car was carried as part of a special train, and was taken out at an intermediate station in order that the cattle might be unloaded and rested for five hours, as required by this section. The special train proceeded on its way, and the car was forwarded by the first regular freight train about seven hours after the

expiration of the five hours. This train left at the regular schedule time, and no delay is shown except such as thus occurred. The mere detention of the car while awaiting the arrival of the first train by which the cattle, after being rested, could be forwarded, was not unreasonable, as the company was not bound

to hold the special train to await the expiration of the five hours and thus detain other freight contained in other cars, nor could the company be required to furnish special transportation of only one carload of cattle. *Galveston, etc., R. Co. v. Warnken*, (1896) 12 Tex. Civ. App. 646, 35 S. W. 72.

**SEC. 2. [Feeding animals at expense of owner — lien on animals for costs — owner may furnish food.]** That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires. [34 Stat. L. 608.]

R. S. sec. 4387 contained provisions similar to those of the text as to feeding and watering, and a lien on the animals for the supplies furnished them. R. S. sec. 4390 as amended by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 251, provided for the enforcement of the lien in certain District Courts. Both sections were repealed by section 5 of this Act *infra*, p. 390.

**Contracts relieving carrier of statutory duty.**— Under the statute, the carrier cannot, by any contract with the shipper, relieve itself of the prescribed duty of feeding and watering the animals, if their owner or custodian fails to do so. It cannot by contract with the shipper exempt itself from liability for its own negligence; and its failure to perform the duty imposed upon it by the statute is negligence *per se*. *Southern R. Co. v. Proctor*, (1911) 3 Ala. App. 413, 57 So. 513.

**Effect of statute on contracts limiting liability of carrier.**— A special contract of carriage, whereby the shipper is to load, unload, reload, feed, water, tend, and care for the stock at his own expense and risk during the entire transportation, does not contravene provisions of this Act, since the Act in terms provides that the owner of the animals shall primarily be charged with feeding and watering them. *Webster v. Union Pac. R. Co.*, (D. C. Colo. 1912) 200 Fed. 597. In this case, which was an action to recover for damage to certain sheep shipped on the defendant's railroad wherein the defendant set up various defenses, the court had this to say of the fourth defense: "The fourth defense sets up a special reduced rate of freight and a special contract of carriage, whereby the

plaintiff shipper was to load, unload, reload, feed, water, tend, and care for the sheep at his own expense and risk during the entire transportation, and further alleges that any injuries suffered by the sheep were due to the carelessness of the plaintiff in and about such matters, and notwithstanding that proper facilities were provided by the defendant. It is not perceived why such agreement would not be valid as between the shipper and the railroad company. Its terms do not contravene the provisions of Act June 29, 1906, ch. 3594, 34 Stat. 607, known as the 'Twenty-eight Hour Law,' since that act in terms provides that the owner of the animals shall primarily be charged with feeding and watering them. While such a provision would not afford any defense to a prosecution by the government for failure of the railroad company, upon the owner's default, it is, as between the owner and the railroad, a sufficient defense, since it is tantamount to an allegation that the railroad company was not itself negligent, but that the negligence was that of the owner of the animals in and about a matter as to which such owner had contracted to assume the sole responsibility."



**SEC. 3. [Penalty for noncompliance — exception.]** That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: *Provided*, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply. [34 Stat. L. 608.]

Similar provisions were contained in R. S. sec. 4388, repealed by section 5 of this Act *infra*, p. 390.

**Knowingly and wilfully.**—The words “knowingly and wilfully,” as employed in the Act, have been many times construed and their meaning determined. “Knowingly” signifies “with a knowledge of the facts which, taken together, constitute the failure to comply with the statute”; and “wilfully” means “purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.” *Oregon—Washington R., etc., Co. v. U. S.*, (C. C. A. 9th Cir. 1913) 205 Fed. 337. See also a companion case between the same parties in 205 Fed. 341, and *Chicago, etc., R. Co. v. U. S.*, (C. C. A. 8th Cir. 1912) 194 Fed. 342; (1912) 195 Fed. 241; *U. S. v. Lehigh Valley R. Co.*, (C. C. A. 3d Cir. 1913) 204 Fed. 705; *U. S. v. Chicago, etc., R. Co.*, (N. D. Ill. 1913) 211 Fed. 770.

The terms “knowingly and wilfully” describe an essential element of the offense on account of which the penalties are prescribed, without proof of which they cannot be recovered. Thus where a stockyards company, which, without actual knowledge that cattle have been confined nearly twenty-eight hours, and without making any effort to find out whether they have been or not, receives them from a common carrier, and with diligence hauls them a few miles to its stockyards, and there unloads them for rest, food, and water, when these stockyards are nearer to the place of the receipt of the cattle than any other place where they could be unloaded, fed, and watered, it is not guilty of “knowingly and wilfully” confining the cattle in violation of the Twenty-eight Hour Law. *St. Joseph Stockyards Co. v. U. S.*, (1911) 187 Fed. 105.

Where defendant, a terminal railroad company, received cattle from a connecting carrier for the sole purpose of transporting them to certain stockyards to feed, water, and rest them, and then to return them to the carrier from which they had been received, not knowing that such carrier had already confined them in the cars exceeding the time allowed by this Act, the terminal carrier, having used due dili-

gence in carrying the cattle to the stockyards and unloading them, was not guilty of itself “knowingly and wilfully” violating such Act; such words being intended to mean either an intentional violation of the statute or an indifferent disregard of its requirements. *U. S. v. Stockyards Terminal R. Co.*, (1910) 178 Fed. 19, *affirming* (1909) 172 Fed. 452.

A carrier that delivers a shipment of cattle to a connecting carrier in time, according to the usual course of transportation, for their carriage to and unloading within the twenty-eight hours at pens suitably equipped for unloading, feeding, watering, and resting them, either at their destination or on their way, without notice or knowledge that they must be or will be delayed on their arrival beyond that time, cannot be held to have violated this Act of Congress knowingly and wilfully. *Missouri, etc., R. Co. v. U. S.*, (1910) 178 Fed. 15.

“Wilfully” as here used means purposely or obstinately and is designed to describe the attitude of a carrier, who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. *St. Louis Merchants’ Bridge Terminal R. Co. v. U. S.*, (C. C. A. 7th Cir. 1913) 209 Fed. 600; *U. S. v. Chicago Junction R. Co.*, (N. D. Ill. 1913) 211 Fed. 724.

“The act of Congress requires the railroad to perform a duty which primarily is imposed on the owner to feed his own stock. Properly, therefore, failure to obey is not made punitive unless the failure is with knowledge and wilful. In a word, it must reach the grade of disobedience. Carriers are, of course, bound to know the law. Knowing it, they know the time of confinement on the connecting line must be computed. Means of knowledge within reach must be resorted to. A refusal to avail themselves of such means would be evidence of that attitude of mind which is conveyed by the word wilful. Mere negligence is clearly, however, at least not necessarily inclusive of wilfulness. There is in common speech the phrase ‘wilful negligence.’ Whether wilfulness or mere negligence is a question of fact.” *U. S.*

*v. Philadelphia, etc., R. Co.*, (E. D. Pa. 1915) 223 Fed. 213. See also *U. S. v. Philadelphia, etc., R. Co.*, (E. D. Pa. 1915) 223 Fed. 211.

"The obligation which is imposed upon them [a railroad company] by the act of Congress is imposed upon them as a carrier, and only as long as the animals are in the course of transmission over the railroad. Moreover, what the railroad is required to do is required of it because of the default of the owner of the animals from whom by law the railroad can recoup the expenses to which it has been subjected. All of which the railroad company is called upon to do is therefore done during the carriage, and cannot be done after the carriage has ended. The motive behind this legislation is in one of its phases at least what may be characterized as humanitarian. The element of cruelty enters into the act of omission for which the penalty is imposed. The act of the carrier must have been 'knowing and wilful.'" *U. S. v. Philadelphia, etc., R. Co.*, (E. D. Pa. 1915) 223 Fed. 207.

No *criminal or evil intent* is imported by the terms "knowingly and wilfully." The words mean that the acts were done intentionally and purposely. *U. S. v. Sioux City Stock Yards Co.*, (1908) 162 Fed. 556; *New York Cent., etc., R. Co. v. U. S.*, (C. C. A. 1908) 165 Fed. 833; *U. S. v. Atchison, etc., R. Co.*, (1908) 166 Fed. 160; *U. S. v. Union Pac. R. Co.*, (C. C. A. 1909) 169 Fed. 65; *St. Louis, etc., R. Co. v. U. S.*, (C. C. A. 1909) 169 Fed. 69.

**Knowledge of agents.**—The knowledge of a railroad company's agents and servants that animals are being transported in violation of the provisions of this Act is knowledge of the company, and renders the company liable to the penalty provided by this section. *Montana Cent. R. Co. v. U. S.*, (1908) 164 Fed. 400.

**Single offense—number of cattle.**—In an action against a railroad company to recover penalties incurred under the former statute, sections 4386 to 4390, the confinement of the entire number of animals for a longer period than twenty-eight consecutive hours, without unloading for rest, water, and feeding, was held to be a single offense, for which the defendants were liable to the penalty. The unlawful confinement of each animal could not be held to constitute a separate offense, and the penalty be multiplied by the whole number of animals carried. The statute fixed the penalty at "not less than one hundred nor more than five hundred dollars." Within these limits the amount of the penalty was to be determined by the court, after verdict for the plaintiff. *U. S. v. Boston, etc., R. Co.*, (1883) 15 Fed. 209.

**Number of cars.**—And where the cattle were shipped in a number of cars, but the cars constituted one train, and it appeared that all the cattle were shipped by the same consignor to the same con-

signee at the same time, it was manifest that the shipment of cattle was one shipment, and a failure of the carrier to comply with the provisions of section 4386 was a single offense. The unlawful confinement of each carload of animals could not be held to constitute a separate offense, and thus the penalty be multiplied by the whole number of carloads shipped. The construction of a statute so highly penal, the court held, must be strict, and nothing can be imported by construction which is not within its spirit and its letter. *U. S. v. St. Louis, etc., R. Co.*, (1901) 107 Fed. 870.

**Failure to furnish water in patent cars.**—Where cattle were transported in patent cattle cars, equipped with troughs affording an opportunity to water them without unloading, but the cattle were kept in the cars for a period longer than that authorized by statute, without water being introduced in the troughs, for at least a part of the cattle, the carrier was held to be liable for the penalty provided by the Twenty-eight Hour Law. *U. S. v. New York Cent., etc., R. Co.*, (1911) 186 Fed. 541.

**Sufficiency of evidence.**—The greater weight of the evidence is sufficient to sustain an action by the United States for a violation of the Twenty-eight Hour Law, and it is not required to establish its case by proof beyond a reasonable doubt. *Atchison, etc., R. Co. v. U. S.*, (1910) 178 Fed. 12; *Missouri, etc., R. Co. v. U. S.*, (1910) 178 Fed. 15.

**Penalty.**—The number of the penalties recoverable under this Act is not measured by the number of shipments on the same train, nor is the train the unit of offense; but where the same train contains live stock loaded at different periods, one penalty accrues when the period of lawful confinement for the cattle first loaded expires, and other separate and distinct penalties accrue as the time for the lawful confinement of the cattle loaded at later periods successively expires. *Baltimore, etc., R. Co. v. U. S.*, (1911) 220 U. S. 94, 31 S. Ct. 368, 55 U. S. (L. ed.) 384, *modifying and affirming* (1908) 159 Fed. 33, 86 C. C. A. 223; *U. S. v. Southern Pac. Co.*, (1907) 157 Fed. 459; *New York Cent., etc., R. Co. v. U. S.*, (1908) 165 Fed. 833; *U. S. v. New York Cent., etc., R. Co.*, (C. C. A. 1909) 168 Fed. 699; *U. S. v. Atchison, etc., R. Co.*, (1908) 166 Fed. 160; *U. S. v. Oregon R., etc., Co.*, (1908) 163 Fed. 642; *Southern Pac. Co. v. U. S.*, (1909) 171 Fed. 360.

But one penalty may be recovered against a carrier violating the provisions of the Act where the time for the required unloading of two shipments loaded at different times coincides, because one shipment was forwarded under the thirty-six-hour rule, and the other was made eight hours later, under the twenty-eight hour rule, from a different station. *Baltimore, etc., R. Co. v. U. S.*, (1911) 220 U. S. 94, 31 S. Ct. 368, 55 U. S. (L. ed.) 384.

So also there is but one violation of the penalty where cattle cars, though loaded at different points, are consolidated into one train and are subsequently delivered to the connecting carrier at the same time, the consignors and consignees being the same, and the destination of the animals the same. *U. S. v. New York Cent. & H. R. R. Co.*, (W. D. N. Y. 1911) 191 Fed. 938.

**Fixing amount of penalty.**—Where there has been a verdict in favor of the government the duty of fixing the amount of the penalty devolves upon the court. *U. S. v. Southern Pac. Co.*, (1908) 162 Fed. 412; *Atchison, etc., R. Co. v. U. S.*, (1910) 178 Fed. 12; *Missouri, etc., R. Co. v. U. S.*, (1910) 178 Fed. 15.

**Jurisdictional amount of penalties.**—The aggregate sum of the possible penalties sued for in several actions brought by the United States against a carrier under this Act, and consolidated, is the amount in dispute for the purpose of sustaining the appellate jurisdiction of the federal Supreme Court. *Baltimore, etc., R. Co. v. U. S.*, (1911) 220 U. S. 94, 31 S. Ct. 368, 55 U. S. (L. ed.) 384.

**Effect of proviso.**—The statute provides that cattle shall not be confined continuously for more than thirty-six hours unless they are carried in cars in which they can and do have proper food and water and opportunity for rest. It will be noticed that it is optional with the carrier either to unload the cattle for rest, food, and water, or to give them proper food, water, and rest or opportunity for rest while in transit without unloading. Congress primarily intended that cattle should be unloaded every twenty-eight or thirty-six hours; but if the cars are properly equipped and suitable for food and rest, then unloading is not required. When, therefore, the cars are not unloaded, all the animals contained therein must have sufficient space for lying down at the same time. The probabilities are that they will not all lie at the same time, but nevertheless opportunity must be given them to do so. *U. S. v. New York Cent., etc., R. Co.*, (W. D. N. Y. 1911) 191 Fed. 938, *followed* in *U. S. v. Erie R. Co.*, (W. D. N. Y. 1911) 191 Fed. 941.

In *Erie R. Co. v. U. S.*, (C. C. A. 2d Cir. 1912) 200 Fed. 406, the question in issue was whether the circumstance that all the cattle in a car could not obtain rest by lying down at the same time would prevent the railroad from availing itself of the proviso in this section, when the car was so large that if the movements of the cattle were regulated in some way, all of them might secure proper opportunity to rest at one time or another. The court said: "It seems to us that it is the object of the statute to secure to every

animal in the shipment proper space and opportunity to rest. Not only is cruelty to a single one 'cruelty to animals,' but the landing of a single one in a condition bad for slaughtering exposes the persons who may eat the meat from that one carcass to a risk which might not exist if this statute were strictly conformed to. Every animal in this shipment might have proper opportunity to rest if they all agreed to take turns in occupying space. But such agreement could not be brought about, and, for aught that any one can tell, two or three or four cattle of this shipment may have been deprived of the opportunity to rest, even for the eight hours out of every twenty-four which is the lowest period of rest contended for by the defendant."

Where, in the shipment of cattle from Chicago to New York, one of the cars, thirty-six feet long, contained twenty-one bulls, and in a number of other cars from eighteen to nineteen large cattle were carried, it was held that the cars were too heavily loaded, it appearing by uncontradicted proof that cattle under transportation should have at least two and one-half feet of space for each animal. *U. S. v. New York Cent., etc., R. Co.*, (1911) 186 Fed. 541.

**Burden of bringing case within proviso.**—It is not indispensable to a recovery of a penalty under this statute that the government should negative the excuse embodied in the proviso of this section. That excuse is a separate topic, a defense, and the burden is on the defendant to establish it. It is that the animals can and do have proper food, water, space, and opportunity to rest in the cars which transport them. The facts that their owner or caretaker, who accompanied them, agreed to care for, feed, and water them on their way, and that food and water with which he might have performed his agreement were easily accessible to him, are not sufficient to establish this excuse, where the animals are knowingly and wilfully confined more than twenty-eight hours and they do not actually receive proper food, or water, or space and opportunity to rest. *Chicago, etc., R. Co. v. U. S.*, (C. C. A. 8th Cir. 1912) 195 Fed. 241.

*Under the former statute, section 4388, R. S.*, it was held that the provisions of this section, that the requirements as to the unloading of stock shall not apply when animals are carried in cars in which they can have proper food, water, space, and opportunity to rest, did not operate as immunity to the common carrier in failing to unload animals which should be unloaded for illness or other sufficient cause. *Regan v. Adams Exp. Co.*, (1897) 49 La. Ann. 1579, 22 So. 835.

**SEC. 4. [Prosecutions.]** That the penalty created by the preceding sections shall be recovered by civil action in the name of the United States

in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this Act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means. [34 Stat. L. 608.]

Similar provisions were contained in R. S. sec. 4389 repealed by section 5 of this Act given below.

**Nature of proceeding.**—So far as the ordinary rules of pleading and proof are concerned a suit under this statute is to be regarded as a civil proceeding. *U. S. v. Southern Pac. R. Co.*, (1907) 157 Fed. 459; *U. S. v. Southern Pac. R. Co.*, (1908) 162 Fed. 412, *affirmed* (1909) 171 Fed. 364; *Montana Cent. R. Co. v. U. S.*, (1908) 164 Fed. 400; *New York Cent., etc., R. Co. v. U. S.*, (C. C. A. 1908) 165 Fed. 837; *U. S. v. Atlantic Coast Line R. Co.*, (1909) 173 Fed. 787. *Contra*, *U. S. v. Louisville, etc., R. Co.*, (1907) 157 Fed. 979.

The proceeding for a violation of the Act being of a civil nature, the government is bound to support its case by only a preponderance of evidence. *U. S. v. Southern Pac. Co.*, (1907) 157 Fed. 459; *New York Cent., etc., R. Co. v. U. S.*, (C. C. A. 1908) 165 Fed. 837. And for the same reason writ of error lies at the instance of the government. *U. S. v. Baltimore, etc., R. Co.*, (1908) 159 Fed. 33, 86 C. C. A. 223; *Montana Cent. R. Co. v. U. S.*, (C. C. A. 1908) 164 Fed. 400; *U. S. v. New York Cent., etc., R. Co.*, (C. C. A. 1909) 168 Fed. 699.

**Venue.**—Neither section 2 of article 3 of the Constitution nor the Sixth Amend-

ment thereto operates to require that an action to recover a penalty incurred out of the limits of a state under this Act be brought or tried in the district wherein the violation occurs; and such an action lawfully may be brought and tried in the district wherein the defendant resides or carries on business, as is provided in the above section. *St. Louis, etc., R. Co. v. U. S.*, (C. C. A. 1909) 169 Fed. 69; *Southern Pac. Co. v. U. S.*, (1909) 171 Fed. 364.

**Allegations of declaration or complaint and proof thereof.**—An objection that the declaration in an action to recover the penalty prescribed by the statute does not discriminate clearly as to whether the defendant was "lessee" of the road upon which the violation of the statute took place is unavailing after verdict, where the declaration follows the language of the Act. *New York Cent., etc., R. Co. v. U. S.*, (C. C. A. 1908) 165 Fed. 836.

The substitution for the word "confine" named in the statute, of other words having the same effect is no ground of objection, especially after verdict. *New York, etc., R. Co. v. U. S.*, (C. C. A. 1908) 165 Fed. 836.

**SEC. 5. [Repeals.]** That sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the Revised Statutes of the United States be, and the same are hereby, repealed. [34 Stat. L. 608.]

For R. S. sec. 4386 see the notes to section 1 of this Act, *supra*, p. 378. For R. S. secs. 4387, 4390 see the notes to section 2 of this Act, *supra*, p. 386. For R. S. sec. 4388 see the notes to section 3 of this Act, *supra*, p. 387. For R. S. sec. 4389 see the notes to section 4 of this Act, *supra*, this page.

### III. QUARANTINE DISTRICTS.

**An Act To enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes.**

[Act of March 3, 1905, ch. 1496, 33 Stat. L. 1264.]

[SEC. 1.] [Cattle quarantine — establishment of districts.] That the Secretary of Agriculture is authorized and directed to quarantine any State or Territory or the District of Columbia, or any portion of any State

or Territory or the District of Columbia, when he shall determine the fact that cattle or other live stock in such State or Territory or District of Columbia are affected with any contagious, infectious, or communicable disease; and the Secretary of Agriculture is directed to give written or printed notice of the establishment of quarantine to the proper officers of railroad, steamboat, or other transportation companies doing business in or through any quarantined State or Territory or the District of Columbia, and to publish in such newspapers in the quarantined State or Territory or the District of Columbia, as the Secretary of Agriculture may select, notice of the establishment of quarantine. [33 Stat. L. 1264.]

This is the first section of the "Live Stock Contagious Diseases Act."

**SEC. 2. [Transportation by carriers or driving out of district prohibited.]** That no railroad company or the owners or masters of any steam or sailing or other vessel or boat shall receive for transportation or transport from any quarantined State or Territory or the District of Columbia, or from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia, any cattle or other live stock, except as hereinafter provided; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or to the master or owner of any boat or vessel, any cattle or other live stock, except as hereinafter provided; nor shall any person, company, or corporation drive on foot, or cause to be driven on foot, or transport in private conveyance or cause to be transported in private conveyance, from a quarantined State or Territory or the District of Columbia, or from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia, any cattle or other live stock, except as hereinafter provided. [33 Stat. L. 1264.]

As to the carriers to which the provisions of this Act are applicable see the Act of June 30, 1914, ch. 131, § 1, *infra*, p. 394.

**Strict construction.**—This statute is penal and must be strictly construed. *U. S. v. Baltimore, etc., R. Co.*, (1911) 222 U. S. 8, 32 S. Ct. 6, 56 U. S. (L. ed.) 68.

**Connecting carriers outside quarantine district.**—The receipt outside of a quarantine district and subsequent transportation by a railroad company of live stock that was received for transportation, and was transported by a previous carrier from a quarantine district in one state into another state, is not an offense under this Act. *U. S. v. Baltimore, etc., R. Co.*, (1911) 222 U. S. 8, 32 S. Ct. 6, 56 U. S. (L. ed.) 68; *St. Louis Merchants' Bridge Terminal R. Co. v. U. S.*, (1911) 188 Fed. 191; *U. S. v. Chicago, etc., R. Co.*, (1910) 181 Fed. 882; *U. S. v. El Paso, etc., R. Co.*, (1910) 178 Fed. 846.

A contrary ruling was made in a case arising in the Circuit Court in the district of South Carolina, wherein it was held that a connecting carrier which received stock outside of the limits of the quarantined state was liable. *U. S. v. Southern R. Co.*, (1911) 187 Fed. 209.

**Knowledge an essential element of offense.**—As the statute is penal and a prosecution thereunder criminal in its nature, the guilty knowledge of the carrier is an indispensable element of the offense, and the burden of proof rests upon the government to establish that fact beyond a reasonable doubt in the mind of the trier of the facts. *U. S. v. Chicago, etc., R. Co.*, (1910) 181 Fed. 882.

But in *St. Louis, etc., R. Co. v. Campbell*, (1915) 116 Ark. 119, 172 S. W. 823, which was a civil suit for damages for loss of cattle, alleged to have been caused by the negligence of the carrier in transporting infected cattle from below the quarantine line, across it, and unloading them at a point above the line, from which the plaintiffs' cattle became infected with fever and died, the court held that it was not necessary to allege or prove that the carrier had notice of such facts as would make it chargeable with knowledge that the cattle were infected.

**Duty imposed on both carrier and shipper.**—In *Wakefield v. Chicago, etc., R. Co.* (Ky. 1907) 104 S. W. 779, it was held

that under this section and a rule of the Secretary of Agriculture forbidding shipment of sheep from a state quarantine for scabies, unless inspected by a government inspector, and requiring a certificate of health to accompany the sheep, the same duty was imposed on the shipper and the carrier as to obtaining a certificate, and if the shipper moved his sheep without a sufficient certificate and the alleged certificate was not signed by an inspector, he violated the Act as well as the carrier, and could not maintain an action for damages suffered by the loss of such paper by the carrier.

**Delegation of legislative power.**—Section 1 of this Act authorizes the Secretary of Agriculture to establish quarantine limits for the transportation of live stock, and section 2 prohibits transportation companies from receiving for transportation or transporting from any quarantined territory in one state to another state "any cattle or other live stock except as hereinafter provided," and section 6 makes a violation of section 2 a misdemeanor. The exception referred to in section 2 is that, in the event the secretary shall deem that public safety permits, he shall estab-

lish rules and regulations under which live stock may be lawfully moved from quarantined territory in one state to another state. It was held that the exception was not to be construed to be as broad as the prohibition, and equivalent to a general prohibition against all shipments accompanied by a general permission of all shipments on compliance with departmental rules, but rather as containing a general prohibition, together with a limited and conditional exception, applicable only to such epidemics determined by the secretary to be of such a character as to justify shipments under particular safeguards; and hence that section 2 was not invalid as attempting to create an offense for violation of the departmental rule. *U. S. v. Louisville, etc., R. Co.*, (1910) 176 Fed. 942.

**Receivers of railroads.**—Receivers of railroads are not affected by this section, but the amendment of March 4, 1913 (see *infra*, p. 24), extending this Act so as to make it apply to any common carrier, is broad enough to include receivers. *U. S. v. Nixon*, (1914) 235 U. S. 231, 35 S. Ct. 49, 59 U. S. (L. ed.) 207.

**SEC. 3. [Regulations for inspections, etc.]** That it shall be the duty of the Secretary of Agriculture, and he is hereby authorized and directed, when the public safety will permit, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment of cattle or other live stock from a quarantined State or Territory or the District of Columbia, and from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia; and the Secretary of Agriculture shall give notice of such rules and regulations in the manner provided in section two of this Act for notice of establishment of quarantine. [*33 Stat. L. 1265.*]

**Regulations.**—Regulations of the Secretary of Agriculture under this section are ineffective to add to the class of railroad companies or to the acts denounced by that statute, and railroad companies that in violation of such regulations receive and transport outside a quarantined district live stock which has been received for transportation, and has been transported by a previous carrier from the quarantined district in one state into another state, are not punishable therefor. *St. Louis Merchants' Bridge Terminal R. Co. v. U. S.*, (1911) 188 Fed. 191.

**Amendment No. 2 of order No. 143 of the regulations of the Agricultural Department, covering shipments of cattle from quarantined territory, only modified, and did not revoke, order No. 143, by revoking regulations 13 and 14 and substituting two new regulations therefor.** *U. S. v. Louisville, etc., R. Co.*, (1910) 176 Fed. 942.

**Must show due publication of notice.**—An indictment charging a railroad company with having transported live stock from a quarantined district into another state, in violation of this Act, which avers that the Secretary of Agriculture gave notice of the establishment of such quarantine to the "proper officers" of defendant, is insufficient, as alleging a mere legal conclusion; nor is the establishment of such quarantine sufficiently alleged by stating that the secretary "duly and legally established" it, but it must further show that he published the notice required by section 1 of the Act, which is prerequisite to a criminal conviction. *U. S. v. El Paso, etc., R. Co.*, (1910) 178 Fed. 846.

**Prospective operation.**—In *U. S. v. Hoover*, (1904) 133 Fed. 950, it was held that this provision affected only rules and regulations made thereafter, and did not have the retroactive effect of giving validity to a prior void order.

**"Make and promulgate."**—The words "make" and "promulgate" as used in this section are not synonymous; the duty to "make" rules and regulations is sufficiently accomplished by writing them and signing them officially, but to "pro-

mulgate" them requires the giving notice thereof to the officers of transportation companies, etc., and their publication in the selected newspapers within the affected district. *U. S. v. Louisville, etc., R. Co.*, (1908) 165 Fed. 936.

**SEC. 4. [Moving cattle from quarantined district — regulations.]** That cattle or other live stock may be moved from a quarantined State or Territory or the District of Columbia, or from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia, under and in compliance with the rules and regulations of the Secretary of Agriculture, made and promulgated in pursuance of the provisions of section three of this Act; but it shall be unlawful to move, or to allow to be moved, any cattle or other live stock from any quarantined State or Territory or the District of Columbia, or from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia, in manner or method or under conditions other than those prescribed by the Secretary of Agriculture. [*33 Stat. L. 1265.*]

**Delegation of legislative power.**—The offense denounced by this section is defined merely by rules and regulations thereafter to be established by the Department of Agriculture, and hence no offense was created by such section, because of the rule that Congress has no right to intrust to the executive the power to declare by a departmental rule or regulation that to be unlawful and to constitute a crime which otherwise would not be so, nor itself to declare a violation of rules or regulations, thereafter to be

promulgated by the executive, a criminal offense. *U. S. v. Louisville, etc., R. Co.*, (1910) 176 Fed. 942.

**Indictment.**—An indictment against a carrier for moving cattle from a quarantined district, contrary to and in violation of the secretary's rules and regulations, failing directly to allege facts showing the promulgation of such rules, or otherwise than that the rules and regulations were "duly and legally made and promulgated," was insufficient. *U. S. v. Louisville, etc., R. Co.*, (1908) 165 Fed. 936.

**SEC. 5. [Punishment for interfering, etc., with employees.]** That every person who forcibly assaults, resists, opposes, prevents, impedes, or interferes with any officer or employee of the Bureau of Animal Industry of the United States Department of Agriculture in the execution of his duties, or on account of the execution of his duties, shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than one month nor more than one year, or by both such fine and imprisonment; and every person who discharges any deadly weapon at any officer or employee of the Bureau of Animal Industry of the United States Department of Agriculture, or uses any dangerous or deadly weapon in resisting him in the execution of his duties, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duties, or on account of the performance of his duties, shall, upon conviction, be imprisoned at hard labor for a term not more than five years or fined not to exceed one thousand dollars. [*33 Stat. L. 1265.*]

This section is in effect superseded by the incorporation of its provisions in the Penal Laws of March 4, 1909, ch. 321, ch. 4, § 62, 35 Stat. L. 1100. See the title **PENAL LAWS**.

**SEC. 6. [Punishment for violations of Act.]** That any person, company, or corporation violating the provisions of sections two or four of this Act shall be guilty of a misdemeanor, and on conviction shall be punished

by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. [33 Stat. L. 1265.]

[SEC. 1.] [To what carriers Act of March 3, 1905, is applicable.]  
 \* \* \* That hereafter all the provisions of the said Act approved March third, nineteen hundred and five, shall apply to any railroad company or other common carrier, whose road or line forms any part of a route over which cattle or other live stock are transported in the course of shipment from any quarantined State or Territory or the District of Columbia, or from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia. [38 Stat. L. 419.]

This is from the Agricultural Appropriation Act of June 30, 1914, ch. 131. A similar provision was contained in the Appropriation Act of March 4, 1913, ch. 145, 37 Stat. L. 831.

For the Act of March 3, 1905, see *supra*, p. 390.

Effect of amendment.—The statute, as thus amended, applies to transportation of live stock over short lines belonging to private individuals or to lumber companies hauling freight for hire; to roads operated by trustees under power contained in a mortgage; and also to the more common case where a railroad is being operated by a receiver acting under judicial appointment. For in so far as he transports passengers and property he

is a common carrier with rights and civil responsibility as such. And there is no reason suggested why a receiver, operating a railroad, should not also be subject to the penal provisions of a statute prohibiting any common carrier from transporting live stock by rail from a quarantine district into another state. U. S. v. Nixon, (1914) 235 U. S. 231, 35 S. Ct. 49, 59 U. S. (L. ed.) 207.

#### IV. INSPECTION OF ANIMALS, CARCASSES, ETC., INTENDED FOR EXPORT OR SUBJECTS OF INTERSTATE COMMERCE.

SEC. 10. [Inspection of animals intended for export — disinfection of vessels.] \* \* \* And the Secretary of Agriculture may cause inspection to be made of all animals described in this act intended for exportation, and provide for the disinfection of all vessels engaged in the transportation thereof, and of all barges or other vessels used in the conveyance of such animals intended for export to the ocean steamer or other vessels, and of all attendants and their clothing, and of all head-ropes and other appliances used in such exportation, by such orders and regulations as he may prescribe; and if, upon such inspection, any such animals shall be adjudged, under the regulations of the Secretary of Agriculture, to be infected or to have been exposed to infection so as to be dangerous to other animals, they shall not be allowed to be placed upon any vessel for exportation: the expense of all the inspection and disinfection provided for in this section to be borne by the owners of the vessels on which such animals are exported. [26 Stat. L. 417.]

This is the latter part of section 10 of the Act of Aug. 30, 1890, ch. 839. The first part of this section relating to the inspection of all imported animals is given *supra*, p. 375.

The provisions of the text are to some extent superseded by those of the Act of March 4, 1907, ch. 2907, § 1, *infra*, p. 397.



**An Act to provide for the inspection of live cattle, hogs, and the carcasses and products thereof which are the subjects of interstate commerce, and for other purposes.**

[Act of March 3, 1891, ch. 555, 26 Stat. L. 1089.]

**SEC. 2. [Cattle whose meat is to be exported — clearance of vessels.]** That the Secretary of Agriculture shall also cause to be made a careful inspection of all live cattle, the meat of which, fresh, salted, canned, corned, packed, cured, or otherwise prepared, is intended for exportation to any foreign country, at such times and places, and in such manner as he may think proper, with a view to ascertain whether said cattle are free from disease, and their meat sound and wholesome, and may appoint inspectors who shall be authorized to give an official certificate clearly stating the condition in which such cattle and meat are found, and no clearance shall be given to any vessel having on board any fresh, salted, canned, corned, or packed beef being the meat of cattle killed after the passage of this Act for exportation to and sale in a foreign country from any port in the United States until the owner or shipper shall obtain from an inspector appointed under the provisions of this Act a certificate that said cattle were free from disease and that their meat is sound and wholesome. [28 Stat. L. 732.]

Section 1 of this Act, providing for the inspection of cattle intended for export, was superseded by the provisions of the Act of March 4, 1907, ch. 2907, § 1, *infra*, p. 397.

The foregoing section 2 was amended to read as above given by an Act of March 2, 1895, ch. 169. In its original form this section read as follows:

"**SEC. 2.** That the Secretary of Agriculture shall also cause to be made a careful inspection of all live cattle the meat of which is intended for exportation to any foreign country, at such times and places, and in such manner, as he may think proper, with a view to ascertain whether said cattle are free from disease and their meat sound and wholesome, and may appoint inspectors, who shall be authorized to give an official certificate clearly stating the condition in which such cattle and meat are found, and no clearance shall be given to any vessel having on board any fresh beef for exportation to and sale in a foreign country from any port of the United States until the owner or shipper shall obtain from an inspector appointed under the provisions of this act such certificate." [26 Stat. L. 1090.]

The provisions of this Act were extended to apply to dairy products by the Act of May 23, 1908, ch. 192, *infra*, p. 406.

**SEC. 3. [Inspection of animals intended for interstate commerce.]** The Secretary of Agriculture shall cause to be inspected prior to their slaughter, all cattle, sheep, and hogs which are subjects of interstate commerce and which are about to be slaughtered at slaughter-houses, canning, salting, packing or rendering establishments in any State or Territory, the carcasses or products of which are to be transported and sold for human consumption in any other State or Territory, or the District of Columbia, and in addition to the aforesaid inspection, there may be made in all cases where the Secretary of Agriculture may deem necessary or expedient, under rules and regulations to be by him prescribed, a post mortem examination of the carcasses of all cattle, sheep, and hogs about to be prepared for human consumption at any slaughter-house, canning, salting, packing or rendering establishment in any State or Territory, or the District of Columbia which are the subjects of interstate commerce. [26 Stat. L. 1090.]

**Purpose of inspection.**—The inspection of cattle and meats at packing houses by the government under the federal statutes is for the purpose of preventing traffic in diseased and unwholesome meats, and does not relieve a corporation engaged in slaughtering cattle from the duty of exercising reasonable care to see that its

employees engaged in handling its meats are not exposed to infectious diseases. If it relies on the government inspection, it is responsible to its servants in that regard for the efficiency of such inspection. *O'Connor v. Armour Packing Co.*, (1908) 158 Fed. 241.

**SEC. 4. [Examinations — official stamp, etc.—penalty for forgery.]** That said examination shall be made in the manner provided by rules and regulations to be prescribed by the Secretary of Agriculture, and after said examination the carcasses and products of all cattle, sheep, and swine found to be free of disease and wholesome, sound, and fit for human food shall be marked, stamped, or labeled for identification as may be provided by said rules and regulations of the Secretary of Agriculture. Any person who shall forge, counterfeit, simulate, imitate, falsely represent, or use without authority, or knowingly and wrongfully alter, deface, or destroy any of the marks, stamps, or other devices provided for in the regulations of the Secretary of Agriculture, of any such carcasses or their products, or who shall forge, counterfeit, simulate, imitate, falsely represent, or use without authority, or knowingly and wrongfully alter, deface, or destroy any certificate or stamp provided in said regulations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [28 Stat. L. 732.]

This section was amended to read as above given by the Agricultural Appropriation Act of March 2, 1895, ch. 169. In its original form section 4 read as follows:

"SEC. 4. That said examination shall be made in the manner provided by rules and regulations to be prescribed by the Secretary of Agriculture, and after said examination the carcasses and products of all cattle, sheep, and swine found to be free of disease, and wholesome, sound, and fit for human food, shall be marked, stamped, or labeled for identification as may be provided by said rules and regulations of the Secretary of Agriculture. Any person who shall forge, counterfeit, or knowingly and wrongfully alter, deface, or destroy any of the marks, stamps, or other devices provided for in the regulations of the Secretary of Agriculture, of any such carcasses or their products, or who shall forge, counterfeit, or knowingly and wrongfully alter, deface, or destroy any certificate provided for in said regulations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or by both said punishments in the discretion of the court." [26 Stat. L. 1090.]

**SEC. 5. [Transporting of unsound carcasses — penalty.]** That it shall be unlawful for any person to transport from one State or Territory or the District of Columbia into any other State or Territory or the District of Columbia, or for any person to deliver to another for transportation from one State or Territory or the District of Columbia into another State or Territory or the District of Columbia the carcasses of any cattle, sheep, or swine, or the food products thereof, which have been examined in accordance with the provisions of sections three and four of this act, and which on said examination have been declared by the inspector making the same to be unsound or diseased. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and punished for each offense as provided in section four of this act. [26 Stat. L. 1090.]

See the Act of March 2, 1895, ch. 169, § 1, *infra*, p. 397, authorizing regulations to be made to carry out the provisions of this Act.

**SEC. 6. [Certificates for sound cattle and meats.]** That the inspectors provided for in sections one and two of this act shall be authorized to give official certificates of the sound and wholesome condition of the cattle, sheep, and swine, their carcasses and products described in sections three and four of this act, and one copy of every certificate granted under the provisions of this act shall be filed in the Department of Agriculture, another copy shall be delivered to the owner or shipper, and when the cattle, sheep, and swine, or their carcasses and products are sent abroad, a third copy shall be delivered to the chief officer of the vessel on which the shipment shall be made. [26 Stat. L. 1090.]

A waiver of certificates was permitted by the Act of March 4, 1907, ch. 2907, § 1, *infra*, p. 402.

**SEC. 7. [Application of act to farmers.]** That none of the provisions of this act shall be so construed as to apply to any cattle, sheep, or swine slaughtered by any farmer upon his farm, which may be transported from one State or Territory or the District of Columbia into another State or Territory or the District of Columbia: *Provided, however,* That if the carcasses of such cattle, sheep, or swine go to any packing or canning establishment and are intended for transportation to any other State or Territory or the District of Columbia as hereinbefore provided, they shall there be subject to the post mortem examination provided for in sections three and four of this act. [26 Stat. L. 1091.]

See next to the last paragraph of section 1 of the Act of March 4, 1907, ch. 2907, *infra*, p. 405.

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**[SEC. 1.] [Rules to prevent carrying condemned meat — punishment for violations.]** \* \* \* The Secretary of Agriculture is hereby authorized to make such rules and regulations as he may decide to be necessary to prevent the transportation from one State or Territory or the District of Columbia into any other State or Territory or the District of Columbia, or to any foreign country, of the condemned carcasses or parts of carcasses of cattle, sheep, and swine, which have been inspected in accordance with the provisions of this Act. Any person, company, or corporation owning or operating any such slaughter-house, abattoir, or meat curing, packing, or canning establishment, or any employee of the same, that shall willfully violate any provision of this Act shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished for each offense by a fine not exceeding one thousand dollars or imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [28 Stat. L. 732.]

This is from the Agricultural Appropriation Act of March 2, 1895, ch. 169. It followed provisions amending the Act of March 3, 1891, ch. 555, § 2, *supra*, p. 395, and § 4, *supra*, p. 396, and the reference to "the provisions of this Act" is evidently to the last cited Act as so amended.

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**[SEC. 1.] [Meat and meat animal inspection — examination of animals before killing — diseased animals to be set apart, etc.]** \* \* \* **MEAT INSPECTION:** That hereafter, for the purpose of preventing the use

in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, the Secretary of Agriculture, at his discretion, may cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle, sheep, swine, and goats before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in interstate or foreign commerce; and all cattle, swine, sheep, and goats found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other cattle, sheep, swine, or goats, and when so slaughtered the carcasses of said cattle, sheep, swine, or goats shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary of Agriculture, as herein provided for. [34 Stat. L. 1260.]

This and the following twenty paragraphs of this section constitute the Meat Inspection Act of 1907 and are from the Agricultural Appropriation Act of March 4, 1907, ch. 2907. Similar provisions occur also in the Agricultural Appropriation Act of June 30, 1908, ch. 3913, 34 Stat. L. 674. See the notes to the various paragraphs of this section set out *infra*.

The provisions of the Meat Inspection Law were extended to the inspection of reindeer by a provision of the Act of June 30, 1914, ch. 131, *infra*, p. 406.

The Agricultural Appropriation Act of May 23, 1908, ch. 192, § 1, 35 Stat. L. 254, contained a provision, "That live horses be entitled to the same inspection as other animals herein named." Similar provisions occurred in prior Appropriation Acts of the same character, but these may be regarded as superseded by the provisions of the Act here given providing for the inspection of all "cattle, sheep, swine, and goats."

**Meat food product.**—The determination of the meaning of the term "meat food product" is a question of fact. Congress having vested in the Secretary of Agriculture the power to make such rules and regulations as may be necessary for the efficient execution of the provisions of the meat inspection law, the power to deter-

mine what manufactures are "meat products" rests in the Secretary of Agriculture, subject to the restriction that the definition of the term adopted be not clearly and unquestionably outside the intent of the Act. (1910) 28 Op. Atty.-Gen. 369.

**[Post-mortem examination at packing, etc., houses — labeling — destruction of condemned meats — reinspection, etc.]** That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose, as hereinafter provided, a post-mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human consumption at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce; and the carcasses and parts thereof of all such animals found to be sound, healthful, wholesome, and fit for human food shall be marked, stamped, tagged, or labeled as "Inspected and passed;" and said inspectors shall label, mark, stamp, or tag as "Inspected and condemned" all carcasses and parts thereof of animals found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food; and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any such establishment which fails to so destroy any such condemned carcass or part thereof, and said

inspectors, after said first inspection, shall, when they deem it necessary, reinspect said carcasses or parts thereof to determine whether since the first inspection the same have become unsound, unhealthful, unwholesome, or in any way unfit for human food, and if any carcass or any part thereof shall, upon examination and inspection subsequent to the first examination and inspection, be found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food, it shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy any such condemned carcass or part thereof. [34 Stat. L. 1260.]

Force of prescribed regulations.—Regulations prescribed by the Secretary of Agriculture under the authority of this Act and which are not inconsistent with its provisions have the force of law. *State v. Peet*, (1908) 80 Vt. 449, 68 Atl. 661, 130 A. S. R. 998, 14 L. R. A. (N. S.) 677.

**[Examination before use for food products — re-examination on return of goods.]** The foregoing provisions shall apply to all carcasses or parts of carcasses of cattle, sheep, swine, and goats, or the meat or meat products thereof which may be brought into any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and such examination and inspection shall be had before the said carcasses or parts thereof shall be allowed to enter into any department wherein the same are to be treated and prepared for meat food products; and the foregoing provisions shall also apply to all such products which, after having been issued from any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, shall be returned to the same or to any similar establishment where such inspection is maintained. [34 Stat. L. 1261.]

**[Inspectors to be appointed at canning, etc., establishments — marks of inspection — destruction if unfit for food — application to export trade — domestic use.]** That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food product prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection said inspectors shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as "Inspected and passed" all such products found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat, or meat food products unsound, unhealthful, unwholesome, or unfit for human food; and said inspectors shall label, mark, stamp, or tag as "Inspected and condemned" all such products found unsound, unhealthful, and unwholesome, or which contain dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food, and all such condemned meat food products shall be destroyed for food purposes, as hereinbefore provided, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy such condemned meat food products: *Provided*, That subject to the rules and regulations of the Secretary of Agriculture the provisions

hereof in regard to preservatives shall not apply to meat food products for export to any foreign country and which are prepared or packed according to the specifications or directions of the foreign purchaser, when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is to be exported; but if said article shall be in fact sold or offered for sale for domestic use or consumption then this proviso shall not exempt said article from the operation of all the other provisions of this Act. [34 Stat. 1. 1261.]

**Imported meats and meat food products.**—Imported meats and meat food products are entitled to admission into this country and to interstate commerce subject only to the provisions of the Food and Drugs Act of June 30, 1906 (see FOOD AND DRUGS), even though they should be further manufactured in this country, provided they are not mixed with domestic meat and meat products, but they can in no instance bear the federal mark of approval provided for by this section. (1912) 29 Op. Atty-Gen. 355.

**Mark of inspection when post-mortem impossible.**—This act requires as a condition to the placing of the stamp "Inspected and passed" that the inspectors should by inspection and examination have found all such products to be sound. If as a matter of fact such soundness cannot be ascertained and found except by the inspection provided for in the second and third paragraphs, it must be that Congress did not intend the provisions of the Act to apply where such inspection is impossible. The proper construction therefore is to read the fourth paragraph in connection with the other portions of the Act and to restrict its application to the cases where inspection can be had in conformity with the requirements of

the statute. (1912) 29 Op. Atty-Gen. 355.

*The federal mark of inspection cannot be lawfully placed upon any meat food product unless the animal from which it was derived received a post-mortem examination by the inspectors of the Bureau of Animal Industry.* (1912) 29 Op. Atty-Gen. 355.

**Establishments subject to inspection.**—The inspection authorized under the meat inspection provisions of this Act does not apply alone to establishments in which both the slaughtering of the animals and the preparation of the meat food products are carried on, but to all establishments in which any of the processes required, from the slaughtering to the finishing of the meat food product, is conducted, regardless of where the meat may have come from. (1910) 28 Op. Atty-Gen. 369; (1911) 29 Op. Atty-Gen. 227.

**"Similar establishments."**—The term "similar establishments," as used in the meat inspection law, was intended to include all establishments which are not specifically mentioned, in which the animal is slaughtered, or the carcass or meat is prepared, or in which the meat food product is manufactured. (1910) 28 Op. Atty-Gen. 369.

**[Marking receptacles — supervision by inspectors — sales under false names prohibited — trade names allowed.]** That when any meat or meat food product prepared for interstate or foreign commerce which has been inspected as hereinbefore provided and marked "Inspected and passed" shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Act is maintained, the person, firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been "inspected and passed" under the provisions of this Act; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Act is maintained shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector, and no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or

names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted. [34 Stat. L. 1262.]

**[Sanitary inspection of establishments — rejection of products if conditions insanitary.]** The Secretary of Agriculture shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering, meat canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and the meat and meat food products thereof are prepared for interstate or foreign commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe the rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food products are rendered unclean, unsound, unhealthful, unwholesome, or otherwise unfit for human food, he shall refuse to allow said meat or meat food products to be labeled, marked, stamped, or tagged as “inspected and passed.” [34 Stat. L. 1262.]

**[Inspection at night.]** That the Secretary of Agriculture shall cause an examination and inspection of all cattle, sheep, swine, and goats, and the food products thereof, slaughtered and prepared in the establishments hereinbefore described for the purposes of interstate or foreign commerce to be made during the nighttime as well as during the daytime when the slaughtering of said cattle, sheep, swine, and goats, or the preparation of said food products is conducted during the nighttime. [34 Stat. L. 1262.]

**[Interstate transportation of meats, etc., not inspected, prohibited — exceptions.]** That on and after October first, nineteen hundred and six, no person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as “Inspected and passed,” in accordance with the terms of this Act and with the rules and regulations prescribed by the Secretary of Agriculture: *Provided*, That all meat and meat food products on hand on October first, nineteen hundred and six, at establishments where inspection has not been maintained, or which have been inspected under existing law, shall be examined and labeled under such rules and regulations as the Secretary of Agriculture shall prescribe, and then shall be allowed to be sold in interstate or foreign commerce. [34 Stat. L. 1262.]

**[Penalty for illegal acts, counterfeiting, etc.]** That no person, firm, or corporation, or officer, agent, or employee thereof, shall forge, counterfeit, simulate, or falsely represent, or shall without proper authority use, fail to use, or detach, or shall knowingly or wrongfully alter, deface, or destroy, or fail to deface or destroy, any of the marks, stamps, tags, labels, or other identification devices provided for in this Act, or in and as directed by the

rules and regulations prescribed hereunder by the Secretary of Agriculture, on any carcasses, parts of carcasses, or the food product, or containers thereof, subject to the provisions of this Act, or any certificate in relation thereto, authorized or required by this Act or by the said rules and regulations of the Secretary of Agriculture. [34 Stat. L. 1263.]

The plain object of this clause is to safeguard the food products in question against alteration or substitution, and thus enable the officials of the government to systematize and render effective the process of inspection; an object that is interfered with if the tags or other identification devices are destroyed, whether they be destroyed by those engaged in the business or by others. *U. S. v. Lewis*, (1914) 235 U. S. 282, 35 S. Ct. 44, 59 U. S. (L. ed.) 229.

**Unlawful use of label.**—In *Armour v. U. S.*, (C. C. A. 3d Cir. 1915) 222 Fed. 233, the court, in sustaining a conviction of the offense denounced by this clause, said: "In our opinion the letter has been violated, and we recognize the

government's right to insist on exact compliance with a statute whose beneficent object is to safeguard the wholesomeness of food. The act impliedly promises the public that government stamps and labels may be relied on to tell the truth, and therefore special care must be taken to maintain the scrupulous accuracy of their statements. Even innocent mistakes may have dangers; carelessness is usually likely to lead to mischief. These marks and labels must therefore be protected, and no one must be allowed to use them, except in accordance with the Act and the regulations; otherwise, their value will be immediately impaired or lost and a chief purpose of the act will be frustrated."

**[Inspection of cattle, etc., for export.]** That the Secretary of Agriculture shall cause to be made a careful inspection of all cattle, sheep, swine, and goats intended and offered for export to foreign countries at such times and places, and in such manner as he may deem proper, to ascertain whether such cattle, sheep, swine, and goats are free from disease. [34 Stat. L. 1263.]

Provisions similar to those contained in this and the following two paragraphs were contained in the Act of March 3, 1891, ch. 555, § 1, 26 Stat. L. 1089, and were superseded by these paragraphs. The other sections of the last cited Act are given *supra*, p. 395.

Other provisions for the inspection of animals intended for exportation were made by the latter part of section 10 of the Act of Aug. 30, 1890, ch. 839, *supra*, p. 394.

**[Certificates.]** And for this purpose he may appoint inspectors who shall be authorized to give an official certificate clearly stating the condition in which such cattle, sheep, swine, and goats are found. [34 Stat. L. 1263.]

See the notes to the preceding paragraph.

**[Clearances refused unless certificate obtained — waiver of certificate.]** And no clearance shall be given to any vessel having on board cattle, sheep, swine, or goats for export to a foreign country until the owner or shipper of such cattle, sheep, swine, or goats has a certificate from the inspector herein authorized to be appointed, stating that the said cattle, sheep, swine, or goats are sound and healthy, or unless the Secretary of Agriculture shall have waived the requirement of such certificate for export to the particular country to which such cattle, sheep, swine, or goats are to be exported. [34 Stat. L. 1263.]

See the notes to paragraph *Inspection of Cattle, etc., supra*, this page.

The Agricultural Appropriation Act of March 3, 1905, ch. 1405, 33 Stat. L. 865, contained, as did similar prior Appropriation Acts, a provision "That the Secretary of Agriculture may, in his discretion, waive the requirement of a certificate with beef or other products which are exported to countries that do not require such inspection." This may be regarded as superseded by the more general provisions of the text.



**[Inspection of meats, etc., for export.]** That the Secretary of Agriculture shall also cause to be made a careful inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats, the meat of which, fresh, salted, canned, corned, packed, cured, or otherwise prepared, is intended and offered for export to any foreign country, at such times and places and in such manner as he may deem proper. [34 Stat. L. 1263.]

**[Certificates.]** And for this purpose he may appoint inspectors who shall be authorized to give an official certificate stating the condition in which said cattle, sheep, swine, or goats, and the meat thereof, are found. [34 Stat. L. 1263.]

**[Clearances refused unless certificate obtained.]** And no clearance shall be given to any vessel having on board any fresh, salted, canned, corned, or packed beef, mutton, pork, or goat meat, being the meat of animals killed after the passage of this Act, or except as hereinbefore provided for export to and sale in a foreign country from any port in the United States, until the owner or shipper thereof shall obtain from an inspector appointed under the provisions of this Act a certificate that the said cattle, sheep, swine, and goats were sound and healthy at the time of inspection, and that their meat is sound and wholesome, unless the Secretary of Agriculture shall have waived the requirements of such certificate for the country to which said cattle, sheep, swine, and goats or meats are to be exported. [34 Stat. L. 1263.]

**[Delivery of official certificates — copies.]** That the inspectors provided for herein shall be authorized to give official certificates of the sound and wholesome condition of the cattle, sheep, swine, and goats, their carcasses and products as herein described; and one copy of every certificate granted under the provisions of this Act shall be filed in the Department of Agriculture, another copy shall be delivered to the owner or shipper, and when the cattle, sheep, swine, and goats or their carcasses and products are sent abroad, a third copy shall be delivered to the chief officer of the vessel on which the shipment shall be made. [34 Stat. L. 1263.]

**[Products of establishments violating law, not to be sold, transported, etc.]** That no person, firm, or corporation engaged in the interstate commerce of meat or meat food products shall transport or offer for transportation, sell or offer to sell any such meat or meat food products in any State or Territory or in the District of Columbia or any place under the jurisdiction of the United States, other than in the State or Territory or in the District of Columbia or any place under the jurisdiction of the United States in which the slaughtering, packing, canning, rendering, or other similar establishment owned, leased, or operated by said firm, person, or corporation is located unless and until said person, firm, or corporation shall have complied with all of the provisions of this Act. [34 Stat. L. 1264.]

**[Penalty for violations.]** That any person, firm, or corporation, or any officer or agent of any such person, firm, or corporation, who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor

and shall be punished on conviction thereof by a fine of not exceeding ten thousand dollars or imprisonment for a period of not more than two years, or by both such fine and imprisonment, in the discretion of the court. [34 Stat. L. 1264.]

**[Appointment of inspectors — duties — rules and regulations.]** That the Secretary of Agriculture shall appoint from time to time inspectors to make examination and inspection of all cattle, sheep, swine, and goats, the inspection of which is hereby provided for, and of all carcasses and parts thereof, and of all meats and meat food products thereof, and of the sanitary conditions of all establishments in which such meat and meat food products hereinbefore described are prepared; and said inspectors shall refuse to stamp, mark, tag, or label any carcass or any part thereof, or meat food product therefrom, prepared in any establishment hereinbefore mentioned, until the same shall have actually been inspected and found to be sound, healthful, wholesome, and fit for human food, and to contain no dyes, chemicals, preservatives, or ingredients which render such meat food product unsound, unhealthful, unwholesome, or unfit for human food; and to have been prepared under proper sanitary conditions, hereinbefore provided for; and shall perform such other duties as are provided by this Act and by the rules and regulations to be prescribed by said Secretary of Agriculture; and said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this Act, and all inspections and examinations made under this Act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this Act. [34 Stat. L. 1264.]

**Judicial notice.**— In a prosecution for a violation of the Meat Inspection Act the court will take judicial notice of the rules and regulations made by the Secretary of

Agriculture, but cannot take such notice of regulations made by the Bureau of Animal Industry. *United States v. Rohe*, (S. D. N. Y. 1914) 218 Fed. 182.

**[Punishment for bribing, etc., officials — accepting gifts, etc., by officials.]** That any person, firm, or corporation, or any agent or employee of any person, firm, or corporation who shall give, pay, or offer, directly or indirectly, to any inspector, deputy inspector, chief inspector, or any other officer or employee of the United States authorized to perform any of the duties prescribed by this Act or by the rules and regulations of the Secretary of Agriculture any money or other thing of value, with intent to influence said inspector, deputy inspector, chief inspector, or other officer or employee of the United States in the discharge of any duty herein provided for, shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by a fine not less than five thousand dollars nor more than ten thousand dollars and by imprisonment not less than one year nor more than three years; and any inspector, deputy inspector, chief inspector, or other officer or employee of the United States authorized to perform any of the duties prescribed by this Act who shall accept any money, gift, or other thing of value from any person, firm, or corporation, or officers, agents, or employees thereof, given with intent to influence his official action, or who shall receive or accept from any person, firm, or corporation engaged in interstate or foreign commerce any gift, money,

or other thing of value given with any purpose or intent whatsoever, shall be deemed guilty of a felony and shall, upon conviction thereof, be summarily discharged from office and shall be punished by a fine not less than one thousand dollars nor more than ten thousand dollars and by imprisonment not less than one year nor more than three years. [34 Stat. L. 1264.]

**[Exceptions to farmers, retailers, etc. — punishment for sale, etc., of unwholesome products — maintenance of inspection authorized.]** That the provisions of this Act requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported as interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products, supplying their customers: *Provided*, That if any person shall sell or offer for sale or transportation for interstate or foreign commerce any meat or meat food products which are diseased, unsound, unhealthful, unwholesome, or otherwise unfit for human food, knowing that such meat food products are intended for human consumption, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars or by imprisonment for a period of not exceeding one year, or by both such fine and imprisonment: *Provided also*, That the Secretary of Agriculture is authorized to maintain the inspection in this Act provided for at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment notwithstanding this exception, and that the persons operating the same may be retail butchers and retail dealers or farmers; and where the Secretary of Agriculture shall establish such inspection then the provisions of this Act shall apply notwithstanding this exception. [34 Stat. L. 1265.]

See the notes to the first paragraph of this section.

See the Act of March 3, 1891, ch. 555, § 7, *supra*, p. 397.

**Effect of Act on right of state to regulate slaughtering of animals by farmers.**— In *Commonwealth v. Moore*, (1913) 214 Mass. 19, 100 N. E. 1071, it was held that the effect of this section making the provisions of the Act inapplicable to animals slaughtered by any farmer was to permit a state under its police powers to regulate the slaughtering of animals by farmers.

**Sufficiency of indictment.**— In *U. S. v. Rohe*, (S. D. N. Y. 1914) 218 Fed. 182, the court ruled that a count in an indictment which charged that the de-

fendants offered for transportation in interstate commerce from New York city to Charleston, S. C., certain hams which were, and which defendants knew to be, unfit for human food and which they knew were intended for human consumption, did not charge an offense under the Meat Inspection Act, on the ground that it was not a crime for an inspected establishment to ship unwholesome meat products in interstate commerce, the proviso of this section being restricted to those whose establishments were not inspected, viz., farmers and retailers.

**[Detailed report of estimates.]** And the Secretary of Agriculture shall, in his annual estimates made to Congress, submit a statement in detail, showing the number of persons employed in such inspections and the salary or per diem paid to each, together with the contingent expenses of such inspectors and where they have been and are employed. [34 Stat. L. 1265.]

The above provisions occur also in the Agricultural Appropriation Act of June 30, 1906, ch. 3913, closing on page 679 of 34 Stat. at L. In that Act, however, is the following permanent appropriation:

"That there is permanently appropriated, out of any money in the Treasury not otherwise appropriated, the sum of three million dollars, for the expenses of the

inspection of cattle, sheep, swine, and goats and the meat and meat food products thereof which enter into interstate or foreign commerce and for all expenses necessary to carry into effect the provisions of this Act relating to meat inspection, including rent and the employment of labor in Washington and elsewhere, for each year." [34 Stat. L. 674.]

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[SEC. 1.] [Inspection of dairy products for export.] \* \* \* That the Act of March third, eighteen hundred and ninety-one, as amended March second, eighteen hundred and ninety-five, for the inspection of live cattle and products thereof, shall be deemed to include dairy products intended for exportation to any foreign country, and the Secretary of Agriculture may apply, under rules and regulations to be prescribed by him, the provisions of said Act for inspection and certification appropriate for ascertaining the purity and quality of such products, and may cause the same to be so marked, stamped, or labeled as to secure their identity and make known in the markets of foreign countries to which they may be sent from the United States their purity, quality, and grade; and all the provisions of said Act relating to live cattle and products thereof for export shall apply to dairy products so inspected and certified: [35 Stat. L. 254.]

This is from the Agricultural Appropriation Act of May 23, 1908, ch. 192.

The Act of March 3, 1891, ch. 555, as amended, mentioned in the text, is given *supra*, p. 395.

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[SEC. 1.] [Inspection of reindeer.] \* \* \* That the provisions of the meat-inspection law may be extended to the inspection of reindeer. [38 Stat. L. 420.]

This paragraph is from the Agricultural Appropriation Act of June 30, 1914, ch. 131. \*

The Meat Inspection Law above mentioned is given *supra*, p. 397 *et seq.*

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## V. BUREAU OF ANIMAL INDUSTRY.

**An Act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals.**

[Act of May 29, 1884, ch. 60, 23 Stat. L. 31.]

[SEC. 1.] [Bureau of Animal Industry — officers — appointment and salary.] That the Commissioner of Agriculture shall organize in his Department a Bureau of Animal Industry, and shall appoint a Chief thereof, who shall be a competent veterinary surgeon, and whose duty it shall be to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also inquire into and report the causes of contagious, infectious, and communicable diseases among them, and the means for the prevention and cure of the same, and to collect such information on these subjects as shall be valuable to the

agricultural and commercial interests of the country; And the Commissioner of Agriculture is hereby authorized to employ a force sufficient for this purpose, not to exceed twenty persons at any one time. The salary of the Chief of said Bureau shall be three thousand dollars per annum; And the Commissioner shall appoint a clerk for said Bureau, with a salary of one thousand five hundred dollars per annum. [23 Stat. L. 31.]

This is the first section of the "Animal Industry Act." The Department of Agriculture was made an executive department under the control of the Secretary of Agriculture by an Act of Feb. 9, 1889, ch. 122, 25 Stat. L. 659, and the authority granted to the Commissioner of Agriculture by the Act given in the text was vested in the Secretary of Agriculture by the Act of July 14, 1890, ch. 707, 26 Stat. L. 288. See the title AGRICULTURE.

As to the sale of animals or animal products purchased or produced under the Bureau of Animal Industry, see the provisions of the Act of Aug. 10, 1912, ch. 284, given under the title AGRICULTURE.

The provisions of this section relating to the number and salaries of employees have been superseded by the various subsequent Appropriation Acts. The Agricultural Appropriation Act of March 4, 1915, ch. 144, § 1, 38 Stat. L. 1089, provides for numerous employees at increased rates of compensation.

**Conflict with state statutes.**—This Act creating a Bureau of Animal Industry was held not to override the statute of Kansas (Act of 1891, ch. 201, as amended) providing for the protection of the cattle of that state from contagious diseases. This Act makes no provision as to liability for damages sustained by transporting cattle into the state of Kansas in violation of the above mentioned statute of that state. *Missouri, etc., R. Co. v. Haber*, (1898) 169 U. S. 613, 18 S. Ct. 488, 42 U. S. (L. ed.) 878, *affirming* (1896) 56 Kan. 694, 44 Pac. 632. For an explanation of this case see *Lake Shore, etc., R. Co. v. Ohio*, (1898) 173 U. S. 285, 19 S. Ct. 466, 43 U. S. (L. ed.) 702. See also *Cotting v. Kansas City Stock Yards Co.*, (1897) 82 Fed. 839; *In re Debs*, (1894) 158 U. S. 564, 15 S. Ct. 900, 39 U. S. (L. ed.) 1092; *Smith v. St. Louis, etc., R. Co.*, (1900) 181

U. S. 248, 21 S. Ct. 603, 45 U. S. (L. ed.) 847.

In *Cotting v. Kansas City Stock Yards Co.*, (1897) 79 Fed. 679; (1897) 82 Fed. 839, the Kansas Act of March 12, 1896, regulating public stockyards, was held not to be in conflict with this Act.

The Colorado statute (Laws 1885, p. 335, § 2) "to prevent the introduction of any infectious or contagious diseases among cattle," etc., was held not to conflict with this Act. Congress has not assumed to itself exclusive jurisdiction over the subjects of quarantine and inspection of animals. On the contrary it has invited the aid and co-operation of the states. Regulations prescribed both by Congress and the states may be enforced, at least so far as they harmonize. *Reid v. Colorado*, (1902) 187 U. S. 137, 23 S. Ct. 92, 47 U. S. (L. ed.) 108, *affirming* (1902) 29 Colo. 333, 68 Pac. 228, 93 A. S. R. 69.

**Sec. 2. [Agents — duties and compensation.]** That the Commissioner of Agriculture is authorized to appoint two competent agents, who shall be practical stock-raisers or experienced business men familiar with questions pertaining to commercial transactions in live stock, whose duty it shall be, under the instructions of the Commissioner of Agriculture, to examine and report upon the best methods of treating, transporting, and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous contagious, infectious, and communicable diseases. The compensation of said agents shall be at the rate of ten dollars per diem, with all necessary expenses, while engaged in the actual performance of their duties under this act, when absent from their usual place of business or residence as such agent. [23 Stat. L. 31.]

As to the Commissioner of Agriculture, and the number and compensation of agents, see the notes to section 1 of this Act, *supra*. Under this Act the general government established inspectors at the Kansas City stockyards, assuming that such stock came within the purview of the Act. *U. S. v. Hopkins*, (1897) 82 Fed. 529, *reversed* on other grounds (1878) 171 U. S. 578, 19 S. Ct. 40, 43 U. S. (L. ed.) 290.

**SEC. 3. [Rules and regulations—co-operation of States and Territories.]** That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Territory, and invite said authorities to co-operate in the execution and enforcement of this act. Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a State or other properly constituted authorities signify their readiness to co-operate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another. [23 Stat. L. 32.]

As to the Commissioner of Agriculture, see the notes to section 1 of this Act, *supra*.

**Effect in states.**—Rules of the Bureau of Animal Industry of the Department of Agriculture, organized by this Act for the suppression of contagious diseases among domestic animals, have not, apart from the action of a state, any binding force upon the state. *Eshleman v. Union Stockyards Co.*, (1908) 222 Pa. St. 20, 70 Atl. 899, 15 Ann. Cas. 998.

**State laws.**—The Arkansas statute (Act May 28, 1907) to prevent the introduction and spread of contagious and infectious diseases of animals in that state is not in conflict with this Act, which does not attempt to assume exclusive control over the quarantine of diseased animals, nor cover the transportation of live stock from state to state, so as to preclude state action, but merely authorizes the Commissioner of Agriculture to co-operate with state authorities, and to prescribe rules and regulations in that regard, nor does it conflict with rules and regulations so prescribed. *Kansas City Southern R. Co. v. State*, (1909) 90 Ark. 343, 119 S. W. 288. See also *Mullen v. Western Union Beef Co.*, (1897) 96 Colo. App. 497, 49 Pac. 425.

In *Reid v. Colorado*, (1902) 187 U. S. 137, 23 S. Ct. 92, 47 U. S. (L. ed.) 108, *affirming* (1902) 29 Colo. 333, 68 Pac. 228, 93 A. S. R. 69, it was held that the subject of transportation of cattle from one state to another was not so far covered by the provisions of this Act, or those relating to the exportation of diseased cattle to ports in foreign countries, and the transportation between the states of live stock known to be diseased, as to

preclude the enactment of a statute (Colo. Sess. Laws 1885, p. 335) prohibiting the importation of cattle from south of the 36th parallel of north latitude between April 1 and Nov. 1, unless first kept for ninety days at some place north of that parallel, or unless a certificate of freedom from contagious or infectious disease has been obtained from the state veterinary sanitary board.

**Rules and regulations.**—This Act being limited to cases where the animal in question was affected with an infectious or contagious disease, the Secretary of Agriculture has no authority to extend the same by a rule prohibiting the taking of any horse outside of a quarantine district without first having it inspected by the Bureau of Animal Industry, etc., regardless of whether it is diseased or has been exposed to disease. *U. S. v. Hoover*, (1904) 133 Fed. 950.

**Judicial notice of regulations.**—The courts will take judicial notice of regulations adopted by the Commissioner of Agriculture under this Act locating a quarantine line for cattle. *Kansas City Southern R. Co. v. State*, (1909) 90 Ark. 343, 119 S. W. 288.

**Delegation of power by Congress,** see *Kansas City Southern R. Co. v. State*, (1909) 90 Ark. 343, 119 S. W. 288.

**Purchase of infected animals for slaughter.**—This section does not authorize the Commissioner (or Secretary) of Agriculture to purchase infected animals for the purpose of slaughter. (1885) 18 Op. Atty-Gen. 154.

**Employment of counsel.**—The Commissioner (or Secretary) of Agriculture is not authorized to employ counsel for the defense of employees of the Bureau of Animal Industry, for acts done by them

in carrying out the provisions of the statute. Such counsel, it would seem, shall be furnished, upon call, by the Department of Justice. (1889) 19 Op. Atty.-Gen. 328.

**SEC. 4. [Investigation as to pleuro-pneumonia, etc.]** That in order to promote the exportation of live stock from the United States the Commissioner of Agriculture shall make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious, or communicable disease, along the dividing-lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock are exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require. [23 Stat. L. 32.]

As to the Commissioner of Agriculture, see the notes to section 1 of this Act *supra*, p. 407.

The powers conferred on the Secretary of the Treasury by this and the following section were transferred to the Secretary of Agriculture by the Act of Feb. 2, 1903, ch. 349, § 1, *infra*, p. 411.

**Exportation and transportation of live stock.**—See enactments under II. *Transportation of animals, supra*, p. 376. IV. *Inspection of animals, carcasses, etc., intended for export or subjects of interstate commerce, supra*, p. 394.

Shipments between points in same

state.—This Act does not relate to, nor was it intended in any manner to regulate or interfere with, shipments of cattle from point to point wholly within any state or territory. *Davis v. Texas, etc., R. Co.*, (1896) 12 Tex. Civ. App. 427, 34 S. W. 144.

**SEC. 5. [Measures to prevent exportation of diseased live stock.]** That to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary. [23 Stat. L. 32.]

See the notes to the preceding section 4 of this Act.

**SEC. 6. [Transportation by railroads, vessels, etc., of diseased live stock.]** That no railroad company within the United States, or the owners or masters of any steam or sailing vessel or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease; Nor shall any person, company, or corporation drive on foot or transport in private conveyance from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease,

and especially the disease known as pleuro-pneumonia: *Provided*, That the so-called splenetic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections four, five, six and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto. [23 Stat. L. 32.]

**Validity of Act.**—This Act making it a misdemeanor for one to drive live stock on foot from one state to another knowing them to have a contagious disease, is within the power given to Congress to regulate interstate commerce. *U. S. v. Slater*, (1903) 123 Fed. 115.

**Rules and regulations.**—An order of the Department of Agriculture giving notice that scabies exists among sheep in the United States, and that it is a violation of law to receive for transportation, to transport or to deliver for transportation from one state to another, any stock affected with such disease, or to drive from one state to another any sheep knowing them to be affected with such disease, is proper, though not specifying any particular district within which a quarantine has been established. *U. S. v. Slater*, (1903) 123 Fed. 115.

**Driving diseased cattle from district not quarantined.**—This Act makes it a misdemeanor to transport or drive on foot from one state to another any live

stock known to be affected with any of the diseases specified in the Act, irrespective of the question whether the Secretary of Agriculture has established as an "infected district" the district from which the live stock are driven. *U. S. v. Slater*, (1903) 123 Fed. 115.

**Knowledge as element of offense.**—Where the defendants delivered over to a railway company for transportation from Texas to New Mexico certain cattle, it was held that if they had knowledge of the fact that their cattle were infected with Texas fever, they were guilty of a violation of the statute in delivering the cattle to the railway company for transportation to New Mexico, and the duty devolved upon them of using all necessary care to prevent their communicating the disease to healthy cattle. What degree of care it is necessary to take depends upon circumstances and is a proper question for the court. *Grayson v. Lynch*, (1896) 163 U. S. 468, 16 S. Ct. 1064, 41 U. S. (L. ed.) 230.

**SEC. 7. [Notice to agents of railroads, etc., through infected districts.]** That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion; And any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section six of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment. [23 Stat. L. 32.]

As to the Commissioner of Agriculture, see the notes to section 1 of this Act, *supra*, p. 407.

**Regulations promulgated by the Secretary of Agriculture** under this Act for the suppression of diseases among cattle, are ineffective unless a state or territory interested in their application should determine to co-operate with him in their enforcement. After cattle have become

domiciled in a state, their management is to be regulated by state laws and not by Act of Congress. *Mullen v. Western Union Beef Co.*, (1897) 9 Colo. App. 497, 49 Pac. 425, writ of error in this case dismissed (1899) 173 U. S. 116, 19 S. Ct. 404, 43 U. S. (L. ed.) 635.

**SEC. 8. [Pleuro-pneumonia in District of Columbia.]** That whenever any contagious, infectious, or communicable disease affecting domestic animals, and especially the disease known as pleuro-pneumonia, shall be



brought into or shall break out in the District of Columbia, it shall be the duty of the Commissioners of said District to take measures to suppress the same promptly and to prevent the same from spreading; And for this purpose the said Commissioners are hereby empowered to order and require that any premises, farm, or farms where such disease exists, or has existed, be put in quarantine; to order all or any animals coming into the District to be detained at any place or places for the purpose of inspection and examination; to prescribe regulations for and to require the destruction of animals affected with contagious, infectious, or communicable disease, and for the proper disposition of their hides and carcasses; to prescribe regulations for disinfection, and such other regulations as they may deem necessary to prevent infection or contagion being communicated, and shall report to the Commissioner of Agriculture whatever they may do in pursuance of the provisions of this section. [23 Stat. L. 33.]

As to the Commissioner of Agriculture, see the notes to section 1 of this Act, *supra*, p. 407.

This section would seem to be superseded by the more general provisions of the Act of Feb. 2, 1903, ch. 349, § 2, *infra*, p. 413.

**SEC. 9. [District attorneys to prosecute.]** That it shall be the duty of the several United States district attorneys to prosecute all violations of this act which shall be brought to their notice or knowledge by any person making the complaint under oath; and the same shall be heard before any district or circuit court of the United State[s] or Territorial court holden within the district in which the violation of this act has been committed. [23 Stat. L. 33.]

Section 10 of this Act made an appropriation for the purpose of carrying it into effect. Appropriations to this end are made annually. See the note to section 1 of this Act, *supra*, p. 407.

**SEC. 11. [Annual reports.]** That the Commissioner of Agriculture shall report annually to Congress, at the commencement of each session, a list of the names of all persons employed, an itemized statement of all expenditures under this act, and full particulars of the means adopted and carried into effect for the suppression of contagious, infectious, or communicable diseases among domestic animals. [23 Stat. L. 33.]

As to the Commissioner of Agriculture, see the notes to section 1 of this Act, *supra*, p. 407.

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**An Act To enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes.**

[Act of Feb. 2, 1903, ch. 349, 32 Stat. L. 791.]

**[SEC. 1.] [Contagious diseases of live stock — power to suppress — regulations — shipments.]** That in order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuropneumonia, foot and mouth disease, and other dangerous contagious, infectious, and communicable diseases in cattle and other live stock, and to prevent the

spread of such diseases, the powers conferred on the Secretary of the Treasury by sections four and five of an Act entitled "An Act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals," approved May twenty-ninth, eighteen hundred and eighty-four (twenty-third United States Statutes, thirty-one), are hereby conferred on the Secretary of Agriculture, to be exercised exclusively by him. He is hereby authorized and directed, from time to time, to establish such rules and regulations concerning the exportation and transportation of live stock from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory, including the Indian Territory, and into and through the District of Columbia and to foreign countries, as he may deem necessary, and all such rules and regulations shall have the force of law. Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle or other live stock which were about to be shipped, driven, or transported from such locality to another, as above stated, and had found them free from Texas or splenic fever infection, pleuropneumonia, foot and mouth disease, or any other infectious, contagious, or communicable disease, such animals, so inspected and certified, may be shipped, driven, or transported from such place into and through any State or Territory, including the Indian Territory, and into and through the District of Columbia, or they may be exported from the United States without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry of the Agricultural Department for the purposes of such inspection. [32 Stat. L. 791.]

Sections 4 and 5 of the Act of May 29, 1884, ch. 60, mentioned in the text, are given *supra*, p. 409.

**Validity of regulations.**—Quarantine regulations promulgated by the Secretary of Agriculture acting under cover of this section are void as in excess of the powers conferred by this Act, where, on their face, they apply as well to intrastate as to interstate commerce. *Illinois Cent. R. Co. v. McKendree*, (1906) 203 U. S. 514, 27 S. Ct. 153, 51 U. S. (L. ed.) 298.

**Shipment of animals free from disease.**—This section does not prohibit the shipment of animals free from disease, and the Secretary of Agriculture has no power thereunder to make rules and regulations with reference to such animals, the violation of which alone would constitute a crime. *U. S. v. Hoover*, (1904) 133 Fed. 950.

**State laws.**—In *Asbell v. Kansas*, (1908) 209 U. S. 251, 28 S. Ct. 485, 53 U. S. (L. ed.) 778, it was held that nothing in the provision of this Act, that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected animals and found them

free from disease such animals may be introduced into any state without further inspection or exaction of fees of any kind except such as may be ordered or exacted by the Secretary of Agriculture, precluded the enactment of Kansas Laws 1905, ch. 495, § 27, making it a misdemeanor for any person to transport into that state cattle from any point south, except for immediate slaughter, without having first caused them to be inspected and passed as healthy by the proper state officials, or by the Bureau of Animal Industry of the Interior Department of the United States.

But in *Chicago, etc., R. Co. v. Frye-Bruhn Co.*, (1910) 184 Fed. 15, it was held that the provisions of orders Nos. 106 and 107 of the Secretary of Agriculture, promulgated March 10 and 13, 1903, respectively, under authority of this Act, establishing quarantine districts for cattle and regulations to be observed by carriers in the shipment of cattle from such districts, and which provided (order No. 107,

§ 4) that "cattle from said area may be transported by rail or boat for immediate slaughter" subject to such regulations, had the force of law and were paramount with respect to interstate shipments; and that the Washington statute (Code Wash. 1896, §§ 3216, 6431), which absolutely prohibits the introduction of Texas cattle into the state, without regard to their condition, so far as it conflicts with such federal regulations was void.

**Effect of departmental regulations on state laws.**—A regulation promulgated by the Secretary of Agriculture under the authority of this Act, which is directed to the transportation of cattle from quar-

antined states, and which in terms recognizes restrictions imposed by the state of destination, does not invalidate—at least, where no quarantined areas are involved—the provision of Kansas Laws 1905, ch. 495, § 27, making it a misdemeanor for any person to transport into the state cattle from any point south, except for immediate slaughter, without having first caused them to be inspected and passed as healthy by the proper state officials, or by the Bureau of Animal Industry of the Interior Department of the United States. *Asbell v. Kansas*, (1908) 209 U. S. 251, 28 S. Ct. 485, 53 U. S. (L. ed.) 778.

**SEC. 2. [Regulations to prevent contagious diseases, etc.]** That the Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion. [32 Stat. L. 792.]

**SEC. 3. [Penalty.]** That any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. [32 Stat. L. 792.]

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[SEC. 1.] [Leaves of absence to outside employees.] \* \* \* The employees of the Bureau of Animal Industry outside of the city of Washington may hereafter, in the discretion of the Secretary of Agriculture, without additional expense to the Government, be granted leaves of absence not to exceed fifteen days in any one year: [33 Stat. L. 865.]

This is from the Agricultural Appropriation Act of March 3, 1905, ch. 1405. Similar provisions are contained in the Appropriation Acts for previous years.

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[SEC. 1.] [Serums, etc., for treatment of diseases of animals.] \* \* \* That the Secretary of Agriculture is authorized to purchase in the open market samples of all tuberculin serums, antitoxins, or analogous products, of foreign or domestic manufacture, which are sold in the United States

for the detection, prevention, treatment, or cure of diseases of domestic animals, to test the same and to publish the results of said tests in such manner as he may deem best. [35 Stat. L. 254.]

This is from the Agricultural Appropriation Act of May 23, 1908, ch. 192.

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[SEC. 1.] [Diseased cattle—fences on international boundary, to keep out.] \* \* \* Hereafter the Secretary of Agriculture may permit the erection of fences along international boundary lines, but entirely within the territory of the United States, for the purpose of keeping out diseased animals. [36 Stat. L. 440.]

This is from the Agricultural Appropriation Act of May 26, 1910, ch. 256.

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**An Act Appropriating funds for the purpose of the investigation, treatment, and eradication of hog cholera and dourine.**

[Act of Feb. 23, 1914, ch. 26, 38 Stat. L. 290.]

[Hog cholera and dourine—investigation and eradication—viruses, serums, toxins, etc.—trade in—inspections.] That there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriate the sum of \$600,000 or so much thereof as in the opinion of the Secretary of Agriculture may be necessary, to be expended, by and under his direction, for the purpose of the investigation, treatment, and eradication of hog cholera and dourine, including the employment of assistants, clerks, and other persons, and the payment of all other necessary expenses, in the city of Washington and elsewhere: *Provided*, That not less than \$50,000 of said sum shall be available for expenditure in carrying on examinations and inspections authorized by the Act approved March fourth, nineteen hundred and thirteen (Thirty-seventh Statutes at Large, pages eight hundred and thirty-two and eight hundred and thirty-three), regulating the preparation, sale, barter, exchange, shipment, and importation of viruses, serums, toxins, and analogous products for use in the treatment of domestic animals, and for the enforcement of the provisions, including detection of violations, of said Act and the regulations made thereunder: *And provided further*, That not more than \$100,000 of the sum hereinbefore provided shall be used for the investigation, treatment, and eradication of the disease known as dourine. [38 Stat. L. 290.]

For the Act of March 4, 1913, ch. 145, mentioned in the text, see the title **FOOD AND DRUGS**.

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## ANTI-TRUST LAWS

See TRADE COMBINATIONS AND TRUSTS

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## APPLE BARRELS

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## ARBITRATION

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#### CROSS-REFERENCE.

See *NAVY*.

**Sec. 1624. [Articles established.]** The Navy of the United States shall be governed by the following articles: [*R. S.*]

The articles for the government of the navy were formulated by the Act of July 17, 1862, ch. 204, 12 Stat. L. 600. They have been amended and added to from time to time.

The constitutional authority of Congress "to make rules for the government and regulation of the land and naval forces" includes the power to provide for trial and punishment by military courts without a jury. *In re Bogart*, (1873) 2 Sawy. (U. S.) 396.

The words "when in actual service in time of war or public danger," in the fifth article of amendment of the Constitution of the United States, refer only to the militia, and not to the army or navy of the United States. *Johnson v. Sayre*, (1895) 158 U. S. 109, 15 S. Ct. 773, 39 U. S. (L. ed.) 914; *In re Bogart*, (1873) 2 Sawy. (U. S.) 396.

It is improper for civil officers to arrest a naval officer in order to his trial before court-martial while adequate power resides in the Secretary of the Navy to cause his arrest. (1897) 21 Op. Atty.-Gen. 504.

**Abolition of death penalty.**—The Act of Jan. 15, 1897 (29 Stat. L. 487), abolishing the death penalty, excepts offenses specified under this section. *Motes v. U. S.*, (1900) 178 U. S. 458, 20 S. Ct. 993, 44 U. S. (L. ed.) 1150.

The written record of the proceedings before a naval court-martial becomes the

record of an adjudicated case, and any limitation of the right to an exemplified copy of such a record, when properly applied for by any person having an interest in it, would be contrary to law. The Secretary of the Navy, and any of his subordinates, are bound in law to testify in regard to the contents of such a record when required to give it by a commission of a state court. (1865) 11 Op. Atty.-Gen. 137.

Navy regulations when directly approved by Congress have the absolute force of law when founded on the President's constitutional powers as commander-in-chief, or are consistent with or supplementary to the Acts of Congress in reference to the navy. *Smith v. Whitney*, (1886) 116 U. S. 167, 6 S. Ct. 570, 29 U. S. (L. ed.) 601; *Ex p. Reed*, (1879) 100 U. S. 13, 25 U. S. (L. ed.) 538.

Who are in the naval service and subject to court-martial.—Rank, title, pay, and retirement are the indicia of military, not civil, office. Though chief of a bureau in the navy department, the paymaster-general of the navy is a person in the naval service and subject to court-martial jurisdiction. *Smith v. U. S.*, (1891) 26 Ct. Cl. 143.



A paymaster's clerk, having been appointed in accordance with the navy regulations, by the Secretary of the Navy, with the approval of the President, is a person in the naval service and subject to court-martial jurisdiction. *Johnson v. Sayre*, (1895) 158 U. S. 109, 15 S. Ct. 773, 39 U. S. (L. ed.) 914; *Ex p. Reed*, (1879) 100 U. S. 13, 25 U. S. (L. ed.) 538; *In re Bogart*, (1873) 2 Sawy. (U. S.) 396; *In re Thomas*, (1869) 3 Am. L. Rev. 779, 23 Fed. Cas. No. 13,888. And so is a paymaster. *Smith v. Whitney*, (1886) 116 U. S. 167, 6 S. Ct. 570, 29 U. S. (L. ed.) 601.

Clerks of naval officers (in this case, of a paymaster) doing duty on land in time of peace, appointed from civil life for periods terminable at the will of such officers, and liable to return to civil life whenever such employment ceases, are civilians, and not subject to court-martial jurisdiction. *Ex p. Van Vranken*, (1891) 47 Fed. 888.

Acts regulating the pay and emoluments of "officers" of the navy apply to a paymaster's clerk. *Hendee v. U. S.*, (1887) 22 Ct. Cl. 134.

Civil engineers in the navy are subject to the jurisdiction of naval courts-martial as being persons "belonging to the navy." (1876) 15 Op. Atty-Gen. 597.

Students at the naval academy constitute in some capacity a part of the navy. See R. S. sec. 1556, and Act of June 23, 1874 (18 Stat. L. 203). *Baker v. U. S.*, (1888) 23 Ct. Cl. 181, *affirmed* 125 U. S. 646, 8 S. Ct. 1022, 31 U. S. (L. ed.) 824.

The marine corps is part of the military service, primarily belonging to the navy, with liability to be ordered to service in connection with the army, and in that case under the command of army officers. *U. S. v. Dunn*, (1887) 120 U. S. 249, 7 S. Ct. 507, 30 U. S. (L. ed.) 667; (1890) 19 Op. Atty-Gen. 616; (1861) 10 Op. Atty-Gen. 116, 129. But, except in the matter of discipline, it is a distinct and independent organization, with its own rules as to pay, rations, etc. (see R. S.

secs. 1596-1623). *Reid v. U. S.*, (1893) 18 Ct. Cl. 625.

Seamen employed on vessels in the coast and geodetic survey are governed by these articles. (1888) 19 Op. Atty-Gen. 182.

For an offense committed by one while in the naval service, the jurisdiction of the naval court-martial may be exercised after the connection of the accused with the service has been severed and he has become a private citizen. *In re Bogart*, (1873) 2 Sawy. (U. S.) 396.

A court-martial has no jurisdiction over a person not in the military service, and a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers. *Wise v. Withers*, (1806) 3 Crauch 331, 2 U. S. (L. ed.) 457. See *Dynes v. Hoover*, (1857) 20 How. 65, 15 U. S. (L. ed.) 838.

**Review of courts-martial by civil courts.**—There must be jurisdiction in the court-martial to give the judgment rendered as well as to hear and determine the cause. *Ex p. Reed*, (1879) 100 U. S. 13, 25 U. S. (L. ed.) 538; *Dynes v. Hoover*, (1857) 20 How. 65, 15 U. S. (L. ed.) 838.

When a court-martial has jurisdiction of the person accused and of the offense charged, and has acted within the scope of its lawful powers, its decision and sentence cannot be reviewed or set aside by the civil courts by writ of habeas corpus or otherwise. *Johnson v. Sayre*, (1895) 158 U. S. 169, 15 S. Ct. 773, 39 U. S. (L. ed.) 914; *In re Crain*, (1897) 84 Fed. 788; *In re Bogart*, (1873) 2 Sawy. (U. S.) 396.

A writ of prohibition will not issue from a civil court to a court-martial unless it clearly appears that the court is about to exceed its jurisdiction. *Smith v. Whitney*, (1886) 116 U. S. 167, 6 S. Ct. 570, 29 U. S. (L. ed.) 601.

Pleas of former conviction and the bar of the statute of limitations are matters of defense and are questions for the determination of the court-martial, and cannot be reviewed by the civil courts. *In re Bogart*, (1873) 2 Sawy. (U. S.) 396.

**ARTICLE 1. [Commander's duties of supervision and correction.]** The commanders of all fleets, squadrons, naval stations, and vessels belonging to the Navy, are required to show in themselves a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and any such commander who offends against this article shall be punished as a court-martial may direct. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 600.

**ART. 2. [Divine service.]** The commanders of vessels and naval stations to which chaplains are attached shall cause divine service to be performed on Sunday, whenever the weather and other circumstances allow

it to be done; and it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 600.

**ART. 3. [Irreverent behavior.]** Any irreverent or unbecoming behavior during divine service shall be punished as a general or summary court-martial may direct. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 600.

**ART. 4. [Offenses punishable by death.]** The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service —

First. **[Mutiny.]** Who makes, or attempts to make, or unites with any mutiny or mutinous assembly, or, being witness to or present at any mutiny, does not do his utmost to suppress it; or, knowing of any mutinous assembly or of any intended mutiny, does not immediately communicate his knowledge to his superior or commanding officer;

Second. **[Disobedience of orders.]** Or disobeys the lawful orders of his superior officer;

Third. **[Striking superior officer.]** Or strikes or assaults, or attempts or threatens to strike or assault, his superior officer while in the execution of the duties of his office;

Fourth. **[Intercourse with an enemy.]** Or gives any intelligence to, or holds or entertains any intercourse with, an enemy or rebel, without leave from the President, the Secretary of the Navy, the commander-in-chief of the fleet, the commander of the squadron, or, in case of a vessel acting singly, from his commanding officer;

Fifth. **[Messages from an enemy.]** Or receives any message or letter from an enemy or rebel, or, being aware of the unlawful reception of such message or letter, fails to take the earliest opportunity to inform his superior or commanding officer thereof;

Sixth. **[Desertion in time of war.]** Or, in time of war, deserts or entices others to desert;

Seventh. **[Deserting trust.]** Or, in time of war, deserts or betrays his trust, or entices or aids others to desert or betray their trust;

Eighth. **[Sleeping on watch.]** Or sleeps upon his watch;

Ninth. **[Leaving station.]** Or leaves his station before being regularly relieved;

Tenth. **[Willful stranding or injury of vessel.]** Or intentionally or willfully suffers any vessel of the Navy to be stranded, or run upon rocks or shoals, or improperly hazarded; or maliciously or willfully injures any vessel of the Navy, or any part of her tackle, armament, or equipment, whereby the safety of the vessel is hazarded or the lives of the crew exposed to danger;

Eleventh. **[Unlawful destruction of public property.]** Or unlawfully sets on fire, or otherwise unlawfully destroys, any public property not at the time in possession of an enemy, pirate, or rebel;

Twelfth. **[Striking flag or treacherously yielding.]** Or strikes or attempts to strike the flag to an enemy or rebel, without proper authority,

or, when engaged in battle, treacherously yields or pusillanimously cries for quarters;

Thirteenth. [**Cowardice in battle.**] Or, in time of battle, displays cowardice, negligence, or disaffection, or withdraws from or keeps out of danger to which he should expose himself;

Fourteenth. [**Deserting duty in battle.**] Or, in time of battle, deserts his duty or station, or entices others to do so;

Fifteenth. [**Neglecting orders to prepare for battle.**] Or does not properly observe the orders of his commanding officer, and use his utmost exertions to carry them into execution, when ordered to prepare for or join in, or when actually engaged in, battle, or while in sight of an enemy;

Sixteenth. [**Neglecting to clear for action.**] Or, being in command of a fleet, squadron, or vessel acting singly, neglects, when an engagement is probable, or when an armed vessel of an enemy or rebel is in sight, to prepare and clear his ship or ships for action;

Seventeenth. [**Neglecting to join on signal for battle.**] Or does not, upon signal for battle, use his utmost exertions to join in battle;

Eighteenth. [**Failing to encourage the men to fight.**] Or fails to encourage, in his own person, his inferior officers and men to fight courageously;

Nineteenth. [**Failing to seek encounter.**] Or does not do his utmost to overtake and capture or destroy any vessel which it is his duty to encounter;

Twentieth. [**Failing to afford relief in battle.**] Or does not afford all practicable relief and assistance to vessels belonging to the United States or their allies when engaged in battle. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 600; Act of April 23, 1800, ch. 33, 2 Stat. L. 47.

ART. 5. [**Spies.**] All persons who, in time of war, or of rebellion against the supreme authority of the United States, come or are found in the capacity of spies, or who bring or deliver any seducing letter or message from an enemy or rebel, or endeavor to corrupt any person in the Navy to betray his trust, shall suffer death, or such other punishment as a court-martial may adjudge. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 602; Act of Feb. 13, 1862, ch. 25, 12 Stat. L. 340; Act of March 3, 1863, ch. 75, 12 Stat. L. 737.

**Punishment under article 5.**—For an offense under this article the prisoner may be sentenced to imprisonment in the penitentiary of the District of Columbia, at hard labor for a term of years. *Toombs's Case, (1861) 10 Op. Atty-Gen. 158.*

ART. 6. [**Murder.**] If any person belonging to any public vessel of the United States commits the crime of murder without the territorial jurisdiction thereof, he may be tried by court-martial and punished with death. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 602.

ART. 7. [**Imprisonment in penitentiary.**] A naval court-martial may adjudge the punishment of imprisonment for life, or for a stated term, at

hard labor, in any case where it is authorized to adjudge the punishment of death; and such sentences of imprisonment and hard labor may be carried into execution in any prison or penitentiary under the control of the United States, or which the United States may be allowed, by the legislature of any State, to use; and persons so imprisoned in the prison or penitentiary of any State or Territory shall be subject, in all respects, to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which the same may be situated. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 602.

The authority to sentence to confinement in a public penitentiary is confined to crimes punishable with death, *Ex p. Van Vranken*, (1891) 47 Fed. 888; though the Attorney-General, J. S. Black (*Crowell's Case*, (1857) 9 Op. Atty.-Gen. 80), said that there was nothing illegal in sentencing a seaman to three years' confinement, at hard labor, in the peniten-

tiary, in the District of Columbia, to be deprived of his pay, and to be marked with the letter D on his right hip, for striking, disobeying, and treating with contempt his superior officer. See *Toombs's case*, (1861) 10 Op. Atty.-Gen. 158; *Lendeneg's Case*, (1868) 12 Op. Atty.-Gen. 510.

**ART. 8. [Offenses punishable at discretion of court-martial.]** Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy —

First. [**Profanity, falsehood, &c.**] Who is guilty of profane swearing, falsehood, drunkenness, gambling, fraud, theft, or any other scandalous conduct tending to the destruction of good morals;

Second. [**Cruelty.**] Or is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders;

Third. [**Quarreling.**] Or quarrels with, strikes, or assaults, or uses provoking or reproachful words, gestures, or menaces toward, any person in the Navy;

Fourth. [**Fomenting quarrels.**] Or endeavors to foment quarrels between other persons in the Navy;

Fifth. [**Duels.**] Or sends or accepts a challenge to fight a duel or acts as a second in a duel;

Sixth. [**Contempt of superior officer.**] Or treats his superior officer with contempt, or is disrespectful to him in language or deportment, while in the execution of his office;

Seventh. [**Combinations against superior officer.**] Or joins in or abets any combination to weaken the lawful authority of, or lessen the respect due to, his commanding officer;

Eighth. [**Mutinous words.**] Or utters any seditious or mutinous words;

Ninth. [**Neglect of orders.**] Or is negligent or careless in obeying orders, or culpably inefficient in the performance of duty.

Tenth. [**Preventing destruction of public property.**] Or does not use his best exertions to prevent the unlawful destruction of public property by others;

Eleventh. [**Negligent stranding.**] Or, through inattention or negligence, suffers any vessel of the Navy to be stranded, or run upon a rock or shoal, or hazarded;

Twelfth. [**Negligence in convoy service.**] Or, when attached to any vessel appointed as convoy to any merchant or other vessels, fails diligently

to perform his duty, or demands or exacts any compensation for his services, or maltreats the officers or crews of such merchant or other vessels;

**Thirteenth. [Receiving articles for freight.]** Or takes, receives, or permits to be received, on board the vessel to which he is attached, any goods or merchandise, for freight, sale, or traffic, except gold, silver, or jewels, for freight or safe-keeping; or demands or receives any compensation for the receipt or transportation of any other article than gold, silver, or jewels, without authority from the President or Secretary of the Navy;

**Fourteenth. [False muster.]** Or knowingly makes or signs, or aids, abets, directs, or procures the making or signing of, any false muster;

**Fifteenth. [Waste of public property, &c.]** Or wastes any ammunition, provisions, or other public property, or, having power to prevent it, knowingly permits such waste;

**Sixteenth. [Plundering on shore.]** Or, when on shore, plunders, abuses, or maltreats any inhabitant, or injures his property in any way;

**Seventeenth. [Refusing to apprehend offenders.]** Or refuses, or fails to use, his utmost exertions to detect, apprehend, and bring to punishment all offenders, or to aid all persons appointed for that purpose;

**Eighteenth. [Refusing to receive prisoners.]** Or, when rated or acting as master-at-arms, refuses to receive such prisoners as may be committed to his charge, or, having received them, suffers them to escape, or dismisses them without orders from the proper authority;

**Nineteenth. [Absence from duty without leave.]** Or is absent from his station or duty without leave, or after his leave has expired;

**Twentieth. [Violating general orders or regulations.]** Or violates or refuses obedience to any lawful general order or regulation issued by the Secretary of the Navy;

**Twenty-first. [Desertion in time of peace.]** Or, in time of peace, deserts or attempts to desert, or aids and entices others to desert;

**Twenty-second. [Harboring deserters.]** Or receives or entertains any deserter from any other vessel of the Navy, knowing him to be such, and does not, with all convenient speed, give notice of such deserter to the commander of the vessel to which he belongs, or to the commander-in-chief, or to the commander of the squadron. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 602; Act of April 23, 1800, ch. 33, 2 Stat. L. 47.

Inclusion of fine and imprisonment in article 14 does not by implication operate as a limitation on the punishment in this article, and the court may impose a sentence of forfeiture of pay and imprisonment. *Williams v. U. S.*, (1889) 24 Ct. Cl. 306.

When the punishment is left to the discretion of the court-martial, the punishment of dismissal from the squadron must be considered legitimate. (1829) 2 Op. Atty-Gen. 297.

A court-martial may render a partial verdict, as when there is an acquittal on one count and a verdict of guilty on another, or when the charge is of a higher degree, including one of a lesser; where one is charged with desertion he may be

found guilty of attempting to desert. *Dynes v. Hoover*, (1857) 20 How. 65, 15 U. S. (L. ed.) 838.

When the sentence declares a forfeiture of pay and allowances except certain specially named amounts, if the amount forfeited is not stated on the face of the sentence, but is capable of being exactly ascertained, the sentence is not void for uncertainty. *Williams v. U. S.*, (1889) 24 Ct. Cl. 306.

For desertion, the court may adjudge forfeiture of bounty in addition to other penalties. Engagement at Manila Bay, (1901) 36 Ct. Cl. 206.

Sufficiency of charge for false swearing. — In *Ex p. Dickey*, (D. C. Me. 1913) 204 Fed. 322, the petitioner sought a writ of

*habeas corpus* to review the validity of his imprisonment under a judgment of a naval court-martial on a charge of "scandalous conduct tending to the destruction of good morals." The writ was denied. The court said: "The petition of William W. Dickey shows that on the 2d day of October, 1912, he was an enlisted man in the United States navy, occupying the position of chief commissary steward on board the United States battleship *Kansas*; that he continued to be in such service of the United States up to December 2, 1912, when a court-martial was held on board the United States ship *Louisiana*; that he was tried before such court-martial for scandalous conduct tending to the destruction of good morals; that the specification under this charge set out at length a statement sworn to by the petitioner on the 13th day of November, 1912, before Commander Frederick B. Bassett, Jr., acting as commanding officer of the United States ship *Utah*, in which statement the petitioner swore that he had at several times, detailed therein, practiced frauds on the United States in conjunction with representatives of certain government contractors named therein, from whom supplies for the navy were purchased, and that such frauds had netted him money, amounting to about \$2,000 in certain cases named in said sworn statement; that thereafterwards, on November 19, 1912, while a witness under oath before a duly constituted court of inquiry, the petitioner gave certain testimony, set out in the specification, in which he denied the truth of his previous statement, and testified that he had never at any time received any money from contractors, and that his former statement was untrue. The specification then concludes: 'And that the said William W. Dickey, chief commissary steward United States navy, did by submitting the said written statement or confession, and by testifying as above shown, make statements inconsistent the one with the other, and one of which must have been, and was, known by him to be false

and misleading, and intended to deceive and defeat the ends of justice.' Upon this charge and specification the court-martial found the petitioner guilty, and sentenced him to five years at hard labor, deprivation of his pay for that time, and dishonorable discharge at the end of the five years, the same being under the provisions of article 1797 of the Navy Regulations, as changed by order of the Secretary of the Navy, November 9, 1911. . . . Upon examination of the charge on which the petitioner was tried, it will be found that it did not attempt to charge the petitioner in the court-martial with 'perjury,' which offense is defined under article 14 of the articles for the government of the navy as a distinct offense, namely, the making of an oath to any fact or writing, knowing such oath to be false, for the purpose of obtaining, or aiding others to obtain, the approval or allowance of any claim against the United States, or officer thereof. It is clear that the pleadings upon which the accused was tried in the court-martial alleged a lesser offense than 'perjury.' The offense set up was 'scandalous conduct tending to the destruction of good morals.' Under this charge the specification made a substantial charge of false swearing, although it did not set forth the charge with the clearness and definiteness required in a civil court. This general charge is well known in courts-martial, and authorized by article 8 of the articles for the government of the navy."

**Desertion by minor.**—The civil courts should not interfere by *habeas corpus* to discharge a minor under eighteen years of age who has been enlisted in either the military or naval service without the consent of his parents or guardian, if at the time of the presentation of the petition for the writ the minor is under arrest and held for trial by court-martial on a charge of desertion or fraudulent enlistment or other charge cognizable by a military or naval court. *U. S. v. Reeves*, (1903) 126 Fed. 127; *Dillingham v. Booker*, (1908) 163 Fed. 696, 16 Ann. Cas. 127.

**ART. 9. [Officers absent without leave may be reduced.]** Any officer who absents himself from his command without leave, may, by the sentence of a court-martial, be reduced to the rating of an ordinary seaman. [*R. S. sec. 1624.*]

Act of May 16, 1864, ch. 86, 13 Stat. L. 75.

**ART. 10. [Desertion by resignation.]** Any commissioned officer of the Navy or Marine Corps who, having tendered his resignation, quits his post or proper duties without leave, and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of such resignation, shall be deemed and punished as a deserter. [*R. S. sec. 1624.*]

Act of Aug. 5, 1861, ch. 54, 12 Stat. L. 316.

**ART. 11. [Dealing in supplies on private account.]** No person in the naval service shall procure stores or other articles or supplies for, and dispose thereof to, the officers or enlisted men on vessels of the Navy, or at navy-yards or naval stations, for his own account or benefit. [*R. S. sec. 1624.*]

Act of Aug. 26, 1842, ch. 206, 5 Stat. L. 535.

**ART. 12. [Importing dutiable goods in public vessels.]** No person connected with the Navy shall, under any pretense, import in a public vessel any article which is liable to the payment of duty. [*R. S. sec. 1624.*]

Act of July 30, 1846, ch. 74, 9 Stat. L. 44.

**ART. 13. [Distilled spirits only as medical stores.]** Distilled spirits shall be admitted on board of vessels of war only upon the order and under the control of the medical officers of such vessels, and to be used only for medical purposes. [*R. S. sec. 1624.*]

Act of July 14, 1862, ch. 164, 12 Stat. L. 565.

**ART. 14. [Certain crimes of fraud against the United States.]** Fine and imprisonment, or such other punishment as a court-martial may adjudge, shall be inflicted upon any person in the naval service of the United States —

**[Presenting false claims.]** Who presents or causes to be presented to any person in the civil, military, or naval service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

**[Agreement to obtain payment of false claim.]** Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

**[False papers.]** Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement; or

**[Perjury.]** Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

**[Forgery.]** Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or

**[Delivering less property than receipt calls for.]** Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the naval service thereof, knowingly

delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

**[Giving receipts without knowing truth of.]** Who, being authorized to make or deliver any paper certifying the receipt of any money or other property of the United States, furnished or intended for the naval service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or

**[Stealing, wrongfully selling, &c.]** Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully and knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money or other property of the United States, furnished or intended for the military or naval service thereof; or

**[Buying public military property.]** Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any other person who is a part of or employed in said service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such other person not having lawful right to sell or pledge the same; or

**[Other fraud.]** Who executes, attempts, or countenances any other fraud against the United States.

**[Liability after leaving service.]** And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed. [*R. S. sec. 1624.*]

Act of March 2, 1863, ch. 67, 12 Stat. L. 696, 697; Act of July 17, 1862, ch. 204, 12 Stat. L. 602.

**Confinement in penitentiary.**—One convicted of an offense made punishable by this article cannot be sentenced to confinement in a public penitentiary; the provisions of article 7 only apply to cases in which the court has the authority to impose a sentence of death. *Ex p. Van Vranken*, (1891) 47 Fed. 888.

**Embezzlement.**—The wilful use of government funds by a pay officer of the navy for the purpose of cashing a certificate of deposit as an accommodation to a personal friend constitutes embezzlement under this article. (1912) 29 Op. Atty.-Gen. 563. So also the wilful withdrawing of public funds by a pay officer of the navy

for his personal use while absent from his station of duty, even though there be no intention on his part to defraud the United States, and the funds withdrawn are subsequently replaced, is a violation of this article. (1912) 29 Op. Atty.-Gen. 563. Similarly, the overpayment by a pay officer of the navy to himself from public funds, where the officer is guilty of such negligence or indifference as to indicate a wilful disregard of the duties imposed upon him by law with respect to safe-keeping of the moneys in his charge, is in violation of this article. (1912) 29 Op. Atty.-Gen. 563.

**ART. 15.** The commanding officer of every vessel in the Navy entitled to or claiming an award of prize-money shall, as soon as it may be practicable after the capture, transmit to the Navy Department a complete list of the officers and men of his vessel entitled to share, stating therein the quality of each person rating; and every commanding officer who offends against this article shall be punished as a court-martial may direct. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 607.

This article was superseded by section 13 of an Act of March 3, 1899, ch. 413, 30 Stat. L. 1007, entitled "An Act to reorganize and increase the efficiency of the per



sonnel of the Navy and Marine Corps of the United States," which expressly repealed all provisions of law authorizing the distribution or payment of prize-money or bounties.

**ART. 16. [Removing property from a prize.]** No person in the Navy shall take out of a prize, or vessel seized as a prize, any money, plate, goods, or any part of her equipment, unless it be for the better preservation thereof, or unless such articles are absolutely needed for the use of any of the vessels or armed forces of the United States, before the same are adjudged lawful prize by a competent court; but the whole, without fraud, concealment, or embezzlement, shall be brought in, in order that judgment may be passed thereon; and every person who offends against this article shall be punished as a court-martial may direct. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 607.

**Allowing officer to go home in command of prize.**—Whether the necessities of the public service will allow the commander, in a time of war, upon a remote station, to spare one of his officers to go home in

command of a prize, is a matter depending on his discretion, provided he exercises reasonable discretion and acts in good faith. *Jecker v. Montgomery*, (1855) 18 How. 110, 15 U. S. (L. ed.) 311.

**ART. 17. [Maltreating persons taken on a prize.]** If any person in the Navy strips off the clothes of, or pillages, or in any manner maltreats, any person taken on board a prize, he shall suffer such punishment as a court-martial may adjudge. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 607.

**Recovery of damages.**—As well as the punishment here prescribed, the persons suffering indignities at the hands of the captors may recover damages, provided

that there was no mutual recrimination to provoke the improper conduct. *The Schooner Lively*, (1812) 1 Gall. (U. S.) 315.

**ART. 18. [Returning fugitives from service.]** If any officer or person in the naval service employs any of the forces under his command for the purpose of returning any fugitive from service or labor, he shall be dismissed from the service. [*R. S. sec. 1624.*]

Act of March 13, 1862, ch. 40, 12 Stat. L. 354.

**ART. 19. [Enlisting deserters, minors, &c.]** Any officer who knowingly enlists into the naval service any person who has deserted in time of war from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of fourteen and eighteen years, without the consent of his parents or guardian, or any minor under the age of fourteen years, shall be punished as a court-martial may direct. [*R. S. sec. 1624. 37 Stat. L. 356.*]

This article was amended to read as above by the latter part of section 2 of the Act of Aug. 22, 1912, ch. 336. The original provision was as follows: "ART. 19. Any officer who knowingly enlists into the naval service any deserter from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of fifteen and eighteen years, without the consent of his parents or guardian, or any minor under the age of fifteen years, shall be punished as a court-martial may direct." [*R. S. sec. 1624.*] Act of March 3, 1855, ch. 79, 13 Stat. L. 490; amended by the Act of May 12, 1879, ch. 5, 21 Stat. L. 3. The minimum age of enlistment was formerly sixteen, and the punishment was dishonorable dismissal from the service of the United States.

**Enlistment of minors.**—A minor who at the age of nineteen, with the consent of his father, enlisted in the navy, has no right to demand his discharge on coming of age, under the rule which applies to ordinary civil contracts. (1896) 21 Op. Atty-Gen. 327.

This article, and sections 1418 and 1419, R. S., show that the consent of his parent or guardian is not essential to the valid

enlistment of a minor over the age of eighteen years. *In re Norton*, (1899) 98 Fed. 606.

By the express provision of section 1621, R. S., the marine corps is a part of the naval service, and the enlistment of minors over the age of eighteen is valid without the consent of parents or guardians. *In re Doyle*, (1883) 18 Fed. 369.

**ART. 20. [Duties of commanding officers.]** Every commanding officer of a vessel in the Navy shall obey the following rules:

**First. [Men received on board.]** Whenever a man enters on board, the commanding officer shall cause an accurate entry to be made in the ship's books, showing his name, the date, place, and term of his enlistment, the place or vessel from which he was received on board, his rating, his descriptive list, his age, place of birth, and citizenship, with such remarks as may be necessary.

**Second. [List of officers, men, and passengers.]** He shall, before sailing, transmit to the Secretary of the Navy a complete list of the rated men under his command, showing the particulars set forth in rule one, and a list of officers and passengers, showing the date of their entering. And he shall cause similar lists to be made out on the first day of every third month and transmitted to the Secretary of the Navy as opportunities occur, accounting therein for any casualty which may have happened since the last list.

**Third. [Deaths and desertions.]** He shall cause to be accurately minuted on the ship's books the names of any persons dying or deserting, and the times at which such death or desertion occurs.

**Fourth. [Property of deceased persons.]** In case of the death of any officer, man, or passenger on said vessel, he shall take care that the paymaster secures all the property of the deceased, for the benefit of his legal representatives.

**Fifth. [Accounts of men received.]** He shall not receive on board any man transferred from any other vessel or station to him, unless such man is furnished with an account, signed by the captain and paymaster of the vessel or station from which he came, specifying the date of his entry on said vessel or at said station, the period and term of his service, the sums paid him, the balance due him, the quality in which he was rated, and his descriptive list.

**Sixth. [Accounts of men sent from the ship.]** He shall, whenever officers or men are sent from his ship, for whatever cause, take care that each man is furnished with a complete statement of his account, specifying the date of his enlistment, the period and term of his service, and his descriptive list. Said account shall be signed by the commanding officer and paymaster.

**Seventh. [Inspection of provisions.]** He shall cause frequent inspections to be made into the condition of the provisions on his ship, and use every precaution for their preservation.

**Eighth. [Health of the crew.]** He shall frequently consult with the surgeon in regard to the sanitary condition of his crew, and shall use all proper means to preserve their health. And he shall cause a convenient place to be set apart for sick or disabled men, to which he shall have them

removed, with their hammocks and bedding, when the surgeon so advises, and shall direct that some of the crew attend them and keep the place clean.

**Ninth. [Attendance at final payment of crew.]** He shall attend in person, or appoint a proper officer to attend, when his crew is finally paid off, to see that justice is done to the men and to the United States in the settlement of the accounts.

**Tenth. [Articles for the government of the Navy.]** He shall cause the articles for the government of the Navy to be hung up in some public part of the ship and read once a month to his ship's company.

**[Punishment for offending against this article.]** Every commanding officer who offends against the provisions of this article shall be punished as a court-martial may direct. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 609.

**ART. 21. [Authority of officers after loss of vessel.]** When the crew of any vessel of the United States are separated from their vessel by means of her wreck, loss, or destruction, all the command and authority given to the officers of such vessel shall remain in full force until such ship's company shall be regularly discharged from or ordered again into service, or until a court-martial or court of inquiry shall be held to inquire into the loss of said vessel. And if any officer or man, after such wreck, loss, or destruction, acts contrary to the discipline of the Navy, he shall be punished as a court-martial may direct. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 608.

**ART. 22. [Offenses not specified.]** All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court-martial may direct. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 603.

Punishment for fraudulent enlistment, see *infra*, p. 440.

**Criminal jurisdiction — court-martial.**—Article 22 is not intended to confer upon a court-martial general criminal jurisdiction, but only jurisdiction over those offenses (not specified in the preceding articles) which are injurious to the order and discipline of the navy. When a coal-heaver committed an assault upon a second-class fireman on board a vessel in the Thames river, opposite the city of New London, Conn., when the vessel was under way, and the injuries resulted in

death, a court-martial might take jurisdiction. (1880) 16 Op. Atty-Gen. 579.

The jurisdiction of courts-martial extends to the trial and punishment of acts of officers which tend to bring disgrace and reproach upon the service, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business. *Smith v. Whitney*, (1886) 116 U. S. 167, 6 S. Ct. 570, 29 U. S. (L. ed.) 601.

**ART. 23. [Offenses committed on shore.]** All offenses committed by persons belonging to the Navy while on shore shall be punished in the same manner as if they had been committed at sea. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 603.

**ART. 24. [Punishments by order of commander.]** No commander of a vessel shall inflict upon a commissioned or warrant officer any other punishment than private reprimand, suspension from duty, arrest, or confinement, and such suspension, arrest, or confinement shall not continue longer

than ten days, unless a further period is necessary to bring the offender to trial by a court-martial; nor shall he inflict, or cause to be inflicted, upon any petty officer, or person of inferior rating, or marine, for a single offense, or at any one time, any other than one of the following punishments, namely:

First. Reduction of any rating established by himself.

Second. Confinement, with or without irons, single or double, not exceeding ten days, unless further confinement be necessary, in the case of a prisoner to be tried by court-martial.

By section 8 of an Act of Feb. 16, 1909, ch. 131, 35 Stat. L. 621, the use of irons, single or double, was abolished, except for the purpose of safe custody, or when part of a sentence imposed by a general court-martial. To the same effect was a provision in the Naval Appropriation Act of May 13, 1908, ch. 166, 35 Stat. L. 132.

Third. Solitary confinement, on bread and water, not exceeding five days.

Fourth. Solitary confinement not exceeding seven days.

Fifth. Deprivation of liberty on shore.

Sixth. Extra duties.

No other punishment shall be permitted on board of vessels belonging to the Navy, except by sentence of a general or summary court-martial. All punishments inflicted by the commander, or by his order, except reprimands, shall be fully entered upon the ship's log. [*R. S. sec. 1624.*]

Act of July 17, 1862, ch. 204, 12 Stat. L. 603.

The provisions of article 26 do not interfere with the power of the commander to reduce seamen to inferior rate for incompetency. *Hough's Case*, (1862) 10 Op. Atty.-Gen. 168.

Every act of continued disobedience constitutes a further offense, and authorizes the commander to inflict an additional punishment; where an act of disobedience is persisted in, and endangers the due subordination of others, the commander is justified not only in punishing personally, but in resorting to any reasonable measures necessary to produce sub-

mission and safety, and imprisoning a seaman on shore in solitary confinement is justifiable unless accompanied by malice. *Wilkes v. Dinsman*, (1849) 7 How. 89, 12 U. S. (L. ed.) 618; *Dinsman v. Wilkes*, (1851) 12 How. 390, 13 U. S. (L. ed.) 1036.

Construing articles 24, 43, and 44 together, there may be two arrests: first, an arrest in an emergency, or with a view to a preliminary examination; and second, "an arrest for trial." (1890) 19 Op. Atty.-Gen. 472.

**ART. 25. [Punishment by officer temporarily commanding.]** No officer who may command by accident, or in the absence of the commanding officer, except when such commanding officer is absent for a time by leave, shall inflict any other punishment than confinement. [*R. S. sec. 1624.*]

Act of April 23, 1800, ch. 33, 2 Stat. L. 49.

**ART. 26. [Summary courts-martial.]** Summary courts-martial may be ordered upon petty officers and persons of inferior ratings, by the commander of any vessel, or by the commandant of any navy-yard, naval station, or marine barracks to which they belong, for the trial of offenses which such officer may deem deserving of greater punishment than such commander or commandant is authorized to inflict, but not sufficient to require trial by a general court-martial. [*R. S. sec. 1624.*]

Act of March 2, 1855, ch. 136, 10 Stat. L. 627.  
"Deck courts," see the title NAVY.

**ART. 27. [Constitution of summary courts-martial.]** A summary court-martial shall consist of three officers not below the rank of ensign, as members, and of a recorder. The commander of a ship may order any officer under his command to act as such recorder. [*R. S. sec. 1624.*]

Act of March 2, 1855, ch. 136, 10 Stat. L. 628.

**ART. 28. [Oath of members and recorder.]** Before proceeding to trial the members of a summary court-martial shall take the following oath or affirmation, which shall be administered by the recorder: "I, A B, do swear (or affirm) that I will well and truly try, without prejudice or partiality, the case now depending, according to the evidence which shall be adduced, the laws for the government of the Navy, and my own conscience." After which the recorder of the court shall take the following oath or affirmation, which shall be administered by the senior member of the court: "I, A B, do swear (or affirm) that I will keep a true record of the evidence which shall be given before this court and of the proceedings thereof." [*R. S. sec. 1624.*]

Act of March 2, 1855, ch. 136, 10 Stat. L. 628.

**ART. 29. [Testimony.]** All testimony before a summary court-martial shall be given orally, upon oath or affirmation, administered by the senior member of the court. [*R. S. sec. 1624.*]

Act of March 2, 1855.

**ART. 30. [Punishments by summary courts.]** Summary courts-martial may sentence petty officers and persons of inferior ratings to any one of the following punishments, namely:

First. Discharge from the service with bad conduct discharge; but the sentence shall not be carried into effect in a foreign country.

Second. Solitary confinement, not exceeding thirty days, in irons, single or double, on bread and water, or on diminished rations.

Third. Solitary confinement in irons, single or double, not exceeding thirty days.

See the note to clause 2, article 24, *supra*, p. 430.

Fourth. Solitary confinement not exceeding thirty days.

Fifth. Confinement not exceeding two months.

Sixth. Reduction to next inferior rating.

Seventh. Deprivation of liberty on shore on foreign station.

Eighth. Extra police duties, and loss of pay, not to exceed three months, may be added to any of the above-mentioned punishments. [*R. S. sec. 1624.*]

Act of March 2, 1855.

**ART. 31. [Disrating for incompetency.]** A summary court-martial may disrate any rated person for incompetency. [*R. S. sec. 1624.*]

Act of July 17, 1862.

**ART. 32. [Execution of sentence of summary court.]** No sentence of a summary court-martial shall be carried into execution until the proceedings and sentence have been approved by the officer ordering the court and

by the commander-in-chief, or, in his absence, by the senior officer present. And no sentence of such court which involves loss of pay shall be carried into execution until the proceedings and sentence have been approved by the Secretary of the Navy. [*R. S. sec. 1624.*]

Act of March 2, 1855; Act of March 2, 1867, ch. 174, 14 Stat. L. 516.

This section was in part superseded by section 17 of an Act of Feb. 16, 1909, ch. 131, entitled "An Act to promote the administration of justice in the Navy," and which is as follows: "That all sentences of summary courts-martial may be carried into effect upon the approval of the senior officer present, and all sentences of deck courts may be carried into effect upon approval of the convening authority or his successor in office." [*35 Stat. L. 623.*]

**ART. 33. [Remission of sentence.]** The officer ordering a summary court-martial shall have power to remit, in part or altogether, but not to commute, the sentence of the court. And it shall be his duty either to remit any part or the whole of any sentence, the execution of which would, in the opinion of the surgeon or senior medical officer on board, given in writing, produce serious injury to the health of the person sentenced, or to submit the case again, without delay, to the same or to another summary court-martial, which shall have power, upon the testimony already taken, to remit the former punishment and to assign some other of the authorized punishments in the place thereof. [*R. S. sec. 1624.*]

Act of March 2, 1855.

By section 9 of an Act of Feb. 16, 1909, ch. 131, 35 Stat. L. 621, entitled "An Act to promote the administration of justice in the Navy," provisions are made for the setting aside of the proceedings or the remission of sentence by the Secretary of the Navy. See the title NAVY.

**ART. 34. [Manner of conducting proceedings.]** The proceedings of summary courts-martial shall be conducted with as much conciseness and precision as may be consistent with the ends of justice, and under such forms and rules as may be prescribed by the Secretary of the Navy, with the approval of the President, and all such proceedings shall be transmitted in the usual mode to the Navy Department, where they shall be kept on file for a period of two years from date of trial, after which time they may be destroyed in the discretion of the Secretary of the Navy. [*35 Stat. L. 622.*]

This article was amended to read as above by section 14 of an Act of Feb. 16, 1909, ch. 131, entitled "An Act to promote the administration of justice in the Navy." The original section was as follows: "ART. 34. The proceedings of summary courts-martial shall be conducted with as much conciseness and precision as may be consistent with the ends of justice, and under such forms and rules as may be prescribed by the Secretary of the Navy, with the approval of the President; and all such proceedings shall be transmitted, in the usual mode, to the Navy Department." [*R. S. sec. 1624.*] Act of March 2, 1855.

**ART. 35. [Same punishments by general court-martial.]** Any punishment which a summary court-martial is authorized to inflict may be inflicted by a general court-martial. [*R. S. sec. 1624.*]

Act of March 2, 1855.

**ART. 36. [Dismissal of officers.]** No officer shall be dismissed from the naval service except by the order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed

except in pursuance of the sentence of a general court-martial or in mitigation thereof. [*R. S. sec. 1624.*]

Act of July 13, 1866, ch. 176, 14 Stat. L. 92.

**Power of President.**—This article does not restrict the power of the President, by and with the advice and consent of the Senate, to displace officers by the appointment of others in their places. Before the Act of July 13, 1866, the President alone had the right summarily to dismiss officers of the army or navy. *Mullan v. U. S.*, (1891) 140 U. S. 240, 11 S. Ct. 788, 35 U. S. (L. ed.) 489; *Blake v. U. S.*, (1880) 103 U. S. 227, 26 U. S. (L. ed.) 462.

It only operates to withdraw from the President the power previously existing in him of removing officers at will, and without the concurrence of the Senate. An officer has not a vested interest in his office of which Congress cannot deprive him. An act of Congress providing for the honorable discharge of naval cadets is not in conflict with the contract clause of the Constitution. *Crenshaw v. U. S.*, (1890) 134 U. S. 99, 10 S. Ct. 431, 33 U. S. (L. ed.) 825; *Harmon v. U. S.*, (1888) 23 Ct. Cl. 132.

If an order of the executive dismissing an officer of the marine corps had not itself been efficient, the appointment of a successor by the President, by and with the advice of the Senate, would have effected the removal. *McElrath's Case*, (1876) 12 Ct. Cl. 201.

**Dismissal by secretary.**—When the Secretary of the Navy, in 1869, wrote to a paymaster that "in consequence of the facts appearing upon the record of the

naval general court-martial . . . you are dismissed the naval service," it cannot be deemed an approval and execution of the sentence, but a dismissal from the service by reason of the disclosures made by the record, and this the executive had not the power to order after the passage of the Act of July 13, 1866. *Bellows's Case*, (1879) 16 Op. Atty.-Gen. 312.

**Civil engineers appointed under section 1413, R. S.**, are officers of the navy. (1876) 15 Op. Atty.-Gen. 165.

**Cadets at the naval academy** are not officers in the naval service, nor in general liable to court-martial, and are consequently entitled to the privilege given by this article to those who are; they may be dismissed for misconduct without trial. (1877) 15 Op. Atty.-Gen. 634; (1882) 17 Op. Atty.-Gen. 329.

**Acting gunner.**—As one appointed an acting gunner on temporary service by the Secretary of the Navy is not an officer, this article does not apply to him, and he may be dismissed at the will of the secretary. (1876) 15 Op. Atty.-Gen. 564.

**Acting master.**—One appointed by the Secretary of the Navy "an acting master in the navy, on temporary service," may be dismissed by the secretary, as, in the absence of legislation, the secretary had the power of determining the time at which an appointment expressly temporary should come to an end. (1876) 15 Op. Atty.-Gen. 560.

**ART. 37. [Officer dismissed by the President may demand trial.]** When any officer, dismissed by order of the President since 3d March, 1865, makes, in writing, an application for trial, setting forth, under oath that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such officer on the charges on which he shall have been dismissed. And if such court-martial shall not be convened within six months from the presentation of such application for trial, or if such court, being convened, shall not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void. [*R. S. sec. 1624.*]

Act of March 3, 1865.

**Civil engineers appointed under section 1413, R. S.**, are officers of the navy. (1876) 15 Op. Atty.-Gen. 165.

**Restoration to service—pay.**—Where an officer more than ten years after his dismissal is restored to the service by the

finding of a court-martial declaring him innocent of every charge, under the Act of June 22, 1874, ch. 392, § 2, he is not entitled to more than "pay as on leave for six months" from date of dismissal. (1876) 15 Op. Atty.-Gen. 569.

**ART. 38.** General courts-martial may be convened by the President, the Secretary of the Navy, or the commander-in-chief of a fleet or squadron; but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the President. [*R. S. sec. 1624.*] Act of July 17, 1862.

This article was superseded by an Act of Feb. 16, 1909, ch. 131, § 10, *infra*, p. 440, making other regulations as to the convening of courts-martial.

One designated in the proceedings as "commander in chief" must be presumed, in view of the Regulations for the Government of the Navy, 1896, article 243, to have been in command of a fleet or squadron. A recital in the precept that the court-martial was convened by the admiral by "express authority vested in me by the President of the United States," is sufficient without attaching to the record a copy of the commission, no objection to his authority having been raised during the trial. *In re Crain*, (1897) 84 Fed. 788.

"Waters of the United States."—The prohibition against the convocation of a general court-martial by the commander of a fleet or squadron without the previous authorization of the President, which is made by article 38, when such fleet or squadron is "in the waters of the United

States," applies only to those waters which are within what is termed by the Act of March 3, 1901, ch. 852, 31 Stat. L. 1108 (see the title NAVY), the continental limits of the United States. In other words, the provision in question does not take into view the dominion or sovereignty of the United States over territory beyond the seas and far removed from the seat of government, but contemplates waters within the United States in the stricter and popular sense of the term. The prohibition against the convocation by the commander of a fleet or squadron of a general court-martial, without the previous authorization of the President, was intended to be operative only when the fleet or squadron is in a home port. *U. S. v. Smith*, (1905) 197 U. S. 386, 25 S. Ct. 489, 49 U. S. (L. ed.) 801.

**ART. 39. [Constitution of.]** A general court-martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such court. But in no case, where it can be avoided without injury to the service, shall more than one-half, exclusive of the president, be junior to the officer to be tried. The senior officer shall always preside and the others shall take place according to their rank. [*R. S. sec. 1624.*]

Act of July 17, 1862.

The provisions of this article are merely directory.—The courts must assume, nothing to the contrary appearing upon the face of the order, that the discretion conferred upon the officer convening the court was properly exercised, and his decision as to the number and rank of the members of a court-martial who could be called together "without injury to the service" cannot be collaterally attacked. *Mullan v. U. S.*, (1891) 140 U. S. 240, 11 S. Ct. 788, 35 U. S. (L. ed.) 489; (1888) 23 Ct. Cl. 34.

The order of the officer ordering the court-martial to the captain, designating the members of the court, was a summons within the meaning of this article; and the fact that subsequently in a letter to

the captain he substituted another in the place of one of the members of the court is immaterial. *In re Crain*, (1897) 84 Fed. 788.

Volunteer naval officers, though their appointments may be temporary, are officers of the navy, and competent to serve on general courts-martial. (1863) 10 Op. Atty-Gen. 522.

When one of the thirteen members of a court-martial was absent two days, from sickness, and took no part in the judgment and sentence, it was a mere irregularity which was waived by the accused failing to take advantage of it before the approval of the sentence by the President. (1855) 7 Op. Atty-Gen. 98. See art. 47.

**ART. 40. [Oaths of members and judge-advocate.]** The president of the general court-martial shall administer the following oath or affirmation to the judge-advocate or person officiating as such:

"I, A B, do swear (or affirm) that I will keep a true record of the evidence given to and the proceedings of this court; that I will not divulge or by any means disclose the sentence of the court until it shall have been approved by the proper authority; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law."

This oath or affirmation being duly administered, each member of the court, before proceeding to trial, shall take the following oath or affirmation, which shall be administered by the judge-advocate or person officiating as such:



"I, A B, do swear (or affirm) that I will truly try without prejudice or partiality, the case now depending, according to the evidence which shall come before the court, the rules for the government of the Navy, and my own conscience; that I will not by any means divulge or disclose the sentence of the court until it shall have been approved by the proper authority; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law." [R. S. sec. 1624.]

Act of July 17, 1862.

What naval officers may administer oath.—See Act of Jan. 25, 1895, ch. 45, as amended by Act of March 3, 1901, ch. 834, 31 Stat. L. 1086, under the title NAVY.

Where the warrant convening a court-martial was general, accompanied with a specification of certain persons who were to be tried, a renewed administration of

the oath in each case was not necessary. (1829) 2 Op. Atty-Gen. 297.

Swearing in.—When the members and judge-advocate were not respectively sworn in the order prescribed by law, it was a mere irregularity, and an objection came too late after trial. (1871) 13 Op. Atty-Gen. 374.

**ART. 41. [Oath of witness.]** An oath or affirmation in the following form, shall be administered to all witnesses, before any court-martial, by the president thereof:

"You do solemnly swear (or affirm) that the evidence you shall give in the case now before this court shall be the truth, the whole truth, and nothing but the truth, and that you will state everything within your knowledge in relation to the charges. So help you God; (or 'this you do under the pains and penalties of perjury.')

 [R. S. sec. 1624.]

Act of July 17, 1862.

**ART. 42. [Contempts of court.]** Whenever any person refuses to give his evidence or to give it in the manner provided by these articles, or prevaricates, or behaves with contempt to the court, it shall be lawful for the court to imprison him for any time not exceeding two months. [R. S. sec. 1624.]

Act of July 17, 1862.

Further provisions with respect to witnesses at court-martial proceedings were made by section 12 of an Act of Feb. 16, 1909, ch. 131, 35 Stat. L. 622, entitled "An Act to promote the administration of justice in the Navy," given under the title NAVY.

Courts-martial should adhere to the rules of evidence established in the common-law courts of criminal jurisdiction, and they cannot dispense with the attendance of witnesses and take depositions to be used on the trial, when objected to by the officer preferring the charges. (1830) 2 Op. Atty-Gen. 343.

A court-martial is a court of limited

and special jurisdiction, and nothing in the way of control over civilians is to be taken in its favor by implication. Civilians cannot be compelled to appear and testify before a naval court-martial. The provisions of section 1202, R. S., apply only to army courts-martial. (1890) 19 Op. Atty-Gen. 501.

**ART. 43. [Charges.]** The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial; in which

case reasonable time shall be given to the accused to make his defense against such new charge. [*R. S. sec. 1624.*]

Act of July 17, 1862.

This article refers to the time when the accused is arrested for trial by court-martial, and not to the time of any previous arrest, as to await the action of a court of inquiry. Being furnished with a copy of the charge and specification when the Secretary of the Navy informed him of the report of the court of inquiry, four days before the court-martial met, was a sufficient compliance. *Johnson v. Sayre*, (1895) 158 U. S. 109, 15 S. Ct. 773, 39 U. S. (L. ed.) 914; (1890) 19 Op. Atty.-Gen. 472.

Failure to furnish the accused with a copy of the charges and specifications goes to the jurisdiction of the court-martial and may be inquired into by a civil court. Sailors on shipboard are beyond the reach of a writ of habeas corpus and without legal advice, and jurisdictional requirements must be followed and appear affirmatively on the record. An entry on the log is not notice to the prisoner, and being first informed of the charges by their being read during the proceedings of the court-martial, is not a compliance with the requirements of this article. *Smith v. U. S.*, (1901) 36 Ct. Cl. 304.

When the record shows that the accused, in reply to an inquiry of the judge-advocate, stated that he had received a copy of the charges and specifications pre-

ferred against him, but it does not appear that such copy was served upon him at the time of his arrest, it must be presumed that the copy was served as required by this article, in the absence of any objection at the trial. *In re Crain*, (1897) 84 Fed. 788.

**What charges may be tried.**—A specification of charge known to the Secretary of the Navy, where former charges against the accused were prepared by him, before another and distinct court-martial, upon a different and distinct matter, may be tried before a subsequent court-martial. The inhibitions of this article apply only to courts-martial ordered on the application of persons other than the Secretary himself. *Voorhees's Case*, (1845) 4 Op. Atty.-Gen. 410.

**Time for service of charges.**—The arrest referred to in this article as the time when the person accused is to be furnished with a copy of the charges and specifications on which he is to be tried by a naval court-martial, is not the preliminary arrest or detention while awaiting the action of higher authority to frame charges and specifications and order the court-martial, but is the arrest resulting from the preferring of the charges by the proper authority and the convening of the court-martial. *U. S. v. Smith*, (1905) 197 U. S. 386, 25 S. Ct. 489, 49 U. S. (L. ed.) 801.

**ART. 44. [Duty of officer arrested.]** Every officer who is arrested for trial shall deliver up his sword to his commanding officer and confine himself to the limits assigned him, on pain of dismissal from the service. [*R. S. sec. 1624.*]

Act of July 17, 1862.

Construing articles 24, 43, and 44 together, there may be two arrests: first, an arrest in an emergency, or with a

view to a preliminary examination; and second, "an arrest for trial." (1890) 19 Op. Atty.-Gen. 472.

**ART. 45. [Suspension of proceedings.]** When the proceedings of any general court-martial have commenced, they shall not be suspended or delayed on account of the absence of any of the members, provided five or more are assembled; but the court is enjoined to sit from day to day, Sundays excepted, until sentence is given, unless temporarily adjourned by the authority which convened it. [*R. S. sec. 1624.*]

Act of July 17, 1862.

**ART. 46. [Absence of members.]** No member of a general court-martial shall, after the proceedings are begun, absent himself therefrom, except in case of sickness, or of an order to go on duty from a superior officer, on pain of being cashiered. [*R. S. sec. 1624.*]

Act of July 17, 1862.

**ART. 47. [Witnesses examined in absence of a member.]** Whenever any member of a court-martial, from any legal cause, is absent from the court after the commencement of a case, all the witnesses who have been examined during his absence must, when he is ready to resume his seat, be recalled by the court, and the recorded testimony of each witness so examined must be read over to him, and such witness must acknowledge the same to be correct and be subject to such further examination as the said member may require. Without a compliance with this rule, and an entry thereof upon the record, a member who shall have been absent during the examination of a witness shall not be allowed to sit again in that particular case. [*R. S. sec. 1624.*]

Act of July 17, 1862.

**ART. 48. [Suspension of pay.]** Whenever a court-martial sentences an officer to be suspended, it may suspend his pay and emoluments for the whole or any part of the time of his suspension. [*R. S. sec. 1624.*]

Act of July 17, 1862.

**ART. 49. [Flogging, branding, &c.]** In no case shall punishment by flogging, or by branding, marking, or tattooing on the body be adjudged by any court-martial or be inflicted upon any person in the Navy. [*R. S. sec. 1624.*]

Act of July 17, 1862; Act of June 6, 1872, ch. 316, 17 Stat. L. 261.

**Flogging seamen.**—Under the Act of a seaman. *U. S. v. Cutler*, (1853) 1 Curt. March 3, 1835, 4 Stat. L. 776, the master (U. S.) 501.  
of a vessel may be indicted for flogging

**ART. 50. [Sentences, how determined.]** No person shall be sentenced by a court-martial to suffer death, except by the concurrence of two-thirds of the members present, and in the cases where such punishment is expressly provided in these articles. All other sentences may be determined by a majority of votes. [*R. S. sec. 1624.*]

Act of July 17, 1862.

See article 63.

**ART. 51. [Adequate punishment; recommendation to mercy.]** It shall be the duty of a court-martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing. [*R. S. sec. 1624.*]

Act of July 17, 1862.

See article 63.

**ART. 52. [Authentication of judgment.]** The judgment of every court-martial shall be authenticated by the signature of the president, and of every member who may be present when said judgment is pronounced, and also of the judge-advocate. [*R. S. sec. 1624.*]

The death of one of the members of a general court-martial after sentence had been imposed, but before he had appended his signature, does not render the sentence void. (1901) 23 Op. Atty.-Gen. 550.

**ART. 53. [Confirmation of sentence.]** No sentence of a court-martial, extending to the loss of life, or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President.

All other sentences of a general court-martial may be carried into execution on confirmation of the commander of the fleet or officer ordering the court. [*R. S. sec. 1624.*]

Act of July 17, 1862.

The President's approval of a sentence of the court-martial dismissing an officer is a judicial act, and cannot be reconsidered and revoked after the approval has been consummated by actual dismissal. But the President may purge the offense by a pardon, and while this would not restore the officer to his lost position, it would remove any disabilities he might be under as a consequence of the conviction and dismissal. (1864) 11 Op. Atty-Gen. 19.

Disapproval of officer ordering court-martial.—When the officer who ordered a naval general court-martial forwarded the record of the proceedings to the Navy Department with the indorsement, "Respectfully forwarded with the remark that the finding of the court is not sustained by the evidence, which fails to show that the accused received from the bank the amount of money he is charged with having received," this action is not a disapproval of the finding and sentence. *Bel lows's Case*, (1879) 16 Op. Atty-Gen. 312.

A court-martial is not dissolved until the officer convening the court has so ordered. Under the Navy Regulations, before the court is dissolved the officer who convened it may direct it to reconsider its proceedings and sentence, and accordingly the court may inflict a severer pun-

ishment. *Ex p. Reed*, (1879) 100 U. S. 13, 25 U. S. (L. ed.) 538; *Smith v. Whitney*, (1886) 116 U. S. 167, 6 S. Ct. 570, 29 U. S. (L. ed.) 601.

An acting master's mate is not a warrant officer of the navy, and the authority to approve the sentence of a court-martial dismissing such an officer from the service was vested in the officer who convened the court. *Arnold's Case*, (1865) 11 Op. Atty-Gen. 251.

When there has been any irregularity in the proceedings by court-martial, it is waived by the accused failing to take advantage of it before the approval of the sentence by the President; and the approval of the sentence of dismissal is a consummated fact, and if the party be restored to the service it can only be by renomination to the Senate and reappointment. (1855) 7 Op. Atty-Gen. 98; (1854) 6 Op. Atty-Gen. 369.

Review by civil court.—Civil courts are not courts of error to review the proceedings and sentences of courts-martial, where they are legally organized and have jurisdiction of the offense and of the person of the accused, and have complied with the statutory requirements governing their proceedings. *Mullan v. U. S.*, (1909) 212 U. S. 516, 29 S. Ct. 330, 53 U. S. (L. ed.) 632.

ART. 54. [*Remission and mitigation of sentence.*] Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm. [*R. S. sec. 1624.*]

Act of July 17, 1862.

See the note to article 33.

The Secretary of the Navy has power to approve or confirm the sentence of courts-martial in all cases where those courts are convened or ordered by him according to law, and where the sentences do not extend to loss of life or to dismissal of a commissioned or warrant officer. (1852) 5 Op. Atty-Gen. 508.

An acting master's mate is not a warrant officer of the navy, and the authority to approve the sentence of a court-martial dismissing such an officer from the service was vested in the officer who convened the court. There is no authority in the President to review the sentence after being carried into execution. *Arnold's Case*, (1865) 11 Op. Atty-Gen. 251.

Where forfeiture or loss of pay is made a part of the sentence of a court-martial, in addition to confinement or suspension

from duty, the former may be remitted in whole or in part by the President or Secretary of the Navy without also remitting the latter. (1876) 15 Op. Atty-Gen. 175.

"Mitigation of sentence."—Reducing the sentence of a court-martial which dismissed a naval officer from the service, to suspension for five years on one-half sea pay, with a reduction in rank to the foot of the list of officers of his grade, is a mitigation of the sentence within the meaning of this article, that "every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm." *Mullan v. U. S.*, (1909) 212 U. S. 516, 29 S. Ct. 330, 53 U. S. (L. ed.) 632.

**ART. 55. [Courts of inquiry, by whom ordered.]** Courts of inquiry may be ordered by the President, the Secretary of the Navy, or the commander of a fleet or squadron. [*R. S. sec. 1624.*]

Act of July 17, 1862.

**ART. 56. [Constitution of.]** A court of inquiry shall consist of not more than three commissioned officers as members, and of a judge-advocate, or person officiating as such. [*R. S. sec. 1624.*]

Act of July 17, 1862.

**ART. 57. [Powers of.]** Courts of inquiry shall have power to summon witnesses, administer oaths, and punish contempts, in the same manner as courts-martial; but they shall only state facts, and shall not give their opinion, unless expressly required so to do in the order for convening. [*R. S. sec. 1624.*]

Act of July 17, 1862.

A court-martial is a court of limited and special jurisdiction, and nothing in the way of control over civilians is to be taken in its favor by implication. Civilians cannot be compelled to appear

and testify before a naval court-martial. The provisions of section 1202, R. S., apply only to army courts-martial. (1890) 19 Op. Atty.-Gen. 501.

**ART. 58. [Oath of members and judge-advocate.]** The judge-advocate, or person officiating as such, shall administer to the members the following oath or affirmation: "You do swear (or affirm) well and truly to examine and inquire, according to the evidence, into the matter now before you, without partiality." After which the president shall administer to the judge-advocate, or person officiating as such, the following oath or affirmation: "You do swear (or affirm) truly to record the proceedings of this court and the evidence to be given in the case in hearing." [*R. S. sec. 1624.*]

Act of July 17, 1862.

**ART. 59. [Rights of party inquired of.]** The party whose conduct shall be the subject of inquiry, or his attorney, shall have the right to cross-examine all the witnesses. [*R. S. sec. 1624.*]

Act of July 17, 1862.

**ART. 60. [Proceedings, how authenticated and used as evidence.]** The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge-advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony cannot be obtained. [*R. S. sec. 1624.*]

Act of July 17, 1862.

**Waiver of objection to admission of record of court of inquiry.**—A court-martial convened at the request of a naval officer to investigate charges against him is not without jurisdiction because such officer was required, as a condition precedent, to waive the protection of this

article, by consenting to the admission in evidence of the record of the testimony introduced before a prior court of inquiry, with the right to call additional witnesses. *Mullan v. U. S.*, (1909) 212 U. S. 516, 29 S. Ct. 330, 53 U. S. (L. ed.) 632.

**ART. 61. [Trials to be within two years of committing offense.]** No person shall be tried by court-martial or otherwise punished for any offense, except as provided in the following article, which appears to have been committed more than two years before the issuing of the order for such

trial or punishment, unless by reason of having absented himself, or of some other manifest impediment he shall not have been amenable to justice within that period. [28 Stat. L. 680.]

This and the following article 62 were added by the Act of Feb. 25, 1895, ch. 128, 28 Stat. L. 680, entitled "An Act to amend the articles for the government of the navy."

**ART. 62. [Trials for desertion in time of peace.]** No person shall be tried by court-martial or otherwise punished for desertion in time of peace committed more than two years before the issuing of the order for such trial or punishment, unless he shall meanwhile have absented himself from the United States, or by reason of some other manifest impediment shall not have been amenable to justice within that period, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was enlisted in the service. [28 Stat. L. 680.]

See note to article 61.

**ART. 63. [Punishment for offenses in time of peace.]** Whenever, by any of the Articles for the Government of the Navy of the United States, the punishment on conviction of an offense is left to the discretion of the court-martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe. [28 Stat. L. 689.]

This article was added by the Act of Feb. 27, 1895, ch. 137, 28 Stat. L. 689, entitled "An Act to amend the articles for the government of the navy relative to punishment on conviction by court martial."

[SEC. 1.] **[Punishment for fraudulent enlistment.]** \* \* \* A fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared an offense against naval discipline and made punishable by general court martial, under article twenty-two of the articles for the government of the Navy; but this provision shall not take effect until sixty days after the passage of this act. [27 Stat. L. 716.]

This is from the Naval Appropriation Act of March 3, 1893, ch. 212.

**Enlistment by person under eighteen without consent of parent or guardian.**—Where an infant, not eligible to enlistment in the navy, enlisted without the consent of his parents or guardian, it was held that he was not "a person belonging to the navy" and was not punishable as for fraudulent enlistment under this section. *Ex p. Lisk*, (1906) 145 Fed. 860.

**Habeas corpus.**—In a habeas corpus

proceeding to recover possession of a minor under eighteen years of age, who had enlisted in the navy without the consent of his parents or guardian, it was held to be no answer to the writ that the naval authorities were entitled to retain the custody of the minor for the purpose of having him tried by a naval court martial for fraudulent enlistment. *Ex p. Lisk*, (1906) 145 Fed. 860.

**SEC. 10. [General courts-martial — by whom convened.]** That general courts-martial may be convened by the President, by the Secretary of the Navy, by the commander in chief of a fleet or squadron, and by the commanding officer of any naval station beyond the continental limits of the United States. [35 Stat. L. 621.]

This is from an Act of Feb. 16, 1909, ch. 131, and supersedes article 38 given *supra*, p. 433, note. See notes to article 38.

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#### CROSS-REFERENCE.

See **WAR DEPARTMENT AND MILITARY ESTABLISHMENT.**

**Sec. 1342. [Articles of war.]** The armies of the United States shall be governed by the following rules and articles. The word officer, as used therein, shall be understood to designate commissioned officers; the word soldier shall be understood to include non-commissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial. [R. S.]

*Act of April 10, 1806, ch. 20, 2 Stat. L. 359.*

**Who are in the army service and subject to court-martial.**—See articles 61 and 63, and R. S. sec. 1343, *infra*, p. 481.

**Death penalty.**—The Act of January 15, 1897 (29 Stat. L., ch. 29, p. 487),

abolishing the death penalty, excepts offenses specified under this section. Notes v. U. S., (1900) 178 U. S. 458, 20 S. Ct. 993, 44 U. S. (L. ed.) 1150.

**Army regulations.**—Army regulations

when directly approved by Congress have the absolute force of law. When not so approved, they have the force of law when founded on the President's constitutional powers as commander-in-chief, or when consistent with or supplementary to the acts of Congress in reference to the army. *Matter of Smith*, (1888) 23 Ct. Cl. 452; *Swain v. U. S.*, (1897) 165 U. S. 553, 17 S. Ct. 448, 41 U. S. (L. ed.) 823. But they do not control subsequent express statutory provisions. *Morrison's Case*, (1877) 13 Ct. Cl. 1.

They are intended for the government of the officers of the army and agents of the department, and do not bind the commander-in-chief nor the head of the War Department. *U. S. v. Burns*, (1870) 12 Wall. 246, 20 U. S. (L. ed.) 388; *Matter of Smith*, (1889) 24 Ct. Cl. 209.

Neither a civilian employed as a quartermaster's clerk nor a superintendent of a national cemetery belongs to the military establishment, or is amenable to a court-martial. The persons comprehended by this section are those designated in section 1094, R. S., and persons who do not belong to that establishment, who are not a part of the army as thus fixed and defined, are not subject to such jurisdiction, excepting where they come within either of sections 1343, 1361, 4824, and 4835, R. S., and during service in the field under art. 64. (1878) 16 Op. Atty-Gen. 13, 48.

A paymaster's clerk is a person engaged in a particular department of the military service, and altering and forging vouchers will subject him to trial before military tribunals. *In re Thomas*, (1869) 23 Fed. Cas. No. 13,888. See *In re Reed*, (1879) 20 Fed. Cas. No. 11,636.

Cadets form a part of the land forces, though not specifically mentioned in the introductory section, and are subject to the rules and articles of war, and to trial by courts-martial. *Babbitt's Case*, (1880) 16 Ct. Cl. 202; (1819) 1 Op. Atty-Gen. 276; (1855) 7 Op. Atty-Gen. 323.

A military officer detailed for duty in the Freedmen's Bureau, guilty of misappropriation of money or any violation of the rules and regulations governing disbursing officers of the army, may be tried by court-martial. (1873) 14 Op. Atty-Gen. 268.

When persons who are to render military service have been ascertained by draft or otherwise, and have been lawfully commanded to attend a rendezvous, those who disobey may be subjected by military force to military discipline and organization. *McCall's Case*, (1863) 5 Phila. (Pa.) 259, 20 Leg. Int. (Pa.) 108.

A soldier serving out a term of imprisonment, though the sentence included discharge from the army, is connected with the military service and subject to military government, and may be tried by court-martial for an offense committed

during such imprisonment. (1879) 16 Op. Atty-Gen. 292; *In re Craig*, (1895) 70 Fed. 969; *Ex p. Wildman*, (1876) 29 Fed. Cas. No. 17,653a.

A soldier who has served out his time but who is refused his discharge, while he remains in the barracks is subject to military rules, and cannot violate them except as to any act or exertion the direct object of which should be to depart from the place. *U. S. v. Travers*, (U. S. Cir. Ct. 1814) 2 Wheel. Crim. (N. Y.) 490.

An army contractor, under the Act of July 17, 1862 (12 Stat. L., p. 596, § 16), is subject to the rules and regulations of the army, and liable to be tried by court-martial for fraud upon the government. *U. S. v. Adams*, (1868) 7 Wall. 463, 19 U. S. (L. ed.) 249; (1866) 2 Ct. Cl. 70; *Hill's Case*, (1873) 9 Ct. Cl. 178. See *Holmes v. Sheridan*, (1870) 1 Dill. (U. S.) 351.

Though in *Ex p. Henderson*, (1878) 11 Fed. Cas. No. 6,349, it is said that an act attempting to make a contractor of supplies to the army a part of the land forces, and providing that fraud will render him amenable to court-martial, is unconstitutional.

In (1829) 2 Op. Atty-Gen. 223, the attorney-general said that the marine corps seemed to belong to the land forces of the military service, as its organization corresponds rather with that of the army than the navy. But the Act of Congress of June 30, 1834 (R. S. 1621), makes the marine corps subject to laws governing the navy, except when serving with the army. The case of *U. S. v. Dunn*, (1887) 120 U. S. 249, 7 S. Ct. 507, 30 U. S. (L. ed.) 667, holds that the chief control of the marine is placed under the Secretary of the Navy unless, by order of the President, it be placed more immediately, for temporary duty, with the army, and under the command of the superior army officers.

A retired officer, one who has not resigned or been dismissed from the service, is still an officer of the United States within the meaning of section 5498, R. S. *In re Winthrop*, (1895) 31 Ct. Cl. 35.

The "muster out" of volunteers and militia troops cannot be viewed as in itself a discharge of such troops from service. Not until discharge certificates are delivered can they be deemed to have been honorably "discharged." (1870) 13 Op. Atty-Gen. 278.

**Martial law.**—Martial law is neither more nor less than the will of the general who commands the army. It is regulated by no known or established system or code of laws, as it is over and above all of them. Its necessity must be shown affirmatively by any person who assumes to exercise it. Where a person was tried by a military commission, in South Carolina, in November, 1865, for a murder committed in September, 1865, and was convicted and sentenced to imprisonment for life,

the Confederate army having surrendered seven months before the trial, he was entitled to be discharged on habeas corpus, as the conviction was illegal for want of jurisdiction in the tribunal. *In re Egan*, (1866) 5 Blatchf. (U. S.) 319.

The President cannot, as Congress alone has the power to, authorize the suspension of the writ of habeas corpus; and in the absence of a valid suspension of the writ, a military officer has no right to detain a person, not subject to the articles of war, for an offense against the law of the United States, except in aid of the civil authority. *Ex p. Merryman*, (1861) Taney (U. S.) 246; *Ex p. Benedict*, (1862) 3 Fed. Cas. No. 1,292. But in *Ex p. Field*, (1862) 5 Blatchf. (U. S.) 63, the court sustains the authority of the President to proclaim martial law.

During the civil war, a citizen of a loyal state in which the courts were open, who had never been in the military service, and was not a prisoner of war, could not be tried by a military commission, but was entitled to his constitutional right of trial by jury, and should be released on a writ of habeas corpus. Congress could not invest military commissions with such powers. *Ex p. Milligan*, (1866) 4 Wall. 2, 18 U. S. (L. ed.) 281; *Devlin's Claim*, (1867) 12 Op. Atty-Gen. 128; *Milligan v. Hovey*, (1871) 3 Biss. (U. S.) 13.

The President has no authority to suspend the writ of habeas corpus unless authorized to do so by Act of Congress; the power of Congress to suspend the writ extends to enabling them to pass laws protecting officers against actions for arrests previously made. *McCall v. McDowell*, (1867) 1 Abb. (U. S.) 212.

When a person was arrested and held by sentence of a military commission in St. Louis, he must be discharged if the grand jury, organized next after a list of prisoners so held is furnished to the judges, do not present him to the court for trial, as the courts of the United States were open, and perfectly competent to the trial of any offenses within their jurisdiction. *In re Murphy*, (1867) Woolw. (U. S.) 141.

In a time of civil war, the President, as commander-in-chief, even in a locality where martial law is not in force, may arrest citizens, not in the military or naval forces, for mischievous acts of disloyalty which impede or endanger the military department as the representative of the President. Such arrests are justifiable on the ground of military necessity, and the existence of that necessity the courts have no authority by writs of habeas corpus to inquire into. *Ex p. Valandigham*, (1863) 28 Fed. Cas. No. 16,816. And in the same case in 1 Wall. (U. S.) 243, 17 U. S. (L. ed.) 589, the Supreme Court says that it has no power to review by certiorari the proceedings of a

military commission ordered by a general officer of the United States army.

Persons charged with the assassination of the President in the city of Washington may be lawfully tried before a military tribunal, though the civil courts were open and held regular sessions, because at the time war was flagrant, the city of Washington was defended by military operations, and martial law had been declared in the District of Columbia. (1865) 11 Op. Atty-Gen. 297.

The suspension of the writ of habeas corpus by the President, acting under authority of an Act of Congress, has the effect of stopping any proceedings under a writ issued before the proclamation. *In re Fagan*, (1863) 2 Sprague (U. S.) 91.

**Review of courts-martial by civil courts.**—There can be no review by a civil court of a trial by court-martial. When the record of a court-martial comes into a civil court in a collateral way the only questions that can be considered are: (1) was the court-martial legally constituted? (2) did it have jurisdiction of the case? (3) was the sentence duly approved and authorized by law? *Swain v. U. S.*, (1893) 28 Ct. Cl. 173, *affirmed in* (1897) 165 U. S. 553, 17 S. Ct. 448, 41 U. S. (L. ed.) 823; *U. S. v. Fletcher*, (1893) 148 U. S. 84, 13 S. Ct. 552, 37 U. S. (L. ed.) 378; *Keyes v. U. S.*, (1883) 109 U. S. 336, 3 S. Ct. 202, 27 U. S. (L. ed.) 954; *Carter v. McLaughry*, (1900) 105 Fed. 614; *In re Zimmerman*, (1887) 30 Fed. 176.

Courts-martial are lawful tribunals, and their proceedings are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced. *Carter v. Roberts*, (1900) 177 U. S. 496, 20 S. Ct. 713, 44 U. S. (L. ed.) 861; *In re Davison*, (1884) 21 Fed. 618; *In re Esmond*, (1886) 5 Mackey (D. C.) 64; *Ex p. Mason*, (1881) 105 U. S. 696, 26 U. S. (L. ed.) 1213; *Biddle's Petition*, (1855) 2 Hayw. & H. (D. C.) 198; *In re White*, (1883) 17 Fed. 723. And the judgments of courts-martial are as final and conclusive as those of civil tribunals. *In re McVey*, (1885) 23 Fed. 878.

Where a court-martial has jurisdiction of the person accused and of the offense charged; and acts within the scope of its lawful powers, its decision and sentence cannot be reviewed or set aside by the civil courts, by writ of habeas corpus or otherwise. *U. S. v. Praeger*, (1907) 149 Fed. 474.

If a court-martial undertakes to try and punish a person not within its jurisdiction, or to punish a person within its jurisdiction for an offense not within its jurisdiction, its judgment is void, and may be so declared by any court having

jurisdiction of the proper parties and of the subject matter, *Barrett v. Hopkins*, (1881) 7 Fed. 312; and so where it inflicts a punishment forbidden by law, *Dynes v. Hoover*, (1857) 20 How. 65, 15 U. S. (L. ed.) 838; and a writ of habeas corpus may issue, except in cases where the privilege of the writ is suspended, and on refusal to discharge a writ of error will lie, *Ex p. Milligan*, (1866) 4 Wall. 2, 18 U. S. (L. ed.) 281.

Where a military officer made a return to a writ of habeas corpus that he declined to obey it at that time under orders from his superior, the court could take no further action in the matter and would deny a motion to execute the writ. *Ex p. McQuillon*, (1861) 16 Fed. Cas. No. 8,924; *Ex p. Merryman*, (1861) Taney (U. S.) 246.

If a Circuit Court has the right, even in an application in a proper case, to issue a writ of prohibition to a court-martial, it could only issue where the court-martial had no jurisdiction; matters of pleading or to the merits cannot be inquired into.

*U. S. v. Maney*, (1894) 61 Fed. 140; *State v. Wakely*, (1820) 2 Nott & M. (S. C.) 410.

In the case of *Smith v. Whitney*, (1886) 116 U. S. 167, the court says that a writ of prohibition will not issue from a civil court to a court-martial unless it clearly appears that the court is about to exceed its jurisdiction.

A person illegally conscripted into the army may be discharged on habeas corpus. (This case is nowhere reported.) *Stingle's Case*, (1863) 23 Fed. Cas. No. 13,458.

**Jurisdiction over civilian.**—A court-martial has no final jurisdiction over a civilian before it as a witness and is without power to punish him for contempt for refusing to testify, its authority over him in that regard being limited to a certification of the facts to the United States district attorney. *U. S. v. Praeger*, (1907) 149 Fed. 474.

The civil courts may, by appropriate proceedings, prohibit a court-martial from trying a civilian. *Ex p. Henderson*, (1878) 11 Fed. Cas. No. 6,349.

**ARTICLE 1. [Officers shall subscribe these articles.]** Every officer now in the Army of the United States shall within six months from the passing of this act, and every officer hereafter appointed shall, before he enters upon the duties of his office, subscribe these rules and articles. [*R. S. sec. 1342.*]

Art. of War, 1.

**ART. 2. [Articles to be read to recruits.]** These rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation, in the following form: "I, A. B., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war." This oath may be taken before any commissioned officer of the Army. [*R. S. sec. 1342.*]

Art. of War, 10; Act of Jan. 29, 1813; Act of Aug. 3, 1861.

The oath is the final act of enlistment. — Reading the articles of war is not a prerequisite. Having taken the oath of enlistment, a soldier cannot avoid a charge

of desertion by showing that at the time he enlisted he was over the age limit. *In re Grimley*, (1890) 137 U. S. 147, 11 S. Ct. 54, 34 U. S. (L. ed.) 636.

**ART. 3. [Officers making unlawful enlistments.]** Every officer who knowingly enlists or musters into the military service any minor over the age of sixteen years without the written consent of his parents or guardians, or any minor under the age of sixteen years, or any insane or intoxicated persons, or any deserter from the military or naval service of the United States, or any person who has been convicted of any infamous criminal

offense, shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct. [*R. S. sec. 1342.*]

Act of March 5, 1833; Act of March 3, 1863; Act of July 4, 1864; Act of March 3, 1865; Act of May 15, 1872, 17 Stat. L. 117.

This section was partly superseded by a provision of section 4 of an Act of March 2, 1889, ch. 352, entitled "An Act for increasing the efficiency of the Army of the United States, and for other purposes" (30 Stat. L. 978), which required that the limits of age for enlistment in the army should be eighteen and thirty-five years.

As to fraudulent enlistment and receipt of pay, see notes to article 62, *infra*, p. 461.

Acts of Congress prohibiting enlistment of minors apply to the volunteer army. *In re Burns*, (1898) 87 Fed. 796.

As to desertion by minors, see art. 47.

**ART. 4. [Discharges.]** No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field-officer of the regiment to which he belongs, or by the commanding officer, when no field-officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial. [*R. S. sec. 1342.*]

Art. of War, 11.

A volunteer soldier, notwithstanding his muster out, is not to be regarded as discharged until he is released from military control and from subjection to the orders of his superior officers; that is, at the time his discharge certificate is delivered to him. (1870) 13 Op. Atty-Gen. 278.

**Authority of President.**—The contract of a soldier of the United States, made by his enlistment and oath to serve for a definite term, "unless sooner discharged by proper authority," is one terminable by the government at will, acting through an officer having proper authority; and this article, which provides that "no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-

martial," confers such authority upon, or recognizes it as existing in, the President of the United States. *Reid v. U. S.*, (1908) 161 Fed. 469.

The power to discharge a soldier is a discretion vested in the President, exercised by him through the Secretary of War; and when granted upon the petition of the soldier, conditions may be prescribed. *Grimley v. U. S.*, (1897) 32 Ct. Cl. 285.

**Terms of discharge.**—The terms of a discharge given to a soldier by order of the President, not being prescribed by any statute, are discretionary with the President, and such discretion, exercised by directing a discharge "without honor," cannot be reviewed by the courts. *Reid v. U. S.*, (1908) 161 Fed. 469.

**ART. 5. [Mustering persons not soldiers.]** Any officer who knowingly musters as a soldier a person who is not a soldier shall be deemed guilty of knowingly making a false muster, and punished accordingly. [*R. S. sec. 1342.*]

Art. of War, 17.

**ART. 6. [Taking money on mustering.]** Any officer who takes money, or other thing, by way of gratification, on mustering any regiment, troop, battery, or company, or on signing muster-rolls, shall be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States. [*R. S. sec. 1342.*]

Art. of War, 16.

**ART. 7. [Returns of regiments, &c.]** Every officer commanding a regiment, an independent troop, battery, or company, or a garrison, shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same, specifying the names of the officers then absent from their posts, with the reasons for and the time of their absence. And any officer who, through neglect or design, omits to send such returns, shall, on conviction thereof, be punished as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 19.

**ART. 8. [False returns.]** Every officer who knowingly makes a false return to the Department of War, or to any of his superior officers, authorized to call for such returns, of the state of the regiment, troop or company, or garrison under his command; or of the arms, ammunition, clothing or other stores thereunto belonging, shall, on conviction thereof before a court-martial, be cashiered. [*R. S. sec. 1342.*]

Art. of War, 18.

**ART. 9. [Captured stores secured for public service.]** All public stores taken from the enemy shall be secured for the service of the United States; and for neglect thereof the commanding officer shall be answerable. [*R. S. sec. 1342.*]

Art. of War, 58.

Property is captured on land when seized or taken from hostile possession by military forces under orders from a commanding officer. The captors and agents of the treasury, while acting within the scope of their powers, are protected by the authority of the government. *Lamar v. Browne*, (1875) 92 U. S. 187, 23 U. S. (L. ed.) 650; *Holmes v. Sheridan*, (1870) 1 Dill. (U. S.) 351.

**Vesting of title.**—Does a capture by a private person during a war, and turning the property over to his government, vest a title in the government? *Worthy v. Kinamon*, (1871) 44 Ga. 299.

The capture of a steamer in time of war vested perfect and complete title in the United States. No legal condemnation was necessary or proper. *White v. Red Chief*, (1870) 1 Woods (U. S.) 40. But the Supreme Court, in *U. S. v. Klein*, (1871) 13 Wall. 128, 20 U. S. (L. ed.) 519, said that the title to the proceeds of captured property was in no case divested out of the original owner; it was for the government to determine whether the proceeds should be restored to the owner or not.

**ART. 10. [Accountability for arms, &c.]** Every officer commanding a troop, battery, or company, is charged with the arms, accouterments, ammunition, clothing, or other military stores belonging to his command, and is accountable to his colonel in case of their being lost, spoiled, or damaged otherwise than by unavoidable accident, or on actual service. [*R. S. sec. 1342.*]

Art. of War, 40.

**ART. 11. [Furloughs.]** Every officer commanding a regiment or an independent troop, battery, or company, not in the field, may, when actually quartered with such command, grant furloughs to the enlisted men, in such numbers and for such time as he shall deem consistent with the good of the service. Every officer commanding a regiment, or an independent troop, battery, or company, in the field, may grant furloughs not exceeding

thirty days at one time, to five per centum of the enlisted men, for good conduct in the line of duty, but subject to the approval of the commander of the forces of which said enlisted men form a part. Every company officer of a regiment, commanding any troop, battery, or company not in the field, or commanding in any garrison, fort, post, or barrack, may, in the absence of his field-officer, grant furloughs to the enlisted men, for a time not exceeding twenty days in six months, and not to more than two persons to be absent at the same time. [*R. S. sec. 1342.*]

Art. of War, 12; Act of March 3, 1863, ch. 75, 12 Stat. L. 736.

**ART. 12. [Musters.]** At every muster of a regiment, troop, battery, or company, the commanding officer thereof shall give to the mustering officer certificates, signed by himself, stating how long absent officers have been absent and the reasons of their absence. And the commanding officer of every troop, battery, or company shall give like certificates, stating how long absent non-commissioned officers and private soldiers have been absent and the reasons of their absence. Such reasons and time of absence shall be inserted in the muster-rolls opposite the names of the respective absent officers and soldiers, and the certificates, together with the muster-rolls, shall be transmitted by the mustering officer to the Department of War, as speedily as the distance of the place and muster will admit. [*R. S. sec. 1342.*]

Art. of War, 13.

**ART. 13. [False certificates.]** Every officer who signs a false certificate, relating to the absence or pay of an officer or soldier, shall be dismissed from the service. [*R. S. sec. 1342.*]

Art. of War, 14.

**ART. 14. [False muster.]** Any officer who knowingly makes a false muster of man or horse, or who signs, or directs, or allows the signing of any muster-roll, knowing the same to contain a false muster, shall, upon proof thereof by two witnesses, before a court-martial, be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States. [*R. S. sec. 1342.*]

Art. of War, 15.

**ART. 15. [Allowing military stores to be damaged.]** Any officer who, willfully or through neglect, suffers to be lost, spoiled, or damaged, any military stores belonging to the United States, shall make good the loss or damage, and be dismissed from the service. [*R. S. sec. 1342.*]

Art. of War, 36; Act of March 2, 1863, ch. 67, 12 Stat. L. 696.

**ART. 16. [Wasting ammunition.]** Any enlisted man who sells, or willfully or through neglect wastes the ammunition delivered out to him, shall be punished as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 37.

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**ART. 17. [Losing or spoiling horses, accouterments, &c.]** Any soldier who sells or through neglect loses [loses?] or spoils his horse, arms, clothing, or accouterments shall be punished as a court-martial may adjudge, subject to such limitation as may be prescribed by the President by virtue of the power vested in him.

This article was amended to read as above by the Act of July 27, 1892, ch. 272, 27 Stat. L. 277, entitled "An Act to Amend the Articles of War and for other purposes." Prior to such amendment the article was as follows: "ART. 17. Any soldier who sells or, through neglect, loses or spoils his horse, arms, clothing, or accouterments, shall suffer such stoppages, not exceeding one-half of his current pay, as a court-martial may deem sufficient for repairing the loss or damage, and shall be punished by confinement or such other corporal punishment as the court may direct." [*R. S. sec. 1342.*] Art. of War, 38.

**Sale of clothing.**—The sale of military clothing issued to a soldier during his term of service constitutes an offense against the military law, for which he may be punished by a court-martial. *U. S. v. Michael*, (1907) 153 Fed. 609.

**ART. 18. [Commanders not to be interested in sale of victuals, &c.]** Any officer commanding in any garrison, fort, or barracks of the United States who, for his private advantage, lays any duty or imposition upon, or is interested in, the sale of any victuals, liquors, or other necessities of life, brought into such garrison, fort, or barracks, for the use of the soldiers, shall be dismissed from the service. [*R. S. sec. 1342.*]

Art. of War, 31.

**ART. 19. [Disrespectful words against the President, &c.]** Any officer who uses contemptuous or disrespectful words against the President, the Vice-President, the Congress of the United States, or the chief magistrate or legislature of any of the United States in which he is quartered, shall be dismissed from the service, or otherwise punished, as a court-martial may direct. Any soldier who so offends shall be punished as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 5.

**ART. 20. [Disrespect toward commanding officer.]** Any officer or soldier who behaves himself with disrespect toward his commanding officer shall be punished as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 6.

**ART. 21. [Striking a superior officer.]** Any officer or soldier who, on any pretense whatsoever, strikes his superior officer, or draws or lifts up any weapon, or offers any violence against him, being in the execution of his office, or disobeys any lawful command of his superior officer, shall suffer death, or such other punishment as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 9.

A soldier who has killed his sergeant is triable by the civil courts for murder, as well as by a court-martial for mutinous conduct. (1857) 8 Op. Atty-Gen. 396.

**ART. 22. [Mutiny.]** Any officer or soldier who begins, excites, causes, or joins in any mutiny or sedition, in any troop, battery, company, party,



post, detachment, or guard, shall suffer death, or such other punishment as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 7.

In preserving the peace within a fort, an officer is authorized to use all reasonable means, but the means used should be measured by the necessity of the case. The law will not justify the killing of a single unarmed soldier, though drunken, riotous, or even mutinous, when he could be arrested without resort to such extreme means. *U. S. v. Carr*, (1872) 1 Woods (U. S.) 480.

ART. 23. [**Failing to resist mutiny.**] Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or having knowledge of any intended mutiny or sedition, does not, without delay, give information thereof to his commanding officer, shall suffer death, or such other punishment as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 8.

ART. 24. [**Quarrels and frays.**] All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, whether among persons belonging to his own or to another corps, regiment, troop, battery, or company, and to order officers into arrest, and non-commissioned officers and soldiers into confinement, who take part in the same, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or non-commissioned officer, or draws a weapon upon him, shall be punished as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 27.

ART. 25. [**Reproachful or provoking speeches.**] No officer or soldier shall use any reproachful or provoking speeches or gestures to another. Any officer who so offends shall be put in arrest. Any soldier who so offends shall be confined, and required to ask pardon of the party offended, in the presence of his commanding officer. [*R. S. sec. 1342.*]

Art. of War, 24.

ART. 26. [**Challenges to fight duels.**] No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge so sent. Any officer who so offends shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 25.

This article was amended to read as above by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 244. The amendment consisted of striking out the word "corporal" before the word "punishment."

ART. 27. [**Allowing persons to go out and fight; seconds and promoters.**] Any officer or non-commissioned officer, commanding a guard, who, knowingly and willingly, suffers any person to go forth to fight a duel, shall be punished as a challenger; and all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals,

and punished accordingly. It shall be the duty of any officer commanding an army, regiment, troop, battery, company, post, or detachment, who knows or has reason to believe that a challenge has been given or accepted by any officer or enlisted man under his command, immediately to arrest the offender and bring him to trial. [*R. S. sec. 1342.*]

**Art. of War, 26.**

**ART. 28. [Upbraiding another for refusing challenge.]** Any officer or soldier who upbraids another officer or soldier for refusing a challenge shall himself be punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept challenges, as they will only have acted in obedience to the law, and have done their duty as good soldiers, who subject themselves to discipline. [*R. S. sec. 1342.*]

**Art. of War, 28.**

**ART. 29. [Wrongs to officers, redress of.]** Any officer who thinks himself wronged by the commanding officer of his regiment, and, upon due application to such commander, is refused redress, may complain to the general commanding in the State or Territory where such regiment is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon. [*R. S. sec. 1342.*]

**Art. of War, 34.**

**ART. 30. [Wrongs to soldiers, redress of.]** Any soldier who thinks himself wronged by any officer may complain to the commanding officer of his regiment, who shall summon a regimental court-martial for the doing of justice to the complainant. Either party may appeal from such regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial. [*R. S. sec. 1342.*]

**Art. of War, 35.**

**ART. 31. [Lying out of quarters.]** Any officer or soldier who lies out of his quarters, garrison, or camp, without leave from his superior officer, shall be punished as a court-martial may direct. [*R. S. sec. 1342.*]

**Art. of War, 42.**

**ART. 32. [Soldiers absent without leave.]** Any soldier who absents himself from his troop, battery, company, or detachment, without leave from his commanding officer, shall be punished as a court-martial may direct. [*R. S. sec. 1342.*]

**Art. of War, 21.**

The pay of a soldier cannot be stopped where he was convicted of absence without leave, when the sentence of the court does

not impose such stoppage, unless a statute or an army regulation so provides. (1880)  
16 Op. Atty-Gen. 474.

**ART. 33. [Absence from parade without leave.]** Any officer or soldier who fails, except when prevented by sickness or other necessity, to repair, at the fixed time, to the place of parade, exercise, or other rendezvous appointed by his commanding officer, or goes from the same, without leave from his commanding officer, before he is dismissed or relieved, shall be punished as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 44.

**ART. 34. [One mile from camp without leave.]** Any soldier who is found one mile from camp, without leave in writing from his commanding officer, shall be punished as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 41.

**ART. 35. [Failing to retire at retreat.]** Any soldier who fails to retire to his quarters or tent at the beating of retreat, shall be punished according to the nature of his offense. [*R. S. sec. 1342.*]

Art. of War, 43.

**ART. 36. [Hiring duty.]** No soldier belonging to any regiment, troop, battery, or company shall hire another to do his duty for him, or be excused from duty, except in cases of sickness, disability, or leave of absence. Every such soldier found guilty of hiring his duty, and the person so hired to do another's duty, shall be punished as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 47.

**ART. 37. [Conniving at hiring duty.]** Every non-commissioned officer who connives at such hiring of duty shall be reduced. Every officer who knows and allows such practices shall be punished as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 48.

**ART. 38. [Drunk on duty.]** Any officer who is found drunk on his guard, party, or other duty, shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct. No court-martial shall sentence any soldier to be branded, marked, or tattooed. [*R. S. sec. 1342.*]

Art. of War, 45.

This article was amended to read as above by the Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 318. The amendment consisted in striking out the word "corporal" before the word "punishment," and in the addition of the last sentence. The word "corporal" was also stricken out by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 244.

When the word used in the charge is "inebriation," and not the word "drunkenness," it is not a strictly formal following of the term used in the article, but is

sufficient to inform the accused of the military offense for which he is to be tried: (1819) 1 Op. Atty-Gen. 294.

**ART. 39. [Sentinel sleeping on post.]** Any sentinel who is found sleeping upon his post, or who leaves it before he is regularly relieved, shall

suffer death, or such other punishment as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 46.

**ART. 40. [Quitting guard, &c., without leave.]** Any officer or soldier who quits his guard, platoon, or division, without leave from his superior officer, except in a case of urgent necessity, shall be punished as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 50.

**ART. 41. [False alarms.]** Any officer who, by any means whatsoever, occasions false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 49.

**ART. 42. [Misbehavior before the enemy, cowardice, &c.]** Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard, which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, shall suffer death, or such other punishment as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 52.

**ART. 43. [Compelling a surrender.]** If any commander of any garrison, fortress, or post is compelled, by the officers and soldiers under his command, to give up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death, or such other punishment as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 59.

**ART. 44. [Disclosing watchword.]** Any person belonging to the armies of the United States who makes known the watchword to any person not entitled to receive it, according to the rules and discipline of war, or presumes to give a parole or watchword different from that which he received, shall suffer death, or such other punishment as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 53.

**ART. 45. [Relieving the enemy.]** Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death, or such other punishment as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 56.

**ART. 46. [Corresponding with the enemy.]** Whosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indi-

rectly, shall suffer death, or such other punishment as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 57.

An acquittal by a court-martial is no bar to a prosecution for treason in a civil court under the Act of July 17, 1862, § 2. *U. S. v. Cashiel*, (1863) 1 *Hughes* (U.S.) 552.

**ART. 47. [Desertion.]** Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 20; Act of May 29, 1830, ch. 183, 4 Stat. L. 418.

Deserters—apprehension of deserters, etc.—See *R. S. secs. 1996, 1997, 1998*, and subsequent acts, under title WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

The penalties imposed under sections 1996 and 1998, *R. S.*, can take effect only upon conviction by court-martial. *Kurtz v. Moffitt*, (1885) 115 U. S. 487, 6 S. Ct. 148, 29 U. S. (L. ed.) 458.

**Defense of over age at time of enlistment.**—Having taken the oath of enlistment, a soldier cannot avoid a charge of desertion by showing that at the time he enlisted he was over the age limit. *In re Grimley*, (1890) 137 U. S. 147, 11 S. Ct. 54, 34 U. S. (L. ed.) 636.

**Forfeiture of rights of citizenship.**—Congress cannot prescribe the qualifications of electors within the several states; the state alone has the power to regulate suffrage and to determine who shall or who shall not be a voter. The Act of March 3, 1865 (*R. S. 1996*), in imposing forfeiture of the rights of citizenship as a punishment for desertion, is within the powers of Congress, and the Act is not an *ex post facto* law in so punishing previous desertion, as failing to return to the service makes the desertion a continuing offense. *Huber v. Reily*, (1866) 53 Pa. St. 112.

Desertion is an exclusively military crime not triable by the civil tribunals. *Kurtz v. Moffitt*, (1885) 115 U. S. 487, 6 S. Ct. 148, 29 U. S. (L. ed.) 458; *In re White*, (1883) 17 Fed. 723.

**Desertion by minors.**—If the enlistment of a minor be void by reason of the absence of consent of parents, yet if he remains in the service for more than two years after coming of age and receives pay, he comes within the letter of the article, and a judgment by court-martial for desertion cannot be collaterally questioned on habeas corpus. *In re Dohrendorf*, (1889) 40 Fed. 148; *In re Spencer*, (1889) 40 Fed. 149.

A minor, enlisted without the consent of his parents or guardians, though improperly enlisted, cannot, after receiving pay and clothing, himself determine the legality or illegality of his service by deserting it, and if he desert, he is liable to be tried and punished by court-martial.

*In re Kaufman*, (1890) 41 Fed. 876; *In re Zimmerman*, (1887) 30 Fed. 176.

The enlistment of a minor is voidable only; and, although under age, he becomes by such enlistment engaged in the service of the United States, and subject to the power and jurisdiction of the military authorities. *In re Spencer*, (1889) 40 Fed. 149; *In re Cosenow*, (1889) 37 Fed. 670; *In re Hearn*, (1887) 32 Fed. 141; *In re Davison*, (1884) 21 Fed. 618.

When a minor, within three days after enlistment, leaves the recruiting station before being assigned to duty and does not return it cannot be considered as a criminal desertion and he may be discharged on habeas corpus from military custody. *U. S. v. Hanchett*, (1883) 18 Fed. 26.

In the case of *In re Baker*, (1885) 23 Fed. 30, the court says that the enlistment, being contrary to *R. S. sec. 1117*, was absolutely void, and must be so held on petition of the father. Not being duly enlisted, the minor could not commit the crime of desertion, and the court-martial could not retain jurisdiction. See also *U. S. v. Wright*, (1863) 5 Phila. (Pa.) 296, 20 Leg. Int. (Pa.) 21.

The enlistment of one under sixteen years of age was void whether the father consented in writing or not. The evidence of relatives, no one of whom testifies with certainty, supported by mutilated records of the ages of the children in what purports to be the family Bible, is not sufficient to establish the fact that one was under sixteen years against the sworn statement of the father at the time of enlistment that he was twenty years and six months. *In re Lawler*, (1889) 40 Fed. 233.

When a bounty is offered to volunteers accepted and mustered into the service, the instalments of bounty due and payable at the time of desertion are forfeited thereby, and the instalments not already due never become due in case the deserter does not return. In case he returns, or is apprehended and put back into service, on serving out his term he is entitled to receive them. (1870) 13 Op. Atty-Gen. 188.

**ART. 48. [Deserter shall serve full term.]** Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried. [*R. S. sec. 1342.*]

Act of Jan. 11, 1812, ch. 14, 2 Stat. L. 673; Act of Jan. 29, 1813, ch. 16, 2 Stat. L. 796.

The penalties imposed under sections 1996 and 1998, R. S., can take effect only upon conviction by court-martial. *Kurtz v. Moffitt*, (1885) 115 U. S. 487, 6 S. Ct. 148, 29 U. S. (L. ed.) 458.

When a conviction for desertion has been disapproved by the reviewing officer, and the prisoner released and restored to duty, it is in effect an acquittal, and pay cannot be withheld. (1871) 13 Op. Atty.-Gen. 459.

**Enlistment of deserter.**—While section 1118, R. S., prohibits the enlistment of a deserter, a deserter who enlists, and afterwards again deserts, on being brought to trial for the second offense, cannot defend on the ground that his enlistment was void. *In re McVey*, (1885) 11 Sawy. (U. S.) 25.

The forfeiture of pay and bounty due and payable at the time of desertion, under No. 1358 of the Army Regulations, is not a fine or penalty, but relates solely to the soldier's rights under his contract of enlistment, and the fact of desertion need not be established by the record of

court-martial. (1870) 13 Op. Atty.-Gen. 188.

**Recovery by deserter for horse captured.**—All statutes for the benefit of soldiers are based on the supposition of faithful service, and a deserter cannot recover for his horse captured by the enemy. *Tapia's Case*, (1880) 16 Ct. Cl. 561.

**Pay and bounty of deserter honorably discharged.**—A soldier found guilty of desertion, though restored to duty and subsequently honorably discharged, is not entitled to pay and bounty forfeited by such desertion. *U. S. v. Landers*, (1875) 92 U. S. 77, 23 U. S. (L. ed.) 603. But where a deserter was restored to duty, without trial, on condition that he make good the time lost, and complied with the condition, an honorable discharge at the expiration of his term of service was a final judgment on his entire military record, and he was entitled to bounty money. *U. S. v. Kelly*, (1872) 15 Wall. 34, 21 U. S. (L. ed.) 106; *Cole v. U. S.*, (1899) 34 Ct. Cl. 446.

**ART. 49. [Desertion by resignation.]** Any officer who, having tendered his resignation, quits his post or proper duties, without leave, and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of the same, shall be deemed and punished as a deserter. [*R. S. sec. 1342.*]

Act of Aug. 5, 1861, ch. 54, 12 Stat. L. 316.

Upon receipt of notice of acceptance of resignation the office becomes vacant, and a revocation by the President does not restore the officer. Nothing could reinstate him but a new nomination and confirmation by the Senate. *Mimmack v.*

*U. S.*, (1878) 97 U. S. 426, 24 U. S. (L. ed.) 1067; *Bennett v. U. S.*, (1884) 19 Ct. Cl. 379; *U. S. v. Corson*, (1885) 114 U. S. 619, 5 S. Ct. 1158, 29 U. S. (L. ed.) 254.

**ART. 50. [Enlisting in other regiment without discharge.]** No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company in which he last served, on a penalty of being reputed a deserter, and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him and give notice thereof to the corps in which he last served, the said officer shall, by a court-martial, be cashiered. [*R. S. sec. 1342.*]

Art. of War, 22.

**ART. 51. [Advising to desert.]** Any officer or soldier who advises or persuades any other officer or soldier to desert the service of the United States, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct. [*R. S. sec. 1342.*]

**Art. of War, 23; Act of May 29, 1830, ch. 183, 4 Stat. L. 418.**

**This is an exclusively military offense** *v. Moffitt*, (1885) 115 U. S. 487, 6 S. Ct. not triable by the civil tribunals. *Kurtz* 148, 29 U. S. (L. ed.) 458.

**ART. 52. [Misconduct at divine service.]** It is earnestly recommended to all officers and soldiers diligently to attend divine service. Any officer who behaves indecently or irreverently at any place of divine worship shall be brought before a general court-martial, there to be publicly and severely reprimanded by the president thereof. Any soldier who so offends shall, for his first offense, forfeit one-sixth of a dollar; for each further offense he shall forfeit a like sum, and shall be confined twenty-four hours. The money so forfeited shall be deducted from his next pay, and shall be applied, by the captain or senior officer of his troop, battery, or company, to the use of the sick soldiers of the same. [*R. S. sec. 1342.*]

**Art. of War, 2.**

**ART. 53. [Profane oaths.]** Any officer who uses any profane oath or execration shall, for each offense, forfeit and pay one dollar. Any soldier who so offends shall incur the penalties provided in the preceding article; and all moneys forfeited for such offenses shall be applied as therein provided. [*R. S. sec. 1342.*]

**Art. of War, 8.**

**ART. 54. [Officers to keep good order in their commands.]** Every officer commanding in quarters, garrison, or on the march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command; and if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, disturbing fairs or markets, or committing any kind of riot, to the disquieting of the citizens of the United States, he refuses or omits to see justice done to the offender, and reparation made to the party injured, so far as part of the offender's pay shall go toward such reparation, he shall be dismissed from the service, or otherwise punished, as a court-martial may direct. [*R. S. sec. 1342.*]

**Art. of War, 32.**

**ART. 55. [Waste or spoil and destruction of property without orders.]** All officers and soldiers are to behave themselves orderly in quarters and on the march; and whoever commits any waste or spoil, either in walks or trees, parks, warrens, fish-ponds, houses, gardens, grain-fields, inclosures, or meadows, or maliciously destroys any property whatsoever belonging to inhabitants of the United States, (unless by order of a general officer commanding a separate army in the field,) shall, besides such penalties as he

may be liable to by law, be punished as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 54.

**ART. 56. [Violence to persons bringing provisions.]** Any officer or soldier who does violence to any person bringing provisions or other necessities to the camp, garrison, or quarters of the forces of the United States in foreign parts, shall suffer death, or such other punishment as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 51.

**ART. 57. [Forcing a safeguard.]** Whosoever, belonging to the armies of the United States in foreign parts, or at any place within the United States or their Territories during rebellion against the supreme authority of the United States, forces a safe-guard, shall suffer death. [*R. S. sec. 1342.*]

Art. of War, 55; Act of July 13, 1861; Act of July 31, 1861; Act of Feb. 13, 1862, ch. 25, 12 Stat. L. 340.

**ART. 58. [Certain crimes during rebellion.]** In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or district in which such offense may have been committed. [*R. S. sec. 1342.*]

Act of July 13, 1861; Act of July 31, 1861; Act of March 3, 1863; Act of March 3, 1875, ch. 144, 18 Stat. L. 479.

**Larceny of a horse** in time of war by one from his fellow soldiers is a crime under this article. *Irby v. U. S.*, (1883) 18 Ct. Cl. 259.

**This article does not confer exclusive jurisdiction** on the military tribunals as against the courts of loyal states; but one in the military service of the United States is not amenable to the laws of a state in which a crime committed by him is perpetrated, when such state was at the time in a state of hostility to the national government. *Coleman v. Tennessee*, (1878) 97 U. S. 509, 24 U. S. (L. ed.) 1118; *Tennessee v. Hibdon*, (1885) 23 Fed. 795.

**"Condition of hostility."**—If a territory be declared to be in a state of insurrection by the President's proclamation, and part of such territory should come

within the national lines, the "condition of hostility" remained impressed upon it until it was removed by proclamation of the President. *McClelland's Case*, 10 Ct. Cl. 68; *Philips v. Hatch*, (1871) 1 Dill. (U. S.) 571.

**Army contractors** are subject to military rules and articles of war, and a commander may issue an order to arrest one who has induced friendly Indians to steal cattle for him with a view to turn the cattle over to the government under contracts to supply beef to the army. *Holmes v. Sheridan*, (1870) 1 Dill. (U. S.) 351.

**This article is limited in its operation** to a state of "war, insurrection, or rebellion," within the United States, and therefore has no application in Cuba during military occupation. (1900) 23 Op. Atty.-Gen. 120.

**ART. 59. [Offenders to be delivered up to civil magistrates.]** When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of any of the United States, which



is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service. [*R. S. sec. 1342.*]

Art. of War, 33; Act of March 3, 1863, ch. 75, 12 Stat. L. 736.

**Surrender of accused.**—An application to the commanding officer must show that the offense charged is "punishable by the known laws of the land," and he must be so satisfied before surrendering the accused to the civil authorities. (1825) 2 Op. Atty.-Gen. 10.

**Jurisdiction of civil courts.**—In *U. S. v. Lewis*, (1904) 129 Fed. 823, *affirmed* (1906) 200 U. S. 1, 26 S. Ct. 229, 50 U. S. (L. ed.) 343, it was held that the enactment of this article was a distinct recognition by Congress of the general jurisdiction in time of peace of the civil courts of the state over persons in the United States military service accused of offenses against citizens of the state.

A District Court has jurisdiction to indict and try a person charged with having forged an obligation of the United States with intent to defraud, which is made an offense against the United States by *R. S. sec. 5414*, 2 Fed. Stat. Annot. 298, although he was at the time an officer of the army, and the alleged offense was committed at a military post, and with intent to defraud an enlisted soldier, where the accused has since been discharged from the army without any action against him having been taken by the military authorities; there being no provision, either constitutional or statutory, conferring exclusive jurisdiction on courts-martial to punish such offense. *Neall v. U. S.*, (1902) 118 Fed. 699.

In *U. S. v. Clark*, (1887) 31 Fed. 710, it was held that a Circuit Court has jurisdiction of a homicide committed by one soldier upon another in a military reservation.

**Homicide by military guard.**—Where, on a writ of habeas corpus to obtain the discharge of two members of the United States army from an indictment for murder, found by the courts of the state where the offense was committed, it appeared that the shooting of the deceased occurred in the streets of a city, outside the military reservation, while the petitioners were endeavoring to arrest deceased for depredations committed on such reservation, but the evidence was conflicting as to whether the shooting was done while deceased was endeavoring to escape or after he had stopped, thrown up his hands, and offered to surrender, the determination of whether the shooting was justifiable was within the exclusive jurisdiction of the state courts. *U. S. v. Lewis*, (1904) 129 Fed. 823, *affirmed* (1906) 200 U. S. 1, 26 S. Ct. 229, 50 U. S. (L. ed.) 343.

**Homicide in Cuba.**—This article does not require that a soldier who committed homicide in Cuba be delivered to the Cuban courts, but it is, nevertheless, proper to permit such courts to try him. (1900) 23 Op. Atty.-Gen. 120.

**Effect of civil judgment.**—The conviction or acquittal by the civil authorities of an offense against the general law does not discharge an officer or soldier from responsibility for the military offense on the same facts; though under some circumstances the civil authority will have the preference until its jurisdiction be exhausted. *Steiner's Case*, (1854) 6 Op. Atty.-Gen. 413; *Howe's Case*. (1854) 6 Op. Atty.-Gen. 506.

**ART. 60. [Certain crimes of fraud against the United States.]** Any person in the military service of the United States who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

**[Making false claim. Presenting false claim.]** Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

**[Agreement to obtain payment of false claim.]** Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

**[False paper.]** Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement; or

**[Perjury.]** Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

**[Forgery.]** Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or

**[Delivering less property than receipt calls for.]** Who, having charge, possession, custody or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any persons having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

**[Giving receipts without knowing truth of.]** Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or

**[Stealing, wrongfully selling, &c.]** Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof; or

**[Buying public military property.]** Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same,

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid, while in the military service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the

same manner and to the same extent as if he had not received such discharge nor been dismissed. [*R. S. sec. 1342.*]

Act of March 2, 1863, ch. 67, 12 Stat. L. 696.

This article was amended by the Act of March 2, 1901, ch. 809, 31 Stat. L. 951, by inserting in the first sentence of the last paragraph the words "or by any or all of said penalties."

An army contractor, under the Act of July 17, 1862 (12 Stat. L. 596, § 16), is subject to the rules and regulations of the army, and liable to be tried by court-martial for fraud upon the government. *U. S. v. Adams*, (1868) 7 Wall. 463, 19 U. S. (L. ed.) 249, (1866) 2 Ct. Cl. 70; *Hill's Case*, (1873) 9 Ct. Cl. 178. See *Holmes v. Sheridan*, (1870) 1 Dill. (U. S.) 351; though in *Ex p. Henderson*, (1878) 11 Fed. Cas. No. 6,349, it is said that an Act of Congress attempting to make a contractor of supplies to the army a part of the land forces, and providing that fraud

will render him amenable to court-martial, is unconstitutional.

A clerk in the employ of a paymaster of the United States army is a person engaged in the military service and is subject to trial before a military tribunal for forging army vouchers. *In re Thomas*, (1869) 23 Fed. Cas. No. 13,888.

The penalty imposed by this article is in the alternative. But the sentences may be in the aggregate when the relator is found guilty of each of several charges. *In re Carter*, (1899) 97 Fed. 496; *Carter v. McClaughry*, (1900) 105 Fed. 614.

**ART. 61. [Conduct unbecoming an officer and gentleman.]** Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service. [*R. S. sec. 1342.*]

Art. of War, 83.

The same course of conduct may constitute an offense elsewhere provided for, and also may warrant a finding of guilty

under this article. *In re Carter*, (1899) 97 Fed. 496.

**ART. 62. [Crimes and disorders to prejudice of military discipline.]** All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field-officers' court-marshal [martial], according to the nature and degree of the offense, and punished at the discretion of such court. [*R. S. sec. 1342.*]

Art. of War, 90.

Fraudulent enlistment and receipt of pay is punishable under this article by section 3 of an Act of July 27, 1892, ch. 272, *infra*, p. 479.

Acts bringing reproach on service.—A court-martial has the right, without a review by the civil courts, to try and punish acts which tend to bring reproach upon the service, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business. *Swain v. U. S.*, (1897) 165 U. S. 553, 17 S. Ct. 448, 41 U. S. (L. ed.) 823.

A soldier charged with assault with intent to kill, in the District of Columbia, may be convicted by court-martial under this article; and a sentence of discharge from the service, forfeiture of pay, and imprisonment in the penitentiary for the term of eight years, is authorized by article 97. *Ex p. Mason*, (1881) 105 U. S. 696, 26 U. S. (L. ed.) 1213; *U. S. v. Maney*, (1894) 61 Fed. 140.

Where an officer was charged with

habitual drunkenness, but only convicted of conduct to the prejudice of good order and military discipline, it was a lesser offense than that charged, and was authorized by this article. *Blankhead v. U. S.*, (1885) 20 Ct. Cl. 406.

Assault.—A charge of assault with a rifle and the infliction of a mortal wound by accused upon a fellow soldier, with particulars of the time and place clearly stated, sufficiently alleged an offense within this article. *In re Stubbs*, (1905) 133 Fed. 1012.

Embezzlement.—Under this article a conviction may be had of the offense of embezzlement as defined by section 5488, R. S., and may be punished by both fine and imprisonment. *In re Carter*, (1899) 97 Fed. 496; *Carter v. McClaughry*, (1900) 105 Fed. 614.

Enlistment expiring before trial.—If

proceedings were instituted against a soldier while he was within the jurisdiction of the military authority, such jurisdiction continued until trial and conviction, notwithstanding his term of enlistment expired before trial. *Barrett v. Hopkins*, (1881) 7 Fed. 312.

**Effect of civil judgment.**—Where a United States soldier killed a fellow soldier during a military encampment, and on being surrendered to the civil authorities of the state was prosecuted for murder and acquitted, such acquittal, though a final determination of his innocence of murder and of each lesser offense necessarily included therein, was no bar to his subsequent military arrest and trial by a general court-martial, for conduct "to the prejudice of good order and military discipline," in violation of this ar-

ticle, though based on the same act. *In re Stubbs*, (1905) 133 Fed. 1012.

So also, it has been held that a trial by a civil court of a charge of larceny is not a bar to a subsequent trial upon the same facts, by court-martial, of a charge of conduct to the prejudice of military discipline. *In re Esmond*, (1886) 5 Mackey (D. C.) 64.

**Effect of discharge of soldier.**—Where a soldier, while in fact discharged from the army, but before the expiration of the term of enlistment, committed a homicide, it was held that he was amenable to this article and might be arrested and held for trial by the military authority, the discharge being afterward set aside and he being, at the time of the offense, a soldier *de jure*. *In re Bird*, (1871) 2 Sawy. 33, 3 Fed. Cas. No. 1,428.

**ART. 63. [Retainers of camp.]** All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war. [*R. S. sec. 1342.*]

**Art. of War, 60.**

Civil employees of the War Department, serving with the army in the Indian country, during offensive and defensive operations against the Indians, are amen-

able to military jurisdiction and trial by court-martial. (1872) 14 Op. Atty-Gen. 22.

**ART. 64. [All troops subject to articles of war.]** The officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States, shall, at all times and in all places, be governed by the articles of war, and shall be subject to be tried by courts-martial. [*R. S. sec. 1342.*]

**Art. of War, 97; Act of July 29, 1861; Act of March 2, 1863, ch. 67, 12 Stat. L. 696.**

State militia ordered into the service of the United States are subject to the Articles of War. *Martin v. Mott*, (1827) 12 Wheat. 19, 6 U. S. (L. ed.) 537; *Luther v. Borden*, (1849) 7 How. 1, 12 U. S. (L. ed.) 581.

Militiamen are not to be considered as being in the service of the United States until mustered at the place of rendezvous. *Houston v. Moore*, (1820) 5 Wheat. 1, 5 U. S. (L. ed.) 19.

A state militiaman disobeying an order to attend a rendezvous, duly called under an Act of Congress, is subject to military discipline. *McCall's Case*, (1863) 5 Phila. (Pa.) 259, 20 Leg. Int. (Pa.) 108. But see *Mills v. Martin*, (1821) 19 Johns. (N. Y.) 7, and *Rathbun v. Martin*, (1823) 20 Johns. (N. Y.) 343.

**ART. 65. [Arrest of officers accused of crimes.]** Officers charged with crime shall be arrested and confined in their barracks, quarters, or tents, and deprived of their swords by the commanding officer. And any officer who leaves his confinement before he is set at liberty by his commanding officer shall be dismissed from the service. [*R. S. sec. 1342.*]

**Art. of War, 77.**

**Retired officer.**—The arrest and detention in military barracks of a retired officer upon charges of "conduct to the prejudice of good order and military disci-

pline," and "conduct unbecoming an officer and gentleman," are authorized by this article. *Closson v. U. S.*, (1896) 7 App. Cas. (D. C.) 460.

**ART. 66. [Soldiers accused of crimes.]** Soldiers charged with crimes shall be confined until tried by court-martial, or released by proper authority. [*R. S. sec. 1342.*]

Art. of War, 78.

No warrant is required for the arrest nor is the manner of confinement specified. *Hutchings v. Van Bokkelen*, (1852) 34 Me. 126.

**ART. 67. [Receiving prisoners.]** No provost-marshal, or officer commanding a guard, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime charged against the prisoner. [*R. S. sec. 1342.*]

Art. of War, 80.

**ART. 68. [Report of prisoners.]** Every officer to whose charge a prisoner is committed shall, within twenty-four hours after such commitment, or as soon as he is relieved from his guard, report in writing, to the commanding officer, the name of such prisoner, the crime charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 82.

**ART. 69. [Releasing prisoner without authority; escapes.]** Any officer who presumes, without proper authority, to release any prisoner committed to his charge, or suffers any prisoner so committed to escape, shall be punished as a court-martial may direct. [*R. S. sec. 1342.*]

Art. of War, 81.

If a military guard committed homicide by shooting an escaping military convict, it was excusable when he acted without malice, in good faith, and doing what he conceived to be his duty, unless the act were manifestly beyond the scope of his authority. *U. S. v. Clark*, (1887) 31 Fed. 710.

**ART. 70. [Duration of confinement.]** No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled. [*R. S. sec. 1342.*]

Art. of War, 78.

This article applies solely to confinement preliminary to trial, and not to confinement during trial and awaiting judgment. *Matter of Corbett*, (1877) 9 Ben. (U. S.) 274.

A confinement for ten days, where it

does not appear that a court-martial could be assembled within that period, did not exceed the bounds authorized by law. *Hutchings v. Van Bokkelen*, (1852) 34 Me. 126.

**ART. 71. [Copy of charges and time of trial.]** When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days

after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest. [*R. S. sec. 1342.*]

Act of July 17, 1862, ch. 200, 12 Stat. L. 595.

If a copy of the charges be not served upon the accused within the time specified in this article, on account of the delay caused by his evading the jurisdiction of

the court-martial by serving out a writ of habeas corpus, he should be returned to the military officers. *Closson v. U. S.*, (1896) 7 App. Cas. (D. C.) 460.

**Art. 72. Repealed.**—This article was as follows: "ART. 72. Any general officer commanding an army, a Territorial Division or a Department, or colonel commanding a separate Department may appoint general courts martial whenever necessary. But when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President; and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case."

Article 72 was amended to read as above by the Act of July 5, 1884, ch. 224, 23 Stat. L. 121. Prior to such amendment the article was as follows: "ART. 72. Any general officer, commanding the Army of the United States, a separate Army, or a separate department, shall be competent to appoint a general court-martial, either in time of peace or in time of war. But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case." [*R. S. sec. 1342.*] Act of May 29, 1830, ch. 179, 4 Stat. L. 417.

It was repealed and other provisions enacted in lieu thereof by the Act of March 2, 1913, ch. 93, § 1, *infra*, p. 479.

**Department commander the accuser.**—A conviction by a court-martial convened by the department commander, who is also the accuser, should be set aside. *In re Bird*, (1871) 2 Sawy. (U. S.) 33.

**The constitutional authority of the President as commander-in-chief and the authority of Congress to "make rules for the government" of the land forces are distinct, and Congress cannot, in the disguise of making rules, impair the authority of the President as such commander-in-chief. As such commander-in-chief, he**

has authority to convene a general court-martial to try an officer upon charges actually preferred, and the authority is not restricted to the single instance named in this article. An order by the President ordering a court-martial to be convened to try an officer upon the charges based upon the findings of the court of inquiry, does not make the President the accuser or prosecutor within the meaning of this section. *Swaim v. U. S.*, (1897) 165 U. S. 553, 17 S. Ct. 448, 41 U. S. (L. ed.) 823.

**Art. 73. Repealed.**—This section was as follows: "ART. 73. In time of war the commander of a division, or of a separate brigade of troops, shall be competent to appoint a general court-martial. But when such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander." [*R. S. sec. 1342.*] Act of Dec. 24, 1861, ch. 3, 12 Stat. L. 330.

It was repealed and other provisions enacted in lieu thereof by the Act of March 2, 1913, ch. 93, § 1, *infra*, p. 479.

**A commander of division, who, upon information laid before him of misconduct on the part of a regimental officer, directed the colonel (from whom the information was received) to prefer charges, and who saw that the charges were put in proper form, cannot be deemed the accuser or prosecutor in the sense of this article.** (1878) 16 Op. Atty-Gen. 106.

**Heading of order.**—If an order convening the court be headed "Headquarters, district of —," it may be shown that the officer was in fact a commander of a "division or separate brigade." *Phelps's Case*, (1868) 4 Ct. Cl. 209.

**ART. 74. [Judge-advocate.]** Officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same. [*R. S. sec. 1342.*]

**Art. of War, 69.**

**Review of irregularities.**—The appointment of the judge-advocate and his taking the oath required are matters of mere procedure, and any irregularities cannot be

reviewed by the Court of Claims in a collateral action. *Swaim v. U. S.*, (1897) 165 U. S. 553, 17 S. Ct. 448, 41 U. S. (L. ed.) 823.

**Art. 75. Repealed.**—This section was as follows: "ART. 75. General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen when that number can be convened without manifest injury to the service." [*R. S. sec. 1342.*] **Art. of War, 64.**

It was repealed and other provisions enacted in lieu thereof by the Act of March 2, 1913, ch. 93, § 1, *infra*, p. 479.

Undergraduate cadets are not commissioned officers, and cannot serve on a court-martial, but graduated cadets assigned to service as supernumerary officers may. (1855) 7 Op. Atty-Gen. 323.

This article is merely directory to the officer appointing the court, and his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive, *Martin v. Mott*, (1827) 12 Wheat. 19, 6 U. S. (L. ed.) 537; provided it does not fall below the minimum number of five, *Howe's Case*, (1854) 6 Op. Atty-Gen. 506.

The execution of a sentence of death is murder unless the court pronouncing it consisted of thirteen commissioned officers, where that number could have been convened without manifest injury to the service. (1819) 1 Op. Atty-Gen. 296.

A member of a court-martial who has been absent during a portion of the trial, and who therefore did not hear the witnesses testify, should not take part in sentencing the accused, and when the court

consisted of only five members, including the absentee, the proceedings will be set aside. (1831) 2 Op. Atty-Gen. 414.

The settled practice should be followed, that a member of a court-martial, who participated in the proceedings of the same at the commencement of its sittings, but who, from sickness, has been unable to attend during the trial of the whole case, could not afterwards, on recovering his health, resume his seat again as a member of the court without a new precept issued; (1842) 4 Op. Atty-Gen. 7. But the remaining members may adjourn the court from day to day until he is able to attend the trial. (1842) 4 Op. Atty-Gen. 17.

**Sentence sent back for revision**—competency of court.—Where a general court-martial was required by the Secretary of War to revise its sentence, and on re-assembling two of the original members were absent, but a legal quorum of the court remained, the court remained the same competent court as when first assembled. (1855) 7 Op. Atty-Gen. 338.

**ART. 76. [When requisite number not at a post.]** When the requisite number of officers to form a general court-martial is not present in any post or detachment, the commanding officer shall, in cases which require the cognizance of such a court, report to the commanding officer of the department, who shall, thereupon, order a court to be assembled at the nearest post or department at which there may be such a requisite number of officers, and shall order the party accused, with necessary witnesses, to be transported to the place where the said court shall be assembled. [*R. S. sec. 1342.*]

**Art. of War, 86.**

**ART. 77. [Regular officers, on what courts may sit.]** Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in **Article 78.** [*R. S. sec. 1342.*]

**Art. of War, 97.**

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Officer on indefinite leave of absence with volunteer forces.—An officer of the regular army is within the provision of this article that "officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces," although such

officer has been granted an indefinite leave of absence from the regular army in order to enable him to accept a commission in the volunteer forces. U. S. v. Brown, (1907) 206 U. S. 240, 27 S. Ct. 620, 51 U. S. (L. ed.) 1046.

**ART. 78. [Marine and Regular Army officers associated on courts.]** Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present and duly authorized, shall be obeyed. [*R. S. sec. 1342.*]

Art. of War, 68; Act of June 30, 1834, ch. 132, 4 Stat. L. 713.

**ART. 79. [Officers triable by general courts-martial.]** Officers shall be tried only by general courts-martial; and no officer shall, when it can be avoided, be tried by officers inferior to him in rank. [*R. S. sec. 1342.*]

Art. of War, 75.

This provision is merely directory to the officer appointing the court, and his decision as to whether the trial by officers inferior in rank to the accused was or was not avoidable, being a matter submitted to his sound discretion, must be conclusive. *Swaim v. U. S.*, (1897) 165

U. S. 553, 17 S. Ct. 448, 41 U. S. (L. ed.) 823.

Graduated cadets assigned to service as supernumerary officers are subject to the duties of commissioned officers, and can only be tried by general courts-martial. (1855) 7 Op. Att.-Gen. 323.

**Art. 80. Repealed.**—This article was repealed by section 2 of an Act of June 18, 1898, ch. 469, 30 Stat. L. 484. Article 80, repealed by above-mentioned Act, read as follows: "In time of war a field-officer may be detailed in every regiment, to try soldiers thereof for offenses not capital; and no soldier, serving with his regiment, shall be tried by a regimental [or] garrison court-martial when a field-officer of his regiment may be so detailed." [*R. S. sec. 1342.*]

**Art. 81. Repealed.**—This article was as follows: "ART. 81. Every officer commanding a regiment or corps shall, subject to the provisions of article eighty, be competent to appoint, for his own regiment or corps, courts-martial, consisting of three officers, to try offenses not capital." [*R. S. sec. 1342.*] Art. of War, 69; Act of July 17, 1862, ch. 201, 12 Stat. L. 598.

It was repealed by the Act of March 2, 1913, ch. 93, § 1, *infra*, p. 479.

**Art. 82. Repealed.**—This section was as follows: "ART. 82. Every officer commanding a garrison, fort, or other place, where the troops consist of different corps, shall, subject to the provisions of article eighty, be competent to appoint, for such garrison or other place, courts-martial, consisting of three officers, to try offenses not capital." [*R. S. sec. 1342.*] Art. of War, 66; Act of July 17, 1862, ch. 201, 12 Stat. L. 598.

This article was amended by the Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 318. The amendment consisted in striking out the words "ninety-five" and inserting the word "eighty."

It was repealed by the Act of March 2, 1913, ch. 93, § 1, *infra*, p. 479.

**Art. 83. Repealed.**—This section was as follows: "ART. 83. Regimental and garrison courts-martial and summary courts detailed under existing laws to try enlisted men shall not have power to try capital cases or commissioned officers, but shall have power to award punishment not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and in addition thereto, in the case of non-commissioned officers reduction to the ranks and in the case of first-class privates reduction to second-class privates: *Provided*, That a summary court shall not adjudge confinement and forfeiture in excess of a period of one month, unless the accused shall before trial consent in writing to trial by said court, but in any case of refusal to so consent, the trial may be had either by general, regimental, or garrison court-martial, or by said summary court, but in case of trial by said summary court without consent as aforesaid, the court shall not adjudge confinement or forfeiture of pay for more than one month."



This article was amended to read as above by section 4 of the Act of March 2, 1901, ch. 809, 31 Stat. L. 950. Prior to the amendment the article read as follows: "ART. 83. Regimental and garrison courts-martial, and field-officers detailed to try offenders, shall not have power to try capital cases or commissioned officers, or to inflict a fine exceeding one month's pay, or to imprison or put to hard labor any non-commissioned officer or soldier for a longer time than one month." [R. S. sec. 1342.] Arts. of War, 66 and 67.

It was repealed by the Act of March 2, 1913, ch. 93, § 1, *infra*, p. 479.

Undergraduate cadets are not commissioned officers and are subject to trial by regimental or garrison court-martial, but graduated cadets assigned to service as supernumerary officers are, and can only be tried by general courts-martial. (1855) 7 Op. Atty.-Gen. 323.

The Act of Oct. 1, 1890, ch. 1259, 26 Stat. L. 648, "to promote the administration of justice in the army" does not repeal articles 81, 82, 83, *et seq.*, nor article 104, nor that part of article 112 providing that every officer, commanding a regiment or garrison in which a regiment or garrison court-martial may be

held, shall have power to pardon or mitigate any punishment which such court may adjudge. The summary court here provided for is a substitute for the garrison or regimental court-martial, with the right reserved to the accused to have his trial by court-martial, in which case he will enjoy the benefit of articles 104 and 112. This Act does not give the reviewing officer power to mitigate or approve a part and disapprove a part of a sentence of a summary court where the sentence was within the power of the court-martial to impose. (1892) 20 Op. Atty.-Gen. 346.

**ART. 84. [Oath of members of courts-martial.]** The judge-advocate shall administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of regimental and garrison courts-martial: "You, A B, do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority, except to the judge-advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God."

This article was amended to read as above by the Act of July 27, 1892, ch. 272, 27 Stat. L. 277. Before the amendment it read as follows: "ART. 84. The judge-advocate shall administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of regimental and garrison courts-martial: 'You, A B, do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God.'" [R. S. sec. 1342.] Art. of War, 69.

**ART. 85. [Oath of judge-advocate.]** When the oath has been administered to the members of a court-martial, the president of the court shall

administer to the judge-advocate, or person officiating as such, an oath in the following form:

“ You, A B, do swear that you will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court to any but the proper authority, until it shall be duly disclosed by the same. So help you God.” [*R. S. sec. 1342.*]

Art. of War, 69.

The appointment of the judge-advocate and his taking the oath required are matters of mere procedure, and any irregularities cannot be reviewed by the Court

of Claims in a collateral action. *Swaim v. U. S.*, (1897) 165 U. S. 553, 17 S. Ct. 448, 41 U. S. (L. ed.) 823.

**ART. 86. [Contempts of court.]** A court-martial may punish, at discretion, any person who uses any menacing words, signs, or gestures, in its presence, or who disturbs its proceedings by any riot or disorder. [*R. S. sec. 1342.*]

Art. of War, 76.

**Civilian witness.**—A court-martial has no authority to punish a civilian witness for contempt in refusing to testify unless the authority is conferred by statute. **Ar-**

ticle 86 does not give this authority. (1885) 18 Op. Atty.-Gen. 278; *U. S. v. Praeger*, (1907) 149 Fed. 474.

**ART. 87. [Behavior of members.]** All members of a court-martial are to behave with decency and calmness. [*R. S. sec. 1342.*]

Art. of War, 72.

**ART. 88. [Challenges by prisoner.]** Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. [*R. S. sec. 1342.*]

Art. of War, 71.

**Review.**—The decision of the court-martial in determining the validity of the challenge cannot be reviewed by the Court

of Claims in a collateral action. *Swaim v. U. S.*, (1897) 165 U. S. 553, 17 S. Ct. 448, 41 U. S. (L. ed.) 823.

**ART. 89. [Prisoner standing mute.]** When a prisoner, arraigned before a general court-martial, from obstinacy and deliberate design, stands mute, or answers foreign to the purpose, the court may proceed to trial and judgment, as if the prisoner had pleaded not guilty. [*R. S. sec. 1342.*]

Art. of War, 70.

**ART. 90. [Judge-advocate, prosecutor and counsel for prisoner.]** The judge-advocate, or some person deputed by him, or by the general or officer commanding the Army, detachment, or garrison, shall prosecute in the name of the United States, but when the prisoner has made his plea, he shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the

prisoner, the answer to which might tend to criminate himself. [*R. S. sec. 1342.*]

Art. of War, 69.

The judge-advocate is required to withdraw from closed sessions by section 2 of the Act of July 27, 1892, ch. 272, *infra*, p. 479.

**ART. 91. [Depositions.]** The depositions of witnesses residing beyond the limits of the State, Territory, or district in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital. [*R. S. sec. 1342.*]

Art. of War, 74; Act of March 3, 1863, ch. 75, 12 Stat. L. 736.

**Accused as witness.**—By the Act of March 16, 1878, ch. 37, 20 Stat. L. 30, the person charged "at his own request; but not otherwise," is made "a competent witness."

**ART. 92. [Oath of witness.]** All persons who give evidence before a court-martial shall be examined on oath, or affirmation, in the following form: "You swear (or affirm) that the evidence you shall give, in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God." [*R. S. sec. 1342.*]

Art. of War, 73.

**Administration of oaths.**—By section 4 of the Act of July 27, 1892, ch. 272, 27 Stat. L. 277, it is provided that "judge-advocates of departments and of courts-martial, and the trial officers of summary courts, are hereby authorized to administer oaths for the purposes of the administration of military justice, and for other purposes of military administration."

**Rules of evidence.**—Courts-martial are governed by the same rules of evidence as ordinary courts of criminal jurisdiction. *Whittaker's Case*, (1882) 17 Op. Atty-Gen. 310.

**Experts.**—The Secretary of War has the right to authorize a judge-advocate to employ expert witnesses at agreed rates of compensation. *Matter of Smith*. (1889) 24 Ct. Cl. 209.

**ART. 93. [Continuances.]** A court-martial shall, for reasonable cause, grant a continuance to either party, for such time, and as often, as may appear to be just: *Provided*, That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days. [*R. S. sec. 1342.*]

Act of March 3, 1863, ch. 75, 12 Stat. L. 736.

**Art. 94. Repealed.** This article was as follows: "ART. 94. Proceedings of trials shall be carried on only between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court, require immediate example." [*R. S. sec. 1342.*] Art. of War, 75.

It was repealed by an Act of March 2, 1901, ch. 890, 31 Stat. L. 950.

**ART. 95. [Order of voting.]** Members of a court-martial, in giving their votes, shall begin with the youngest in commission. [*R. S. sec. 1342.*]

Art. of War, 72.

**ART. 96. [Sentence of death.]** No person shall be sentenced to suffer death, except by the concurrence of two-thirds of the members of a general court-martial, and in the cases herein expressly mentioned. [*R. S. sec. 1342.*]

Art. of War, 87.

**ART. 97. [Penitentiaries.]** No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment. [*R. S. sec. 1342.*]

Act of July 16, 1862, ch. 190, 12 Stat. L. 589.

A soldier charged with assault with intent to kill, in the District of Columbia, may be convicted by court-martial under article 62; and a sentence of discharge from the service, forfeiture of pay, and

imprisonment in the penitentiary for the term of eight years, is authorized by this article. *Ex p. Mason*, (1881) 105 U. S. 696, 26 U. S. (L. ed.) 1213.

**ART. 98. [Flogging.]** No person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body. [*R. S. sec. 1342.*]

Act of Aug. 5, 1861; Act of June 6, 1872, ch. 316, 17 Stat. L. 261.

**ART. 99. [Discharge and dismissal of officers.]** No officer shall be discharged or dismissed from the service, except by order of the President, or by sentence of a general court-martial; and in time of peace no officer shall be dismissed, except in pursuance of the sentence of a court-martial, or in mitigation thereof. [*R. S. sec. 1342.*]

Art. of War, 11; Act of July 13, 1866, ch. 176, 14 Stat. L. 92.

**Power of President.**—Until the Act of July 13, 1866, the President had the power to remove officers. (*Gratiot's Case*, (1865) 1 Ct. Cl. 258.)

The constitutional authority of the President as commander-in-chief and the authority of Congress to "make rules for the government" of the land forces are distinct, and Congress cannot in the disguise of making rules impair the authority of the President as such commander-in-chief. *Swaim v. U. S.*, (1893) 28 Ct. Cl. 173.

While the President is made commander-in-chief by the Constitution, Congress has the right to legislate for the army, not impairing his efficiency as such commander-in-chief, and when a law is passed for the regulation of the army, having that constitutional qualification, he becomes as to that law an executive officer, and is limited in the discharge of his duty by the statute. *McBlair v. U. S.*, (1884) 19 Ct. Cl. 528.

An order of the President dismissing an officer may be revoked by the same President that issued it; and if the office be not filled at the time of revocation, and if the pay thereof has not been paid lawfully to another, the dismissed officer will be entitled to the office and to the pay *ad interim*; but if the office be filled by the appointment of another, the revocation must remain suspended till a

vacancy occur; and if the pay *ad interim* has been paid lawfully to another, the officer must take his reinstatement *cum onere*. *Montgomery's Case*, (1869) 5 Ct. Cl. 136; *Smith's Case*, (1866) 2 Ct. Cl. 206.

If an officer be once entirely severed from the army by the constitutional action of the President, and more particularly if the place has been filled by a new appointment confirmed by the Senate, he cannot be restored by any action of the President alone, but only with the advice and consent of the Senate. *U. S. v. Corson*, (1885) 114 U. S. 619, 5 S. Ct. 1158, 29 U. S. (L. ed.) 254; *Montgomery v. U. S.*, (1884) 19 Ct. Cl. 370.

The purpose of this article is not to attach a life tenure or element of vested right to the office, but to save officers "in times of peace" from a hasty and dishonorable dismissal. It cannot limit the power of Congress to reduce the army by appropriate legislation. *Street v. U. S.*, (1890) 133 U. S. 299, 10 S. Ct. 309, 33 U. S. (L. ed.) 631; *Hildeburn's Case*, (1877) 13 Ct. Cl. 62.

This article discloses no intention to restrict the power of the President, by and with the advice and consent of the Senate, to displace officers by the appointment of others in their places. *Keyes v. U. S.*, (1883) 109 U. S. 336, 3 S. Ct. 202, 27 U. S. (L. ed.) 954; *Blake v. U. S.*,

(1880) 103 U. S. 227, 26 U. S. (L. ed.) 462; *McElrath v. U. S.*, (1880) 102 U. S. 426, 26 U. S. (L. ed.) 189; *Mullan v. U. S.*, (1891) 140 U. S. 240, 11 S. Ct. 788, 35 U. S. (L. ed.) 489; *Crenshaw v. U. S.*, (1890) 134 U. S. 99, 10 S. Ct. 431, 33 U. S. (L. ed.) 825; *Fletcher v. U. S.*, (1891) 26 Ct. Cl. 541; *Carrick v. U. S.*, (1889) 24 Ct. Cl. 264.

If an officer resign while of unsound mind and the resignation be accepted, and

the vacancy be duly filled, the loss must fall on the officer who caused it, notwithstanding his insanity. *Blake's Case*, (1878) 14 Ct. Cl. 462.

**Commission of President.**—The right of one to an office is not vested until his commission has been signed by the President. Until a commission has been signed, it is within the discretionary power of the President to withhold it. *Eggleston's Case*, (1869) 13 Op. Atty.-Gen. 44.

**ART. 100. [Publication of officers cashiered for cowardice or fraud.]**

When an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp, and in the State from which the offender came, or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him. [*R. S. sec. 1342.*]

Art. of War, 85.

**ART. 101. [Suspension of officers' pay.]** When a court-martial suspends an officer from command, it may also suspend his pay and emoluments for the same time according to the nature of his offense. [*R. S. sec. 1342.*]

Art. of War, 84.

Suspension of pay signifies its absolute forfeiture, and not simply the temporary

withholding thereof. *Swaim's Case*, (1885) 18 Op. Atty.-Gen. 113.

**ART. 102. [No person tried twice for same, &c.]** No person shall be tried a second time for the same offense. [*R. S. sec. 1342.*]

Art. of War, 87.

A plea of former arrest on the same charges and a discharge without trial is not well founded; a former trial is the only defense in this article. (1819) 1 Op. Atty.-Gen. 294.

**New trial.**—For error in excluding proper testimony the President may order a new trial by a court composed of different members upon the motion of the accused. The plea of former conviction or acquittal is the privilege of the accused and may be waived by him. (1818) 1 Op. Atty.-Gen. 233.

A conviction or acquittal by the civil authorities of an offense against the gen-

eral law does not discharge the accused from responsibility for the military offense on the same facts. *In re Stubbs*, (1905) 133 Fed. 1012; *In re Esmond*, (1886) 5 Mackey (D. C.) 64; *Steiner's Case*, (1854) 6 Op. Atty.-Gen. 413; *Howe's Case*, (1854) 6 Op. Atty.-Gen. 506; (1842) 3 Op. Atty.-Gen. 749.

**An acquittal by a court-martial is not a bar to the prosecution for the same act by the civil authorities.** *In re Fair*, (1900) 100 Fed. 149. Nor is a conviction. *U. S. v. Cashiel*, (1863) 1 Hughes (U. S.) 552.

**ART. 103. [Limitation of time of prosecution.]** No person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period.

No person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy, committed more than two

years before the arraignment of such person for such offense, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was mustered into the service.

This article was amended to read as above by the Act of April 11, 1890, ch. 78, 26 Stat. L. 54. The amendment consisted in adding the last paragraph. The first paragraph was from original Article of War, 88, R. S. sec. 1342.

**Courts of inquiry.**—This article does not apply to courts of inquiry. (1853) 6 Op. Atty.-Gen. 239.

**A plea of the statute of limitations is a matter of defense in the trial by court-martial and cannot be inquired into on habeas corpus.** *In re Cadwallader*, (1904) 127 Fed. 881; *In re Zimmerman*, (1887) 30 Fed. 176; *In re Davison*, (1884) 21 Fed. 618; *In re White*, (1883) 17 Fed. 723.

**To what offenses applicable.**—This article applies to all offenses triable and punishable by court-martial, (1872) 14 Op. Atty.-Gen. 52; and so is applicable to the offense of desertion. (1876) 15 Op. Atty.-Gen. 152; *In re Davison*, (1880) 4 Fed. 507; *In re Zimmerman*, (1887) 12 Sawy. (U. S.) 257.

**Desertion being a continuing offense, the limitation does not begin to run until the expiration of the term of enlistment. The provision of article 48 does not of itself operate to extend the term of service so as to continue the offense correspondingly, and thus postpone the time when the limitation begins to run.** (1878) 16 Op. Atty.-Gen. 170; (1879) 16 Op. Atty.-Gen. 396; (1876) 15 Op. Atty.-Gen. 152; *In re Zimmerman*, (1887), 12 Sawy. (U. S.) 257.

**Prosecution is barred when more than five years have expired since the alleged desertion, and more than two years from the expiration of the term of enlistment to the arrest.** (1871) 13 Op. Atty.-Gen. 462.

**The limitation will run in favor of a deserter who re-enlists in another regiment.** *Harris's Case*, (1873) 14 Op. Atty.-Gen. 265.

**A soldier may be detained in custody by the military authorities, for trial or lawful disposition after his term of service expires, on account of an act committed during such service.** *In re Bird*, (1871) 2 Sawy. (U. S.) 33.

**Pendency of proceedings in civil courts.**—A plea of the statute of limitations cannot be sustained where it appears that the accused was arraigned before court-martial within the two years, and action was suspended upon his plea of the pendency of proceedings against him in the

civil courts, which were not finally disposed of until the expiration of two years. *Howe's Case*, (1854) 6 Op. Atty.-Gen. 506. See (1842) 3 Op. Atty.-Gen. 749.

**The accused cannot waive the benefit of the limitation, so that upon a plea of guilty the government must show, in some other way than by his plea or admission at the trial, why he was not brought to trial for desertion within the two years from the cessation of the offense, that is, from the expiration of the term of enlistment.** (1878) 16 Op. Atty.-Gen. 170; (1879) 16 Op. Atty.-Gen. 396; (1853) 6 Op. Atty.-Gen. 239; (1820) 1 Op. Atty.-Gen. 383.

**Concealment of the offense by the accused is not such a "manifest impediment" to his prosecution as will prevent the running of the limitation.** (1872) 14 Op. Atty.-Gen. 52; *Harris's Case*, (1873) 14 Op. Atty.-Gen. 265.

**The mere absence without leave by a deserter does not bring him within the exceptions of this article, so that an arrest or surrender is not necessary to start the running of the limitation.** (1876) 15 Op. Atty.-Gen. 152; *In re Davison*, (1880) 4 Fed. 507.

**Officer dismissed and restored.**—Where charges were preferred against an officer, and shortly thereafter he was dismissed from the service for other reasons, upon his restoration he cannot be tried on the charges pending against him at the time of his dismissal, after the lapse of two years from the commission of the alleged offense. (1858) 9 Op. Atty.-Gen. 181.

**"Time of peace."**—A soldier who deserted after the signing of the protocol between the United States and Spain, and while a state of peace actually existed, and nothing remained to be done to conclude peace except the settlement of the details of the treaty, was held to be within the provision of this section that no person shall be court-martialed for desertion in time of peace, and not in the face of an enemy, committed more than two years before his arraignment therefor. *In re Cadwallader*, (1904) 127 Fed. 881.

**ART. 104. [Approval of sentence by officer ordering court.]** No sentence of a court-martial shall be carried into execution until the same

shall have been approved by the officer ordering the court, or by the officer commanding for the time being.

This article was amended to read as above by the Act of July 27, 1892, ch. 272, 27 Stat. L. 277. Before the amendment it was as follows: "ART. 104. No sentence of a court-martial shall be carried into execution until the whole proceedings shall have been approved by the officer ordering the court, or by the officer commanding for the time being. [*R. S. sec. 1342.*] Art. of War, 65.

If a sentence in gross is pronounced upon conviction under sixteen specifications, and upon review by the President twelve are set aside, the sentence need not be disturbed provided it is such as could have been lawfully imposed under the counts which are upheld. *Carter v. McClaughry*, (1900) 105 Fed. 614.

**Inadmissible evidence.**—Courts-martial are governed by the same rules of evidence as ordinary courts of criminal jurisdiction, and when inadmissible evidence has been received, it is error if it was material to the finding of the court, and the sentence should be set aside by the reviewing officer. *Whittaker's Case*, (1882) 17 Op. Atty-Gen. 310.

**The reviewing officer's approval and orders** are as much a part of the record as the proceedings and sentence of the court. All constitute an entire proceeding and are to be construed together. *In re Esmond*, (1886) 5 Mackey (D. C.) 64.

**Disapproval as acquittal.**—Where a conviction has been disapproved by the reviewing officer, and the prisoner released from confinement and restored to duty, it is in effect an acquittal. (1871) 13 Op. Atty-Gen. 459.

**Where a sentence discharging a soldier from the service has been set aside as void**, he is not affected by such sentence, and is deemed to have been in the service between the sentence and the order setting

it aside. *In re Bird*, (1871) 2 Sawy. (U. S.) 33.

**Questioning legality of sentence.**—If the sentence of a court-martial does not sever the relations of the accused with the military service, he may any time question the legality of his sentence. *Swaim v. U. S.*, (1893) 28 Ct. Cl. 173.

**After the dissolution of a court-martial**, the Secretary of War has no authority to receive affidavits or other evidence as to the incorrectness of the record and modify or amend it. (1900) 23 Op. Atty-Gen. 23.

**Evidence to supply facts which record fails to show.**—Upon an application to the department to have proceedings as of court-martial declared null and void, evidence may be admitted, not to impeach the validity of the proceedings, but to supply facts which the record fails to show. (1878) 16 Op. Atty-Gen. 106.

**Increasing severity of sentence.**—The commanding officer charged with the duty of reviewing the proceedings of the court cannot increase the severity of a sentence; he may approve or disapprove or mitigate. But he may remand the case to the court suggesting the inadequacy of the sentence, and the court may in its discretion revoke the sentence and inflict a severer sentence. *Swaim v. U. S.*, (1893) 28 Ct. Cl. 173. See *Ex p. Reed*, (1879) 100 U. S. 13, 25 U. S. (L. ed.) 538.

**ART. 105. [Confirmation of death sentence.]** No sentence of a court-martial, inflicting the punishment of death, shall be carried into execution until it shall have been confirmed by the President; except in the cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers, and in the cases of guerilla marauders, convicted, in time of war, of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the sentence of death may be carried into execution upon confirmation by the commanding general in the field, or the commander of the department, as the case may be. [*R. S. sec. 1342.*]

Art. of War, 65; Act of July 17, 1862; Act of March 3, 1863; Act of July 2, 1862, ch. 215, 13 Stat. L. 356.

**A court-martial may reconsider the sentence and judgment, and sentence to death where the former sentence imposed only imprisonment.** (1819) 1 Op. Atty-Gen. 296.

**Fifth amendment to Constitution.**—The words "when in actual service in time of

war or public danger," in the fifth article of amendments to the United States Constitution, apply only to the militia. *Johnson v. Sayre*, (1895) 158 U. S. 109, 15 S. Ct. 773, 39 U. S. (L. ed.) 914.

This article does not authorize a trial of citizens of a state by a military

commission for the alleged offense of killing a military guard when the state is in fact in the exercise of its civil functions.

U. S. v. Commandant of Ft. Delaware, (1866) 25 Fed. Cas. No. 14,342.

**ART. 106. [Confirmation of dismissals in time of peace.]** In time of peace no sentence of a court-martial, directing the dismissal of an officer, shall be carried into execution, until it shall have been confirmed by the President. [*R. S. sec. 1342.*]

Art. of War, 65.

**When officer is out of service.**—Upon a sentence of dismissal by a court-martial, the officer sentenced is not legally out of the service unless the record positively and distinctly shows that the proceedings have been approved by the President. *Runkle v. U. S.*, (1887) 122 U. S. 543, 7 S. Ct. 1141, 30 U. S. (L. ed.) 1167; *Page v. U. S.*, (1890) 25 Ct. Cl. 254.

**An indorsement upon the record by the Secretary of War that:** "In conformity with the 65th (now article 106) of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President. The proceedings, findings, and sentence are approved, and the sentence will be duly executed," is sufficient to show compliance with this article. This article requires the personal judicial action of the President, but such may be evidenced by the act of the Secretary of War under section 216, *R. S.* *U. S. v. Fletcher*, (1893) 148 U. S. 84, 13 S. Ct. 552, 37 U. S. (L. ed.) 378; *U. S. v. Page*, (1891) 137 U. S. 673, 11 S. Ct. 219, 34 U. S. (L. ed.) 828; (1877) 15 Op. Atty.-Gen. 290.

The case of *Runkle v. U. S.*, (1887) 122 U. S. 543, 7 S. Ct. 1141, 30 U. S. (L. ed.) 1167, is distinguished, in that the record did not show in that case that

the proceedings had been laid before the President or acted on by him, and in the *Fletcher* case the court says that the *Runkle* case is hardly a safe precedent.

**Nomination of successor.**—A sentence of dismissal of an officer, carried into effect under orders of the War Department, is confirmed by a nomination of a successor to the Senate, or by an appointment by the President of a successor during a recess of the Senate. (1879) 16 Op. Atty.-Gen. 298.

**Review by succeeding President.**—A decision made and executed under one President is not liable to be reviewed and annulled under the administration of another. *Howe's Case*, (1854) 6 Op. Atty.-Gen. 506; (1854) 6 Op. Atty.-Gen. 369. See (1877) 15 Op. Atty.-Gen. 290.

**Waiver of right.**—If an officer on the active list submits without appeal and without objection for an unreasonable time to an illegal or irregular order of dismissal, he must be held to have abandoned and waived his right to all title and claim to the office and to its emoluments. *Ide v. U. S.*, (1890) 25 Ct. Cl. 401; *Armstrong v. U. S.*, (1891) 26 Ct. Cl. 387.

**An officer on the retired list does not come under the rule in *Ide's* case, above cited.** *Fletcher v. U. S.*, (1891) 26 Ct. Cl. 541.

**ART. 107. [Dismissal by division or brigade courts.]** No sentence of a court-martial appointed by the commander of a division or of a separate brigade of troops, directing the dismissal of an officer, shall be carried into execution until it shall have been confirmed by the general commanding the army in the field to which the division or brigade belongs. [*R. S. sec. 1342.*]

Act of Dec. 24, 1861, ch. 3, 12 Stat. L. 330.

**ART. 108. [General officers, sentences respecting.]** No sentence of a court-martial, either in time of peace or in time of war, respecting a general officer, shall be carried into execution, until it shall have been confirmed by the President. [*R. S. sec. 1342.*]

Art. of War, 65.

**ART. 109. [Confirmation by officer ordering court.]** All sentences of a court-martial may be confirmed and carried into execution by the officer



ordering the court, or by the officer commanding for the time being, where confirmation by the President, or by the commanding general in the field, or commander of the department, is not required by these articles. [*R. S. sec. 1342.*]

Art. of War, 65.

Art. 110. *Repealed.* This section was as follows: "ART. 110. No sentence adjudged by a field officer, detailed to try soldiers of his regiment, shall be carried into execution until the same shall have been approved by the brigade commander, or, in case there be no brigade commander, by the commanding officer of the post or camp."

Article 110 was amended so to read by the Act of July 27, 1892, ch. 272, 27 Stat. L. 277. Prior to the amendment it read as follows: "ART. 110. No sentence of a field-officer, detailed to try soldiers of his regiment, shall be carried into execution, until the whole proceedings shall have been approved by the brigade commander, or, in case there be no brigade commander, by the commanding officer of the post." [*R. S. sec. 1342.*]

It was repealed by an Act of June 18, 1898, ch. 464, 30 Stat. L. 484.

ART. 111. [**Suspension of sentence of death or dismissal.**] Any officer who has authority to carry into execution the sentence of death, or of dismissal of an officer, may suspend the same until the pleasure of the President shall be known; and, in such case, he shall immediately transmit to the President a copy of the order of suspension, together with a copy of the proceedings of the court. [*R. S. sec. 1342.*]

Art. of War, 80.

ART. 112. [**Pardon and mitigation of sentences.**] Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer. Every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held, shall have power to pardon or mitigate any punishment which such court may adjudge. [*R. S. sec. 1342.*]

Art. of War, 89; Act of July 17, 1862, ch. 201, 12 Stat. L. 598.

**Power of officers.**—An officer who is authorized to order a general court-martial has no power to pardon or mitigate the punishment after confirmation by him of the sentence. (1888) 19 Op. Atty.-Gen. 106.

A general, commanding the forces of the United States in the field, does not possess power to commute a sentence of dismissal of an officer, but only the power to execute the sentence, or to suspend it and take the direction of the President. (1853) 6 Op. Atty.-Gen. 123.

The appointment of an officer to a new commission is constructive pardon of a previous sentence pronounced but not yet executed. (1853) 6 Op. Atty.-Gen. 123.

The President may substitute a suspension for a term of years without pay for a sentence of absolute dismissal, as he possesses the power to revise, pardon, and to mitigate a sentence, (1845) 4 Op. Atty.-Gen. 432; but he cannot substitute another punishment for that decreed by the court, as the mitigation must be of the punishment adjudged, by modifying its severity, except in cases of sentences of death, where there is no inferior degree, (1845) 4 Op. Atty.-Gen. 444; and in case of sentence of death he may substitute a milder punishment. (1820) 1 Op. Atty.-Gen. 327.

ART. 113. [**Proceedings forwarded to Judge-Advocate-General.**] Every judge-advocate, or person acting as such, at any general court-martial, shall, with as much expedition as the opportunity of time and distance of place may admit, forward the original proceedings and sentence

of such court to the Judge-Advocate-General of the Army, in whose office they shall be carefully preserved. [*R. S. sec. 1342.*]

Art. of War, 90; Act of July 17, 1862; Act of July 28, 1866; Act of March 3, 1877, ch. 102, 19 Stat. L. 310.

**ART. 114. [Party entitled to a copy.]** Every party tried by a general court-martial shall, upon demand thereof, made by himself or by any person in his behalf, be entitled to a copy of the proceedings and sentence of such court. [*R. S. sec. 1342.*]

Art. of War, 90.

**ART. 115. [Courts of inquiry, how ordered.]** A court of inquiry, to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier, may be ordered by the President or by any commanding officer; but, as courts of inquiry may be perverted to dishonorable purposes, and may be employed, in the hands of weak and envious commandants, as engines for the destruction of military merit, they shall never be ordered by any commanding officer, except upon a demand by the officer or soldier whose conduct is to be inquired of. [*R. S. sec. 1342.*]

Arts. of War, 91 and 92.

The great purpose of a court of inquiry is to collect information by which to guide the discretion of him who orders it. The two years' limitation, article 103, does not apply to courts of inquiry. (1853) 6 Op. Atty-Gen. 239.

**ART. 116. [Members of court of inquiry.]** A court of inquiry shall consist of one or more officers, not exceeding three, and a recorder, to reduce the proceedings and evidence to writing. [*R. S. sec. 1342.*]

Art. of War, 91.

**ART. 117. [Oaths of members and recorder of court of inquiry.]** The recorder of a court of inquiry shall administer to the members the following oath: "You shall well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward: so help you God." After which the president of the court shall administer to the recorder the following oath: "You, A B, do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing: so help you God." [*R. S. sec. 1342.*]

Art. of War, 93.

**ART. 118. [Witnesses before courts of inquiry.]** A court of inquiry, and the recorder thereof, shall have the same power to summon and examine witnesses as is given to courts-martial and the judge-advocates thereof. Such witnesses shall take the same oath which is taken by witnesses before courts-martials, and the party accused shall be permitted to examine and cross-examine them, so as fully to investigate the circumstances in question. [*R. S. sec. 1342.*]

Arts. of War, 91 and 93; Acts of March 3, 1863, ch. 75, 12 Stat. L. 736, ch. 79, 12 Stat. L. 754.

**ART. 119. [Opinion; when given by.]** A court of inquiry shall not give an opinion on the merits of the case inquired of unless specially ordered to do so. [*R. S. sec. 1342.*]

Art. of War, 91.

**ART. 120. [Authentication of proceedings of court of inquiry.]** The proceedings of a court of inquiry must be authenticated by the signatures of the recorder and the president thereof, and delivered to the commanding officer. [*R. S. sec. 1342.*]

Art. of War, 92.

**ART. 121. [Proceedings of court of inquiry used as evidence.]** The proceedings of a court of inquiry may be admitted as evidence by a court-martial, in cases not capital, nor extending to the dismissal of an officer: *Provided*, That the circumstances are such that oral testimony cannot be obtained. [*R. S. sec. 1342.*]

Art. of War, 92.

A court-martial should itself decide questions as to the admissibility of evidence or the construction of a statute; it is not the official duty of the Secretary of War to give an opinion. (1881) 17 Op. Atty-Gen. 54.

**ART. 122. [Command, when different corps happen to join.]** If, upon marches, guards, or in quarters, different corps of the army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, organized militia, or volunteers, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful in the service, unless otherwise specially directed by the President, according to the nature of the case. [*R. S. sec. 1342.*]

This article was amended to read as above given by section 1 of an Act of March 8, 1910, ch. 88, 36 Stat. L. 234, entitled "An Act to modify the one hundred and twenty-second and one hundred and twenty-fourth articles of war, and to repeal the one hundred and twenty-third article of war." The article amended was originally as follows: "ART. 122. If, upon marches, guards, or in quarters, different corps of the Army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President, according to the nature of the case." [*R. S. sec. 1342.*]

Art. of War, 62.

**Art. 123. Repealed.** This section was as follows: "ART. 123. In all matters relating to the rank, duties, and rights of officers, the same rules and regulations shall apply to officers of the Regular Army and to volunteers commissioned in, or mustered into said service, under the laws of the United States, for a limited period." [*R. S. sec. 1342.*] Act of March 2, 1867, ch. 159, 14 Stat. L. 435.

It was repealed by an Act of March 8, 1910, ch. 88, § 2, 36 Stat. L. 235.

**Regulars and volunteers.**—This article seems only intended for a condition of the military service in which both volunteers and regulars exist as distinct organizations. The officers of the regular army and the officers of the volunteer forces mustered into service shall, in the matter of rank, duty, and rights, be governed by the same rules and regulations. (1877) 15 Op. Atty-Gen. 330.

**ART. 124. [Rank of organized militia officers on duty with officers of regular or volunteer forces.]** Officers of the organized militia of the several States, when called into the service of the United States, shall on

all detachments, courts-martial, and other duty, wherein they may be employed in conjunction with the regular or volunteer forces of the United States, take rank next after all officers of the like grade in said regular forces, and shall take precedence of all officers of volunteers of equal or inferior rank, notwithstanding the commissions of such militia officers may be older than the commissions of the said officers of the regular forces of the United States. [*R. S. sec. 1342.*]

This article was amended to read as above by section 1 of an Act of March 8, 1910, ch. 88, 36 Stat. L. 234, see the note to article 122 *supra*. The section amended was as follows: "ART. 124. Officers of the militia of the several States, when called into the service of the United States, shall on all detachments, courts-martial, and other duty wherein they may be employed in conjunction with the regular or volunteer forces of the United States, take rank next after all officers of the like grade in said regular or volunteer forces, notwithstanding the commissions of such militia officers may be older than the commissions of the said officers of the regular or volunteer forces of the United States." [*R. S. sec. 1342.*] Art. of War, 98; Act of March 2, 1867, ch. 159, 14 Stat. L. 435.

**ART. 125. [Deceased officers' effects.]** In case of the death of any officer, the major of his regiment, or the officer doing the major's duty, or the second officer in command at any post or garrison, as the case may be, shall immediately secure all his effects then in camp or quarters, and shall make, and transmit to the office of the Department of War, an inventory thereof. [*R. S. sec. 1342.*]

Art. of War, 94.

**ART. 126. [Deceased soldiers' effects.]** In case of the death of any soldier, the commanding officer of his troop, battery, or company shall immediately secure all his effects then in camp or quarters, and shall, in the presence of two other officers, make an inventory thereof, which he shall transmit to the office of the Department of War. [*R. S. sec. 1342.*]

Art. of War, 94.

**ART. 127. [Effects of deceased officers and soldiers to be accounted for.]** Officers charged with the care of the effects of deceased officers or soldiers shall account for and deliver the same, or the proceeds thereof, to the legal representatives of such deceased officers or soldiers. And no officer so charged shall be permitted to quit the regiment or post until he has deposited in the hands of the commanding officer all the effects of such deceased officers or soldiers not so accounted for and delivered. [*R. S. sec. 1342.*]

Art. of War, 95.

**ART. 128. [Articles of war to be published once in six months to every regiment, &c.]** The foregoing articles shall be read and published, once in every six months, to every garrison, regiment, troop, or company in the service of the United States, and shall be duly observed and obeyed by all officers and soldiers in said service. [*R. S. sec. 1342.*]

Art. of War, 101.

**An Act to amend the Articles of War relative to the punishment on conviction by courts-martial.**

[*Act of Sept. 27, 1890, ch. 998, 26 Stat. L. 491.*]

**[Punishment on conviction by courts martial.]** That whenever by any of the Articles of War for the government of the Army the punishment or conviction of any military offense is left to the discretion of the court martial the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe. [26 Stat. L. 491.]

**Sentence.**—The President having fixed a term of ten years as the maximum of imprisonment in cases prosecuted under the sixty-second article of war, as authorized by this paragraph, it was held that a court-martial, on convicting a soldier of conduct prejudicial to good order and

military discipline in violation of such article, had jurisdiction to sentence the accused to a term of five years' imprisonment, though such term extended beyond the term of military service for which he had enlisted. *In re Stubbs*, (1905) 133 Fed. 1012.

**SEC. 2. [Judge-advocate to withdraw from closed sessions.]** That whenever a court-martial shall sit in closed session the judge-advocate shall withdraw, and when his legal advice or his assistance in referring to recorded evidence is required it shall be obtained in open court. [27 Stat. L. 278.]

The above section 2 and section 3 following are from the Act of July 27, 1892, ch. 272, entitled "An Act to amend the articles of war, and for other purposes."

This section relates to procedure and not to jurisdiction and the nonobservance of it by military tribunals is a matter for the revising military authorities and not for the civil courts, which are in no sense appellate tribunals for the revision of proceedings in courts-martial. When

it appears that the court-martial had jurisdiction of the person and of the subject matter which was tried before it, errors in procedure can be corrected only by the proper military authorities. *Ex p. Tucker*, (D. C. Mass. 1913) 212 Fed. 569.

**SEC. 3. [Fraudulent enlistment and receipt of pay.]** That fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared a military offense and made punishable by court-martial, under the Sixty-second Article of War. [27 Stat. L. 278.]

**Fraudulent enlistment and receipt of pay.**—A minor who by misrepresenting his age has fraudulently enlisted in the army without the consent of his parents, and thereby subjected himself to punishment under military law, will not be relieved from such punishment by his discharge by the civil courts on a writ of

habeas corpus on the application of his parents, even though the military prosecution is not instituted until after the writ is issued. *Ex p. Lewkowitz*, (1908) 163 Fed. 646, *overruling In re Carver*, (1900) 103 Fed. 624. See also *In re Scott*, (1906) 144 Fed. 79.

**[SEC. 1.] [Courts-martial — members — appointment — powers.]**  
\* \* \* On and after July first, nineteen hundred and thirteen, courts-martial shall be of three kinds, namely: First, general courts-martial; second, special courts-martial; and third, summary courts-martial.

General courts-martial may consist of any number of officers from five to thirteen, inclusive.

Special courts-martial may consist of any number of officers from three to five, inclusive.

A summary court-martial shall consist of one officer.

The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, a field army, an army corps, a division, or a separate brigade, and when empowered by the President, the commanding officer of any district or of any force or body of troops, may appoint general courts-martial whenever necessary; but when any such commander is the accuser or the prosecutor of the person or persons to be tried the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser, or a witness for the prosecution.

The commanding officer of a district, garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a brigade, regiment, detached battalion, or other detached command, may appoint special courts-martial for his command; but such special courts-martial may in any case be appointed by superior authority when by the latter deemed desirable, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other detachment may appoint summary courts-martial for his command; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: *Provided*, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him.

General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by the Articles of War and any other person who by statute or by the law of war is subject to trial by military tribunals: *Provided*, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy.

Special courts-martial shall have power to try any person subject to military law, except an officer, for any crime or offense not capital made punishable by the Articles of War: *Provided*, That the President may by regulations, which he may modify from time to time, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

Special courts-martial shall have power to adjudge punishment not to exceed confinement at hard labor for six months or forfeiture of six months' pay, or both, and in addition thereto reduction to the ranks in the cases of noncommissioned officers, and reduction in classification in the cases of first-class privates.

Summary courts-martial shall have power to try any soldier, except one who is holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by the Articles of

War: *Provided*, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial.

Summary courts-martial shall have power to adjudge punishment not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and in addition thereto reduction to the ranks in the cases of noncommissioned officers and reduction in classification in the cases of first-class privates: *Provided*, That when the summary court officer is also the commanding officer no sentence of such summary court-martial adjudging confinement at hard labor or forfeiture of pay, or both, for a period in excess of one month shall be carried into execution until the same shall have been approved by superior authority.

Articles seventy-two, seventy-three, seventy-five, eighty-one, eighty-two, and eighty-three of section thirteen hundred and forty-two of the Revised Statutes; the first section of an Act entitled "An Act to promote the administration of justice in the Army," approved October first, eighteen hundred and ninety, as amended by the first section of an Act approved June eighteenth, eighteen hundred and ninety-eight (Thirtieth Statutes, four hundred and eighty-three, four hundred and eighty-four), are hereby repealed, but courts-martial duly and regularly convened in orders issued prior to the date when this Act takes effect and in existence on that date, under Articles of War hereby repealed, may continue as legal courts for the trial of cases referred to them prior to that date with the same effect as if this Act has [*sic*] not been passed: *Provided*, That prior to July first, nineteen hundred and thirteen, the President may, when deemed by him necessary, empower any officer competent under the terms of this Act to appoint the general courts-martial which it authorizes, to appoint general courts-martial authorized by existing law. [37 Stat. L. 721.]

This is from the Army Appropriations Act of March 2, 1913, ch. 93. For the Articles of War above repealed see *supra*, this title.

**Sec. 1343. [Spies.]** All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death. [R. S.]

Act of April 10, 1806; Act of Feb. 13, 1862; Act of March 3, 1863, ch. 75, 12 Stat. L. 737.

This section, as well as articles 60 and 63 of section 1342, R. S., makes persons not strictly in the military service amenable to court-martial jurisdiction. Such statutes are not unconstitutional as being in conflict with the United States Constitution, amendment 5. (1879) 16 Op. Atty-Gen. 294; *Ex p. Wildman*, (1876) 29 Fed. Cas. No. 17,653a.

**Status of spy on restoration of peace.**—One cannot be held as a spy who was not brought to trial and punishment during the existence of the war. *Matter of Mar-*

*tin*, (1865) 45 Barb. (N. Y.) 142, wherein it appeared that the return to a writ of habeas corpus stated that the relator was, in November, 1864, within the federal lines as a spy, he being at that time an officer in the Confederate army, disguised in the dress of a citizen. The court held that the restoration of peace absolved all offenses committed by the public enemy during the existence of the war, and that the prisoner could not therefore be lawfully arraigned before a military tribunal for the offense of being a spy.

## **ASH PAN ACT**

See RAILROADS

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## **ASSAULT**

See PENAL LAWS

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## **ASSAY OFFICES**

See COINAGE, MINTS AND ASSAY OFFICES

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## **ASYLUMS**

See HOSPITALS AND ASYLUMS



## ATTACHMENT

- R. S. 924. *Attachment in Postal Suits*, 483.
- R. S. 925. *Application for Warrant; By Whom and How Made*, 484.
- R. S. 926. *Issuing Warrant; Duty of Clerk and Marshal*, 484.
- R. S. 927. *Ownership of Attached Property; Trial; Other Remedies*, 484.
- R. S. 928. *Proceeds of Attached Property to Be Invested*, 485.
- R. S. 929. *Publication of Attachment*, 485.
- R. S. 930. *Persons Having Property of Defendants to Account for It; Sales Void; Personal Notice*, 485.
- R. S. 931. *Discharge of Attachment; Bond*, 485.
- R. S. 932. *Accrued Rights Not to Be Abridged*, 485.
- R. S. 933. *Attachment Dissolved in Conformity with State Laws*, 485.

### CROSS-REFERENCES.

*In Alaska*, see *ALASKA*.

*In Bankruptcy Matters*, see *BANKRUPTCY*.

*Of Goods of Foreign Ministers*, see *DIPLOMATIC AND CONSULAR OFFICERS*.

*In Internal Revenue Cases*, see *INTERNAL REVENUE*.

*Procedure in Federal Courts*, see *JUDICIARY*.

*Against National Banks*, see *NATIONAL BANKS*.

*Of Pensions*, see *PENSIONS*.

*Of Property in which the United States has an Interest*, see *PUBLIC PROPERTY, BUILDINGS, AND GROUNDS*.

*Of Seamen's Wages*, see *SEAMEN*.

**Sec. 924. [Attachment in postal suits.]** In all cases where debts are due from defaulting or delinquent postmasters, contractors, or other officers, agents, or employés of the Post-Office Department, a warrant of attachment may issue against all real and personal property and legal and equitable rights belonging to such officer, agent, or employé, and his sureties, or either of them, in the following cases:

First. When such officer, agent, or employé, and his sureties, or either of them, is a non-resident of the district where such officer, agent, or employé was appointed, or has departed from such district for the purpose of permanently residing out of the same, or of defrauding the United States, or of avoiding the service of civil process.

Second. When such officer, agent, or employé, and his sureties, or either of them, has conveyed away, or is about to convey away his property, or any part thereof, or has removed or is about to remove the same or any part thereof from the district wherein it is situate, with intent to defraud the United States.

And when any such property has been removed, certified copies of the warrant may be sent to the marshal of the district into which the same

has been removed, under which certified copies he may seize said property and convey it to some convenient point within the jurisdiction of the court from which the warrant originally issued. And alias warrants may be issued in such cases upon due application, and the validity of the warrant first issued shall continue until the return day thereof. [R. S.]

Act of Feb. 23, 1865, ch. 47, 13 Stat. L. 432, 433.

**Amendments of process.**—Section 948 confers the power upon circuit or district courts to allow amendments of any process returnable to or before such courts, and the power applies, beyond doubt, to the distinctive and special proceedings in attachment authorized in favor of the United States against defaulting and delinquent postmasters, contractors, and other offi-

cers, agents, and employees of the post-office, as regulated by section 924. "It is not necessary to say that the power to permit amendments in such cases is to be exercised according to the sound discretion of the court to whom the application is addressed." *Erstein v. Rothschild*, (1884) 22 Fed. 61.

**Sec. 925. [Application for warrant; by whom and how made.]** Application for such warrant of attachment may be made by any district or assistant district attorney, or any other person authorized by the Postmaster-General, before the judge, or, in his absence, before the clerk of any court of the United States having original jurisdiction of the cause of action. And such application shall be made upon an affidavit of the applicant, or of some other credible person, stating the existence of either of the grounds of attachment enumerated in the preceding section, and upon production of legal evidence of the debt. [R. S.]

Act of Feb. 23, 1865, ch. 47, 13 Stat. L. 433.

**Sec. 926. [Issuing warrant; duty of clerk and marshal.]** Upon any such application and upon due order of any judge of the court, or, in his absence, without such order, the clerk shall issue a warrant for the attachment of all the property of any kind belonging to the person specified in the affidavit, which warrant shall be executed with all possible dispatch by the marshal, who shall take the property attached, if personal, into his custody, and hold the same subject to all interlocutory or final orders of the court. [R. S.]

Act of Feb. 23, 1865, ch. 47, 13 Stat. L. 433.

**Sec. 927. [Ownership of attached property; trial; other remedies.]** At any time within twenty days before the return day of such warrant, the party whose property is attached may, on giving notice to the district attorney of his intention, file a plea in abatement, traversing the allegations of the affidavit, or denying the ownership of the property attached to be in the defendants or either of them; in which case the court may, upon application of either party, order an immediate trial by jury of the issues raised by the affidavit and plea; but the parties may, by consent, waive a trial by jury, in which case the court shall decide the issues raised. And any party claiming ownership of the property attached and a specific return thereof, shall be confined to the remedy herein afforded, but his right to an action of trespass, or other action for damages, shall not be impaired hereby. [R. S.]

Act of Feb. 23, 1865, ch. 47, 13 Stat. L. 435.

**Sec. 928. [Proceeds of attached property to be invested.]** When the property attached is sold on any interlocutory order of the court or is producing any revenue, the money arising from such sale or revenue shall be invested in securities of the United States, under the order of the court, and all accretions shall be held subject to the orders of the same. [R. S.]

Act of Feb. 23, 1865, ch. 47, 13 Stat. L. 433.

**Sec. 929. [Publication of attachment.]** Immediately upon the execution of any such warrant of attachment, the marshal shall cause due publication thereof to be made, in the case of absconding debtors for two months and of non-residents for four months. The publication shall be made in some newspaper published in the district where the property is situate, and the details thereof shall be regulated by the order under which the warrant is issued. [R. S.]

Act of Feb. 23, 1865, ch. 47, 13 Stat. L. 434.

**Sec. 930. [Persons having property of defendants to account for it; sales void; personal notice.]** After the first publication of such notice of attachment as required by law, every person indebted to, or having possession of any property belonging to, the said defendants, or either of them, and having knowledge of such notice, shall account and answer for the amount of such debt and the value of such property; and any disposal or attempt to dispose of any such property, to the injury of the United States, shall be illegal and void. And when the person indebted to, or having possession of the property of, such defendants, or either of them, is known to the district attorney or marshal, such officer shall see that personal notice of the attachment is served upon such person, but the want of such notice shall not invalidate the attachment. [R. S.]

Act of Feb. 23, 1865, ch. 47, 13 Stat. L. 434.

**Sec. 931. [Discharge of attachment; bond.]** Upon application of the party whose property has been attached, the court, or any judge thereof, may discharge the warrant of attachment as to the property of the applicant, provided such applicant shall execute to the United States a good and sufficient penal bond, in double the value of the property attached, to be approved by a judge of the court, and with condition for the return of said property, or to answer any judgment which may be rendered by the court in the premises. [R. S.]

Act of Feb. 23, 1865, ch. 47, 13 Stat. L. 434.

**Sec. 932. [Accrued rights not to be abridged.]** Nothing contained in the preceding eight sections shall be construed to limit or abridge, in any manner, such rights of the United States as have accrued or been allowed in any district under the former practice of, or the adoption of State laws by, the United States courts. [R. S.]

Act of Feb. 23, 1865, ch. 47, 13 Stat. L. 434.

**Sec. 933. [Attachments dissolved in conformity with State laws.]** An attachment of property, upon process instituted in any court of the United States, to satisfy such judgment as may be recovered by the plaintiff

therein, except in the cases mentioned in the preceding nine sections, shall be dissolved when any contingency occurs by which, according to the laws of the State where said court is held, such attachment would be dissolved upon like process instituted in the courts of said State: *Provided*, That nothing herein contained shall interfere with any priority of the United States in the payment of debts. [R. S.]

Act of March 14, 1848, ch. 18, 9 Stat. L. 213; Act of Feb. 23, 1865, ch. 47, 13 Stat. L. 434.

**Dissolved upon state insolvency proceedings.**—After the death of a member of a partnership, in a state (Louisiana) in which the share of the deceased partner descends to his heir and does not vest in the survivor, an attempt of the surviving partners to surrender all the partnership effects to the civil court for the benefit of the creditors is not authorized by law unless by consent of the heirs; but when the surrender of the partnership effects is accepted by the court, which, by the appointment of a syndic, undertakes the administration of all the property of the late firm, the judgment of the court accepting the cession of the property and appointing a syndic cannot be collaterally attacked; the judgment can be set aside only by appeal or action in nullity. Where, under the state law, the effect of a cession of property by an insolvent person is to dissolve all attachments which have not matured into judgment, a writ of attachment levied on the partnership property, on the petition of one of the creditors of the late firm, will be dissolved. *Tua v. Carriere*, (1886) 117 U. S. 201, 6 S. Ct. 565, 29 U. S. (L. ed.) 855.

And see *Shwartz v. H. B. Claflin Co.*, (C. C. A. 1893) 60 Fed. 676, in which the court said that either the insolvent partnership or interveners, claiming to be the owners of the goods seized, had the right, as well as the syndic, to suggest or plead the cession of the effects of the insolvent partnership as ground for the dissolution of the attachment.

**Stayed until question of insolvency adjudicated.**—In an action at law to recover a certain amount of money alleged to be due the plaintiff from the defendant, in which action an attachment was duly issued, and levied by the marshal on property of the defendant, the proceedings for the enforcement of plaintiff's demand will be stayed, until the State Insolvency Court shall have adjudicated the question of defendant's alleged insolvency, where it was made to appear that, after the commencement of the action, resident creditors of the defendant instituted insolvency proceedings against him in one of the superior courts of the state, and, in pursuance of the state statute regulating such matters, the Superior Court made an order directing that no creditor whose debt is provable under the Insolvency Act of the state be allowed to prosecute to final judgment any action therefor against the al-

leged insolvent until the question of his discharge be finally determined, and that any and all such suits and proceedings be stayed until the further order of the said superior court. "The purpose [of the provisions of this section] was to give to the nonresident, who might sue in the federal courts, the same rights, but no more, in respect to attachment, as are enjoyed by the resident creditor, who must sue in the state court." *Neufeld v. Neufeld*, (1889) 37 Fed. 560. See also *Mather v. Nesbit*, (1882) 13 Fed. 872; *Mayer v. Cahalin*, (1879) 5 Sawy. (U. S.) 355.

**Plead insolvency proceedings before judgment.**—An action was commenced by attachment, in which judgment was rendered sustaining the attachment and awarding plaintiffs the amount of their claim. After the levy of the attachment, and before trial, the defendants, upon their own petition, were adjudicated insolvents and a provisional syndic was appointed. Upon an appearance by the insolvent defendants or the interveners or the syndic, by a proper plea suggesting insolvency, the attachment would have been dissolved, but by the judgment and sale of the property under a decree of foreclosure, the syndic was cut off from asserting a right which he otherwise would have had, and the plaintiff in attachment has a prior right to the proceeds of the foreclosure sale. *Muser v. Kern*, (1893) 55 Fed. 916.

**State Insolvency Act—impairing obligation of contract.**—A state statute (*Wisconsin*) went into effect on April 30, 1897, providing that, upon the making of an assignment by a debtor within ten days after the levy of an attachment, the attachment and levy "shall be dissolved, and the property attached or levied upon shall be turned over to such assignee or receiver;" and the further provisions have the effect, not only of depriving a creditor of his priority under the attachment, but of excluding him from all substantial enforcement of his contract, unless he shall come into the assignment proceedings, accept such shares as the assets may furnish, and become bound by a release of all remaining indebtedness. In an action founded on an indebtedness alleged to have been contracted prior to the time the state statute went into effect, upon which action a writ of attachment was issued and levy made, the court held that the statute is inoperative upon an attachment founded upon a contract entered into before the passage of the Act, because it

takes away substantial remedies for enforcement of the contract, without substituting or leaving an adequate remedy in their place. "Burdening the proceeding with new conditions and restrictions, so as to make the remedy hardly worth pursuing," defines an impairment of the obligation of a contract within the meaning of the constitutional prohibition, as well as legislation touching the express terms of the contract. *Heath, etc., Mfg. Co. v. Union Oil, etc., Co.*, (1897) 83 Fed. 776. See *Sloane v. Chiniquy*, (1884) 22 Fed. 213.

**Bond by defendants for release — waiver of right to dissolve.**—Defendants in attachment do not, by the execution of a bond for the release to them of the attached property, waive their right to move the discharge of the attachment, where the state (*Idaho*) law provides that "the defendant may also at any time, either before or after the release of the attached property, apply on motion to the court that the writ of attachment be discharged, on the ground that the same was improperly or irregularly issued." *Glidden v. Whittier*, (1891) 46 Fed. 437.

**Motion not entertained unless on general appearance.**—Where the state (*Washington*) law provides that "the defendant may at any time after he has appeared in the action, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, that the writ of attachment be dissolved on the ground that the same was improperly or irregularly issued," the court must refuse to entertain a motion to dissolve the attachment until the plaintiff is within the jurisdiction of the court by a general appearance. *Feurer v. Stewart*, (1897) 82 Fed. 294.

**Motion to discharge not heard at chambers.**—A motion to discharge attached property, made upon affidavits in support of the motion, with counter-affidavits in opposition to it, will not be heard by a judge at chambers, although the Attachment Act of the state authorizes a state judge to hear in vacation a motion to discharge attached property. *Claffin v. Steinberg*, (1871) 2 Dill. (U. S.) 324.

**Review order discharging — time to file petition in error.**—Provisions of the federal law as to the time within which writs of error may be sued out to review a judgment at law, or within which a party desiring to have a judgment reviewed may obtain a supersedeas by giving the requisite bond, cannot be regarded as overborne by the local law of the state prescribing different limits of time. If there is any conflict between the local statute and the federal statute, the latter must prevail. But where a local statute, fixing a time within which a petition in error must be filed to review orders discharging or modifying attachments, has reference to interlocutory orders made during the progress of the trial, and not to a final judgment which has had that effect, there is no such conflict, and the local statute should be followed. *Logan v. Goodwin*, (C. C. A. 1900) 101 Fed. 654.

**Adoption of procedure of state court.**—Where a state statute (*Massachusetts*) provides that no trust, whether implied by law or created or declared by the parties, shall prevent a creditor who has no notice of the trust from attaching the land or from taking it on execution in like manner as if no such trust existed, a plaintiff in an action at law in the Circuit Court for the federal district of that state, who attaches real estate within that state, is governed by such local statute. *M'Dermott v. Hayes*, (C. C. A. 1st Cir. 1912) 197 Fed. 129.

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## ATTORNEY-GENERAL

See JUDICIARY

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## ATTORNEYS

See JUDICIARY

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## AVIATION

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

## BAIL AND RECOGNIZANCES

- R. S. 942. *Special Bail Required in Suits for Duties and Penalties*, 488.  
R. S. 943. *When Defendant Giving Bail in One District Is Committed in Another*, 489.  
R. S. 944. *Defendant Held until Judgment in the First Suit*, 489.  
R. S. 946. *Calling of Bail in Kentucky*, 489.  
R. S. 947. *When Clerks May Take Bail De Bene Esse*, 489.  
R. S. 1015. *Bail Shall Be Admitted in Cases Not Capital; by Whom*, 490.  
R. S. 1016. *Bail May Be Admitted in Capital Cases; by Whom*, 490.  
R. S. 1017. *Bail in Criminal Cases Removed by Writ of Error from State Courts*, 491.  
R. S. 1018. *Surrender of Criminals by Their Bail*, 491.  
R. S. 1019. *New Bail to Be Given in Certain Cases*, 492.  
R. S. 1020. *When Penalty of Recognizances May Be Remitted*, 492.

### CROSS-REFERENCES.

*Bail of Offenders against United States Laws*, see **CRIMINAL LAW**.  
*False Bail*, see **PENAL LAWS**.

#### **Sec. 942. [Special bail required in suits for duties and penalties.]**

In all suits or prosecutions for the recovery of duties or pecuniary penalties prescribed by the laws of the United States, commenced in any State where, by the laws thereof, imprisonment for debt shall not have been abolished, the person against whom process is issued shall be held to special bail, subject to the rules which prevail in civil suits in which special bail is required. [R. S.]

Act of March 2, 1790, ch. 22, 1 Stat. L. 676; Act of Feb. 28, 1839, ch. 35, 5 Stat. L. 321; Act of Jan. 14, 1841, ch. 2, 5 Stat. L. 410.

R. S. secs. 659 and 727 are repealed by the Judicial Code. See **JUDICIARY**.

**Imprisonment for debt prohibited in certain cases only.**—When the object of the state law is, not to allow imprisonment for debt under certain conditions and restrictions, but to prohibit it in certain cases, the law does not come within the terms employed by Congress to describe the state laws intended to be referred to. If the law permits imprisonment for debt in some cases and prohibits it in others, it is not abolished within the meaning of the Act of Congress. *Catherwood v. Gapeete*, (1854) 2 Curt. (U. S.) 94.

**Cases pending when imprisonment for debt abolished.**—So far as regards the remedy, the legislature may alter the law, in its discretion; and unless they be excepted, the law operates as well on cases pending as on those which may be commenced subsequently. When, pending an

action in which appearance bail was given, the state legislature abolishes imprisonment for debt, the defendants cannot be required to give special bail, and on motion they will be discharged on common bail and an exoneretur entered as to the sureties on the appearance bail. *Gray v. Munroe*, (1839) 1 McLean (U. S.) 528.

**Committed without a mittimus.**—This section authorizes a demand of bail, and on failure to give bond the officer may take the person of the defendant and commit him to the state prison without a mittimus, notwithstanding the state law requires a mittimus in civil cases. *Palmer v. Allen*, (1813) 7 Cranch 550, 3 U. S. (L. ed.) 436.

**Penalties recovered by civil action.**—In *U. S. v. Elliot*, (1879) 25 Fed. Cas. No. 15,043, the court incidentally said that

from this section and sections 732, 919, 1041, 2124, 3087, and 3213, it clearly appears that a civil action is understood to be the usual form for recovering these penalties.

**Sec. 943. [When defendant giving bail in one district is committed in another.]** When a defendant who has procured bail to respond to the judgment in a suit in any court of the United States in any district is afterward arrested in any other district and is committed to a jail, the use of which had been ceded to the United States for the custody of prisoners, the judge of the court wherein the suit in which the defendant has so procured bail is depending, shall, at the request of the bail, order that such defendant be held in said jail, in the custody of the marshal of the district in which it is. The said marshal, upon the delivery of such order, duly authenticated, shall receive such person into his custody, and thereupon be chargeable for an escape, and shall forthwith make a certificate, under his hand and seal, of such commitment, and transmit the same to the court from which the order issued, and, if required, shall make and deliver to such bail or to his attorney a duplicate thereof. Upon the return of said certificate, the court which made the said order, or any judge thereof, may direct that an exoneretur be entered upon the bail-piece, where special bail shall have been found, or otherwise discharge such bail. [R. S.]

Act of March 2, 1799, ch. 32, 1 Stat. L. 727.

**Sec. 944. [Defendant held until judgment in the first suit.]** When a defendant is committed by virtue of the order provided in the preceding section, he shall, unless sooner discharged by law, be holden in jail until final judgment is rendered in the suit in which he procured bail as aforesaid, and sixty days thereafter, if such judgment is rendered against him, in order that he may be charged in execution, which may, in such cases, be directed to and served by the marshal in whose custody he is. [R. S.]

Act of March 2, 1799, ch. 32, 1 Stat. L. 727.

Section 945, R. S., relates to the taking of bail by commissioners "of the circuit court for the district," "when required or allowed in any civil cause in any circuit or district court." See JUDICIAL OFFICERS.

**Sec. 946. [Calling of bail in Kentucky.]** When a bail-bond is given for the appearance of any person to answer in the district or circuit court for the district of Kentucky, the clerk of such court shall call the party at the time he is bound to appear. If the party fails, the clerk shall enter such failure on his minutes, and on said entry judgment may afterward be made of record by the court; but if the party appears, the clerk shall take another bond, with sureties similar to the first, for further appearance at the next succeeding term of the court, and if the party fails to give such other bond and surety, he shall stand committed by order of the clerk until he complies. [R. S.]

Act of May 15, 1862, ch. 71, 12 Stat. L. 387.

**Sec. 947. [When clerks may take bail de bene esse.]** Recognizances of special bail may be taken de bene esse by the clerks of the circuit and district courts, in the absence or in case of the disability of the judges, in

any action depending in either of the said courts, where special bail is demandable. [R. S.]

Act of May 8, 1792, ch. 36, 1 Stat. L. 278.

**Sec. 1015. [Bail shall be admitted in cases not capital; by whom.]** Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section [section 1014] to arrest and imprison offenders. [R. S.]

Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 91; Act of March 2, 1793, ch. 22, 1 Stat. L. 334; Act of April 10, 1869, ch. 22, 16 Stat. L. 44.

**Authority of Supreme Court justice.**—Under section 917, R. S., by which the "Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process," the Supreme Court has power to regulate the manner of proceeding, or "mode of process," in taking bail upon writs of error. Under the Act of March 3, 1891, ch. 517, Congress must have intended, in cases not capital, and therefore bailable of right before conviction, that bail might be taken, upon writ of error, by order of the proper court, justice, or judge, so that any justice of the Supreme Court is authorized to allow a writ of error, to sign the citation, and, as incidental to the exercise of this power, to order the plaintiff in error to be admitted to bail. He might either himself approve the bail bond, or he might order that such a bond should be taken in an amount fixed by him, the form and sufficiency to be passed upon by the court whose judgment was to be reviewed, or by a judge of that court; or he might leave the whole matter of bail to be dealt with by such court or judge. When a justice of the Supreme Court has fixed the amount of bail and referred the matter to the district judge, a writ of mandamus will lie upon the refusal of the district judge to pass upon the bond tendered on the ground that the justice has no authority to order the plaintiff in error to be admitted to bail and fix the amount of the bail bond. *Hudson v. Parker*, (1895) 156 U. S. 277, 15 S. Ct. 450, 39 U. S. (L. ed.) 424. For the reasons assigned by the district judge for refusing to pass upon the form and sufficiency of the bond, see *U. S. v. Hudson*, (1894) 65 Fed. 68.

**Recognizance acknowledged before clerk.**—A recognizance is not void when signed

and acknowledged before the clerk of the District Court, where it appears that it was done by order of the judge at the request of the attorney for the accused, for the purpose of securing the speedy release of the accused, and to prevent his detention in prison over night. *Hunt v. U. S.*, (C. C. A. 1894) 61 Fed. 795, *affirmed* upon petition to rehear, (C. C. A. 1894) 63 Fed. 568.

**Bond taken by clerk under direction of the court.**—A clerk of court, as such, has no authority to act as a committing magistrate and hold to bail. But when a bond has been signed by the clerk, "signed, sealed, and acknowledged and approved by me," from the facts that the bond was a part of the record, that the court was open on the day the bond was given, that the defendant was present on trial in court, and that there was a mistrial, and the case continued, it will be presumed that the bond was taken under the immediate direction of the court. *U. S. v. Evans*, (1880) 2 Fed. 147.

**Authority of commissioners after indictment.**—Under the provisions of section 1014, R. S. (see title CRIMINAL LAW), commissioners have power to cause the arrest of all persons charged with having violated the criminal statutes of the United States, and to order them to be held for trial; and under the provisions of this section "commissioners have the same power to take bail upon an arrest made after an indictment as they have in cases of arrest before indictment." *Hoeffner v. U. S.*, (C. C. A. 1898) 87 Fed. 185. See also *U. S. v. Jones*, (1890) 134 U. S. 483, 10 S. Ct. 615, 33 U. S. (L. ed.) 1007.

**Bail during trial.**—No provision is made by the statutes of the United States regarding bail during trial, and the defendant may be refused bail in the discretion of the court. *United States v. Rice*, (S. D. N. Y. 1911) 192 Fed. 720.

**Sec. 1016. [Bail may be admitted in capital cases; by whom.]** Bail may be admitted upon all arrests in criminal cases where the punishment may be death; but in such cases it shall be taken only by the Supreme Court



or a circuit court, or by a justice of the Supreme Court, a circuit judge, or a judge of a district court, who shall exercise their discretion therein, having regard to the nature and circumstance of the offense, and of the evidence, and to the usages of law. [R. S.]

Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 91; Act of March 2, 1793, ch. 22, 1 Stat. L. 334; Act of April 10, 1869, ch. 22, 16 Stat. L. 44.

**Treason.**—In 1795, a prisoner who had been committed upon the warrant of a district judge, charging him with high treason, was admitted to bail by the Supreme Court upon a writ of habeas corpus. *U. S. v. Hamilton*, (1795) 3 Dall. 17, 1 U. S. (L. ed.) 490. But in *U. S. v. Stewart*, (1795) 2 Dall. 343, 1 U. S. (L. ed.) 408, in refusing to admit a prisoner to bail, pending the adjournment of his trial, the court said: "Stewart has no claim upon the legal discretion of the court; and indeed, the circumstances must be very

strong, which will at any time, induce us to admit a person to bail, who stands charged with high treason."

A court possessing the power to bail prisoners not committed by itself may award a writ of habeas corpus for the exercise of that power. The Supreme Court granted a motion for a writ in the case of a person committed by a Circuit Court on a charge of treason. *Ex p. Bollman*, (1807) 4 Cranch 75, 2 U. S. (L. ed.) 554.

**Sec. 1017. [Bail in criminal cases removed by writ of error from State courts.]** When a writ of error is issued for the revision of the judgment of a State court, in any criminal proceeding where is drawn in question the validity of a statute of, or an authority exercised under, the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or any statute of, or commission held or authority exercised under, the United States, the defendant, if charged with an offense that is bailable by the laws of such State, shall not be released from custody until a final judgment upon such writ, or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the State court, is given; and if the offense is not so bailable, until a final judgment upon the writ of error. [R. S.]

Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 85; Act of July 13, 1866, ch. 184, 14 Stat. L. 172; Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 386.

**Sec. 1018. [Surrender of criminals by their bail.]** Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneratur of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law. [R. S.]

Act of Aug. 8, 1846, ch. 98, 9 Stat. L. 73.

**Surrender of defendants to avoid expense of transportation to place of trial.**—Upon a claim for fees and expenses incurred by a United States marshal in transporting prisoners, surrendered by the sureties on their bonds, to the place where the court was held, the marshal's account was not allowed where it appeared that the defendants were surrendered on the

day preceding the time at which they were required to appear, raising a presumption that the expense of transportation was intended to be avoided on the part of the defendants and cast upon the United States. *Allen v. U. S.*, (1901) 36 Ct. Cl. 44.

**Defendants arrested by state authorities.**—Where it appeared that the accused

had been admitted to bail by a federal court and while out on bail had been arrested and imprisoned by state authorities, a writ of habeas corpus, sued out on the petition of the sureties on the bail bond representing that they desired to surrender the accused under the provisions of this section, was discharged. A conflict of jurisdiction between the federal and state courts cannot be so brought in question. *In re Fox*, (1892) 51 Fed. 427. See (1853) 6 Op. Atty.-Gen. 103.

**Parties should see that proper entries of record are made.**—Defenses to a writ of scire facias on bail bond should be made to appear and be proven by the record. The only evidence of the discharge of the sureties in bail is the entry by competent authority of the exoneretur on the record or the bail-piece, or a copy of them. It is the duty of the parties or their attorneys to see that the clerk or other ministerial officer shall make the proper entries on the record. A motion will be granted allowing the entry of the exoneretur where it appears that the defendants did all in their power to relieve themselves from fur-

ther liability as bail for their principal except to see that the discharge and exoneretur were properly entered of record, and the scire facias will be set aside upon payment of costs. *U. S. v. Stevens*, (1883) 16 Fed. 101.

**Sureties to pay fees.**—It is the duty of the bail to procure and pay for the certified copy of the recognizance in case they desire to have the exoneration indorsed thereon. The fee of the clerk in such a case is not a proper charge against the United States. *U. S. v. Van Duzee*, (C. C. A. 1892) 52 Fed. 930.

**Arrest by bail.**—In *Leary v. United States*, (1912) 224 U. S. 567, 32 S. Ct. 599, 56 U. S. (L. ed.) 889, Ann. Cas. 1913D 1029, the court said: "It is said that the bail contemplated by the Revised Statutes is common-law bail and that nothing should be done to diminish the interest of the bail in producing the body of his principal. But bail no longer is the mundium, although a trace of the old relation exists in the 'right to arrest' under this section."

**Sec. 1019. [New bail to be given in certain cases.]** When proof is made to any judge of the United States, or other magistrate having authority to commit on criminal charges as aforesaid, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed to prison; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof. [*R. S.*]

Act of Aug. 8, 1846, ch. 98, § 9 Stat. L. 73.

**Sec. 1020. [When penalty of recognizances may be remitted.]** When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced. [*R. S.*]

Act of Feb. 28, 1839, ch. 36, § 5 Stat. L. 322.

**Discretion of the court.**—The penalty upon forfeiture of the bond may be remitted even where the circumstances are not strictly within the letter of this section, when the defendant appears subsequently during the term, and the remission is conditioned upon the defendant paying the fine imposed upon him and the costs of prosecution. The record is in control of the court during the term,

and a forfeiture may be set aside, vacated, or modified. *U. S. v. Barger*, (1884) 20 Fed. 500.

"The object of a recognizance is not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty." A forfeited recognizance is not such a debt due to the United States as to be beyond the

control of the court. The reasonableness of an excuse for not appearing on the day mentioned in the recognizance "ought to be examined somewhere, and no tribunal can be more competent than that which possesses all the circumstances of the original offense and of the default." *U. S. v. Feely*, (1813) 1 Brock. (U. S.) 255.

The attorney-general said, (1854) 6 Op. Atty.-Gen. 408, that when the proceedings have reached the final point of return of execution to judgment in *scire facias*, they have passed beyond the stage at which the court can remit, and the only relief which can be given to the party is by pardon.

**Mere technical breach.**—The defendant appeared and answered to the indictment, but, during the trial, he departed without leave of the court; but as the offense charged was only a misdemeanor, the trial proceeded and resulted in an acquittal. As there was a mere technical breach of the recognizance, and, for aught that appeared, the bail was innocent, upon application of the surety the default was set aside, on payment of the costs of any suit that had been commenced by the district attorney. *U. S. v. Santos*, (1862) 5 Blatchf. (U. S.) 104.

**Wilful default.**—Where, on breach of an appearance bond, the court found that the party had made wilful default, and final judgment was rendered at the succeeding term, it was held that the court had no power to remit any portion of the judgment against one of the sureties on his apprehending the principal and delivering him into custody at the term at which final judgment was entered, no answer having been filed to the *scire facias* issued and served at the previous term. *U. S. v. Robinson*, (1908) 158 Fed. 410.

Where a defendant on bail in a criminal case in a federal court voluntarily went into another state with knowledge that prior indictments were there pending against him, and he was arrested, tried, convicted, and imprisoned, it was held that his default of the bail bond was wilful and entitled him to no relief under this section. *U. S. v. Marrin*, (1909) 170 Fed. 476.

**Enforced in an aggravated case.**—An application by the defendant to the court to remit the penalty incurred by his bail was denied where it appeared that the defendant, while acting as deputy collector of customs, assisted some or all of his codefendants to smuggle wine and whisky into the district, and the evidence showed that the ends of justice required that the penalty should be enforced. The crime committed by the defendant was an aggravated one, because, at the time, he was in the pay and trust of the government as an officer, for the purpose of preventing just such frauds upon the government.

*U. S. v. Mercer*, (1868) Deady (U. S.) 502.

**Principal in custody of state officer.**—A motion to remit the penalty of a forfeited recognizance, on the ground that the party was, when called, in the custody of a state officer under a warrant issued out of a court of the state, on a criminal charge, was denied upon the ground that the question could be best determined on the trial of the action which had been brought upon the forfeited recognizance. *U. S. v. Stricker*, (1874) 12 Blatchf. (U. S.) 389.

**Continuance and nol. pros.—change in time of holding court.**—The obligation of a bail bond is peremptory, and the penalty accrues on the failure to appear. An application to have the penalty remitted in whole or in part must be addressed to the court which adjudged the forfeiture, and where alone is lodged the discretion to grant relief. Continuances following forfeitures, and a *nolle prosequi*, do not absolve the sureties from liability. In an action at law upon a forfeited recognizance, only a legal defense can be heard. *U. S. v. McGlashen*, (1895) 66 Fed. 537.

Upon appeal, the Circuit Court of Appeals, in *McGlashan v. U. S.*, (C. C. A. 1896) 71 Fed. 434, said that it was relieved from passing upon the conclusion reached by the Circuit Court, as, for reasons not presented to the court below, the action on the bond could not be maintained. When an Act of Congress changed the time at which a court should be held in the district to one week later than the time theretofore held and the time specified in the recognizance, the court was convened without authority of law when held at the old term time, and an attempted forfeiture of a recognizance for nonappearance of the principal was void. Under section 573, the appearance of the principal, and all proceedings, were returnable to the term established "next after the return day thereof," by reason of any acts changing the time of holding the court.

**Time for application for remission.**—An application to a federal court which has entered judgment on a forfeited recognizance in favor of the United States, for a remission of the penalty for which such judgment was rendered, is not a motion to vacate the judgment, and may be entertained after the term at which the judgment was entered. *U. S. v. Jenkins*, (1909) 176 Fed. 672. See also *U. S. v. Traynor*, (1909) 173 Fed. 114.

**Prosecution in a territorial court.**—The provisions of this statute apply where the recognizance is taken in a territorial court in a prosecution by the United States of an offense against it, as the territorial court is then exercising the jurisdiction of a District Court of the United States.

Lane v. Roth, (C. C. A. 3d Cir. 1912) 195 Fed. 255, wherein the court said: "While in the trial of cases territorial courts are required to conform to the statutes and practice of the territory, the acts of Congress govern the disposition of moneys and obligations of the United States, and we are clearly of the opinion that the territorial statute was not applicable to the discharge of this forfeiture, that section 1020 of the Revised Statutes of the United States governs, and that under it the court had full power and authority to set aside the forfeiture and exonerate the bond, even, after the term at which the forfeiture was entered. Even though section 1020 of the Revised Statutes governed, that section did not give

the parties an absolute right to have the forfeiture vacated. That was a matter left to the discretion of the court upon a proper showing, and it is elementary that a court may vacate, modify, or set aside any order or judgment during the term that such order or judgment is entered, and in this case it appears that the order releasing the defendant and his bondsmen was set aside and vacated by the court during the term. The judgment of the court forfeiting the bond remains, and was the foundation for the present action. So long as the judgment of forfeiture stood, an action upon the bond could be maintained, and the judgment in this case was properly rendered and is therefore affirmed."

# BANKRUPTCY

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## An Act To establish a uniform system of bankruptcy throughout the United States.

[*Act of July 1, 1898, ch. 541, 30 Stat. L. 544, as amended by the Act of Feb. 5, 1903, ch. 487, 32 Stat. L. 797, the Act of June 15, 1906, ch. 3333, 34 Stat. L. 267, and the Act of June 25, 1910, ch. 412, 36 Stat. L. 838.*]

This Act is known as the "Bankruptcy Act," sometimes called the "Nelson Act."

**Various national bankruptcy acts.**—Bankruptcy laws have been enacted by the United States as follows:

April 4, 1800, 2 Stat. L. 19, repealed December 19, 1803, 2 Stat. L. 248.

August 19, 1841, 5 Stat. L. 440, repealed March 3, 1843, 5 Stat. L. 614.

March 2, 1867, 14 Stat. L. 517, the provisions of which are incorporated into R. S. Title LXI, secs. 4972-5132, materially amended June 22, 1874, 18 Stat. L. 178, repealed June 7, 1878, 20 Stat. L. 99.

Various amendments and additions to the present Act of 1898 have been made in the Act of Feb. 5, 1903, ch. 487, 32 Stat. L. 797, Act of June 15, 1906, ch. 3333, 34 Stat. L. 267, and Act of June 25, 1910, ch. 412, 36 Stat. L. 838, all of which have been incorporated in their designated places in the text of the Bankruptcy Act following herein.

The concluding section in each of the amendatory Acts of 1903 and 1910 above cited excepted pending cases from the operation of those Acts. Those sections are printed herein at the end of this title.

**General orders and forms in bankruptcy,** promulgated by the United States Supreme Court Nov. 28, 1898, pursuant to authority given in section 30, and originally appearing in 172 U. S. 653, 43 U. S. (L. ed.) 1189, are printed herein immediately following section 30.

**Constitutionality of the bankruptcy acts.**—By the 4th clause of section 8 of article 1 by the Constitution the power is vested in Congress "to establish . . . uniform laws on the subject of bankruptcies throughout the United States." The constitutionality of the Bankruptcy Act of 1898 was unanimously affirmed in *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, against the objection (1) that under its provisions others than traders may be adjudged bankrupts, and that this may be done on voluntary petitions; (2) that the Act is not uniform throughout the United States, the court holding that "the operation of the law is uniform although it may result in certain particulars differently in different states;" (3) that the recognition of the local law in the matter of exemptions, dower, priority of payments and the like is an attempt by Congress unlawfully to delegate its legislative power; and (4) that as to voluntary proceedings the Act is in violation of the Fifth Amendment in that it deprives creditors of their property without due process of law in failing to provide for notice.

The uniformity which the Constitution requires of a federal bankruptcy act relates to the law itself, and not to its results upon the varying rights of debtor and creditor under the laws of the several

states. It has no bearing on the right of dower. That is a matter exclusively for state definition. *Thomas v. Woods*, (1909) 173 Fed. 585, 97 C. C. A. 535, 19 Ann. Cas. 1080, 26 L. R. A. (N. S.) 1180.

"Congress gets its power to legislate on the subject of bankruptcy from section 8 of article 1 of the Constitution, which empowers it to pass 'uniform laws on the subject of bankruptcies throughout the United States.' It has been held, correctly we think, that the 'subject of bankruptcies' includes the distribution of the property of the fraudulent or insolvent debtor among his creditors, and the discharge of the debtor from his contracts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends." *Pope v. Title Guaranty & Surety Co.*, (1913) 152 Wis. 611, 140 N. W. 348.

Philologically and historically, a bankrupt is but a broken bank or bench. Such bank or bench, or "counter" as we would in this day designate it, was the bench over which the money lender, trader, or merchant transacted his business; and it was broken for or by him as an evidence of the discontinuance of his business. At English law at the time of the adoption of our Constitution, the meaning of the word was usually limited to persons engaged in trade, in one form or another, who did certain acts affording evidence either of an inability to pay their debts, or of an intention to avoid such payment. Other persons not engaged in trade, and who showed a like disposition to avoid, or a like inability to meet, their obligations to their creditors, were ordinarily called insolvents.

By definition in the last federal Bankruptcy Act, insolvents, as well as bankrupts proper, are included, and the only persons exempt from the operation of the present national law are "wage-earners" and "persons engaged chiefly in farming or tillage of the soil." Whether or not this is an extension of the common-law definition of a bankrupt, and is justifiable, is not a matter of present interest. A bankrupt, then, being as defined a person who by his acts and conduct affords evidence of his inability to pay, or his intention to avoid payment of, his debts, it is quite within the scope of the Bankruptcy Act to define the acts or omissions of the debtor which shall afford *prima facie* or conclusive evidence of bankruptcy. This the national Bankrupt Act has done. Continental Building & Loan Ass'n v. Superior Court, (1912) 163 Cal. 579, 126 Pac. 476.

The constitutionality of the Bankruptcy Act of 1841 was upheld by Mr. Justice Catron in *Re Klein*, Fed. Cas. No. 7,865, reported in a note to Nelson v. Carland, (1843) 1 How. 265, 11 U. S. (L. ed.) 126. See also *Kunzler v. Kohans*, 5 Hill (N. Y.) 317. And for similar views of the Bankruptcy Act of 1867, see *In re Reiman*, (1874) 7 Ben. 455, 20 Fed. Cas. No. 11,673; *In re Silverman*, (1871) 1 Sawy. 410, 22 Fed. Cas. No. 12,865; *In re California, etc., R. Co.*, (1874) 3 Sawy. 240, 4 Fed. Cas. No. 2,315; and likewise as to the Acts of 1841 and of 1867, *In re Reynolds*, (1867) 8 R. I. 485, 5 Am. Rep. 615.

**Suspension of state insolvency laws — In general.**—A constitutional federal bankruptcy law suspends or supersedes all state insolvency laws relative to persons or acts declared by the Bankruptcy Act to be subjects of bankruptcy. *Sturges v. Crowninshield*, (1819) 4 Wheat. 122, 4 U. S. (L. ed.) 529; *Ogden v. Saunders*, (1827) 12 Wheat. 213, 6 U. S. (L. ed.) 606; *In re Watts*, (1903) 190 U. S. 1, 23 S. Ct. 718, 47 U. S. (L. ed.) 933; *Carling v. Seymour Lumber Co.*, (1902) 113 Fed. 483, 51 C. C. A. 1; *In re F. A. Dell Co.*, (1903) 121 Fed. 992; *In re Salmon*, (1906) 143 Fed. 395; *In re Pickens Mfg. Co.*, (1908) 158 Fed. 894; *In re Weedman Stave Co.*, (1912) 199 Fed. 948; *In re Macon Sash, etc., Co.*, (1901) 112 Fed. 323; *In re Storck Lumber Co.*, (1902) 114 Fed. 360; *In re Rogers*, (1902) 116 Fed. 437; *Carling v. Seymour Lumber Co.*, (C. C. A. 1902) 113 Fed. 483; *In re Curtis*, 91 Fed. 737, *affirmed* (C. C. A. 1899) 94 Fed. 630; *In re Sievers*, (1899) 91 Fed. 366, *affirmed sub nom.* *Davis v. Bohle*, (C. C. A. 1899) 92 Fed. 329; *In re Smith*, (1890) 92 Fed. 135; *In re Ogles*, (1899) 93 Fed. 426; *In re John A. Etheridge Furniture Co.*, (1899) 92 Fed. 329; *In re Richard*, (1899) 94 Fed. 633; *In re Bruns-Ritter Co.*, (1898) 90 Fed. 651; *Armour Packing Co. v. Brown*, (1899) 76 Minn.

465, 79 N. W. 522; *Parmenter Mfg. Co. v. Hamilton*, (1898) 172 Mass. 178, 51 N. E. 529, 70 A. S. R. 258; *Mauran v. Crown Carpet Lining Co.*, (1901) 23 R. I. 324, 50 Atl. 331; *Harbaugh v. Costello*, (1900) 184 Ill. 110, 56 N. E. 363, 75 A. S. R. 147; *In re Rouse*, (1899) 91 Fed. 99; *Capital Lumber Co. v. Saunders*, (1914) 26 Idaho 408, 143 Pac. 1178; *Idaho Hardware, etc., Co. v. Saunders*, (1914) 26 Idaho 424, 143 Pac. 1183; *Duffy v. His Creditors*, (1909) 122 La. 600, 48 So. 120; *Guilford First Nat. Bank v. Ware*, (1901) 95 Me. 388, 50 Atl. 24; *Littlefield v. Gay*, (1902) 96 Me. 422, 52 Atl. 925; *Rogers v. Boston Club*, (1910) 205 Mass. 261, 91 N. E. 321, 28 L. R. A. (N. S.) 743; *Pelton v. Sheridan*, (1914) 74 Ore. 176, 144 Pac. 410; *Peckham's Estate*, (1906) 35 Pa. Super. Ct. 330; *Hoover v. Ober*, (1910) 42 Pa. Super. Ct. 308.

"The proposition that the state bankrupt law is suspended by the enactment of the uniform system of national bankruptcy is as clear upon authority as it must inevitably be by the logic of the supremacy of national law." *Speer, J.*, in *In re Macon Sash, etc., Co.*, (1901) 112 Fed. 329.

"Any doubt which might otherwise exist upon the subject is removed by the necessary implication arising from the provision contained in section 70 of the federal [bankruptcy] act that proceedings commenced under state insolvency laws before its passage should not be affected by it. Whenever the federal door is open, the state door is automatically shut." *Rockville Nat. Bank v. Latham*, (1914) 88 Conn. 70, 89 Atl. 1117.

The state insolvency law is suspended only as to those who can, without their consent, be made subject to the provisions of the Bankruptcy Act. *State Nat. Bank of Denison v. Syndicate Co.*, (1910) 178 Fed. 359; *R. H. Herron Co. v. Superior Court*, (1902) 136 Cal. 279, 68 Pac. 814, 89 A. S. R. 124; *Keystone Driller Co. v. Superior Court*, (1903) 138 Cal. 738, 72 Pac. 398; *Dille v. People*, (1905) 118 Ill. App. 426; *Old Town Bank v. McCormick*, (1903) 96 Md. 341, 53 Atl. 934, 94 A. S. R. 577, 60 L. R. A. 577; *Rittenhouse's Estate*, (1906) 30 Pa. Super. Ct. 468; *Miller v. Jackson*, (1907) 34 Pa. Super. Ct. 31; *Hoover v. Ober*, (1910) 42 Pa. Super. Ct. 308; *Landis Mach. Co. v. Cooper*, (1913) 53 Pa. Super. Ct. 416; *Lace v. Smith*, (1912) 34 R. I. 1, 82 Atl. 268, Ann. Cas. 1913E 945.

As to who may be made involuntary bankrupts see *infra*, section 4b. But in *Littlefield v. Gay*, (1902) 96 Me. 422, 52 Atl. 925, the state insolvent law was held to be superseded by the federal Bankruptcy Act, as to a person who could have gone into bankruptcy voluntarily, but could not have been made an involuntary bankrupt.

It is only where the Bankruptcy Law

covers and supplies that which is undertaken to be disposed of by the state law that the latter must give way. *Johnson v. Crawford*, (1907) 154 Fed. 761.

A person is a bankrupt, within the meaning of the federal statute, only when he has been guilty of one or another of the forbidden acts whose commission stamps him as a bankrupt. But it does not at all follow that the state, for good reasons of its own, may not prevent a person or corporation from conducting business, and in so preventing it take control of its affairs, terminate its business, and pay its creditors for acts entirely foreign to and absolutely without the contemplation of bankruptcy. And if the state does this thing for acts not within the contemplation of the Bankruptcy Law, it is immaterial that the procedure which it adopts for the payment of creditors is similar to or identical with the procedure adopted in case of bankruptcy. *Continental Building & Loan Ass'n v. Superior Court*, (1913) 163 Cal. 579, 126 Pac. 476.

*"What constitutes an insolvency law?"* The elements of an insolvency law are insolvency, surrender of property, its administration by a receiver or trustee, distribution of the assets among the creditors, and a provision for priorities or other matters not permissible in the absence of such statute. A provision for the discharge of the debtor from the unpaid balances of his debts is not essential to make it an insolvency law. *In re Curtis*, (1899) 91 Fed. 737; *In re F. A. Hall Co.*, (1903) 121 Fed. 992; *In re Salmon*, (1906) 143 Fed. 395; *Harbaugh v. Costello*, (1900) 184 Ill. 110, 56 N. E. 363, 75 A. S. R. 147." *In re Weedman Stave Co.*, (1912) 199 Fed. 948.

"A state statute authorizing a general assignment is an insolvent law when it permits a person of any class voluntarily to take advantage of its provisions by transferring his property in trust for the benefit of his creditors, and provides that, upon a due administration of his estate and a compliance with the requirements of the statute regulating the proceedings, he is thereby discharged from all liabilities on account of his debts which had been incurred at the time of making the general assignment." *Pelton v. Sheridan*, (1914) 74 Ore. 176, 144 Pac. 410.

A proceeding in aid of execution, with the object of reaching the property of a judgment debtor which he fraudulently conceals, not designed to effect the distribution of the debtor's assets among his creditors, is not an insolvent law. *Ex p. Crawford*, (1907) 154 Fed. 769.

*Assignments for benefit of creditors.*—If a state statute regulating assignments for creditors is not an insolvency law in the proper sense of the term, it is not suspended by the Bankruptcy Act. *Mayer v. Hellman*, (1875) 91 U. S. 496, 23 U. S. (L. ed.) 377; *In re Sievers*, (1899) 91

Fed. 366, *affirmed* (1899) 92 Fed. 325, 34 C. C. A. 372; *In re Scholtz*, (1901) 104 Fed. 834; *In re Farrell*, (1910) 176 Fed. 505; *Downer v. Porter*, (1903) 116 Ky. 422, 76 S. W. 135; *Hilliard v. Burlington Shoe Co.*, (1903) 76 Vt. 57, 56 Atl. 283; *Binder v. McDonald*, (1900) 106 Wis. 332, 82 N. W. 156.

But if such statute is to be regarded as an insolvency law, its operation is suspended by the Bankruptcy Act. *In re Curtis*, (1899) 91 Fed. 737, *affirmed* (1899) 94 Fed. 630; *In re Smith*, (1899) 92 Fed. 135; *Baxter County Bank v. Copeland*, (1914) 114 Ark. 316, 169 S. W. 1180; *Rockville Nat. Bank v. Latham*, (1914) 88 Conn. 70, 89 Atl. 1117; *Harbaugh v. Costello*, (1900) 184 Ill. 110, 56 N. E. 363, 75 A. S. R. 147; *Pelton v. Sheridan*, (1914) 74 Ore. 176, 144 Pac. 410; *Duryea v. Muse*, (1903) 117 Wis. 399, 94 N. W. 365.

The Bankruptcy Court, in deciding upon the effect of the passing of a federal Bankruptcy Act upon the operation of a state statute which regulates the administration and distribution of estates under general assignments for the benefit of creditors, will be governed by the decision of the state Supreme Court that such statute is an insolvency act. *In re Curtis*, (1899) 91 Fed. 737, *affirmed* (C. C. A. 1899) 94 Fed. 630. See also *In re Weedman Stave Co.*, (1912) 199 Fed. 948.

A common-law assignment for the benefit of creditors, not attacked by a proceeding under the Bankruptcy Law, is not affected by the latter. *Boese v. King*, (1883) 108 U. S. 379, 2 S. Ct. 765, 27 U. S. (L. ed.) 760; *Pogue v. Rowe*, (1908) 236 Ill. 157, 86 N. E. 207; *Thompson v. Shaw*, (1908) 104 Me. 85, 71 Atl. 370; *Armour Packing Co. v. Brown*, (1899) 76 Minn. 465, 79 N. W. 522; *Patty-Joiner, etc., Co. v. Cummins*, (1900) 93 Tex. 398, 57 S. W. 566.

*State acts for winding up corporations.* If a state statute providing for the winding up of a corporation is an insolvency law its operation is suspended by the federal Bankruptcy Act. *In re Storck Lumber Co.*, (D. C. Md. 1902) 114 Fed. 361; *Moody v. Port Clyde Development Co.*, (1907) 102 Me. 363, 66 Atl. 967; *In re Salmon*, (1906) 143 Fed. 395. But in *State v. Superior Court*, (1899) 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177, it was held upon careful consideration that such proceedings are valid so long as no steps are taken to have the corporation adjudicated bankrupt under the national Bankruptcy Act.

The Bankruptcy Act "does not necessarily deprive a state court of jurisdiction conferred by a state law to dissolve a local corporation even though the reason for exercising such jurisdiction be the insolvency of the corporation. *Murphy v. Peniman*, (1907) 105 Md. 452, 66 Atl. 282.



121 A. S. R. 583; *Singer v. National Bedstead Mfg. Co.*, (1903) 65 N. J. Eq. 290, 55 Atl. 868. Where, however, bankruptcy proceedings are reasonably instituted, the winding-up proceedings in the state court are superseded." *Lyon v. Russell*, (1914) 41 App. Cas. (D. C.) 554. To the proposition first above stated see also *Continental Building, etc., Ass'n v. Superior Court*, (1912) 163 Cal. 579, 126 Pac. 476.

**Attachment laws of the states are not abrogated by the national Bankruptcy Act.** *In re Ogles*, (1899) 93 Fed. 426.

**General purposes of the Act.**—A leading purpose of the Act is to secure an equality of distribution of the assets of the bankrupt among his creditors. *Wood v. A. Wilbert's Sons Shingle, etc., Co.*, (1912) 226 U. S. 384, 33 S. Ct. 125, 57 U. S. (L. ed.) 264; *Clarke v. Rogers*, (1913) 228 U. S. 534, 33 S. Ct. 587, 57 U. S. (L. ed.) 953; *Merchants' Nat. Bank v. Sexton*, (1913) 228 U. S. 634, 33 S. Ct. 725, 57 U. S. (L. ed.) 998; *In re Blount*, (1906) 142 Fed. 263; *Hewitt v. Boston Straw Board Co.*, 214 Mass. 260, 101 N. E. 424; *Utah Ass'n of Creditmen v. Boyle Furniture Co.*, 43 Utah 523, 136 Pac. 572.

"The intent of the bankruptcy law is to make an equal distribution of the assets of insolvent persons among their creditors and to prevent preferences and favoritism." *Whitwell v. Wright*, (1909) 115 N. Y. S. 48.

"It is obviously one of the purposes of the bankrupt law that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution." *Bailey v. Glover*, (1874) 21 Wall. 342, 22 U. S. (L. ed.) 636, *reaffirmed* in *Wiswall v. Campbell*, (1876) 93 U. S. 347, 23 U. S. (L. ed.) 923.

"The determination of the status of the honest and unfortunate debtor by his liberation from incumbrance on future exertion is matter of public concern," and one of the purposes of the Act. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113.

"It is the twofold purpose of the bankruptcy act to convert the estate of the bankrupt into cash and distribute it among creditors, and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched." *Burlingham v. Crouse*, (1913) 228 U. S. 459, 33 S. Ct. 564, 57 U. S. (L. ed.) 920, 46 L. R. A. (N. S.) 148. To the same point see 3 R. C. L. 164.

"The purpose of the bankrupt act . . . was twofold: First, the relief of the bankrupt from his debts; and, second, an equal distribution of his assets among his creditors. The several provisions of the act must be read in the light of these two objects." *Webb v. Lynchburg Shoe Co.*, (1908) 107 Va. 807, 60 S. E. 130.

In *Hardie v. Swafford Bros. Dry Goods Co.*, (1908) 165 Fed. 588, 91 C. C. A. 426,

20 L. R. A. (N. S.) 785, overruling a contention that the provisions of the law relating to the discharge of bankrupts should be construed against the bankrupt, and all implications and doubts should be resolved against him, *Pardee, J.*, said: "Originally, in bankrupt laws, the discharge of the bankrupt may have been incidental, and the main purpose the equal distribution of his goods among creditors; but to say it now, and of the present law, we must shut our eyes to the actual practice in our courts. In nearly all and every voluntary bankruptcy brought under the present law the administration or distribution of the bankrupt's property has been practically concluded before filing petition, and the sole object of the petitioner is to be relieved from his debts, and in number the voluntary cases are about four to one of the involuntary. See Report, Dept. of Justice, 1907. And the same may be said of the voluntary cases under the Act of March 2, 1867, c. 176, 14 Stat. 517, which was passed mainly to relieve the unfortunate debtors ruined by and through the vicissitudes of the great civil war. For these considerations, we are disposed to deny that in the present bankruptcy law the discharge of the honest debtor is a mere incident which could have been omitted without impairing its symmetry and efficiency; and, on the contrary, to assert that the release of the honest, unfortunate, and insolvent debtor from the burden of his debts and restore him to business activity, in the interest of his family and the general public, is one of the main, if not the most important, objects of the law."

"The business of such an act is, so far as may be, to preserve, not to upset, existing relations." For instance, "the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral, like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets." *Francis v. McNeal*, (1913) 228 U. S. 695, 33 S. Ct. 701, 57 U. S. (L. ed.) 1029.

**Interpretation of Act.**—*General purposes of Act controlling.*—The Act should be construed in the light of the general purposes of the law (*Burlingham v. Crouse*, (1913) 228 U. S. 459, 33 S. Ct. 564, 57 U. S. (L. ed.) 676), stated *supra* in this note, and technical constructions conflicting with those purposes will not be applied. 3 R. C. L. 170; *Zavelo v. Reeves*, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676; *Burlingham v. Crouse*, (1913) 228 U. S. 459, 33 S. Ct. 564, 57 U. S. (L. ed.) 920, 46 L. R. A. (N. S.) 148; *Clarke v. Rogers*, (1913) 228 U. S. 534, 33 S. Ct. 587, 57 U. S. (L. ed.) 953; *Merchants' Nat. Bank v. Sexton*, (1913) 228 U. S. 634, 33 S. Ct. 725, 57 U. S. (L. ed.) 998.

The national Bankruptcy Act is remedial and should be interpreted reasonably and according to a fair import of its terms, with a view to effect its object and to promote justice. *Wetmore v. Markoe*, (1904) 196 U. S. 68, 25 S. Ct. 172, 49 U. S. (L. ed.) 390, 2 Ann. Cas. 265; *Blake v. Francis-Valentine Co.*, (1898) 89 Fed. 691; *Norcross v. Nathan*, (1900) 99 Fed. 414; *Southern L. & T. Co. v. Benbow*, (1899) 96 Fed. 514.

It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes. And nothing is better settled than that statutes should be sensibly construed with a view to effectuating the legislative intent. *Williams v. U. S. Fidelity, etc., Co.*, (1915) 236 U. S. 549, 35 S. Ct. 289, 59 U. S. (L. ed.) 713. See also *Kreitlein v. Ferger*, (1915) 238 U. S. 21, 34, 35 S. Ct. 685, 690, 59 U. S. (L. ed.) 1184, 1189.

On the other hand, "the courts may not change what Congress did on the theory that the general purpose of Congress will be more nearly carried out by construing the Act to mean something which Congress was unwilling to say. Under the Act of 1867, the courts were asked to put a rather strained interpretation upon some of its language in order to carry out the supposed intent of Congress to secure equality of distribution in all cases of insolvency." *In re Truitt*, (D. C. Md. 1913) 203 Fed. 550, 557.

**Comparison with earlier bankruptcy acts.**—The courts have had frequent occasion, in construing the present Act, to resort to a comparison of its provisions with those of earlier bankruptcy acts, and a consideration of the judicial construction placed thereon. 3 R. C. L. 171. Where provisions in the present Act and in an earlier bankruptcy act are substantially identical they should ordinarily receive the same construction. *Babbitt v. Dutcher*, (1910) 216 U. S. 102, 30 S. Ct. 372, 54 U. S. (L. ed.) 402, 17 Ann. Cas. 969.

On the other hand, a wide departure in the language of the present Act from that in a former act may be persuasive that a different construction is required. *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147; *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284. For "when the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose." *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 44 U. S. (L. ed.) 1171.

**Legislative policy.**—The rule that legislative policy clearly deducible from the

consistent legislation of Congress is a legitimate factor in determining the meaning of subsequent acts open to construction has been exemplified in a multitude of federal cases. Article *Statutes and Statutory Construction*, ante, p. 75. Thus it has always been the policy of Congress both in general legislation and in bankruptcy acts to recognize and give effect to the state exemption laws, and an intention to violate that rule in the present Bankruptcy Act should be made to appear by clear and unmistakable language. *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116; *Steele v. Buel*, (1900) 104 Fed. 968, 44 C. C. A. 287.

**Legislative history of Act.**—In a case where the court declined to give vital significance to the fact that certain words in a bill amending the Bankruptcy Act as the bill passed the House, were dropped in the Senate, the court said: "It is only in extremely doubtful matters of interpretation that the legislative history of an act of Congress becomes important." *Loeser v. Savings Deposit Bank, etc., Co.*, (1906) 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233. And see in general on that point the article *Statutes and Statutory Construction*, ante, p. 64.

**The opinions of individual legislators** as to the object and effect of the statute are of little or no weight on the question of its construction. *Carter v. Hobbs*, (1899) 92 Fed. 595. And see article *Statutes and Statutory Construction*, ante, p. 62.

**Section headings.**—"This act has the somewhat unusual feature of inserting at the head of each section a separate title indicating the subject matter." *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175.

The titles given by Congress to the various sections of the Act are frequently resorted to for the purpose of determining the scope of the provisions and their relation to other portions of the Act. *Holden v. Stratton*, (1905) 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018; *Shropshire v. Bush*, (1907) 204 U. S. 186, 27 S. Ct. 178, 51 U. S. (L. ed.) 436.

**Provisos and exceptions.**—Many provisos and exceptions appear in the Bankruptcy Act. The usual and primary office of a proviso is to limit generalities and exclude from the scope of the statute that which would otherwise be within its terms. *Burlingham v. Crouse*, (1913) 228 U. S. 459, 33 S. Ct. 564, 57 U. S. (L. ed.) 920, 46 L. R. A. (N. S.) 148.

But an enactment in the form of a proviso may sometimes mean simply additional legislation. Article *Statutes and Statutory Construction*, ante, p. 155; *Burlingham v. Crouse*, (1913) 228 U. S. 459, 33 S. Ct. 564, 57 U. S. (L. ed.) 920, 46 L. R. A. (N. S.) 148.

A proviso intended to protect existing rights ought not to be given an interpretation which would destroy any part of those rights. *Thomas v. Woods*, (1909) 173 Fed. 585, 97 C. C. A. 535, 19 Ann. Cas. 1080, 26 L. R. A. (N. S.) 1180.

It is a maxim of interpretation that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted. See article *Statutes and Statutory Construction*, ante, p. 156. So where general words in a section of the Bankruptcy Act are followed by specified exceptions, these special exceptions exclude all other exceptions. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; *Wood v. A. Wilbert's Sons Shingle, etc., Co.*, (1912) 226 U. S. 384, 33 S. Ct. 125, 57 U. S. (L. ed.) 264.

*Declarations in the official forms* promulgated by the Supreme Court have been referred to by that court as indicating the construction it has adopted of provisions of the Act for which the forms are made. *Zavelo v. Reeves*, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676, Ann. Cas. 1914D 664.

*Amendments of the Bankruptcy Act* which are embodied in one enactment are presumed not to be in conflict but to be harmonious with each other, and a construction will be adopted, if possible, which reconciles apparent disagreements. *Wood v. A. Wilbert's Sons Shingle, etc., Co.*, (1912) 226 U. S. 384, 33 S. Ct. 125, 57 U. S. (L. ed.) 264.

*"When language is clear and unambigu-*

*ous* it must be held to mean what it plainly expresses and no room is left for construction." *Swarts v. Siegel*, (C. C. A. 1902) 117 Fed. 13.

*Deliberate dictum of federal Supreme Court.*—Where the federal Supreme Court deliberately expresses its preference for a particular construction of a provision, the mere fact that it expressly refrains from deciding the point will not prevent the court in a later case from regarding the dictum as an authoritative deliverance if it was evidently not inconsiderately uttered nor inconsequent to the considerations involved. *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771. See also *Brown v. United Button Co.*, (1906) 149 Fed. 48, 79 C. C. A. 70, 9 Ann. Cas. 445, 8 L. R. A. (N. S.) 961.

*Stare decisis.*—"Of course the construction of the Bankruptcy Act rests with the federal courts, and at last with the Supreme Court of the United States. If there were no difference of opinion among those courts, or indeed if the Supreme Court had finally spoken on the subject, we should, of course, be guided by such utterance. But where variant views are entertained, it is the duty of this court to decide for itself. When it has done so once upon full consideration, at least the rule of *stare decisis* would suggest the duty and certainly the advisability of adhering to the rule laid down." *Stuart v. Farmers' Bank of Cuba City*, (1908) 137 Wis. 66, 75, 117 N. W. 820, 16 Ann. Cas. 821, 824.

## CHAPTER ONE.

### DEFINITIONS.

**SECTION 1. MEANING OF WORDS AND PHRASES.**—*a* The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: [(1898) 30 Stat. L. 544.]

"It will be noted that some of these definitions in section 1 read 'shall mean,' while others read 'shall include.' It was not intended that definitions of words used in the act which read 'shall include' should exclude other meanings or defini-

tions of the word, or limit the ordinary and well-understood meanings. It was intended, as the words used plainly indicate, to make sure that they would be held to include what is expressed." *In re Harper*, (1910) 175 Fed. 412, 423.

(1) [Person against whom petition has been filed.] "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; [(1898) 30 Stat. L. 544.]

(2) [Adjudication.] "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; [(1898) 30 Stat. L. 544.]

(3) **[Appellate courts.]** "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; [(1898) 30 Stat. L. 544.]

(4) **[Bankrupt.]** "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; [(1898) 30 Stat. L. 544.]

(5) **[Clerk.]** "clerk" shall mean the clerk of a court of bankruptcy; [(1898) 30 Stat. L. 544.]

(6) **[Corporations.]** "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; [(1898) 30 Stat. L. 544.]

(7) **[Court.]** "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; [(1898) 30 Stat. L. 544.]

(8) **[Courts of bankruptcy.]** "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; [(1898) 30 Stat. L. 544.]

The specific designation of the courts of bankruptcy and the investment of them with jurisdiction will be found in chapter II, section 2.

(9) **[Creditor.]** "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; [(1898) 30 Stat. L. 544.]

**Creditor.**—When no restriction is declared by the context, the general terms of the definition of "creditor" as here given must apply; and throughout the Act, whenever the word is used in a narrow sense, apt language is employed to indicate such intention, as in sections 56, 65, and 12. *In re Walker*, (1899) 96 Fed. 550.

**Stockholders** as such are not "creditors" of a corporation whose stock they own. *In re Eureka Anthracite Coal Co.*, (W. D. Ark. 1912) 197 Fed. 216.

**Attorney.**—The word "attorney" in this section includes the attorney-at-law,

although he has no power to vote, except upon additional authority. *In re Henschel*, (1901) 109 Fed. 861.

An acknowledgment of a power of attorney before a foreign consul is sufficient proof of the creditor's claim before the referee, General Order in Bankruptcy No. 21, par. 5, providing that "the execution of any letter of attorney to represent a creditor . . . may be proved or acknowledged before a referee or a United States commissioner, or a notary public," not contemplating such a case, apparently, but not invalidating such acknowledgment. *In re Sugenhimer*, (1899) 91 Fed. 744.

(10) **[Date of bankruptcy — time of bankruptcy — commencement of proceedings — bankruptcy.]** "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; [(1898) 30 Stat. L. 544.]

(11) **[Debt.]** "debt" shall include any debt, demand, or claim provable in bankruptcy; [(1898) 30 Stat. L. 544.]

**Strict legal meaning.**—The word "debt" in the Bankrupt Law is not restricted to its strict legal meaning, viz., "a sum of

money due by certain and express agreement." *In re Fife*, (1901) 109 Fed. 880.

(12) **[Discharge.]** "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act; [(1898) 30 Stat. L. 544.]

(13) **[Document.]** "document" shall include any book, deed, or instrument in writing; [(1898) 30 Stat. L. 544.]

(14) **[Holiday.]** "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; [(1898) 30 Stat. L. 544.]

(15) **[When person deemed insolvent.]** a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; [(1898) 30 Stat. L. 544.]

**Question of insolvency, in general.**—As to partnership insolvency, see the annotation under section 5a.

*This definition does not govern* in determining whether a voluntary conveyance is fraudulent, so that the property may be recovered by the trustee under section 70e; the question in such a case is to be decided according to the state law. *Underleak v. Scott*, (1912) 117 Minn. 136, 134 N. W. 731.

*The definition of insolvency provided by section 1a (15) must be strictly adhered to in determining whether an alleged bankrupt is solvent or otherwise.* *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Rome Planing-Mill Co.*, (N. D. N. Y. 1900) 99 Fed. 937, 3 Am. Bankr. Rep. 766; *Duncan v. Landis*, (3d Cir. 1901) 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649; *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484; *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; *In re Pettingill*, (D. C. Mass. 1905) 135 Fed. 218; *In re Marine Iron Works*, (E. D. N. Y. 1908) 159 Fed. 753, 20 Am. Bankr. Rep. 390; *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 123 Ia. 432, 99 N. W. 121; *Hackney v. Raymond Bros. Clarke Co.*, (1903) 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; *National Bank, etc., Co. v. Spencer*, (1900) 53 App. Div. 547, 65 N. Y. S. 1001; *Levor v. Seiter*, (1901) 34 Misc. 382, 69 N. Y. S. 987, reversed on other grounds (1902) 60 App. Div. 33, 74 N. Y. S. 499; *Martin v. Bigelow*, (1901) 36 Misc. 298, 73 N. Y. S. 443; *Wilkinson v. Anderson-Taylor Co.*, (1904) 28 Utah 346, 79 Pac. 46.

*The issue as to solvency or insolvency is to be determined at the date of the com-*

*mission of the alleged act of bankruptcy.* *In re Rome Planing-Mill Co.*, (N. D. N. Y. 1900) 99 Fed. 937, 3 Am. Bankr. Rep. 766.

*Post-dated check and renewal.*—The fact that a merchant, seven months before filing his bankruptcy petition, sent a creditor a post-dated check and a note, which he afterward renewed and paid a little less than four months before the filing of the petition, for the balance, does not prove insolvency within section 1a (15) of the Act. *In re Chappell*, (1901) 113 Fed. 545.

*To say that a man is in failing circumstances or unable to pay all his debts in full is a different thing from saying that his property taken at a fair valuation is not sufficient in amount to pay his debts, as a man's property at a fair valuation, which means the market value, may be sufficient to pay his debts, but he may not be able to realize at once the amount of the valuation.* *Martin v. Bigelow* (Supm. Ct. Spec. T. 1901) 36 Misc. 298, 73 N. Y. S. 443.

*A letter of the debtor stating his inability to pay his debts and calling a meeting of his creditors for the purpose of inducing them to take thirty cents on a dollar in unsecured notes is sufficient prima facie evidence of insolvency.* *In re Lange*, (1899) 97 Fed. 197.

*Permitting judgment and its satisfaction is not proof that the debtor had no other property sufficient to pay his other debts, and that he was therefore insolvent.* *Levor v. Seiter*, (Supm. Ct. Spec. T. 1901) 34 Misc. 382, 69 N. Y. S. 987.

*There is a presumption that a debtor knows his financial condition as to solvency, but this is a disputable presumption.* *In re Gilbert*, (1902) 112 Fed. 951.

*Corporation unable to pay debts — evidence.*—Upon the question of the insolvency of a corporation, evidence of its

inability to pay its debts, of the suspension of its business, and of negotiations looking to the granting by the creditors of permission to the corporation to carry on future operations, is material and competent, and, in the absence of other evidence, is conclusive of insolvency; and evidence of insolvency at the admitted time justifies the inference of insolvency for a prior period. *In re Elmira Steel Co.*, (1901) 109 Fed. 456

On the general question of insolvency, see also *In re Bloch*, (C. C. A. 1901) 109 Fed. 790, where it was held that evidence was improperly rejected at the trial; *Hewitt v. Boston Straw Board Co.*, (1913) 214 Mass. 260, 101 N. E. 424; *Gill v. Eli-Norris Safe Co.*, (1913) 170 Mo. App. 478, 156 S. W. 811, and *In re Rome Planing-Mill Co.*, (1900) 99 Fed. 937, where, upon the proof, insolvency was established; and *In re Gilbert*, (1902) 112 Fed. 951, where it was not.

**Fair valuation.**—Insolvency, under the definition contained in this section, turns on what is a fair valuation of the property. *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951.

It is impossible to say that a party is insolvent so long as the evidence leaves the fair value of his property an unanswered speculative question. *Jump v. Bernier*, (1915) 221 Mass. 241, 108 N. E. 1027.

**Time of valuation.**—The property should be taken at a fair valuation in determining the question of solvency, not at the amount it afterward brings when sold at auction by a trustee in bankruptcy. *Rutland County Nat. Bank v. Graves*, (D. C. Vt. 1907) 156 Fed. 168, 19 Am. Bankr. Rep. 446.

"Fair valuation" means a value that can be made promptly effective by the owner of property to pay his debts. Such a value excludes, on the one hand, the sacrifice price that would result from an execution or foreclosure sale; and, on the other hand, the retail price that could be realized in the slow process of trade. *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228.

"Fair valuation" has been held to be the present market value, and not the amount which might be realized from a forced sale of the property. *Ziegler v. Thayer*, (1912) 34 R. I. 288, 83 Atl. 266. It means the value which the debtor might realize thereon if permitted to continue in business. But in considering the actual value of commercial paper, accounts, etc., the actual value, not the face of the accounts, must be taken as the true value. *Arnold v. Knapp*, (W. Va. 1915) 84 S. E. 895.

"Fair valuation" means such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property. Such a value will depend

upon many circumstances, such as the age and condition of the stock, the season of the year, and the state of trade. *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228.

"The valuation for the test of solvency or insolvency under the issue made must relate to the conditions affecting the hotel as a going concern when the mortgage was given, and not at its value as dead property after bankruptcy intervened." *In re Klein*, (C. C. A. 6th Cir. 1912) 197 Fed. 241.

In *Empire State Trust Co. v. William F. Fisher Co.*, (1904) 67 N. J. Eq. 88, 57 Atl. 502, the following rule is given: "The authorities seem to hold the reasonable rule that the assets of the debtor must . . . be valued as those of a going concern, if that be the actual condition, and that subsequent actual insolvency is not the true and only test."

The test of a "fair valuation" of property is its market value at the time legal proceedings were taken, where that can be fairly established, and not its value as it may have been affected by such proceedings. *In re Hines*, (D. C. Ore. 1906) 144 Fed. 142, 16 Am. Bankr. Rep. 295.

The fair "market value" of a corporation's assets, for the purpose of determining its solvency when it commits an alleged act of bankruptcy, is the value which the corporation might have realized on them for itself. *In re Marine Iron Works*, (E. D. N. Y. 1908) 159 Fed. 753, 20 Am. Bankr. Rep. 390.

**Charge to jury as to fair valuation.**—The definition of insolvency in this section must be strictly adhered to, and a charge by the court to a jury that solvency means ability to realize sufficient to pay the liabilities, and that "a fair valuation" is what can be at once realized for the property, the debtor's situation and the number and amount of the obligations, with the time each becomes due, being considered, is "misleading, and calculated to place the debtor in a harder situation than was intended by the statute." *Duncan v. Landis*, (C. C. A. 1901) 106 Fed. 839.

**Assets, in general—Exempt property included.**—In determining the issue as to the solvency or insolvency of an alleged bankrupt, all of the property which he owns is to be reckoned in computing the amount of his assets, except such as he may have transferred or concealed in fraud of creditors, but not excluding property which is exempt from execution by the laws of the state. *Plymouth Cordage Co. v. Smith*, (1907) 18 Okla. 249, 90 Pac. 418, 11 Ann. Cas. 445 and note; *In re Baumann*, (W. D. Tenn. 1899) 96 Fed. 946, 3 Am. Bankr. Rep. 196; *In re Hines*, (D. C. Ore. 1906) 144 Fed. 142, 16 Am. Bankr. Rep. 295; *In re Crenshaw*, (S. D. Ala. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502; *Louisiana Nat. Life Assur. Society v. Segen*, (E. D. La. 1912) 196 Fed. 903.

**Preferences considered.**—Where the alleged act of bankruptcy consists in granting or permitting a preference to a creditor, the property thus transferred is to be considered in determining the question of solvency at that time. *In re Doscher*, (E. D. N. Y. 1902) 120 Fed. 408, 9 Am. Bankr. Rep. 547; *In re Hines*, (D. C. Ore. 1906) 144 Fed. 142, 16 Am. Bankr. Rep. 295; *Acme Food Co. v. Meier*, (6th Cir. 1907) 153 Fed. 77, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550.

**Fraudulent transfers excluded.**—Property transferred in fraud of creditors is not to be considered in determining the solvency of an alleged bankrupt. *In re Shoesmith*, (7th Cir. 1905) 135 Fed. 684, 68 C. C. A. 322, 13 Am. Bankr. Rep. 645; *Acme Food Co. v. Meier*, (6th Cir. 1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550; *In re Crenshaw*, (S. D. Ala. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502.

**Contingent assets.**—Assets must have a present value, and be salable, in order to be considered in determining the question of the solvency of an alleged bankrupt; contingent assets are not within the meaning of the Bankruptcy Act. *In re Rome Planing-Mill Co.*, (N. D. N. Y. 1900) 99 Fed. 937, 3 Am. Bankr. Rep. 766; *In re Bloch*, (2d Cir. 1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; *In re Marine Iron Works*, (E. D. N. Y. 1908) 159 Fed. 753, 20 Am. Bankr. Rep. 390.

**Prospective profits** upon goods ordered, but not paid for and not delivered, which might arise from orders to be filled in the future if not canceled, and if paid for, are not property, and cannot be considered as a part of the alleged bankrupt's assets. *In re Bloch*, (2d Cir. 1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300.

**The liability of stockholders of a corporation for stock claimed to have been issued without payment**, which claim is disputed, cannot be taken into account as an asset in determining the question of the corporation's solvency in bankruptcy proceedings against it. *Wilkes Barre First Nat. Bank v. Wyoming Valley Ice Co.*, (M. D. Pa. 1905) 136 Fed. 466, 14 Am. Bankr. Rep. 448.

**Accounts receivable.**—In determining the solvency or insolvency of a person, his accounts receivable are to be taken at their actual value and not at their nominal value. While it might be that something could be realized out of them in the future, that does not satisfy the law. It is their value at the time of the bankruptcy that is to be taken into consideration. *In re Coddington*, (M. D. Pa. 1902) 118 Fed. 281, 9 Am. Bankr. Rep. 243.

**Unpaid stock subscriptions** are "assets" of a corporation on the question of its insolvency. *In re Commonwealth Lumber Co.*, (W. D. Wash. 1915) 223 Fed. 667.

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**Open accounts against execution-proof parties.**—"It appears that the defendant is a peddler of jewelry, and that he sells same on the instalment plan, usually to people who have no assets except their salaries. It is a reasonable inference from the testimony taken that a great majority of these parties are execution proof, though they are doubtless honest, and may eventually pay their debts in full. Therefore these open accounts should not be considered in estimating the defendant's resources. In considering assets in relation to liabilities, to determine solvency *vel non*, the assets ought to be such as a creditor of the alleged bankrupt could realize on if he obtained a judgment against him in the ordinary course of judicial procedure." On an application for a new trial the court said: "In my former remarks I inadvertently stated too broadly the rule in regard to what assets should be considered in determining solvency *vel non*, as under it as stated exempt property would be excluded from consideration, which is clearly not the intention of the law. But in determining solvency the property relied upon should undoubtedly be such as would be available to the bankrupt himself with which to meet his liabilities within a reasonable time." *Louisiana Nat. Life Assur. Society v. Segen*, (E. D. La. 1912) 196 Fed. 903.

**Other matters considered in determining solvency.**—**Outstanding bonds**, though issued irregularly, should not be excluded from consideration in determining the question of a corporation's insolvency in bankruptcy proceedings against it. *Wilkes Barre First Nat. Bank v. Wyoming Valley Ice Co.*, (M. D. Pa. 1905) 136 Fed. 466, 14 Am. Bankr. Rep. 448.

**Interest of mortgagor in mortgaged property.**—The interest of an alleged bankrupt in premises that he has mortgaged should be considered in determining whether he is solvent or insolvent within the meaning of the Bankruptcy Act. *Lansing Boiler, etc., Works v. Ryerson*, (6th Cir. 1904) 128 Fed. 701, 63 C. C. A. 253, 11 Am. Bankr. Rep. 558; *Acme Food Co. v. Meier*, (6th Cir. 1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550.

**Debt guaranteed by bankrupt.**—In a suit by a bankrupt's trustee to avoid a preference, it was held that a debt of a third person who was insolvent, and which the bankrupt had guaranteed, was properly considered as a debt of the bankrupt in determining his solvency at the time the alleged preference was given; and this though the guaranty was oral and within the statute of frauds, as that statute relates merely to the evidence required to prove the undertaking, and not to its validity. *Huttig Mfg. Co. v. Edwards*, (8th Cir. 1908) 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349.

**Suspension of business.**—Upon the question of the insolvency of a corporation at the time of the commission of an alleged act of bankruptcy, evidence of its suspension of business, and its inability to pay its debts, at a time within a few weeks or months thereafter is competent, and, in the absence of other evidence, is sufficient to warrant a finding of such insolvency. *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484.

**The verified schedules** of a bankrupt are competent evidence on the question of his insolvency, not only when the petition was filed, but also when a conveyance claimed to have been preferential was made, if within a reasonable time prior thereto. *In re Mandel*, (S. D. N. Y. 1903) 127 Fed. 863, 10 Am. Bankr. Rep. 774, *affirmed* (2d Cir. 1905) 135 Fed. 1021, 68 C. C. A. 546.

**Inference of insolvency.**—No inference arises from an adjudication in bankruptcy that the bankrupt was insolvent within the meaning of the act four months before he was adjudicated such. *In re Chappell*,

(E. D. Va. 1901) 113 Fed. 545, 7 Am. Bankr. Rep. 608.

The fact that a man is pressed and cannot meet his debts as they fall due is no evidence that he is insolvent within the meaning of the Bankrupt Act. *In re Chappell*, (E. D. Va. 1901) 113 Fed. 545, 7 Am. Bankr. Rep. 608.

Proof that a man was insolvent on a certain day does not justify an inference that he was insolvent on a day some time prior thereto. Many contingencies, such as unwise investments, losing contracts, misfortune, or accident, might happen to reduce a person from a state of solvency to one of insolvency within a short space of time. *Kimball v. Dresser*, (1904) 98 Me. 519, 57 Atl. 787; *Halbert v. Pranke*, (1904) 11 Am. Bankr. Rep. 620, 91 Minn. 204, 97 N. W. 976.

In *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231, it was held, where the bankrupt sent a letter to his creditors stating his inability to pay his debts and calling a meeting for the purpose of inducing them to take in settlement a small percentage in unsecured notes, that he was insolvent.

(16) [Judge.] “judge” shall mean a judge of a court of bankruptcy, not including the referee; [(1898) 30 Stat. L. 544.]

Allowance of a claim by a referee, while binding and conclusive against the estate in bankruptcy, unless reversed on appeal, is not a personal judgment binding on the bankrupt, even though it is true that referees in bankruptcy “take the same oath of office as judges of the United States courts,” are referred to “as an arm of the Bankruptcy Court, invested with

certain judicial powers,” and as “a court of very great importance in the administration of bankrupt assets and the determination of conflicting rights arising thereunder,” and in their hearings within the scope of their powers are clothed with the authority of judges. *Maryman v. Dreyfus*, (1915) 117 Ark. 17, 174 S. W. 549.

(17) [Oath.] “oath” shall include affirmation; [(1898) 30 Stat. L. 544.]

(18) [Officer.] “officer” shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; [(1898) 30 Stat. L. 544.]

(19) [Persons.] “persons” shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; [(1898) 30 Stat. L. 545.]

(20) [Petition.] “petition” shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; [(1898) 30 Stat. L. 545.]

(21) [Referee.] “referee” shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead; [(1898) 30 Stat. L. 545.]



(22) [Conceal.] "conceal" shall include secrete, falsify, and mutilate; [(1898) 30 Stat. L. 545.]

A broad meaning is given to the word "conceal" by this definition. *In re Doyle*, (W. D. N. Y. 1912) 199 Fed. 247.

(23) [Secured creditor.] "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; [(1898) 30 Stat. L. 545.]

The words "secured creditor" are limited to security out of or against the estate. *In re Thompson*, (E. D. N. Y. 1913) 208 Fed. 207.

There is some conflict of opinion as to

whether one who holds security upon the exempt property of the bankrupt is a "secured creditor." *In re Cale*, (C. C. A. 8th Cir. 1911) 191 Fed. 31.

(24) [States.] "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; [(1898) 30 Stat. L. 545.]

(25) [Transfer.] "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; [(1898) 30 Stat. L. 545.]

As to a "transfer" constituting a preference, see *infra*, sections 60a and 60b and notes thereto.

"The word 'transfer' is given by the present law a much broader meaning than it had under its predecessor." *In re Truitt*, (D. C. Md. 1913) 203 Fed. 550.

"All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished." *In re Muir*, (M. D. Pa. 1914) 212 Fed. 495.

Confession of judgment as "transfer."—A transfer within the meaning of this section occurs when a party transfers his property to another by voluntarily confessing judgment to that other and allowing him to issue execution, having a levy made on such property and a sale made at which the other becomes the purchaser of such property. *Grant v. National Bank of Auburn*, (N. D. N. Y. 1912) 197 Fed. 581.

Transfer by way of "security."—A creditor who obtains a judgment which becomes a lien upon the debtor's property thereby obtains security. And a debtor who aids his creditor to obtain a judgment which has such effect transfers property to him by way of security within the meaning of the Act. *In re Truitt*, (D. C. Md. 1913) 203 Fed. 550.

A payment of money on account in the ordinary course of business is a "transfer" within the meaning of the definition here given. *In re Fixen*, (C. C. A. 1900) 102 Fed. 295. And in *Boyd v. Lemon, etc., Co.*, (C. C. A. 1902) 114 Fed. 647, it was held that the word "property" as here used includes money. Citing *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171.

Payment of money in due course of business.—"This section defines 'transfer' to include a transfer of property as a payment, but does not seem to warrant the construction in *Worden v. Columbia Electric Co.*, (1899) 96 Fed. 803, that payment of money in due course of business is included." *In re Ratliff*, (1901) 107 Fed. 80.

The creation of a receivership by a court of equity does not come within the definition of a "transfer" in this section. *In re Baker-Ricketson Co.*, (1899) 97 Fed. 480.

Deposit in bank.—The delivery to a bank of coin, bills, checks, etc., to be passed to the credit of a depositor and to be subject to his draft, is a "transfer" of his property. *In re Stege*, (C. C. A. 1902) 116 Fed. 342. See also *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171, where the court said that "the word ['transfer'] is used in its most comprehensive sense."

(26) [Trustee.] "trustee" shall include all of the trustees of an estate; [(1898) 30 Stat. L. 545.]

(27) [**Wage-earner.**] "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; [(1898) 30 Stat. L. 545.]

(28) [**Words importing masculine gender.**] words importing the masculine gender may be applied to and include corporations, partnerships, and women; [(1898) 30 Stat. L. 545.]

(29) [**Words importing plural number.**] words importing the plural number may be applied to and mean only a single person or thing; [(1898) 30 Stat. L. 545.]

(30) [**Words importing singular number.**] words importing the singular number may be applied to and mean several persons or things. [(1898) 30 Stat. L. 545.]

## CHAPTER II.

### CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

SEC. 2. [**Federal and Territorial Courts.**] That the courts of bankruptcy as hereinbefore defined, viz, the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to [(1898) 30 Stat. L. 545.]

See also the concluding paragraph of this section following clause (20).

**Ancillary jurisdiction.**—See *infra*, section 2 (20) and annotation thereunder.

**Right to exercise original jurisdiction.**—The Bankruptcy Act confers on the District Courts, as courts of bankruptcy, such jurisdiction, at law and in equity, as enables them to exercise original jurisdiction in bankruptcy proceedings. *Brumby v. Jones*, (5th Cir. 1905) 141 Fed. 318, 72 C. C. A. 466, 15 Am. Bankr. Rep. 578; *Horner-Gaylord Co. v. Miller*, (N. D. W. Va. 1906) 147 Fed. 295, 17 Am. Bankr. Rep. 257; *Pelton v. Sheridan*, (1914) 74 Ore. 176, 144 Pac. 410.

A distinct purpose of the Bankruptcy Act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when an important part of the administration is sought to be effected through the slower and less appropriate

processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern. *United States Fidelity, etc., Co. v. Bray*, (1912) 225 U. S. 205, 32 S. Ct. 620, 56 U. S. (L. ed.) 1055.

**Not courts of limited jurisdiction.**—"It is true the District Court as a court of bankruptcy is one of limited jurisdiction—that is, limited in respect of the subjects over which it may exercise jurisdiction—but it is unlimited in respect of its power over proceedings in bankruptcy, specifically made subject to its jurisdiction by section 2 of the Act. When judgments are rendered by that court upon questions arising in such proceedings, they possess all the incidents and qualities of formality and conclusiveness appertaining to judgments of courts of general jurisdiction." *Edelstein v. U. S.*, (1906) 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236. To the same point see *In re Marion Contract, etc., Co.*, (W. D. Ky. 1909) 166 Fed. 618, 22 Am. Bankr. Rep. 81.

The jurisdiction of the court which

makes an adjudication extends to all property of the bankrupt situated anywhere in the United States, and it may make such orders with respect thereto as are necessary for the preservation, collection, and administration of such property. *In re Dempster*, (8th Cir. 1909) 172 Fed. 353, 97 C. C. A. 51, 22 Am. Bankr. Rep. 751; *Staunton v. Wooden*, (9th Cir. 1910) 179 Fed. 61, 102 C. C. A. 355, 24 Am. Bankr. Rep. 736.

The jurisdiction of the bankruptcy courts in all "proceedings in bankruptcy" is intended to be exclusive of all other courts, and such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them. *United States Fidelity, etc., Co. v. Bray*, (1912) 225 U. S. 205, 32 S. Ct. 620, 56 U. S. (L. ed.) 1055.

**Territorial jurisdiction.**—The fact that the court of bankruptcy, in which a petition has been filed, has jurisdiction, co-extensive with that of the United States, to order and control the disposition of the bankrupt's estate, does not mean that such court may issue its process to run into another district. Such court may not extend its process beyond the territorial limits of the district within which its ordinary jurisdiction may be exercised. *In re Waukesha Water Co.*, (E. D. Wis. 1902) 116 Fed. 1009, 8 Am. Bankr. Rep. 715; *In re Alphin, etc., Cotton Co.*, (E. D. Ark. 1904) 131 Fed. 824, 12 Am. Bankr. Rep. 653; *In re Steele*, (N. D. Ala. 1908) 161 Fed. 886, 20 Am. Bankr. Rep. 446; *Staunton v. Wooden*, (9th Cir. 1910) 179 Fed. 61, 102 C. C. A. 355, 24 Am. Bankr. Rep. 736; *In re Benedict*, (1905) 140 Fed. 55.

**Equitable jurisdiction.**—A court of bankruptcy is, in a strict sense, a court of equity, and is guided and controlled by equitable doctrines and principles, except as far as otherwise expressly provided in the Bankruptcy Act. *In re Gillaspie*, (N. D. W. Va. 1911) 190 Fed. 88; *In re Siegel-Hillman Dry Goods Co.*, (E. D. Mo. 1901) 111 Fed. 983, 7 Am. Bankr. Rep. 351; *In re Waukesha Water Co.*, (E. D. Wis. 1902) 116 Fed. 1009, 8 Am. Bankr. Rep. 715; *In re Rochford*, (8th Cir. 1903) 124 Fed. 182, 59 C. C. A. 388, 10 Am. Bankr. Rep. 608; *In re Kane*, (7th Cir. 1904) 127 Fed. 552, 62 C. C. A. 616, 11 Am. Bankr. Rep. 533; *Lockman v. Lang*, (8th Cir. 1904) 132 Fed. 1, 65 C. C. A. 621, 11 Am. Bankr. Rep. 597; *In re Waugh*, (9th Cir. 1904) 133 Fed. 281, 66 C. C. A. 659, 13 Am. Bankr. Rep.

187; *Dodge v. Norlin*, (8th Cir. 1904) 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 86; *Mason v. Wolkowich*, (1st Cir. 1906) 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765, 17 Am. Bankr. Rep. 709; *Ex p. Steele*, (N. D. Ala. 1908) 162 Fed. 694, 20 Am. Bankr. Rep. 446; *Westall v. Avery*, (4th Cir. 1909) 171 Fed. 626, 96 C. C. A. 428, 22 Am. Bankr. Rep. 673; *Clay v. Waters*, (8th Cir. 1910) 178 Fed. 385, 101 C. C. A. 645, 24 Am. Bankr. Rep. 293; *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463, 24 Am. Bankr. Rep. 474; *In re Swofford Bros. Dry Goods Co.*, (W. D. Mo. 1910) 180 Fed. 549; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148.

See also *infra*, section 2 (15) and annotation thereunder.

"A comparison of section 1 of the Act of 1867, 18 Stat. 517, and section 2 of the Act of 1898 will demonstrate that the jurisdiction conferred upon district courts by the latter is much more ample than under the former, especially as regards equitable jurisdiction." *In re Benedict*, (1905) 140 Fed. 55.

The equitable jurisdiction conferred on the bankruptcy courts by section 2 is that adopted by the Constitution from the English High Court of Chancery, as administered generally by the federal courts. *In re Waukesha Water Co.*, (E. D. Wis. 1902) 116 Fed. 1009, 8 Am. Bankr. Rep. 715.

Although courts of law, in the absence of statutory authority, will not enforce contracts between husband and wife, the instances are many where courts of equity, following the doctrine of the civil rather than the common law, will do so. That courts of equity will aid the wife to recover her separate estate, which has come into the hands of her husband and has been retained by him against her consent, is entirely settled. Courts of bankruptcy are courts of equity, and such recovery will be enforced against the trustee administering the husband's estate in bankruptcy. *In re Hoffman*, (D. C. N. J. 1912) 199 Fed. 448.

**Jurisdiction of independent suits at law or in equity.**—It is settled that the bankruptcy courts under the present Bankruptcy Acts have no jurisdiction of independent suits at law or in equity. *Maryman v. Dreyfus*, (1915) 117 Ark. 17, 174 S. W. 549. But see section 23b and the provisions there referred to.

**Personal judgments against bankrupt debtors.**—There was no intention upon the part of the lawmakers to give the bankruptcy courts jurisdiction to render personal judgments against bankrupt debtors as in civil suits at law or in equity. *Maryman v. Dreyfus*, (1915) 117 Ark. 17, 174 S. W. 549.

**Bankruptcy court always open.**—For the purposes of bankruptcy jurisdiction a District Court is always open. It has no separate terms. *Mahoney v. Ward*, (E. D. N. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770; *In re Ives*, (6th Cir. 1902) 113 Fed. 911, 51 C. C. A. 541, 7 Am. Bankr. Rep. 692; *In re Henschel*, (S. D. N. Y.

1902) 114 Fed. 968, 8 Am. Bankr. Rep. 201.

The proceedings in a pending suit are therefore continuous from the filing of the petition to the closing of the estate, and at all times open for re-examination. *In re Ives*, (6th Cir. 1902) 113 Fed. 911, 51 C. C. A. 541, 7 Am. Bankr. Rep. 692.

(1) **[To adjudge bankrupt.]** adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions; [(1898) 30 Stat. L. 545.]

**Jurisdiction as dependent on residence or domicile within the district**—*In general*.—A court of bankruptcy has jurisdiction to adjudge persons bankrupt who have resided, or have had their domicile, within its territorial jurisdiction for the six months preceding the filing of the petition in bankruptcy, or the greater portion thereof. *In re Murray*, (N. D. Ia. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601; *In re Wixelbaum*, (S. D. N. Y. 1899) 97 Fed. 562, 3 Am. Bankr. Rep. 267; *In re Blair*, (S. D. N. Y. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588; *In re Williams*, (D. C. Wash. 1900) 99 Fed. 544, 3 Am. Bankr. Rep. 677; *In re Plotke*, (7th Cir. 1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171; *In re Filer*, (S. D. N. Y. 1900) 108 Fed. 209, 5 Am. Bankr. Rep. 332; *In re Dinglehoefer*, (E. D. N. C. 1904) 109 Fed. 866, 6 Am. Bankr. Rep. 242; *In re Scott*, (D. C. Mass. 1901) 111 Fed. 144, 7 Am. Bankr. Rep. 39; *In re Williams*, (E. D. Ark. 1903) 120 Fed. 34, 9 Am. Bankr. Rep. 738; *In re Garneau*, (7th Cir. 1904) 127 Fed. 62, C. C. A. 403, 11 Am. Bankr. Rep. 679; *In re Isaacson*, (S. D. N. Y. 1908) 161 Fed. 777, 20 Am. Bankr. Rep. 430; *In re Oldstein*, (D. C. Ore. 1910) 182 Fed. 409; *In re Stokes*, (D. C. Wash. 1899) 1 Am. Bankr. Rep. 35; *In re Ray*, (D. C. Wash. 1899) 2 Am. Bankr. Rep. 158; *In re Clisdell*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 424; *In re Berner*, (N. D. Ohio 1899) 3 Am. Bankr. Rep. 325; *Matter of Harris*, (D. C. N. J. 1904) 11 Am. Bankr. Rep. 649.

*Where a judicial district is divided and there is a District Court in both divisions, the court having jurisdiction of a bankrupt residing in the district is the one within the particular territory where he resides.* *In re Lemen*, (N. D. Ohio 1912) 208 Fed. 80.

The phrase "the greater portion thereof," as used in section 2 (1), means the greater portion of the six months preceding the filing of the petition in bank-

ruptcy. *In re Plotke*, (7th Cir. 1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171.

**Residence must be bona fide.**—Residence within the district, to give a court jurisdiction of the proceedings in bankruptcy, must be *bona fide*; and the removal of a person from one district to another for the express purpose of filing a petition in bankruptcy therein, and with the intention of leaving the district as soon as he obtains a discharge, does not make him a resident so as to confer jurisdiction on the court. *In re Garneau*, (7th Cir. 1904) 127 Fed. 677, 62 C. C. A. 403, 11 Am. Bankr. Rep. 679. See also *In re Stokes*, (D. C. Wash. 1899) 1 Am. Bankr. Rep. 35.

**Bankrupt beyond territorial limits of court.**—"It seems clear to us that we must assume that Congress intended the same jurisdiction over, and as complete and full an administration upon the property, of a bankrupt who was without the jurisdiction of the district when the petition was filed, but whose domicile, residence, or place of business otherwise conformed to the provisions of this second section, as in a case where the bankrupt was at the time within the territorial limits of the court." *Hills v. F. D. McKinniss Co.*, (N. D. Ohio 1910) 188 Fed. 1012.

A court of bankruptcy has jurisdiction of a voluntary petition for adjudication in bankruptcy, filed by a debtor who has had his domicile within the district for the preceding six months, although during the greater portion of that time he has resided abroad, provided there was no abandonment of the original domicile, nor acquisition of a new one, and the debtor returned to the district, before the filing of the petition, with the intention of making his permanent home there. *In re Williams*, (D. C. Wash. 1900) 99 Fed. 544, 3 Am. Bankr. Rep. 677.

**Removal prior to filing petition**—Proof that an alleged bankrupt, whose residence

and domicile had for years been in another state, had her principal place of business in the district where the petition was filed, up to a time four months prior to the filing of such petition, after which she had no place of business, is not sufficient to give the court jurisdiction of the proceedings. *In re Plotke*, (7th Cir. 1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171.

Where a traveler resided in a particular district for only two months prior to the filing of a petition to have him declared a bankrupt, it was held that the court of that district had no jurisdiction thereof. *In re Williams*, (E. D. Ark. 1903) 120 Fed. 34, 9 Am. Bankr. Rep. 736.

A corporation organized under the laws of a state cannot be a "resident" of another state so as to confer jurisdiction on a court of bankruptcy in the latter state of proceedings against it. *In re Mathews Consol. Slate Co.*, (D. C. Mass. 1905) 144 Fed. 724, 16 Am. Bankr. Rep. 350.

**Domicile as distinguished from residence.**—Domicile is of more extensive signification than residence (*In re Grimes*, (1899) 94 Fed. 800), and includes, beyond mere physical presence at a particular locality an intention to constitute it a permanent abiding place. *In re Davis*, (D. C. N. J. 1914) 217 Fed. 113, citing *Brisenden v. Chamberlain*, (C. C. S. C. 1892) 53 Fed. 307, wherein a clear statement of the distinction may be found.

It is settled that a man may reside in one state and be domiciled in another. The purpose underlying the Bankruptcy Act, that may operate uniformly, requires that such distinction be employed, and it is not impossible that the courts of two districts may have jurisdiction to entertain a petition against the same debtor; that one acting which is first invoked. *In re Lemen*, (N. D. Ohio 1912) 208 Fed. 80.

**Presumption as to jurisdiction.**—"Where jurisdiction of the federal courts is made dependent upon citizenship or other specific fact, the presumption in every stage of the cause is that it is without their jurisdiction, unless the contrary appears from the record. The essential fact must appear affirmatively and distinctly, and it is not sufficient that jurisdiction may be inferred argumentatively." *In re Plotke*, (C. C. A. 1900) 104 Fed. 964, reversing order of District Court.

A domicile once acquired is presumed to continue until it is shown to have been changed; and, where a change of domicile is alleged, the burden of proving it rests upon the person making the allegation. *In re Grimes*, (1899) 94 Fed. 800; *In re Waxelbaum*, (S. D. N. Y. 1899) 97 Fed. 562, 3 Am. Bankr. Rep. 267; *In re Filer*, (S. D. N. Y. 1900) 108 Fed. 209, 5 Am. Bankr. Rep. 332; *In re Oldstein*, (D. C.

Ore. 1910) 182 Fed. 409; *In re Davis*, (D. C. N. J. 1914) 217 Fed. 113.

**Residence as dependent on place of business—In general.**—A court of bankruptcy has jurisdiction, for the purposes of adjudication, over persons who have had their principal place of business within the territorial jurisdiction of the court for the six months preceding the filing of the petition in bankruptcy, or the greater portion thereof. *Guinn v. Iowa Cent. R. Co.*, (S. D. Ia. 1882) 14 Fed. 323; *In re Marine Mach., etc., Co.*, (S. D. N. Y. 1899) 91 Fed. 630, 1 Am. Bankr. Rep. 421; *In re Brice*, (S. D. Ia. 1899) 93 Fed. 942, 2 Am. Bankr. Rep. 197; *In re Blair*, (S. D. N. Y. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588; *In re Williams*, (D. C. Wash. 1900) 99 Fed. 544, 3 Am. Bankr. Rep. 677; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1901) 107 Fed. 255, 5 Am. Bankr. Rep. 744; *In re Magid-Hope Silk Mfg. Co.*, (D. C. Mass. 1901) 110 Fed. 352, 6 Am. Bankr. Rep. 610; *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577; *In re Southwestern Bridge, etc., Co.*, (D. C. Kan. 1904) 133 Fed. 568, 13 Am. Bankr. Rep. 304; *Tiffany v. La Plume Condensed Milk Co.*, (M. D. Pa. 1905) 141 Fed. 444, 15 Am. Bankr. Rep. 413; *In re Duplex Radiator Co.*, (S. D. N. Y. 1906) 142 Fed. 906, 15 Am. Bankr. Rep. 324; *Burdick v. Dillon*, (1st Cir. 1906) 144 Fed. 737, 75 C. C. A. 603, 16 Am. Bankr. Rep. 407; *In re Munger Vehicle Tire Co.*, (2d Cir. 1908) 159 Fed. 901, 87 C. C. A. 81, 19 Am. Bankr. Rep. 785; *In re Alaska American Fish Co.*, (W. D. Wash. 1908) 162 Fed. 498, 20 Am. Bankr. Rep. 712; *In re Pennsylvania Consol. Coal Co.*, (E. D. Pa. 1908) 163 Fed. 579, 20 Am. Bankr. Rep. 872; *In re Perry Aldrich Co.*, (D. C. Mass. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244.

"With jurisdiction dependent upon the single fact of having the principal place of business within the district, the statute then imposes the further prerequisite that such business shall have been there carried on for more than half of the preceding six months. In other words, the limitation is made with reference alone to the duration of the business in the district, and regardless of the fact that its location may be changed short of that period, and thus be carried on in different districts without exceeding the three months in either, or that it may be discontinued entirely without reaching the time limited in any one; and the provisions in reference to domicile and residence are equally restricted, except for the distinction as to residence, that it may be retained in one district after domicile is changed to another." *In re Plotke*, (C. C. A. 1900) 104 Fed. 964, reversing order of District Court.

**Residence in one district, business place in another.**—Where a petitioner in voluntary bankruptcy resides in one district,

and is there employed as clerk in a store, but is engaged in trade on his own account, as a general merchant in another district, the court of bankruptcy in the latter district has jurisdiction of the petition, the bankrupt's principal place of business being within its territorial limits. *In re Brice*, (S. D. Ia. 1899) 93 Fed. 942, 2 Am. Bankr. Rep. 197.

*Residence continued for winding up business sufficient.*—Where a partnership has had its only place of business within a given judicial district for a period of more than three months before the filing of a petition in bankruptcy against it in such district, the court therein will have jurisdiction of the petition, although during a part of that time the only business carried on was in the way of winding up the affairs of the firm by two of the partners, the other partners having retired. *In re Blair*, (S. D. N. Y. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588.

*"Place of business," as used in this section has no application to a clerk who has no "place of business" anywhere.* *In re Lipphart*, (S. D. N. Y. 1912) 201 Fed. 103, wherein the court said: "It seems to me that it was intended, among other things, by the Bankruptcy Law that these proceedings should, as far as practicable, be carried on in the jurisdiction most convenient to all concerned. The debts of a clerk on a small salary would most likely be owing to the tradesmen doing business in the place where he lived. I think that a clerk, or, for that matter, the general run of employees, cannot be said to be in business or to have a place of business. It seems to me that 'place of business' means a place where a man is conducting a business of his own in which he is a principal. I am inclined to think that the statute contemplated 'place of business' as applying only to those who have a business of their own, but in this case it is only necessary to decide that a clerk, such as this bankrupt, did not have a place of business anywhere, and therefore he should have filed his petition at the place where he resided or had his domicile."

**Corporation's principal place of business**—*In general.*—Section 2 (1) and section 1 (19), taken together, "give this court jurisdiction of an involuntary petition against a corporation, which, for the necessary time, has had its principal place of business, as distinct from its residence or domicile, within this district." *In re Magid-Hope Silk Mfg. Co.*, (1901) 110 Fed. 352; *In re Marine Mach., etc., Co.*, (1899) 91 Fed. 630.

*Neither charter nor place of incorporation is controlling.*—A corporation's principal place of business is the actual principal place of business, and it is immaterial that a different place is named in the articles of incorporation. *In re Beiermeister Bros. Co.*, (N. D. N. Y. 1913) 208 Fed. 945; *In re Wenatchee-Stratford*

*Orchard Co.*, (1913) 205 Fed. 964; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1901) 107 Fed. 255, 5 Am. Bankr. Rep. 744; *In re Pennsylvania Consol. Coal Co.*, (E. D. Pa. 1908) 163 Fed. 579, 20 Am. Bankr. Rep. 872; *In re Guanacevi Tunnel Co.*, (C. C. A. 2d Cir. 1912) 201 Fed. 316.

The locus of the principal place of business of a corporation is always a question of fact; but the doubt should be resolved in favor of that jurisdiction in which the corporation obtained its corporate existence and where, as is usually the case, the state law requires the maintenance of an office. *In re Tennessee Const. Co.*, (S. D. N. Y. 1913) 207 Fed. 203.

A nominal office in a state does not make that state a corporation's principal place of business although that is where it was incorporated, provided its activities are in another state and the substantial property is there. *In re E. & G. Theatre Co.*, (D. C. Mass. 1915) 223 Fed. 657.

*A question of fact.*—The locus of the principal place of business of a corporation is always a question of fact and the burden of proving it rests on the petitioning creditors. *Fernwood, etc., R. Co. v. Bessemer Coal, etc., Co.*, (C. C. A. 5th Cir. 1914) 213 Fed. 33.

The mere fact that a certificate has been filed in some public office designating a place as the principal place of business of a foreign corporation does not make it a place of business unless business is done there. There must not only be a place where business can be done, but business must be done there, in order that a corporation shall have had a principal place of business within the meaning of section 2 of the Bankrupt Act. *In re Thomas McNally Co.*, (S. D. N. Y. 1913) 208 Fed. 291.

*In re Tygarts River Coal Co.*, (N. D. W. Va. 1913) 203 Fed. 178, the court, construing the words "principal place of business," as applied to a coal mining corporation, said: "I am not ignorant of the fact that some of the federal courts have construed this phrase 'principal place of business' to be the place where its chief officers reside and maintain an office; but in my judgment the determination of the question of where the principal place of business is depends upon where the actual business of the concern is transacted. It is a question of fact to be determined in each particular case largely on the character of the corporation, its purposes, and the kind of business it is engaged in. As regards a coal mining corporation like this, it is very evident that the basic necessity for its doing business at all is to have somewhere a body of coal, owned or leased, from which it may mine and ship coal. It is not sufficient for the officers of such a corporation to gather together in a city office and call it 'the principal place of busi-

ness' of the concern because it better suits their convenience to live and meet in such city. Unless the coal exists in place somewhere else to be mined and shipped to consumers, such city organization cannot exist. It is purely incident to and dependent upon the practical mining operations, 'the doing of business' elsewhere. The fact that such city organization may control the company's sale of the coal cannot avoid the inevitable conclusion. In such case the city office becomes only the agent of the corporation for a limited purpose, that of selling what cannot be sold until it has first been elsewhere mined, prepared for, and shipped to market for sale."

In *Home Powder Co. v. Geis*, (C. C. A. 8th Cir. 1913) 204 Fed. 568 it was held, on the facts there stated, that the principal place of business of a mining corporation incorporated in Arizona was in Missouri.

Where a corporation operating factories, mills, or mines in various states has a principal office, from which supreme direction and control are exercised over all its business and property and its selling and collecting are done, where its directors meet, its books of account are kept, and its correspondence conducted, such office will be held to be its principal place of business. *Burdick v. Dillon*, (1st Cir. 1906) 144 Fed. 737, 75 C. C. A. 603, 16 Am. Bankr. Rep. 407.

Where a New Jersey corporation, having been proclaimed against in that state for nonpayment of taxes, maintained its principal office in New York city, it was held that bankruptcy proceedings were properly instituted against it in New York. *In re Munger Vehicle Tire Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 901, 19 Am. Bankr. Rep. 785.

Where the defendant corporation shut down its works and ceased all business at Warren, R. I., in June, 1908, but continued its business in New York, where all its executive and banking business had been done, until the petition was filed in November following, it was held that New York was its principal place of business during the preceding six months, and that the petition was properly filed in that district. *In re Marine Mach., etc., Co.*, (S. D. N. Y. 1899) 91 Fed. 630, 1 Am. Bankr. Rep. 421.

*Foreign corporation's noncompliance with local law immaterial.*—In determining whether a corporation has had its principal place of business in another state, so as to give the court in that district jurisdiction to adjudicate it a bankrupt, it is immaterial whether or not it complied with the laws of that state, so as to entitle it to do business therein as a foreign corporation. *In re Duplex Radiator Co.*, (S. D. N. Y. 1906) 142 Fed. 906, 15 Am. Bankr. Rep. 324; *In re Perry Aldrich Co.*, (D. C. Mass. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244.

*Commingled business relations in different districts.*—Where a manufacturing corporation was organized under the laws of Washington, having its home office and principal place of business at Tacoma, and subsequently a second corporation was organized in California, apparently for the purpose of succeeding and taking over the business of the first, its home office being in Oakland, but its business being transacted in Tacoma by a manager who was also the manager of the first corporation, the business of which was continued by such joint manager without change and in such manner that the transactions and liabilities of the two corporations could not be separated, it was held that the Washington District Court had jurisdiction to entertain a petition in bankruptcy against both corporations as joint parties; it not appearing that any prior proceedings had been elsewhere instituted. *In re Alaska American Fish Co.*, (W. D. Wash. 1908) 162 Fed. 498, 20 Am. Bankr. Rep. 712.

*Concurrent jurisdiction.*—Where a bankrupt corporation has its domicile in one judicial district, and its principal place of business in another, the courts of bankruptcy of both districts have concurrent jurisdiction of involuntary bankruptcy proceedings against it. *In re United Button Co.*, (D. C. Del. 1904) 137 Fed. 668, 13 Am. Bankr. Rep. 454.

*Objection to jurisdiction by creditor.*—An objection that the principal place of business of an insolvent corporation was not within the jurisdiction of the court is jurisdictional and may be made by a creditor. *In re Guancevi Tunnel Co.*, (C. C. A. 2d Cir. 1912) 201 Fed. 316.

(2) [Allow and disallow claims.] allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; [(1898) 30 Stat. L. 545.]

As to

Allowance, proof, and reconsideration of claims, see the several subdivisions of section 57.

What are provable claims, see the several subdivisions of section 63.

As to

Appeals from allowance or rejection of claims, see sections 25a (3) and 25b.

*Jurisdiction of court.*—A Bankruptcy Court in which an estate is being administered has full power to inquire into the

validity of any alleged debt or obligation of the bankrupt upon which a demand or claim against the estate is based. This is essential to the performance of the duties imposed upon it. When an alleged debt or obligation is ascertained to be invalid—without lawful existence—the claim based thereon is necessarily disallowed. A disallowed claim and a non-provable debt are not identical things. *Lesser v. Gray*, (1915) 236 U. S. 70, 35 S. Ct. 227, 59 U. S. (L. ed.) 471.

*Exempt property* constitutes no part of the estate in bankruptcy subject to administration by the trustee or by the court of bankruptcy. The District Court cannot entertain a suit by creditors to reach such property although they

hold notes expressly waiving exemptions granted by state law. *Woodruff v. Cheeves*, (C. C. A. 1901) 105 Fed. 601; *reversing In re Woodruff*, (1899) 96 Fed. 317. And see numerous cases cited in note to section 2 (11).

The referee is authorized to perform the acts specified in this clause, subject to revision by the Bankruptcy Court. *In re Hamilton Automobile Co.*, (C. C. A. 7th Cir. 1913) 209 Fed. 596.

**Modification of orders and records.**—So long as the bankrupt's estate is pending in court and unsettled, the court has power over its orders and records as to the disposition of claims and to modify the same to conform to the rights of the parties. *In re Hamilton Automobile Co.*, (C. C. A. 7th Cir. 1913) 209 Fed. 596.

(3) [Appoint receivers, etc.] appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; [(1898) 30 Stat. L. 545.]

As to seizure and possession of property, see section 69.

**Appointment of receivers or marshals, in general.**—For cases recognizing the authority of the Bankruptcy Court, under this clause, to appoint receivers or marshals see in general *Lazarus v. Prentice*, (1914) 234 U. S. 263, 34 S. Ct. 851, 58 U. S. (L. ed.) 1305; *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, 5 Am. Bankr. Rep. 623; *In re John A. Etheridge Furniture Co.*, (D. C. Ky. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 112; *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *McNulty v. Feingold*, (E. D. Pa. 1904) 129 Fed. 1001, 12 Am. Bankr. Rep. 338; *In re Moody*, (N. D. Ia. 1904) 131 Fed. 525, 12 Am. Bankr. Rep. 718; *Latimer v. McNeal*, (3d Cir. 1906) 142 Fed. 451, 73 C. C. A. 567, 16 Am. Bankr. Rep. 43; *In re T. E. Hill Co.*, (7th Cir. 1907) 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73; *In re Wentworth Lunch Co.*, (C. C. A. 2d Cir. 1911) 191 Fed. 821; *Le Master v. Spencer*, (C. C. A. 8th Cir. 1913) 203 Fed. 210; *In re White*, (M. D. Pa. 1913) 205 Fed. 393.

While the Bankruptcy Law of 1867 contained no express provision for the appointment of receivers, still the power was exercised by the courts under that law in appropriate cases. *Keenan v. Shannon*, (1874) 10 Phila. (Pa.) 219, 14 Fed. Cas. No. 7,640; *Lansing v. Manton*, (1876) 14 Nat. Bankr. Reg. 27, (1876) 14 Fed. Cas. No. 8,077. And it has been said that under the Bankruptcy Act now in force the court may, in suitable cases, appoint receivers, by virtue of its general equity powers. *In re Fixen*, (1899) 96 Fed. 753.

*Ancillary receiver* may be appointed in another district, see note to section 2 (20).

**Paramount jurisdiction of Bankruptcy Court.**—The fact that proceedings have been begun against the bankrupt in a state court, founded upon allegations of his insolvency and fraud and seeking appointment of a receiver, or the fact that the bankrupt has made a general assignment under the state law and that his property is being administered in the state court, does not preclude the Bankruptcy Court from taking jurisdiction of a motion to appoint a receiver, *In re Bruss-Ritter Co.*, (1898) 90 Fed. 651; *In re John A. Etheridge Furniture Co.*, (1899) 92 Fed. 329; or a marshal to take charge of the bankrupt's property, *Davis v. Bohle*, (C. C. A. 1899) 92 Fed. 325, *affirming In re Sievers*, (1899) 91 Fed. 366.

The foregoing conclusions result from the suspension of state insolvency laws by the enactment of a national bankruptcy law. See *supra*, notes immediately preceding section 1 of this Act.

But where mortgaged property of the bankrupt is in the actual possession of a state court, through its receiver, in a foreclosure suit of which the state court has jurisdiction, the Bankruptcy Court will not order the marshal to seize it. *Carling v. Seymour Lumber Co.*, (C. C. A. 1902) 113 Fed. 483, *reversing* such order in *In re Macon Sash, etc., Co.*, (1901) 112 Fed. 323.

Nor has the court of bankruptcy power to make an order appointing a receiver of property shown by an ancillary bill to be held and claimed adversely; such an order,



if made, will be reversed and the receiver directed to surrender to such adverse claimant the property taken from his possession. *Beach v. Macon Grocery Co.*, (C. C. A. 1902) 116 Fed. 143.

**Receivership proceedings as ancillary proceedings.**—From a consideration of this provision in reference to the appointment of receivers, together with the other provisions of the Bankruptcy Act, it is apparent that the petition for adjudication and the application for the appointment of a receiver are separate and distinct, and the receivership proceedings are but ancillary to the proceedings in bankruptcy. *T. E. Hill Co. v. United States Fidelity, etc., Co.*, (1914) 265 Ill. 534, 107 N. E. 194.

**The title to the property of the alleged bankrupt remains in him until adjudication**, subject to the control of the court, to be exercised either by a receiver or the marshal, if otherwise the interests of the creditors are not sufficiently protected. *Marcello v. Concordia Fire Ins. Co.*, (1912) 234 Pa. St. 31, 82 Atl. 1090, 39 L. R. A. (N. S.) 366.

**Who are "parties in interest."**—This clause does not limit the right to apply for the appointment of a receiver to any one or more of the petitioning creditors, but provides that any party in interest may make application for such appointment. This would necessarily include any creditor who has a provable debt against the bankrupt that would be affected by his discharge in bankruptcy, whether he be one of the petitioning creditors or not. *T. E. Hill Co. v. United States Fidelity, etc., Co.*, (1914) 265 Ill. 534, 107 N. E. 194.

**Eligibility of proposed receiver.**—An assignee under a general assignment for creditors is not ineligible for appointment as a receiver by the Bankruptcy Court. *In re John A. Etheridge Furniture Co.*, (1899) 92 Fed. 329, where under the circumstances of the case such assignee was appointed a receiver.

**Bond required.**—A court of bankruptcy is authorized to appoint a receiver to take possession of the property of one against whom a petition in involuntary bankruptcy has been filed, and is pending, only upon the giving of a bond by the petitioners therefor, as required by section 3e. *Beach v. Macon Grocery Co.*, (5th Cir. 1902) 116 Fed. 143, 53 C. C. A. 463, 8 Am. Bankr. Rep. 751; *In re McKane*, (E. D. N. Y. 1907) 152 Fed. 733, 18 Am. Bankr. Rep. 594. And see section 3e, and the annotation thereunder, *infra*.

**Appointment not subject to collateral attack.**—Where claimants instituted proceedings, in the nature of a replevin suit, against a bankrupt's receiver to recover personal property, their only claim to relief depending on their ownership or right of possession of the property which the receiver had seized, it was held that

they could not in such proceeding collaterally attack the official status of the receiver or the regularity of the proceedings leading to his appointment. *Ross v. Stroh*, (3d Cir. 1908) 165 Fed. 628, 91 C. C. A. 616, 21 Am. Bankr. Rep. 644. See also *In re Isaacson*, (2d Cir. 1909) 174 Fed. 406, 98 C. C. A. 614, 23 Am. Bankr. Rep. 98.

**Receiver entitled to possession of property.**—Bankruptcy proceedings properly instituted vest the court of bankruptcy with exclusive jurisdiction to administer the estate of the bankrupt, and oust the jurisdiction of a state court which has appointed a receiver in insolvency proceedings; and the receiver appointed by the court of bankruptcy is entitled to possession of the property. *In re Lengert Wagon Co.*, (S. D. N. Y. 1901) 110 Fed. 927, 6 Am. Bankr. Rep. 535.

But under the rule of comity between federal and state courts, a receiver appointed by a court of bankruptcy will be required to apply to a state court for an order requiring its receiver to turn over the property of the bankrupt. *In re Lengert Wagon Co.*, (S. D. N. Y. 1901) 110 Fed. 927, 6 Am. Bankr. Rep. 535. And see generally the annotation under section 23b, *infra*.

**Effect of collusion in appointment of receiver.**—Where receivers, the appointment of whom is prayed for in a petition in bankruptcy against a corporation, were in fact selected by the alleged bankrupt and named at its instance, they will not be appointed; or, if such facts are shown after their appointment, they will be removed; but the court is not required, because of such unsuccessful collusion, to dismiss the petition in favor of one filed by other creditors; and, where it is otherwise sufficient, the adjudication may be made thereon. *Birmingham Coal, etc., Co. v. Southern Steel Co.*, (N. D. Ala. 1908) 160 Fed. 212, 20 Am. Bankr. Rep. 151.

**Attorney for receiver.**—Where a debtor is declared a bankrupt at the instance of a creditor, and a receiver is appointed, the attorney for such petitioning creditor should not be employed as attorney for the receiver. *In re Strobel*, (2d Cir. 1908) 160 Fed. 916, 88 C. C. A. 98, 20 Am. Bankr. Rep. 22.

The general rule is that a receiver may not employ the solicitor of either of the parties to the suit in which he is appointed. But it is only when the receiver is acting adversely to one of the parties that there is any impropriety in his employing the counsel of the other. *In re Smith*, (C. C. A. 6th Cir. 1913) 203 Fed. 369, wherein the court said: "In *Keyes v. McKerrow*, 180 Mass. 261, 62 N. E. 259, it was held that, in the absence of a rule of court forbidding such employment, a trustee in bankruptcy might lawfully employ the bankrupt's attorney in the collection of debts, on the ground that there

were no conflicting interests between the bankrupt and the trustee in that matter. In the instant case the referee states that it has been the uniform practice in the district, since the present Bankruptcy Act was passed, 'to permit the attorneys for the petitioning creditors or the attorney for other creditors to act as attorney for the receiver or trustee, except in those cases where such attorneys represent creditors whose interests are adverse or contrary to the interest of the general creditors'; and the district judge states that 'the practice has been to allow attorneys for creditors to advise the trustee.' The effect of these statements of the referee and judge as to the practice is not overthrown by the decision of the former district judge in *Re Columbia Iron Works*, (D. C.) 142 Fed. 234, in which, on review of a selection of counsel previous to the performance of services, a conclusion was reached opposed to the propriety of the appointment here in question. The district judge, in deciding the instant case, said: 'In the absence of a rule or decision distinctly forbidding it, it would be unjust to put such rule into force and give it retroactive effect.' We cannot disturb this conclusion."

**Appointment must be necessary for preservation of estate.**—Receivers in bankruptcy are necessary, and should be appointed, only when the preservation of the estate demands their intervention. *Sprague v. L. D. Margolis Co.*, (D. C. Mass. 1913) 211 Fed. 171, wherein the court held that a receiver would not be appointed simply for the purpose of getting evidence; *Guaranty Title, etc., Co. v. Pearlman*, (W. D. Pa. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461; *Faulk v. Steiner*, (5th Cir. 1908) 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623; *Dunlap Hardware Co. v. Huddleston*, (5th Cir. 1909) 167 Fed. 433, 93 C. C. A. 69, 21 Am. Bankr. Rep. 731; *In re Oakland Lumber Co.*, (2d Cir. 1909) 174 Fed. 634, 98 C. C. A. 388, 23 Am. Bankr. Rep. 181; *In re Desrochers*, (N. D. N. Y. 1911) 183 Fed. 991; *In re Standard Cordage Co.*, (S. D. N. Y. 1910) 184 Fed. 156; *In re Desrochers*, 25 Am. Bankr. Rep. 703.

The words "absolutely necessary," as used in section 2 (3), require clear, positive, and certain proof of necessity. *In re Oakland Lumber Co.*, (2d Cir. 1909) 174 Fed. 634, 98 C. C. A. 388, 23 Am. Bankr. Rep. 181.

**Danger of waste, despoilment, or misappropriation necessary.**—The property of a bankrupt should not be taken out of his control before adjudication unless it clearly appears either that the property is perishable, or that it is apt to become wasted, despoiled, or misappropriated. *In re Standard Cordage Co.*, (S. D. N. Y. 1910) 184 Fed. 156.

Thus it has been held that where a bankrupt's property was in the hands of

an assignee for the benefit of creditors, and it was not claimed that it was being dissipated or improvidently cared for, or that the assignee was not careful, prudent, or responsible, an *ex parte* order appointing a receiver was erroneous. *In re Oakland Lumber Co.*, (2d Cir. 1909) 174 Fed. 634, 98 C. C. A. 388, 23 Am. Bankr. Rep. 181.

**Consent of an alleged bankrupt to the appointment of a receiver** does not authorize such appointment where it is not absolutely necessary for the preservation of the estate. *Faulk v. Steiner*, (5th Cir. 1908) 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623.

**Notice.**—The statute does not provide for the giving of notice of the appointment, or application for the appointment, of a receiver to take charge of the bankrupt's property, when necessary for its preservation; therefore it has been held that such appointment is valid whether notice be given or not. But, in accordance with the general tenor of the Bankruptcy Law, it has also been held that notice of the appointment, or of the application for the appointment, should be given in all cases if possible. *Ross-Meehan Foundry Co. v. Southern Car, etc., Co.*, (W. D. Tenn. 1903) 124 Fed. 403, 10 Am. Bankr. Rep. 624; *In re Francis*, (E. D. Pa. 1905) 136 Fed. 912, 14 Am. Bankr. Rep. 676; *Latimer v. McNeal*, (3d Cir. 1906) 142 Fed. 451, 73 C. C. A. 567, 16 Am. Bankr. Rep. 43; *Faulk v. Steiner*, (5th Cir. 1908) 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623; *In re Abrahamson*, (D. C. N. Y. 1898) 1 Am. Bankr. Rep. 44.

The appointment of a receiver for the property of an alleged bankrupt, either with or without notice, is not in violation of the Constitution, as depriving the defendant of his property without due process of law. *Latimer v. McNeal*, (3d Cir. 1906) 142 Fed. 451, 73 C. C. A. 567, 16 Am. Bankr. Rep. 43. *Contra*, possibly, if made without notice. *Ross-Meehan Foundry Co. v. Southern Car, etc., Co.*, (W. D. Tenn. 1903) 124 Fed. 403, 10 Am. Bankr. Rep. 624.

**As a general rule, however, it is necessary that notice shall be given** the alleged bankrupt, before the appointment of a receiver shall be made, except (1) where the defendants or parties in interest have absconded, or are beyond the jurisdiction of the court, or cannot be found; (2) where there is imminent danger of loss or great damage, or irreparable injury, or the gravest emergency, or when by notice the very purpose of a receiver may be rendered wholly nugatory, as where the property may be removed without the jurisdiction of the court, or it is being collected, and the proceeds wrongfully appropriated. In such cases the court will lay its hand upon the property, through the appointment of a receiver, for the purpose of maintaining the *status quo* until the issues may be

determined as to the right of ownership. *In re Francis*, (E. D. Pa. 1905) 136 Fed. 912, 14 Am. Bankr. Rep. 676.

The receiver or marshal is only a custodian or caretaker of the visible property of the estate, and cannot exercise the general powers conferred upon the trustee. *Boonville Nat. Bank v. Blakey*, (C. C. A. 7th Cir. 1901) 107 Fed. 891; *In re Kleinhans*, (1902) 113 Fed. 109.

"Receivers should allow bankrupts only a reasonable time in which to try to effect a settlement or a composition. Usually a month is enough." *In re Tisch*, (S. D. N. Y. 1912) 202 Fed. 1018, where, however, under the circumstances, the rent for a long time of premises occupied by the bankrupt was ordered to be paid by the trustee and not charged to the receiver.

**Receiver's powers and duties in general**—**Custodian of property.**—A temporary receiver of a bankrupt is merely a custodian of the estate, with authority to inventory and receive and retain all of the bankrupt's assets; the purpose of his appointment being only to protect the property from dissipation and loss until it is ascertained that there is a bankrupt's estate to be administered. *Boonville Nat. Bank v. Blakey*, (7th Cir. 1901) 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13; *In re Kolin*, (7th Cir. 1905) 134 Fed. 557, 67 C. C. A. 481, 13 Am. Bankr. Rep. 531; *Guaranty Title, etc., Co. v. Pearlman*, (W. D. Pa. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461; *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566; *In re Leonard*, (D. C. Nev. 1910) 177 Fed. 503, 24 Am. Bankr. Rep. 97.

The receiver in bankruptcy is but a custodian, without title, for the purpose of preservation, and not for the purpose of distributing the estate. But he is entitled to take custody of whatever is plainly the property of the bankrupt and against which no third party makes any claim with color of title. *In re Michaelis*, (S. D. N. Y. 1912) 196 Fed. 718.

A receiver has no power to appoint a custodian and if he does so appoint, and the custodian was unnecessary, the custodian's fees are properly chargeable to him. *In re Tisch*, (S. D. N. Y. 1912) 202 Fed. 1018, wherein the court said: "I think, also, that the receiver should be charged with the custodian's fees. There was no need of custodians. The bankrupt's assets consisted of a small lot of jewelry worth about \$1,200, a large safe, and some showcases. The assets might have been put in the safe and the safe locked; or if, for any reason, it was deemed objectionable to leave them in the safe, they could have been stored at slight expense. Apparently the custodian's services consisted in watching the safe and the showcases, but there could not have been much danger of burglars stealing them. If the custodians have rendered the service, they

should be paid by the trustee, but the amounts paid should be charged to the receiver. Some receivers seem to suppose that custodians are to be employed in every case. They are not required in most cases. If a receiver takes the same care of the assets that a prudent man takes of his property, that is ordinarily enough."

"It is the immediate duty of the receiver of the property to preserve the estate intact, and to conserve the assets and estate of the bankrupt, pursuing that course pointed out by the Act which will best promote and further the interests of the creditors." *In re Kleinhans*, (1902) 113 Fed. 107.

**Duty to turn over assets to trustee.**—It seems to be a common practice for receivers not to turn over assets in their hands to a trustee until their accounts are passed and they are discharged, but there is no reason for such a practice. It is important that dividends be declared to creditors as soon as there are sufficient funds for that purpose. A receiver may properly retain a sufficient sum to cover the probable expenses of the receivership, but any surplus should be immediately turned over to the trustee as soon as he is appointed, in order that an immediate dividend may be declared. *In re College Clothes Shop*, (S. D. N. Y. 1911) 192 Fed. 80.

"Sales by receivers are justified only when property is perishable or is rapidly depreciating in value on a falling market or for other reasons. No bankrupt estate should be charged with the expense of such a proceeding except in case of plain necessity." *In re Desrochers*, (N. D. N. Y. 1911) 183 Fed. 991.

"After a receiver has once gone into possession, it may become necessary to sell the property for the very purpose of preserving it, or its value . . . in whole or in part. In such event, I think the court has ample power to order or confirm a sale, either under the power to preserve implied by clause 3 itself, or under clause 7 of the same section, which empowers the court to 'cause the assets of bankrupts to be collected, reduced to money and distributed.'" *Per McPherson, D. J., in In re Becker*, (1899) 98 Fed. 407.

In *In re Peerless Furnishing Co.*, (S. D. N. Y. 1912) 199 Fed. 350, the facts were held to warrant the confirmation of a receiver's sale.

**Authority to act outside of district.**—Section 2 (3) contains nothing which authorizes the court to confer upon a receiver, appointed thereunder, who is not vested with title to the bankrupt's property, the power to exercise his official functions in respect to such property in any other district; and, under the general rule governing courts of equity and their receivers appointed in creditors' suits, such receiver has no authority to act officially

outside of the district of his appointment. *In re Benedict*, (E. D. Wis. 1905) 140 Fed. 55, 15 Am. Bankr. Rep. 232. See also *infra*, this page, cases cited under paragraph *Suits outside of district*.

**Right to examine books and papers.**—Where it is alleged that the bankrupt's stock of goods has been sold by him to a certain corporation without any adequate consideration, the sale being induced by the fraud of the vendee, a receiver of the bankrupt's estate has the right, under process from the court of bankruptcy, to examine any books or documents of such corporation showing or tending to show its receipt or disposition of said stock, or in any other way relating thereto. *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822. See also the annotations under sections 7a (9) and 21a, *infra*.

**Duty to furnish statements from bankrupt's accounts.**—Where a corporation defendant, in a suit for infringement of a patent, was adjudged a bankrupt, and a receiver appointed for its property, after an interlocutory decree against it and a reference for an accounting as to damages and profits, it was held that the receiver could not be required to prepare a statement of profits for use before the master from the company's books, or to render any other active assistance to the complainant at the expense of the estate, unless he elected to become a party to the suit; but that he might be required by subpoena to produce the books before a master. *American Graphophone Co. v. Leeds, etc., Co.*, (S. D. N. Y. 1909) 174 Fed. 158, 23 Am. Bankr. Rep. 337.

**Power to adjust claims.**—Receivers, prior to adjudication, are in no condition to adjust claims, liquidated or unliquidated, and have no power to do so. They may not compromise claims or admit or reject them. They cannot properly defend, or, if they do, cannot act intelligently, as their office is of short duration, and their province is to care for and protect or preserve the property, not to defend suits. *In re Heim Milk Product Co.*, (N. D. N. Y. 1910) 183 Fed. 787.

**Right of receiver to maintain suits.**—It has been held that a receiver, appointed under section 2 (3) for the preservation of the bankrupt's property, has no authority to maintain a suit to set aside a preferential or fraudulent transfer. *Boonville Nat. Bank v. Blakey*, (7th Cir. 1901) 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13, where, however, the court said: "We do not say that the receiver may not by suit or otherwise assert or defend his possession of the visible property which the law has placed in his custody." *Guaranty Title, etc., Co. v. Pearlman*, (W. D. Pa. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461.

But in *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822, it

was held that the court has jurisdiction, in appointing such receiver, to authorize him to institute all necessary actions at law or in equity for the recovery of the bankrupt's property.

**Suits outside of district.**—It has been held that a receiver in bankruptcy, under an order to collect and take possession of all the assets of an alleged bankrupt, is not authorized to bring suits in a district other than the one in which he was appointed. *In re Dunseath, etc., Co.*, (W. D. Pa. 1909) 168 Fed. 973, 22 Am. Bankr. Rep. 75, following *In re National Mercantile Agency*, (E. D. Pa. 1904) 128 Fed. 639, 12 Am. Bankr. Rep. 189.

**Ancillary suit.**—In *In re Tygarts River Coal Co.*, (N. D. W. Va. 1913) 203 Fed. 178, the court said: "I do not think the temporary receivers appointed in bankruptcy, pending the election of a trustee, have such interest in the controversy as warrants them to institute in this court of different jurisdiction an ancillary proceeding to secure its aid in confirming their appointment and securing for them the custody of property in this district. Their appointment is merely temporary; they are presumed to be wholly disinterested parties, not creditors, directors, stockholders, officers of, or in any way interested in the affairs of the bankrupt; therefore such ancillary proceeding cannot in my judgment be instituted by them."

But see *In re Dempster*, (8th Cir. 1909) 172 Fed. 353, 97 C. C. A. 51, 22 Am. Bankr. Rep. 751, wherein it was held that a receiver in bankruptcy, appointed under section 2 (3), is charged with the duty of preserving the property of the bankrupt, and to that end, where property is situated at a distance from the court of his appointment, and is in danger of being dissipated through sales by judgment creditors, which would cause irreparable damage to the estate before he can apply to that court, he may maintain any plenary suit or action necessary for its protection in the district where the property is situated. And see section 2 (20), *infra*.

A petition in involuntary bankruptcy having been filed against an absconding debtor, and a receiver having been appointed by the Bankruptcy Court to take charge of the debtor's property within its territorial jurisdiction, the court will not, before the adjudication in bankruptcy has been made, order the receiver to enter suit in another state, in order to get possession of the bankrupt's property there situate; the proper course to pursue being "for the petitioning creditors to take proceedings in the proper court, state or federal, . . . in their own name, setting up the proceedings now pending in bankruptcy . . . as the basis of their action," and asking to have their rights as to property situate in that jurisdiction duly protected by injunction, the appointment of a

receiver, or any other appropriate remedy. *In re Schrom*, (1899) 97 Fed. 760.

**Injunction in aid of receivership.**—Before the qualification of a receiver appointed to take charge of the bankrupt's goods summary proceedings were instituted in a state court by the lessors of the bankrupt to recover premises which had been leased and which contained the said goods, no possession, however, having been obtained before such qualification. It was held that the receiver was entitled to an injunction restraining such summary proceedings. *In re Kleinhans*, (1902) 113 Fed. 107.

**Remedy of adverse claimant.**—The receivers or the marshals cannot forcibly seize property in the possession of an adverse claimant. *Per Gray, J.*, in *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 538, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175; *per Rogers, D. J.*, in *In re Bender*, (1901) 106 Fed. 877. But where the bankrupt peaceably surrenders property in his possession the court will not on special appearance and summary motion by an adverse claimant deliver it to the latter. *In re Bender*, (1901) 106 Fed. 873, holding that the claimant must resort to a plenary action in some court of competent jurisdiction, or intervene in the Bankruptcy Court and submit himself to its jurisdiction.

**Liability of receiver.**—A receiver who contracts beyond his powers makes himself individually liable. *In re Kalb, etc., Mfg. Co.*, (2d Cir. 1908) 165 Fed. 895, 97 C. C. A. 573, 21 Am. Bankr. Rep. 393.

A receiver in bankruptcy for a railroad contractor, who continues the work under a contract, by paying the employees of a subcontractor who has abandoned the work the wages due them, less the amounts they owe for supplies, which it was the custom of the subcontractor to withhold and pay to the petitioner, does not incur any liability to the petitioner for the amounts due him, where the receiver is not indebted to the subcontractor, but pays the men to avoid delay in the work, and the filing of liens. *In re Ferguson Contracting Co.*, (C. C. A. 2d Cir. 1911) 187 Fed. 940.

**Necessity of leave to sue receiver.**—The Act of March 3, 1887, ch. 373, § 3, 24 Stat. L. 554, and Act of Aug. 13, 1888, ch. 866, § 3, 25 Stat. L. 436, in title JUDICIARY, which authorize a receiver appointed by a federal court to be sued without previous leave of such court "in respect of any act or transaction of his in carrying on the business connected with" the property in his charge apply to receivers in bankruptcy, but do not authorize a suit without leave against such receiver unless he is carrying on the business of the bankrupt, or in respect to his acts relating merely to the care and preservation of the property of the estate. *In re Kalb, etc., Mfg. Co.*, (2d Cir. 1908) 165 Fed. 895, 91 C. C. A. 573, 21 Am. Bankr. Rep. 393.

**Restraining suits against receivers.**—Where a receiver in bankruptcy acts as an officer of the court in the administration of the estate, the Bankruptcy Court has jurisdiction to determine the validity of his acts, even to the extent of preventing an action at law by one who is raising no question and relying on no right which is not within the jurisdiction of the Bankruptcy Court in the bankruptcy proceeding, the parties being the same; but such court has no jurisdiction to prevent maintenance of an action against the receiver to enforce a liability *in personam* against him for acts done beyond the scope of his authority. *In re Spechler*, (E. D. N. Y. 1911) 185 Fed. 311.

**Surcharge on accounting.**—In *In re Reliable Bottle Box Co.*, (E. D. N. Y. 1912) 199 Fed. 670, a motion was granted for an order compelling a former receiver to pay \$1,583.40, with which his account was surcharged, and also to punish him for contempt for failure to obey a subsequent order to pay at once three items included in the account.

**Compensation.**—The compensation of receivers or marshals, appointed under section 2 (3), is regulated, since the enactment of the amendment of June 25, 1910, by section 48d.

**Receiver entitled to protection as to expenses and services.**—The receiver, upon appointment and acceptance, becomes the officer and hand of the court in the performance of his duties, neither subject to the wishes or directions of the parties, nor dependent upon the result of the controversy for the payment of his expenses or services; and he is clearly entitled to protection by the court, in the exercise of such jurisdiction, for all expenses rightly incurred and services rendered under its orders, either in allowances out of the funds committed to his charge, or through provision otherwise made by the court to that end. *In re T. E. Hill Co.*, (7th Cir. 1907) 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73.

A court of bankruptcy may enforce an order requiring petitioning creditors to pay the expenses of a receivership, procured by them, by proceedings in contempt. *In re Lacov*, (2d Cir. 1906) 142 Fed. 960, 74 C. C. A. 130, 15 Am. Bankr. Rep. 290.

**Termination of receivership.**—The functions of the receiver, as between the parties in interest, cease with the final termination of the petition for adjudication. The receiver is still amenable to the court, however, and his functions do not entirely cease until he has been expressly discharged by order of the court. *T. E. Hill Co. v. United States Fidelity, etc., Co.*, (1914) 265 Ill. 534, 107 N. E. 194.

"Accounts of marshal" are required and the contents thereof prescribed in General Order No. XIX.

(4) **[Try and punish bankrupts, etc.]** arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; [(1898) 30 Stat. L. 545.]

As to

Offenses generally, see the several subdivisions of section 29.

Jury trial, see section 19c.

(5) **[Permit temporary transaction of business.]** authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight of this Act; [(amended 1903 and 1910, both acts excepting pending cases) 32 Stat. L. 797 and 36 Stat. L. 838.]

This clause as originally enacted read as follows:

"(5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates;" [30 Stat. L. 546.] The amendatory Act of 1903 made it read as follows: "(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this Act allowed trustees for similar services." [32 Stat. L. 797.] The Act of 1910 made it read as in the text.

**A referee should obtain the sanction of the judge before authorizing the continuance of a bankrupt's business,** where such business is of considerable magnitude. *Bray v. Johnson*, (4th Cir. 1908) 166 Fed. 57, 91 C. C. A. 643, 21 Am. Bankr. Rep. 383.

**Order to continue business.**—An order authorizing a receiver in bankruptcy to continue the business of the bankrupt for a limited time is largely discretionary, and cannot be collaterally attacked. *In re Isaacson*, (2d Cir. 1909) 174 Fed. 406, 98 C. C. A. 614, 23 Am. Bankr. Rep. 98.

**Power to borrow money to continue business.**—A receiver who is authorized to conduct a business, for the successful conduct of which the extension of credit and borrowing of money is necessary and customary, has the implied power to purchase on credit, and even to borrow money. Such a power will be implied, however, only in the absence of an express power to borrow conferred by the court. *In re Burkhalter*, (N. D. Ala. 1910) 182 Fed. 353.

**Receivers' certificates.**—To continue the business of bankrupts by receivers, courts of bankruptcy have implied power to authorize the issuance of receivers' certificates to provide the funds necessary for operating expenses. *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; *In re Restein*, (E. D. Pa. 1908) 162 Fed. 986, 20 Am. Bankr. Rep. 832.

**Trustees' certificates.**—In a case where the compensation which a receiver was entitled to receive upon funds handled through the bankrupt's trustees in conducting the business was ordered to be continued by the referee, the court said: "The courts are authorized to continue the business of bankrupts, and this referee exercised this authority, which, in passing, it may be said as to a transaction of this magnitude, without the express sanction of the court, was of exceedingly doubtful propriety, and the issuance of trustees' certificates for \$75,000, or indeed for any amount, assuming it should be done in a bankruptcy case at all, ought manifestly not to be thought of by a referee. The temptation, if a referee could thus increase his compensation, to err, would be too great. Serious questions involving his personal interest, upon which he would have judicially to pass, would be continually presented, and the result of such a system would soon be disastrous, and bring the courts of bankruptcy into disrepute." *Bray v. Johnson*, (4th Cir. 1908) 166 Fed. 57, 91 C. C. A. 643, 21 Am. Bankr. Rep. 383.

**Compensation.**—Since the amendatory Act of 1910 enacting section 2 (5) in its present form, the compensation of trustees, marshals, or receivers, where the business of the bankrupt is conducted by them, is regulated by section 48e.

Section 2 (5) does not vest the court with power to fix the compensation of a

trustee in advance for services to be rendered in the future. *In re Willis W. Russell Card Co.*, (D. C. N. J. 1909) 174 Fed. 202, 23 Am. Bankr. Rep. 300.

"Under the original Act of 1898, a receiver's compensation was not limited by statute, but only by the discretion of the court, like that of a receiver in equity.

*In re Scott*, (1900) 99 Fed. 404; *In re Adams Sartorial Art Co.*, (1900) 101 Fed. 215." *Per* Lowell, J., in *In re Cambridge Lumber Co.*, (1905) 136 Fed. 983, in which case and in *In re Richards*, (1903) 127 Fed. 772, the compensation to which a receiver was entitled under section 2 (5) as amended in 1903 was determined.

(6) [Substitute additional parties.] bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; [(1898) 30 Stat. L. 546.]

**Bringing in a party.**—It was held that, under the authority of this clause, the Bankruptcy Court had power to bring in a purchaser from the bankrupt's assignee in insolvency, in order to settle the equities in respect to the property purchased or the money paid therefor, where the purchase was made before any trustee was appointed; but after and with full knowledge of the petition in bankruptcy. *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814.

A nonresident alleged member of a partnership was brought into the case of *In re Schwartz*, (E. D. N. Y. 1913) 204 Fed. 326, a case of adjudication against other members of the firm individually and as partners.

Section 2 (6) does not confer plenary

jurisdiction of civil actions, at law and in equity, to determine title to and reduce to possession alleged assets of a bankrupt, since section 23 of the Act is intended to define the jurisdiction of such courts over suits of that character. *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175, 4 Am. Bankr. Rep. 163, decided prior to the amendment of sections 23b, 60b, 67e and 70e, giving bankruptcy courts jurisdiction of certain suits by the trustee.

The test of jurisdiction to determine matters in controversy between third persons is the necessity of doing so in order to administer the estate. *In re Hobbs*, (N. D. W. Va. 1906) 145 Fed. 211, 16 Am. Bankr. Rep. 544.

(7) [Collect and distribute assets.] cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; [(1898) 30 Stat. L. 546.]

As to

Collection and reduction of assets, see section 47a (2).

Determining validity of liens, see the several subdivisions of section 67.

Jurisdiction of referees, see the several subdivisions of section 38.

Jurisdiction over adverse claimants and determination of controversies, see sections 23 a and b, and the last division of the first note to section 70a.

Recovery of voidable preferences, see section 60b.

Recovery of fraudulent transfers within the four-months period, see section 67e.

Recovery of transfers in fraud of creditors generally, see section 70e.

Sale of property, see section 47a (2), and section 70b.

**Causing estates to be collected.**—The Bankruptcy Court has power in a proper case to order an assessment on stockholders of a bankrupt corporation for unpaid subscriptions to the capital stock, and the stockholders are not necessary parties in an application to levy an assessment.

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*In re Miller Electrical Maintenance Co.*, (1901) 111 Fed. 515, citing *Sanger v. Upton*, (1875) 91 U. S. 56, 23 U. S. (L. ed.) 220, to the point that a similar jurisdiction was exercised under the Bankruptcy Act of 1867. See also *In re Crystal Spring Bottling Co.*, (1899) 96 Fed. 945.

**Jurisdiction to "determine controversies," in general, etc.**—For a full discussion of the subject, see *infra*, notes to section 2 (15) and section 23b.

The jurisdiction of courts of bankruptcy to determine controversies under section 2 (7) depends upon "(1) whether the controversy is one having reference to property actually in the possession of the bankruptcy court or belonging to the bankrupt's estate; or (2) whether it arises in the bankruptcy proceeding, and the property in question, therefore, becomes subject to distribution to creditors; or (3) whether, by the nature of the controversy, power is conferred on the court to determine as to conflicting liens and apportion assets." *Per* Hazel, J., in *In re Kellogg*, (W. D. N. Y. 1902) 113 Fed. 120, 7 Am. Bankr. Rep. 623.

District Courts of the United States, as courts of bankruptcy, have jurisdiction to entertain and determine all suits brought by trustees in bankruptcy which are necessary for collecting, reducing to money, and distributing the estates of bankrupts, and for determining controversies in relation thereto, except such as are otherwise provided for in the Bankruptcy Act. *In re Sievers*, (E. D. Mo. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117; *In re McCallum*, (E. D. Pa. 1902) 113 Fed. 393, 7 Am. Bankr. Rep. 596.

"The utmost effect that can be given to clause 7 of section 2 is to authorize jurisdiction of such controversies between a trustee and an adverse claimant of the bankrupt's property as the trustee is not compelled by section 23 to bring in the state court." *In re Baudouine*, (C. C. A. 1900) 101 Fed. 574.

The concluding words, "except as herein otherwise provided," refer to the provisions of section 23 *a* and *b*, limiting the jurisdiction of Bankruptcy Courts. *Bryan v. Burnheimer*, (1901) 181 U. S. 194, 21 S. Ct. 557, 45 U. S. (L. ed.) 814; *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 535, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175. See also *In re Kellogg*, (1902) 113 Fed. 124; *In re Woodbury*, (1900) 98 Fed. 836; *Pepperdine v. Headley*, (1900) 98 Fed. 864; *Carter v. Hobbs*, (1899) 92 Fed. 599.

The exception referred to in clause (7) is contained in the provision of section 23, which relates to suits against adverse claimants. *In re Alexander*, (N. D. Ohio 1911) 193 Fed. 749.

**Determination of extent of liens and of rights thereunder.**—"The broad powers conferred by section 2 (7) of the Bankruptcy Act authorize a bankruptcy court to cause the estate of a bankrupt to be collected, reduced to money, and distributed, to determine controversies in relation thereto, and to bring in and substitute additional parties whenever necessary for the complete determination of a matter in controversy. When property has thus become subject to a bankruptcy court, jurisdiction exists to pass upon questions relating to the disposition of the property, and to determine the extent and character of liens thereon, or rights therein." *In re National Boat, etc., Co.*, (D. C. Me. 1914) 216 Fed. 208.

Section 2 (7) is qualified by the provisions in section 67*d* concerning liens, and section 57*h* concerning the method of ascertaining the value of securities held by creditors. *In re Browne*, (1900) 104 Fed. 762.

**Property in the physical possession of the bankrupt** is within the jurisdiction of Bankruptcy Court, to administer it as assets of the estate, and to determine all claims to the property. *Hebert v. Crawford*, (1913) 228 U. S. 204, 33 S. Ct. 484, 57 U. S. (L. ed.) 800.

**Where property is in possession of the Bankruptcy Court** as assets of the estate, that court has jurisdiction to determine a right thereto claimed by one who has subsequently levied thereon under state process. *In re Lemmon, etc., Co.*, (C. C. A. 1901) 112 Fed. 296.

**Controversy between trustees.**—The right to determine ownership of a fund claimed by the trustee of two different estates and to distribute it to one set of creditors or the other is necessarily vested in the court of bankruptcy. *In re Rosenberg*, (1902) 116 Fed. 402.

**Intervention by claimants.**—The owner of property in the custody of an officer of the Bankruptcy Court may intervene and obtain an order for its return to him. *In re Whitever*, (C. C. A. 1900) 105 Fed. 180; *Fisher v. Cushman*, (C. C. A. 1900) 103 Fed. 860; *In re Kindt*, (1900) 101 Fed. 107. See also *In re Todd*, (1901) 109 Fed. 265; *In re Durham*, (1900) 104 Fed. 231. And see the last division of the first note to section 70*a*.

*In Bloomingdale v. Empire Rubber Mfg. Co.*, (1902) 114 Fed. 1016, the court ordered that certain property which the bankrupt had obtained by fraud and had secreted, should be returned to the parties from whom he obtained it.

But if the claimant's title is disputed he will be remitted to a plenary action in some court of competent jurisdiction. *In re Bender*, (1901) 106 Fed. 873.

**One who claims a superior right to a fund** about to be distributed by the District Court in bankruptcy should present his claim to that court for determination, though the amount claimed be less than the jurisdictional amount required for a suit in the federal courts. *In re McCallum*, (1902) 113 Fed. 393, where leave to sue the trustee in bankruptcy in the state court was denied.

**A sale of the bankrupts' property** made by an assignee to the bankrupts' wives, the proceeds of the sale being thereafter paid over to the trustee in bankruptcy, appearing by satisfactory evidence to be voidable, nevertheless, after the property had been resold, and by reason of lapse of time it appeared doubtful whether the vacation of the sale and a suit for an accounting rendered necessary thereby would result in benefit of the estate, the Bankruptcy Court refused to vacate the sale on behalf of the creditors unless they gave a bond to indemnify the trustee for any prospective loss to the estate. *In re Finlay*, (1900) 104 Fed. 675.

**Exclusive jurisdiction to distribute.**—The assets of a bankrupt which are in the custody of the Bankruptcy Court are distributable under its order alone, and are not subject to a levy by a sheriff on a judgment against the trustee. *In re Neely*, (1901) 108 Fed. 371, granting a restraining order against such levy.



As to declaration and payment of dividends, see notes to section 65.

The distribution of the bankrupt's estate is controlled by the provisions of the

Act of Congress, and its interpretation is ultimately a matter for federal determination. *In re York Silk Mfg. Co.*, (M. D. Pa. 1911) 188 Fed. 735.

(8) [Close estates.] close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; [(1898) 30 Stat. L. 546.]

**Closing estate.**—"It is the duty of the courts to close estates as soon as practicable." *Per Baker, D. J.*, in *In re Stein*, (1899) 94 Fed. 125. And see as to the duty of the trustees in that behalf, *infra*, section 47a (2).

As expressly stated in clause (8) an estate is closed when the final account is approved and all the funds are distributed. *Kinder v. Scharff*, (1911) 129 La. 218, 55 So. 769.

In *In re Carr*, (1902) 116 Fed. 556, final settlement was refused on account of the inadequate records kept by the bankruptcy officers, although the court had no suspicion that funds had been misapplied.

**Reopening of estate — In general.**—Under section 2 (8) a court of bankruptcy may, upon a proper showing, reopen estates whenever it appears that they were closed before they were fully administered; thus estates may be reopened on the discovery of additional assets, or for the purpose of correcting schedules, or where the interest of justice requires it. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728; *In re Paine*, (W. D. Ky. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351; *Clark v. Pidcock*, (3d Cir. 1904) 129 Fed. 745, 64 C. C. A. 273, 12 Am. Bankr. Rep. 309; *In re Barton*, (W. D. Ark. 1906) 144 Fed. 540, 16 Am. Bankr. Rep. 569; *In re Ryburn*, (D. C. Conn. 1906) 145 Fed. 662, 16 Am. Bankr. Rep. 514; *In re McKee*, (E. D. N. Y. 1908) 165 Fed. 269, 21 Am. Bankr. Rep. 306; *In re Pierson*, (S. D. N. Y. 1909) 174 Fed. 160, 23 Am. Bankr. Rep. 58; *Matter of Sonnabend*, (D. C. Mass. 1906) 18 Am. Bankr. Rep. 117.

**Existence of unadministered assets necessary.**—To authorize the court to reopen the estate of a bankrupt, it should appear by some satisfactory evidence that there are assets unadministered, although no formal or technical procedure is required. An unverified petition filed by a creditor, stating on information and belief that the wife of the bankrupt has "money or property" belonging to him, without stating its character or amount, and which is unsupported by affidavits or other evidence, is insufficient to warrant action by the court. *In re Newton*, (8th Cir. 1901) 107 Fed. 429, 46 C. C. A. 399, 6 Am. Bankr. Rep. 52.

**To recover assets.**—Where bankrupt

partners were refused a discharge after the estate in bankruptcy had been closed, on the ground that they had in their possession several thousand dollars in money which they did not schedule, and there is evidence tending to show that they have since invested such money in property in the names of other persons, creditors are entitled to have the estate reopened, to the end that proceedings may be instituted to recover such property for their benefit. *In re Barton*, (W. D. Ark. 1906) 144 Fed. 540, 16 Am. Bankr. Rep. 569.

Where it appears that certain property had been transferred by the bankrupt, prior to his adjudication; that it was omitted from his schedules and had no part in the settlement of his estate; and that since such settlement facts have been discovered which lead creditors to believe that the transfer was fraudulent, an order reopening the estate is warranted. *In re Ryburn*, (D. C. Conn. 1906) 145 Fed. 662, 16 Am. Bankr. Rep. 514.

**To administer new assets.**—After an estate had been closed and the voluntary bankrupt discharged, he filed a supplementary petition with additional schedules, setting forth the reasons why they had been previously omitted. It was held that the court might reopen the proceedings in order that the new assets might be administered for the benefit of creditors who had established their claims in the prior proceedings according to the Act; but that the supplementary proceedings were not to affect the bankrupt's discharge granted more than a year prior thereto, nor was a creditor who had omitted to prove his claim in such prior proceedings to have any status in the subsequent proceedings or any right to examine the bankrupt. *In re Shaffer*, (1900) 104 Fed. 982.

In *In re Lighthall*, (N. D. N. Y. 1915) 221 Fed. 791, an estate was reopened to administer money paid on a claim subsequent to the discharge of the trustee, who had reported the claim as of no value, but had done nothing to show a purpose to abandon the claim. The court said: "The closing of the estate in bankruptcy did not operate to transfer the title of unadministered assets, the title to which had vested by operation of law in the trustee, back to the bankrupt. If such were the effect of closing the estate of a bankrupt it would be of no avail to reopen the estate when not fully administered."

*To amend schedules.*—Where the members of a partnership were adjudged bankrupts on a voluntary petition and obtained a discharge, having scheduled no assets; and at the time of the adjudication an action on promissory notes was pending against them in a state court, in which they had pleaded a counterclaim, but through inadvertence or mistake neither the notes nor the counterclaim were scheduled, it was held, that on their application, made before the expiration of the time for filing claims, the bankrupts were entitled to have the discharge set aside, and to amend their schedules by including both the creditors' claim and their counterclaim. *In re McKee*, (E. D. N. Y. 1908) 165 Fed. 269, 21 Am. Bankr. Rep. 306.

The power to reopen the estate is given in one contingency, namely, when it appears that the case was closed before being fully administered, and the court has no power to open a closed estate, so as to permit a discharged bankrupt to amend his schedule by inserting the name of a creditor omitted therefrom. *In re Sayer*, (N. D. N. Y. 1914) 210 Fed. 397; *In re Spicer*, (1906) 145 Fed. 431, 16 Am. Bankr. Rep. 802.

Amendment of schedules, see in general the note to section 7a (8).

*To remove bar against suit by trustee.*—The power to reopen estates given in this section "whenever it appears that they were closed before being fully administered" cannot be taken to include the power of the court of bankruptcy to remove the bar of section 11d at its own will simply because a trustee may have changed his mind. *Kinder v. Scharff*, (1913) 231 U. S. 517, 34 S. Ct. 164, 58 U. S. (L. ed.) 343, wherein the court said: "The question is simply whether, when, after an estate is closed, and more than two years later a trustee comes to the conclusion that he undervalued a claim that he knew of and might have sued upon, or finds that the value has risen since, the Bankruptcy Court may reopen the estate for the sole purpose of getting rid of the statute, and allowing the trustee to sue. . . . The judge had no power by an *ex parte* order reopening the estate to remove the bar that was completed, and that there was no ground for removing. Whether it be put on the construction of the Bankruptcy Act or on the ground that the estate was fully administered *quoad hoc*, or of laches on the part of the trustee, it comes to the same thing. The claim in controversy cannot be made the ground of a suit."

*Effect of reopening with respect to discharge, and proof of claims.*—Under section 2 (8) a court of bankruptcy has jurisdiction to entertain a supplemental petition filed by a voluntary bankrupt after the estate has been closed and the bankrupt discharged, setting out addi-

tional schedules of property, with one reasons for their former omission; and the court may reopen the proceedings for the purpose of administering the new assets for the benefit of creditors who proved their claims in accordance with the statute in the original proceedings. But such supplementary proceedings cannot affect the discharge of the bankrupt, where more than a year has elapsed since it was granted, nor has a creditor who failed to prove his claim in the original proceedings any standing in such supplementary proceedings, or the right to examine the bankrupt therein. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728.

*The pendency of a petition to set aside a composition* does not operate to prohibit the referee from exercising his right independently of, or in conjunction with, such application, to reopen an estate; and such reopening is not an interference with the administration of the estate. *Matter of Sonnabend*, (D. C. Mass. 1906) 18 Am. Bankr. Rep. 117.

*Who may apply for reopening.*—The application or petition to reopen estates in bankruptcy must be made by some party interested in the estate, and who would be benefited by such reopening. *In re Chandler*, (7th Cir. 1905) 138 Fed. 637, 71 C. C. A. 87, 14 Am. Bankr. Rep. 512; *In re Meyer*, (D. C. Ore. 1910) 181 Fed. 904.

Thus it has been held that where a bankrupt's estate has been closed and the bankrupt discharged, the office of trustee is thereby terminated, and the former trustee of the estate has no standing to apply to have the estate reopened for the reason that it was not fully administered. *In re Paine*, (W. D. Ky. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351.

Where claims of creditors were not proved within the time required by section 57n, such creditors have no standing to apply to have the bankrupt's estate reopened on the ground that he had fraudulently concealed assets. *In re Paine*, (W. D. Ky. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351.

*Time of making application for reopening.*—An application to reopen a bankruptcy proceeding, on the ground that it was closed before the estate was fully administered, must be made within a reasonable time. *In re Paine*, (W. D. Ky. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351.

*Doctrine of laches applicable.*—The Bankruptcy Law provides that no limitation of time within which closed estates may be reopened, and the doctrine of laches is applicable where an unreasonable delay has intervened. *Traub v. Field*, (5th Cir. 1910) 182 Fed. 622, 105 C. C. A. 488.

But the fact that more than a year has elapsed before a creditor's petition for the reopening of the estate is filed, showing

that the bankrupt died leaving assets which he had fraudulently transferred, does not deprive the court of jurisdiction to open the proceedings, and to appoint a trustee under section 44. *Clark v. Pidcock*, (3d Cir. 1904) 129 Fed. 745, 64 C. C. A. 273, 12 Am. Bankr. Rep. 309.

**Requisites of petition to reopen.**—The petition to reopen an estate once closed need not be of a formal or technical character; but "such petition must be, either

in itself or in connection with supporting affidavits, of such persuasive character as to reasonably satisfy the court of the requisite jurisdictional fact, namely, that there are some assets belonging to the bankrupt which have not been administered." *In re Newton*, (C. C. A. 1901) 107 Fed. 429, holding the petition in that case insufficient to warrant action by the court.

(9) [**Confirm or reject compositions.**] confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; [(1898) 30 Stat. L. 546.]

As to compositions generally, see sections 12 and 13.

**Jurisdiction of compositions.**—Section 13 defines exclusively the ground upon which a composition may be vacated, and operates as a limitation upon the general grant of authority in section 2 (9). *In*

*re Rudnick*, (D. C. Mass. 1899) 93 Fed. 787, 2 Am. Bankr. Rep. 114.

Section 2 (9) does not give the court power to confirm an irregular composition; such power being limited by section 12, specifying what compositions may be confirmed. *In re Frear*, (N. D. N. Y. 1903) 120 Fed. 978, 10 Am. Bankr. Rep. 199.

(10) [**Modify, etc., referee's findings.**] consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; [(1898) 30 Stat. L. 546.]

As to review of proceedings before referee, see section 38a.

(11) [**Determine exemptions.**] determine all claims of bankrupts to their exemptions; [(1898) 30 Stat. L. 546.]

As to

Exemptions generally, see section 6.

Dower and allowances for widow and children, see section 8a.

Mode of claiming exemptions, see section 7a (8).

Title to exempt property, see section 70a.

Trustee's duty with respect to exempt property, see section 47a (11).

**Determination of claims to exemption.**

—*In general.*—A court of bankruptcy, under section 2 (11), has exclusive jurisdiction to determine all claims of bankrupts to their exemptions. *McGahan v. Anderson*, (4th Cir. 1902) 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641, reversing (D. C. S. C. 1900) 103 Fed. 854, 4 Am. Bankr. Rep. 640; *In re Lucius*, (S. D. Ala. 1903) 124 Fed. 455, 10 Am. Bankr. Rep. 653; *In re McCrary*, (S. D. Ala. 1909) 169 Fed. 485, 22 Am. Bankr. Rep. 161; *In re Dobbs*, (N. D. Ga. 1909) 175 Fed. 319, 23 Am. Bankr. Rep. 569.

*The bankrupt may petition the court in relation to his claim to exemption at any time while the property is still unadministered.* *In re White*, (D. C. Vt. 1900) 103 Fed. 774, 4 Am. Bankr. Rep. 613.

**Right of mortgagee to exemption.**—A

court of bankruptcy is without jurisdiction to adjudge a bankrupt's exemption to a mortgagee, or to any one except the bankrupt. *In re Paramore*, (E. D. N. C. 1907) 156 Fed. 208, 19 Am. Bankr. Rep. 130; *In re Blanchard*, (E. D. N. C. 1908) 161 Fed. 797, 20 Am. Bankr. Rep. 422.

**Protection of exemption rights.**—The court of bankruptcy should see to it, pending a discharge, that remedies for the collection of debts, from which the discharge might absolve the debtor, shall not be perfected so as to condemn exempt property in satisfaction of debts from which the discharge is intended to free it. *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285.

**Extent of jurisdiction—Generally.**—The only question to be determined on a bankrupt's application for his exemption is whether he is entitled to such exemptions as against the general creditors; and when that question has been disposed of, and the property set apart to the bankrupt, the jurisdiction of the federal court thereover ceases. The court will not retain jurisdiction for the purpose of enforcing the rights of creditors holding claims wherein the exemption has been waived by the bankrupt, nor will it entertain proceedings

to subject the exempt property to liens, or adjudicate the rights of claimants with respect thereto. *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061, 10 Am. Bankr. Rep. 107; *In re Camp*, (N. D. Ga. 1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165; *In re Black*, (W. D. Pa. 1900) 104 Fed. 289, 4 Am. Bankr. Rep. 776; *Woodruff v. Cheeves*, (5th Cir. 1901) 105 Fed. 601, 44 C. C. A. 631, 5 Am. Bankr. Rep. 296; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *In re Swords*, (N. D. Ga. 1901) 112 Fed. 661, 7 Am. Bankr. Rep. 436; *In re Reese*, (N. D. Ala. 1902) 115 Fed. 993, 8 Am. Bankr. Rep. 411; *In re Brumbaugh*, (D. C. Pa. 1904) 128 Fed. 971, 12 Am. Bankr. Rep. 204; *In re Hartsell*, (N. D. Ala. 1905) 140 Fed. 30, 15 Am. Bankr. Rep. 177; *In re Castleberry*, (N. D. Ga. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159; *In re Blanchard*, (E. D. N. C. 1908) 161 Fed. 797, 20 Am. Bankr. Rep. 422; *In re MacKissic*, (E. D. Pa. 1909) 171 Fed. 259, 22 Am. Bankr. Rep. 817; *In re Yeager*, (E. D. Pa. 1910) 182 Fed. 951; *In re Remmerde*, (N. D. Ia. 1913) 206 Fed. 822.

Where exempt property is not readily divisible from the mass of the estate without the necessary inquiry to determine the fact of segregation and the specific property which is really exempt, the court has authority over the property for the time being at least, wheresoever the very title may rest, and it possesses the power to regulate the time and manner in which the exemption shall be claimed and set apart to the ultimate use and benefit of the bankrupt. *Bank of Nez Perce v. Pindel*, (C. C. A. 9th Cir. 1912) 193 Fed. 917.

The power of the court is without limitation of time, and the bankrupt's petition for exemptions is seasonable so long as the estate remains in such condition that the exemptions can be allowed. *In re White*, (1900) 103 Fed. 774.

The Bankruptcy Court does not lose its jurisdiction over exempt property until it has been set apart to the bankrupt; up to that time the court has full authority to consider and dispose of such questions as are involved in relation thereto. *In re*

*Baughman*, (M. D. Pa. 1910) 183 Fed. 668.

Exempt property may be held by the trustee for a reasonable time to await the action of the creditors having claims which they desire to enforce against the exemption. *In re Maynard*, (N. D. Ga. 1910) 183 Fed. 823.

The court may direct the trustee to hold a fund out of which the bankrupt's exemptions are to be paid, until proceedings to determine the right thereto can be instituted in a court of competent jurisdiction. *In re Castleberry*, (N. D. Ga. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159.

Where the exemption is claimed from the proceeds of a sale, the court may consider and determine any claim made by others to the fund while it remains in the hands of the trustee. *In re Renda*, (M. D. Pa. 1906) 149 Fed. 614, 17 Am. Bankr. Rep. 521. And see annotation under section 6.

Rights of lien claimant.—The court of bankruptcy has jurisdiction to determine a creditor's claim to an equitable lien on money of the bankrupt, collected by the trustee, and claimed by the bankrupt as exempt. *In re Lucius*, (S. D. Ala. 1903) 124 Fed. 455, 10 Am. Bankr. Rep. 653.

The fact that the purchase price of the goods claimed as exempt had not been paid gives the seller no right to enforce his vendor's lien in a court of bankruptcy. *In re Wells*, (W. D. Ark. 1900) 105 Fed. 762, 5 Am. Bankr. Rep. 308.

Where exempt property is attached in a state court, such property may be held under the attachment until it is determined in bankruptcy proceedings what part of the attached property has passed to the trustee, freed from the claim of exemption. *In re Edwards*, (S. D. Ala. 1907) 156 Fed. 794, 19 Am. Bankr. Rep. 632.

An order setting apart a homestead exemption may be vacated during the term at which it was entered. *In re Mayer*, (C. C. A. 1901) 108 Fed. 599, holding that such order was properly vacated where the bankrupt was in contempt for disobedience of a prior order in the bankruptcy proceedings.

(12) [Discharge bankrupts, etc.] discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; [(1898) 30 Stat. L. 546.]

As to

Debts not affected by discharge, see the several subdivisions of section 17.

Discharges generally, see the several subdivisions of section 14.

Effect of discharge as to liability of corporation officers, directors, and stockholders, see section 4b.

As to

Effect of discharge on codebtors, see section 16.

Faith and credit given to order granting or setting aside discharge, see section 21f.

Revocation of discharge and effect of revocation, see sections 15, 70d, 64c.

(13) **[Enforce orders.]** enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; [(1898) 30 Stat. L. 546.]

As to

Authority to punish for contempts committed before referees, see section 2 (16).

Contempts and proceedings thereon, see section 41.

**Enforcement of lawful orders.**—A court of bankruptcy has, under section 2 (13), complete authority to enforce obedience to all its lawful orders, by fine, imprisonment, or both. *In re Mayer*, (E. D. Wis. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533; *In re Rosser*, (8th Cir. 1900) 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153; *Ripon Knitting Works v. Schreiber*, (D. C. Wash. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re Wilson*, (W. D. Ark. 1902) 116 Fed. 419, 8 Am. Bankr. Rep. 612; *In re Shachter*, (N. D. Ga. 1902) 119 Fed. 1010, 9 Am. Bankr. Rep. 499; *In re Lacov*, (2d Cir. 1905)

142 Fed. 960, 74 C. C. A. 130, 15 Am. Bankr. Rep. 290.

**Order to turn over assets.**—See the annotation under section 38a (4) and section 41a (1).

**Frauds which are made criminal by the Act** are punishable only on conviction by the verdict of a jury, or on plea of guilty; and fraudulent transfers which have been consummated cannot be reached by summary proceeding. *In re Mayer*, (E. D. Wis. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533.

**Assault on trustee as contempt.**—The court has jurisdiction summarily to try and determine the merits of a proceeding to punish for an assault on a trustee in bankruptcy, in the performance of his duties as such, as a contempt of court. *Ex p. O'Neal*, (N. D. Fla. 1903) 125 Fed. 967, 11 Am. Bankr. Rep. 196.

(14) **[Extradite bankrupts.]** extradite bankrupts from their respective districts to other districts; [(1898) 30 Stat. L. 546.]

As to extradition generally, see section 10a.

(15) **[Make orders.]** make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; [(1898) 30 Stat. L. 546.]

**Procedure at law and in equity** is regulated by general provisions in General Order 37. "Process" is the title of General Order 3, and "Conduct of the proceedings" is the title of General Order 4.

**Power to adopt equitable procedure.**—In view of the full equity powers conferred on courts of bankruptcy, so far as may be necessary to enforce the Act, such courts may employ the procedure, writs, and remedies known to equity jurisprudence. *In re Benedict*, (E. D. Wis. 1905) 140 Fed. 55, 15 Am. Bankr. Rep. 232; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148. And see the annotation under clause (1) of this section.

**Order reference.**—The Bankruptcy Court may order a reference where such a proceeding would be proper in ordinary equity practice. *Fellows v. Freudenthal*, (C. C. A. 1900) 102 Fed. 731.

**General power of Bankruptcy Court.**—A broad grant of power to make orders and issue process is conferred by this section. *In re Ironclad Mfg. Co.*, (C. C. A. 2d Cir. 1912) 201 Fed. 66; *Mitchell Store-building Co. v. Carroll*, (C. C. A. 6th Cir. 1912) 193 Fed. 616.

Section 2 (15) may be availed of to compel anything which ought to be done

for, or to prevent anything which ought not to be done against, the enforcement of the Bankruptcy Law; provided the court otherwise has jurisdiction of the parties and the subject matter. *In re Swofford Bros. Dry Goods Co.*, (W. D. Mo. 1910) 180 Fed. 549.

As a court of equity, a Bankruptcy Court is competent to grant final and auxiliary reliefs adapted to the circumstances of any case, however peculiar. *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148.

**Order for surrender of assets.**—The Bankruptcy Court has jurisdiction to order the bankrupt to deliver up money or other assets in his possession on petition and rule to show cause. *In re Miller*, (1900) 105 Fed. 57; *Fisher v. Cushman*, (C. C. A. 1900) 103 Fed. 860; *In re Emrich*, (1900) 101 Fed. 231; *In re Diack*, (1900) 100 Fed. 770; *In re Fisher*, (1899) 98 Fed. 89. And see numerous other cases cited in note to section 38a (4). And the power may be exercised by the referee in the first instance subject to review by the judge on petition for review. *Mueller v. Nugent*, (1902) 184 U. S. 13, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *In re Miller*, (1900) 105 Fed. 57; *In re Deuell*, (1900)

100 Fed. 633; *In re* Mayer, (1900) 98 Fed. 839; *In re* McCormick, (1899) 97 Fed. 566; *In re* Purvine, (C. C. A. 1899) 96 Fed. 192; *In re* Tudor, 96 Fed. 942, (1900) 100 Fed. 796; *In re* Oliver, (1899) 96 Fed. 85; *In re* Coffman, (1899) 93 Fed. 422; *In re* Sapiro, (1899) 92 Fed. 340. See also cases cited in note to section 38a (4). And the referee's order in this behalf will not be reversed on review by the judge where "it is not plain that the referee was mistaken in his judgment, or that the testimony was not sufficient to support the order." *In re* Tudor, 96 Fed. 942, (1900) 100 Fed. 796.

As to enforcement of such orders by contempt proceedings, see section 2 (13), and section 41 and notes thereto.

The bankrupt should not be ordered to surrender property, unless it satisfactorily appears that the property is in his possession or under his control. See cases cited in note to section 38a (4).

A summary order should not be granted against the bankrupt without affording him an opportunity to be heard and reasonable time to prepare his defense; "while proceedings in bankruptcy may be summary, they should not be too summary." *Boyd v. Glucklich*, (C. C. A. 1902) 116 Fed. 131; *In re* Rosser, (C. C. A. 1900) 101 Fed. 562.

As to recovery of property in the possession of other persons, see section 23 a and b, and notes thereto.

**Injunctions to protect or preserve assets.**—As to power of referee to grant stays and injunctions, see note to section 38a (4). And see section 11a.

This section "gives the Bankruptcy Court power to issue injunctions against persons within the court's jurisdiction, whether parties to the bankruptcy proceedings or not, to prevent the transfer or disposition of any part of the bankrupt's property." *Morehouse v. Giant Powder Co.*, (C. C. A. 9th Cir. 1913) 206 Fed. 24.

"It is well settled that, in matters pertaining to bankruptcy, the federal courts have the right and power to enjoin not only the officers of the state courts but to stay the proceedings of the courts themselves when necessary to enforce their jurisdiction to administer bankrupt estates." *McLoughlin v. Knop*, (E. D. La. 1913) 214 Fed. 260.

"This court has no hesitation in holding that express power is given by the Act of Congress to courts of bankruptcy to enjoin all persons within its jurisdiction, whether litigants in a state court or elsewhere, from doing any act that will interfere with or prevent the due administration of the Bankruptcy Act." *In re Hornstein*, (N. D. N. Y. 1903) 122 Fed. 266, 10 Am. Bankr. Rep. 308.

The filing of a petition in involuntary bankruptcy is in effect an attachment and injunction, and those who deal with the bankrupt's property in the interval be-

tween the filing of the petition and the final adjudication do so at their peril. *In re Krinsky*, (1902) 112 Fed. 975. And in *In re Arnett*, (1901) 112 Fed. 770, the bankrupt and his mortgage trustee for a creditor were fined for disposing of assets after the petition in bankruptcy was filed.

In *In re Smith*, (1902) 113 Fed. 993, a petition in involuntary bankruptcy having been filed, but no trustee yet appointed, the Bankruptcy Court, on the authority of *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, issued a restraining order to prevent an adverse claimant from removing fixtures from the bankrupt's premises.

Where a bankrupt's assignment for the benefit of creditors is voidable in the bankruptcy proceedings, the Bankruptcy Court, after adjudication and pending appointment of a trustee, may enjoin the assignee from parting with possession of the property assigned. *Rumsey, etc., Co. v. Novelty, etc., Mfg. Co.*, (1899) 99 Fed. 699; *In re Gutwillig*, (C. C. A. 1899) 92 Fed. 337. To the same effect see *Lea v. George M. West Co.*, (1899) 91 Fed. 237, and *Leidigh Carriage Co. v. Stengel*, (C. C. A. 1899) 95 Fed. 637, where the assignee was acting under a state insolvency law pursuant to orders of a state court.

In *In re Kimball*, (1899) 97 Fed. 29, it was held that where personal property of the bankrupt at the date of the adjudication is subject to the levy of a pending execution, the right of the Bankruptcy Court to enjoin the execution creditor, if the execution is an unlawful preference and contrary to the provisions of the Bankrupt Act, is clear.

Proceedings supplementary to execution in a state court may be enjoined after an adjudication in bankruptcy, "because otherwise the property of the bankrupt, which ought to be distributed equally among creditors through the trustee, might be discovered and turned over to the receiver in supplementary proceedings, and thereby sold and lost to creditors before the trustee was appointed." *In re Kletchka*, (1899) 92 Fed. 901.

Where a chattel mortgagee of the bankrupt under a mortgage voidable in the bankruptcy proceedings has taken possession of the mortgaged property after the filing of a petition in involuntary bankruptcy, he may be enjoined from disposing of the property until further order of the court. *In re Nathan*, (1899) 92 Fed. 590.

**Restraining suits against trustee.**—Where a third party has brought a suit against the trustee in a state court, and it appears to the Bankruptcy Court that the party cannot possibly have any legal rights to be established in the litigation, further prosecution of the suit will be

enjoined. *In re Gutman*, (1902) 114 Fed. 1009.

**Restraining suits against bankrupts.**—Section 720, U. S. Rev. Stat., which forbids a court of the United States from enjoining proceedings in a state court, expressly excepts bankruptcy proceedings.

The Bankruptcy Court may restrain the further prosecution of a suit against the bankrupt begun after institution of the bankrupt proceedings, if the prosecution of the suit to judgment and the enforcement of the judgment during the pendency of the bankruptcy proceedings will interfere with the proper and speedy enforcement of the provisions of the Bankruptcy Act, or tend to embarrass the court. And the prosecution may be thus enjoined even though it be not clear that the suit is founded on a claim of such a nature that the judgment or debt represented thereby will be released by a discharge. *In re Nuttall*, (S. D. N. Y. 1912) 201 Fed. 557, where the court also said: "It is settled law that the Bankruptcy Court may restrain the further prosecution of all actions pending against the bankrupt when the bankruptcy proceeding is instituted or commenced thereafter during the pendency of such bankruptcy proceedings, provided the claim or demand sued upon is one from which a discharge in bankruptcy will be a release." And see section 11a.

The Bankruptcy Court may enjoin the prosecution in a state court of a suit to foreclose a mortgage given by the bankrupt and charged in the petition in involuntary bankruptcy to be an act of bankruptcy. *In re Donnelly*, (N. D. Ohio 1910) 188 Fed. 1001, where the court cited in support of its power to grant the injunction *In re Jersey Island Packing Co.*, (1905) 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, and *In re Dana*, (1909) 167 Fed. 529, 93 C. C. A. 238, and said: "It appears from the facts involved in the cases cited that the power now questioned has been upheld on the theory that the Bankruptcy Court should be allowed full sway in attempting to conserve the bankrupt's equity of redemption, that the most might be made thereof for the unsecured creditors. The mortgage is as completely protected in this court as he could be in the state court, and here is the only forum in which the contingent interests of the general creditors may be fully protected."

The institution of a suit in a state court and the appointment of a receiver to wind up the business of a corporation are acts of bankruptcy and a Bankruptcy Court has authority under this section to enjoin such proceedings pending instituted in the Bankruptcy Court. *Morehouse v. Giant Powder Co.*, (C. C. A. 9th Cir. 1913) 206 Fed. 24.

In *In re Chambers*, (1900) 98 Fed. 865, the Bankruptcy Court granted an injunction to restrain prosecution of an eject-

ment action brought in a state court by the bankrupt's lessor against the bankrupt and the bankrupt's receiver, to recover property in the bankrupt's possession at the date of adjudication, it appearing that an execution in the action would seriously embarrass the Bankruptcy Court.

In *In re Russell*, (C. C. A. 1900) 101 Fed. 248, after adjudication and appointment of a trustee, the Bankruptcy Court granted an injunction to restrain prosecution of a replevin suit in a state court by an adverse claimant against the property in the actual possession of the trustee. See also *In re Gutman*, (1902) 114 Fed. 1009.

**Power of referee.**—General Order 12 deprives the referee of power to grant an injunction to stay proceedings of a court or officer of the United States or of a state. See cases cited in note to section 38a (4).

**Writ of ne exeat against bankrupt.**—Under the broad powers at law and in equity conferred upon the District Courts in bankruptcy proceedings by section 2 and subdivision 15 of that section, it is competent . . . for the court to issue an order in the nature of a writ of *ne exeat* as broad as that provided by section 717 of the Revised Statutes whenever such process is 'necessary for the enforcement of the provisions' of the Bankrupt Act." *In re Lipke*, (1900) 98 Fed. 971, where the court granted an order in the nature of a writ of *ne exeat* against the bankrupt. And see the annotation under section 9b.

**The production of books and papers in a proceeding before a special master may be required under this section.** *In re Ironclad Mfg. Co.*, (C. C. A. 2d Cir. 1912) 201 Fed. 66.

**Miscellaneous orders and judgments.**—The respective jurisdictions of the Bankruptcy Court and of other courts, state and federal, in regard to property which is claimed to be a part of the assets of the bankrupt, and is also claimed by third parties, are discussed more at large in the notes to sections 2 (7), 23a, 23b, and in the last division of the first note to section 70a, authorities relating to various other orders, see the notes to those provisions of the Bankruptcy Act which treat of particular proceedings wherein orders are entered.

**Power to vacate orders.**—Any order made in the progress of the bankruptcy proceedings may be subsequently set aside and vacated, regardless of terms of court that have elapsed, provided rights have not become vested under it which will be disturbed by its vacation. *In re Ives*, (C. C. A. 1902) 113 Fed. 913. See also *Sandusky v. Indianapolis First Nat. Bank*, (1874) 23 Wall. 289, 23 U. S. (L. ed.) 155; *Lisberger v. Garnett*, (1877) 1 Hughes 650, 15 Fed. Cas. No. 8,383; *In re Betts*, (1877) 4 Dill. 98, 3 Fed. Cas. No. 1,371; *Boutwell v. Allerdice*, (1876) 2 Hughes

122, 3 Fed. Cas. No. 1,708. Generally, however, an order should not be vacated except upon motion or petition for that precise purpose. *In re Lemmon, etc., Co.*,

(C. C. A. 1901) 112 Fed. 296. See also Equity Rule 72, promulgated by the federal Supreme Court, 226 U. S. 670, 57 U. S. (L. ed.) 1653.

(16) **[Punish for contempt.]** punish persons for contempts committed before referees; [(1898) 30 Stat. L. 546.]

As to contempts before referees generally, see the several subdivisions of section 41.

Power of commitment for contempt resides in the court alone and cannot be exercised by the referee. *In re Haring*,

(W. D. Mich. 1912) 193 Fed. 168; *Smith v. Belford*, (6th Cir. 1901) 106 Fed. 658, 45 C. C. A. 526, 5 Am. Bankr. Rep. 291. See also *In re Schulman*, (1910) 177 Fed. 191, 101 C. C. A. 381, and section 41b.

(17) **[Appoint and remove trustees.]** pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; [(1898) 30 Stat. L. 546.]

As to

Appointment of trustees, see section 44.

Removal of trustees, see section 46.

(18) **[Tax costs.]** tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; [(1898) 30 Stat. L. 546.]

Costs have been considered throughout the annotation in connection with the particular matter wherein the question of costs has arisen. As to the costs and expenses of administration, see section 62; and as to costs which are entitled to priority, see section 64b (1), (2), and (3).

Discretionary power to tax costs.—By this section the court has a discretionary power to impose the costs "allowed by law" upon one or the other of the parties,

or part against each and part against the estate. *In re Ward*, (D. C. N. J. 1913) 203 Fed. 769.

If the unsuccessful party is the bankrupt the costs should ordinarily be visited upon him, but it will not be done if the bankrupt has no property or means whereby the costs could be realized if they were taxed against him. *In re Kyte*, (M. D. Pa. 1911) 189 Fed. 531.

(19) **[Transfer cases.]** transfer cases to other courts of bankruptcy; and [(1898) 30 Stat. L. 546.]

As to

Absence or disability of referee as warranting appointment of another referee to conduct the proceedings, see section 43.

Reference of cases before adjudication, see sections 18 f and g.

Reference of cases after adjudication, see section 22a.

As to

Transfer of cases from one referee to another, see section 22b.

Transfer of cases where petitions are filed in different districts, see section 32.

(20) **[Ancillary jurisdiction.]** exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy. [(Inserted 1910) 36 Stat. L. 839, which excepted pending cases.]

As to the exercise of ancillary jurisdiction under the Bankruptcy Act of 1841, see *Ex p. Martin*, (1842) 1 Pa. L. J. 188, 16 Fed. Cas. No. 9,149. As to the exercise of such jurisdiction under the Bankruptcy Act of 1867, see *Lathrop v.*

*Drake*, (1875) 91 U. S. 516, 23 U. S. (L. ed.) 740; *Moore v. Jones*, 17 Fed. Cas. No. 9,768; *In re Tift*, 23 Fed. Cas. No. 14,034; *McGehee v. Hentz*, 19 Fed. Cas. No. 8,794; *Sherman v. Bingham*, 3 Cliff. (U. S.) 552; *Goodall v. Tuttle*, 10 Fed.



Cas. No. 5,533; *Payson v. Dietz*, 19 Fed. Cas. No. 10,861.

Prior to the amendment of 1910, the decisions were conflicting as to the authority to exercise such jurisdiction under the Bankruptcy Act of 1898. In the following cases it was decided that ancillary jurisdiction might be exercised for certain purposes. *Babbitt v. Dutcher*, (1910) 216 U. S. 102, 30 S. Ct. 372, 54 U. S. (L. ed.) 402, 17 Ann. Cas. 969, 23 Am. Bankr. Rep. 519; *Elkus, Petitioner*, (1910) 216 U. S. 115, 30 S. Ct. 377, 54 U. S. (L. ed.) 407; *In re Schrom*, (N. D. Ia. 1899) 97 Fed. 760, 3 Am. Bankr. Rep. 352; *In re Peiser*, (E. D. Pa. 1902) 115 Fed. 199, 7 Am. Bankr. Rep. 690; *In re Sutter*, (S. D. N. Y. 1904) 131 Fed. 654, 11 Am. Bankr. Rep. 632; *In re Benedict*, (E. D. Wis. 1905) 140 Fed. 55, 15 Am. Bankr. Rep. 232; *In re John L. Nelson, etc., Co.*, (S. D. N. Y. 1907) 149 Fed. 590, 18 Am. Bankr. Rep. 66; *In re Dunseath, etc., Co.*, (W. D. Pa. 1909) 168 Fed. 973, 22 Am. Bankr. Rep. 75; *In re Robinson*, (D. C. Minn. 1910) 179 Fed. 724, 24 Am. Bankr. Rep. 617; *Matter of Westfall*, (D. C. Cal. 1902) 8 Am. Bankr. Rep. 431; *In re United Button Co.*, (S. D. N. Y. 1904) 132 Fed. 378, 12 Am. Bankr. Rep. 766.

The reason for the enactment of the amendment providing for the exercise of ancillary jurisdiction is found in the fact that some courts insisted that such jurisdiction did not exist. *In re Williams*, (E. D. Ark. 1903) 120 Fed. 38, 9 Am. Bankr. Rep. 741; *In re Williams*, (W. D. Tenn. 1903) 123 Fed. 321, 10 Am. Bankr. Rep. 538; *Ross-Meehan Foundry Co. v. Southern Car, etc., Co.*, (W. D. Tenn. 1903) 124 Fed. 403, 10 Am. Bankr. Rep. 624; *In re Tybo Min., etc., Co.*, (D. C. Nev. 1904) 132 Fed. 697, 13 Am. Bankr. Rep. 62; *In re Granite City Bank*, (8th Cir. 1905) 137 Fed. 818, 70 C. C. A. 316, 14 Am. Bankr. Rep. 404; *In re Owings*, (E. D. N. C. 1905) 140 Fed. 739, 15 Am. Bankr. Rep. 472; *In re Von Hartz*, (2d Cir. 1905) 142 Fed. 726, 74 C. C. A. 58, 15 Am. Bankr. Rep. 747; *Henrie v. Henderson*, (4th Cir. 1906) 145 Fed. 316, 76 C. C. A. 196, 16 Am. Bankr. Rep. 617; *Hull v. Burr*, (5th Cir. 1907) 153 Fed. 945, 83 C. C. A. 61, 18 Am. Bankr. Rep. 541; *In re Dempster*, (8th Cir. 1909) 172 Fed. 353, 97 C. C. A. 51, 22 Am. Bankr. Rep. 751.

Under the amendment of 1910 the ancillary jurisdiction there authorized has been frequently exercised. *Lazarus v. Prentice*, (1914) 234 U. S. 263, 34 S. Ct. 851, 58 U. S. (L. ed.) 1305; *Acme Harvester Co. v. Beekman Lumber Co.*, (1911) 222 U. S. 300, 32 S. Ct. 96, 56 U. S. (L. ed.) 208; *Musica v. Prentice*, (1914) 211 Fed. 326, 127 C. C. A. 575, *affirming* (1913) 205 Fed. 413; *In re Brockton Ideal Shoe Co.*, (C. C. A. 2d Cir. 1912) 200 Fed. 745. And see the following cases in this note.

**Territorial limits.**—The power of a bank-

ruptcy court to exercise ancillary jurisdiction is restricted to the territorial limits of the district and therefore an order for the delivery of property or money to a trustee may not be made against a nonresident of the district. *In re Boston-Cerrillos Mines Corporation*, (D. C. N. M., 1913) 206 Fed. 794.

**Security for costs** may be required when the trustee intervenes in a suit in admiralty brought in another federal District Court by or against the bankrupt. *The Alert*, (D. C. Mass. 1912) 199 Fed. 542, where, however, the court, in the exercise of discretion, permitted the intervention without requiring security, and reserved for consideration thereafter the question whether the trustee ought to be required to obtain an ancillary appointment in that jurisdiction.

**Ancillary receiver.**—The amendment of 1910, providing for ancillary proceedings in bankruptcy, simply recognized by statute a practice which courts of bankruptcy, in pursuance of principles of equity and comity, had theretofore generally exercised. In the nature of things an ancillary receiver must be subject alone to, and obey the orders of, that court of which he is an officer. So obeying, it follows that to it alone must he account. Any other course would breed confusion in administration and go far toward making the exercise of ancillary jurisdiction impracticable; for if a court, in pursuance of comity, undertakes to exercise ancillary jurisdiction by administering local assets, which it alone has power and jurisdiction to administer, it follows that its hand must be free to administer by its own officer and to exact from him the full measure of duty. Such executive work it can only secure from an officer answerable to it alone. *Loeser v. Dallas*, (C. C. A. 3d Cir. 1911) 192 Fed. 909.

However, in *In re Benedict* (1905) 140 Fed. 55, where, prior to the amendment of 1910, an ancillary receiver was appointed the court remarked at the conclusion of the opinion that "the receiver so appointed must account to, and be largely controlled by, the original court that is charged with the administration of the estate." It was also held that an *ex parte* application for the appointment of such receiver is sufficient if it conclusively shows facts conferring jurisdiction upon the parent court.

**Adverse claims.**—"It would be unjust, unwise, and detrimental to the administration of justice to establish the rule that courts of ancillary jurisdiction under the Bankruptcy Law are without judicial power or duty to hear and decide whether the property they take is that of the bankrupt or of strangers, that they must seize and send to the court of original jurisdiction the proceeds of whatever property the receiver or trustee appointed by that court claims as the property of the bankrupt, and that adverse claimants of title to or

liens upon it, and even its own officers, have no remedy for the enforcement of their claims but to follow the proceeds to other jurisdictions or to sue the receiver. Nor is this the natural or rational interpretation of the Act of Congress or of the decisions of the Supreme Court. That Act and those decisions are that the District Courts sitting in bankruptcy, and consequently in equity, have ancillary jurisdiction in bankruptcy proceedings pending in other districts. Ancillary jurisdiction is a term which has a plain and well-known meaning in the equity jurisprudence of the United States, a meaning fixed by settled practice and adjudged by the uniform current of the decisions of the courts of the United States. As neither the court nor the Congress modified or limited the term, the unavoidable presumption is that they used it, and intended to use it, in its recognized legal significance. In that significance ancillary jurisdiction includes the power to hear and adjudge, at the request of interveners, their claims to title to, or legal or equitable liens upon, the property it takes or holds in its legal custody, by virtue of that jurisdiction and to send the proceeds to the court of original jurisdiction, or to apply it to the discharge of the claims of the interveners in accord with its decision. A court exercising ancillary jurisdiction acts independently of the court of primary jurisdiction, or of its officers and for itself. It appoints its own receiver, generally the same person appointed receiver by the court of primary jurisdiction, but in the seizure, management, sale, and distribution of the property seized within the territorial limits of its district, of which it takes the legal custody, this receiver is, and must be, governed by its orders exclusively." *Fidelity Trust Co. v. Gaskell*, (C. C. A. 8th Cir. 1912) 195 Fed. 865.

"Congress, by express enactment, has vested in the several courts of bankruptcy, 'within their respective territorial limits,' full and complete power and authority to

try and determine bankruptcy controversies, and specially to 'cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto.' The jurisdiction thus defined and conferred is exclusive within the territorial limits of each court and confined to those limits. While a summary proceeding to collect property belonging to the estate of a bankrupt, which is in the possession of a stranger who resides outside of the territorial limits of the court of the original adjudication, is ancillary in character, nevertheless it presents a completely distinct and separable controversy, and therefore one which must be determined by the court within whose jurisdiction the property is located and the respondent resides. Any other rule would result in unnecessary confusion of authority and would do violence to the plain provisions of the Bankruptcy Act." *In re Farrell*, (C. C. A. 6th Cir. 1912) 201 Fed. 338.

But see *Knauth v. Latham*, (C. C. A. 5th Cir. 1915) 219 Fed. 721, wherein the court held that if adverse claimants sought to impress a trust in their favor upon any of the assets of the bankrupt in the hands of the trustee, they should proceed in the court of original jurisdiction and that they would not be permitted to intervene in an ancillary suit, brought by the trustee, the sole purpose of which was to collect assets of the bankrupt and transfer them to the proper court for administration.

**Sale of property by receiver.**—A receiver appointed to conserve the property of a corporation in a jurisdiction different from that in which bankruptcy proceedings are commenced against the corporation will not be allowed to sell the property in his hands before the appointment of a trustee in bankruptcy, in the absence of instructions from the court in which the bankruptcy petition was filed, unless there is some pressing necessity requiring the sale. *In re Brockton Ideal Shoe Co.*, (S. D. N. Y. 1912) 194 Fed. 233.

**[Unspecified powers.]** Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated. [(1898) 30 Stat. L. 546.]

See also the note immediately preceding clause (1) of this section 2.

## CHAPTER THREE.

### BANKRUPTS.

**SEC. 3. ACTS OF BANKRUPTCY.**—a Acts of bankruptcy by a person shall consist of his having [(1898) 30 Stat. L. 546.]

This section and section 60 are to be construed in harmony. *In re Donnelly*, (N. D. Ohio 1912) 193 Fed. 755.

**Condonation of act of bankruptcy.**—An act of bankruptcy once committed cannot be condoned at the will of that creditor

only who may be immediately concerned in it. Every creditor, whether a party to the transaction or not, is a creditor entitled to ask for adjudication by reason of it. *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870.

Intent of bankrupt.—“In the first and second of these [following clauses] an in-

tent on the part of the bankrupt, either to hinder, delay, or defraud his creditors, or to prefer other creditors, is necessary to constitute the act of bankruptcy. But in the third, fourth and fifth no such intent is required.” *Per Mr. Justice Gray in Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147.

(1) [Conveyances to defraud.] conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or [(1898) 30 Stat. L. 546.]

As to fraudulent transfers, etc., generally, and annulment thereof, see section 67e and section 70e.

The word “transfer” is defined in section 1a (25).

The word “conceal” is defined in section 1a (22).

Fraudulent transfer, etc., in general.—The conveyance, transfer, concealment, or removal of any part of a debtor's property, by either his act or his permission, with the intent to hinder, delay, or defraud any of his creditors, constitutes an act of bankruptcy under section 3a (1). *In re R. L. Radke Co.*, (N. D. Cal. 1911) 193 Fed. 735; *In re Glazier*, (M. D. Pa. 1912) 195 Fed. 1020; *In re Condon*, (S. D. N. Y. 1912) 198 Fed. 947; *Rumsey, etc., Co. v. Novelty, etc., Mfg. Co.*, (E. D. Mo. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704; *In re Pease*, (E. D. Mich. 1902) 129 Fed. 446, 12 Am. Bankr. Rep. 66; *In re Riggs Restaurant Co.*, (2d Cir. 1904) 130 Fed. 691, 66 C. C. A. 48, 11 Am. Bankr. Rep. 508; *Martin v. Hulen*, (8th Cir. 1906) 149 Fed. 982, 79 C. C. A. 492, 17 Am. Bankr. Rep. 510; *Henkel v. Seider*, (D. C. N. Y. 1908) 163 Fed. 553, 20 Am. Bankr. Rep. 773; *In re Larkin*, (N. D. N. Y. 1909) 168 Fed. 100, 21 Am. Bankr. Rep. 711; *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870, 24 Am. Bankr. Rep. 927; *In re Wishniefsky*, (D. C. N. Y. 1910) 181 Fed. 896; *In re Hughes*, (S. D. N. Y. 1910) 183 Fed. 872; *In re Leland*, (W. D. Mich. 1910) 185 Fed. 830.

Wrongful purpose involved.—An intent to hinder or delay creditors involves a purpose wrongfully or unjustifiably to prevent, obstruct, embarrass, or postpone the collection or enforcement of their claims. *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581.

A transfer of his individual property by a member of a firm, although with intent to defraud individual and firm creditors, is not an act of bankruptcy on the part of the partnership. *Hartman v. Peters*, (M. D. Pa. 1906) 146 Fed. 82, 17 Am. Bankr. Rep. 61; *In re Stovall Grocery Co.*, (N. D. Ga. 1908) 161 Fed. 882, 20 Am. Bankr. Rep. 537.

Making no defense in state court suit.—Where the debtor makes no defense to a

suit in a state court for the appointment of a receiver, but tacitly allows the receiver to be appointed and the property to vest in him, there is not a conveyance or transfer within this section. *In re Baker-Ricketson Co.*, (1899) 97 Fed. 489.

Surviving partners not opposing application for receiver.—The fact that surviving members of a partnership which had been dissolved did not oppose the application for the appointment of a receiver by the administrator of a deceased partner does not render them chargeable under this clause. *Vaccaro v. Security Bank*, (C. C. A. 1900) 103 Fed. 436.

Winding up application by corporation.—Whether the fact that an insolvent corporation voluntarily applies to a state court for dissolution and winding up of its affairs under a receiver, according to a state law, can be a transfer removal or conveyance under this clause was made a *quære* in *In re Harper*, (1900) 100 Fed. 266.

For a general discussion of fraudulent transfers within the four months preceding bankruptcy, see the annotation under section 67e, the latter containing the words “hinder, delay, or defraud.”

Actual fraud is necessary to make a conveyance an act of bankruptcy under this clause. *Coder v. Arts*, (1909) 213 U. S. 223, 53 U. S. (L. ed.) 772, 29 S. Ct. 436, 16 Ann. Cas. 1008, (affirming) (1907) 152 Fed. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372, quoting with approval from *Lansing Boiler, etc., Works v. Ryerson*, (1904) 128 Fed. 701, 63 C. C. A. 253, wherein Severens, J., said: “It is to be observed that subsection 1 of section 3 of the bankrupt act . . . makes those conveyances which by the common law and the statute of Elizabeth were held void, because fraudulent, a ground for adjudicating the grantor a bankrupt. No question of solvency or insolvency or of preference arises under this subsection, except as they bear upon the issue of good faith in making the conveyance, saying nothing now of the provisions of subsection 3 of section 3, which relieves the consequences of subsection 1, if the respondent can prove that at the date of filing the petition

he was solvent. The language of subsection 1 of section 3 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words. *Githens v. Shiffer*, (1902) 112 Fed. 505. And so construed the test of the conveyances intended by subsection 1 of section 3 is that of the *bona fides* of the transfer. . . . For it is the well-settled law that a conveyance, made in good faith, whether for an antecedent or present consideration, is not forbidden by such statutes, notwithstanding the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor."

**Necessity of intention to hinder, delay, or defraud.**—The intention, on the part of the debtor, to hinder, delay, or defraud his creditors, or some of them, is essential in order to constitute the act of bankruptcy specified in section 3a (1). *Willson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142; *In re Kassel*, (C. C. A. 2d Cir. 1912) 195 Fed. 492; *In re Hallin*, (W. D. Mich. 1912) 199 Fed. 806; *In re Funk*, (N. D. Ia. 1900) 101 Fed. 244, 4 Am. Bankr. Rep. 96; *Davis v. Stevens*, (D. C. S. D. 1900) 104 Fed. 242, 4 Am. Bankr. Rep. 763; *In re Shapiro*, (S. D. N. Y. 1901) 106 Fed. 495, 5 Am. Bankr. Rep. 839; *Githens v. Shiffer*, (M. D. Pa. 1902) 112 Fed. 505, 7 Am. Bankr. Rep. 453; *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581; *In re Foster*, (E. D. Pa. 1903) 126 Fed. 1014, 11 Am. Bankr. Rep. 131; *Lansing Boiler, etc., Works v. Ryerson*, (6th Cir. 1904) 128 Fed. 701, 63 C. C. A. 253, 11 Am. Bankr. Rep. 558; *In re Belknap*, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326; *Merchants' Nat. Bank v. Cole*, (8th Cir. 1907) 149 Fed. 708, 79 C. C. A. 414, 18 Am. Bankr. Rep. 44; *In re Kehler*, (2d Cir. 1908) 159 Fed. 55, 86 C. C. A. 245, 19 Am. Bankr. Rep. 513, *reversing* (W. D. N. Y. 1907) 153 Fed. 235, 18 Am. Bankr. Rep. 596; *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482; *In re McLoon*, (D. C. Me. 1908) 162 Fed. 575, 20 Am. Bankr. Rep. 719; *In re Kehler*, (2d Cir. 1908) 162 Fed. 674, 89 C. C. A. 466, 20 Am. Bankr. Rep. 669; *In re Tupper*, (N. D. N. Y. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824; *Hoffschlaeger Co. v. Young Nap*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 517.

**The burden of establishing the intent to hinder, delay, or defraud creditors rests on the petitioners.** *Davis v. Stevens*, (D. C. S. D. 1900) 104 Fed. 242, 4 Am. Bankr. Rep. 763; *In re Shapiro*, (S. D. N. Y. 1901) 106 Fed. 495, 5 Am. Bankr. Rep. 839; *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr.

Rep. 581; *In re Kehler*, (2d Cir. 1908) 159 Fed. 55, 86 C. C. A. 245, 19 Am. Bankr. Rep. 513, *reversing* (W. D. N. Y. 1907) 153 Fed. 235, 18 Am. Bankr. Rep. 596.

**Thus a transfer of property by an insane person cannot be held to be an act of bankruptcy.** *In re Funk*, (N. D. Ia. 1900) 101 Fed. 244, 4 Am. Bankr. Rep. 96; *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482; *In re Kehler*, (2d Cir. 1908) 162 Fed. 674, 89 C. C. A. 466, 20 Am. Bankr. Rep. 669.

**Transaction purged of fraud.**—Where by a state law a chattel mortgage is constructively fraudulent as to creditors where the mortgagor is allowed to remain in possession of the mortgaged property, but the mortgage becomes purged of its fraud by subsequent possession taken by the mortgagee, it is not a transfer in fraud of creditors so as to constitute one act of bankruptcy where, before proceedings in bankruptcy are commenced, the mortgagee has taken possession of the property. *Johansen Bros. Shoe Co. v. Alles*, (C. C. A. 8th Cir. 1912) 197 Fed. 274.

**The intent of the creditor who received the preference is not material.** *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Ed. W. Wright Lumber Co.*, (W. D. Ark. 1902) 114 Fed. 1011, 8 Am. Bankr. Rep. 345; *Crooks v. People's Nat. Bank*, (1899) 3 Am. Bankr. Rep. 238, 46 App. Div. 335, 61 N. Y. S. 604.

**An intention to prefer is not the same as an intention to defraud, nor is a preferential the same as a fraudulent transfer, and the fact that the insolvent, for a full cash consideration, sold certain property, that he employed the proceeds of the sale in paying some creditors rather than others, and that he applied a portion of such proceeds to his own personal use, the sale not having been made in order to remove the property beyond the reach of creditors, does not make such act a fraudulent transfer within the above section.** *Githens v. Shiffer*, (1902) 112 Fed. 505. See also note to section 60b.

**For evidence held sufficient to support a petition in involuntary bankruptcy under this clause see** *Cribben, etc., Co. v. North End House Furnishing Co.*, (C. C. A. 8th Cir. 1915) 222 Fed. 830; *Citizens' Bank v. W. C. DePauw Co.*, (C. C. A. 1901) 105 Fed. 926, holding on the proof that there was a fraudulent transfer, but sustaining a demurrer, as such transfer was more than four months prior to the filing of the petition in bankruptcy; *In re Shapiro*, (1901) 106 Fed. 495, holding that the withdrawal and transfer were with intent to hinder and delay creditors, and therefore were acts of bankruptcy.

**Intent presumed.**—Where the inevitable result of a transfer of property by the debtor, or with his permission, is actually to hinder, delay, or defraud his creditors, the intent to do so will be presumed.

Rumsey, etc., Co. v. Novelty, etc., Mfg. Co., (E. D. Mo. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704; Bean-Chamberlain Mfg. Co. v. Standard Spoke, etc., Co., (6th Cir. 1904) 131 Fed. 215, 65 C. C. A. 201, 12 Am. Bankr. Rep. 610; *In re* Salmon, (W. D. Mo. 1906) 143 Fed. 395, 16 Am. Bankr. Rep. 122; *In re* Minard, (D. C. Ore. 1907) 156 Fed. 377, 19 Am. Bankr. Rep. 485; *In re* Larkin, (N. D. N. Y. 1909) 168 Fed. 100, 21 Am. Bankr. Rep. 711; *In re* Hughes, (S. D. N. Y. 1910) 183 Fed. 872; *In re* Leland, (W. D. Mich. 1910) 185 Fed. 830; *In re* Glazier, (M. D. Pa. 1912) 195 Fed. 1020.

*In determining the question whether a transfer was made in good faith, or with intent to hinder, delay, or defraud creditors, so as to constitute an act of bankruptcy, the court or the jury may properly take into consideration the natural and necessary result of the transfer, and may infer the intent therefrom.* Bean-Chamberlain Mfg. Co. v. Standard Spoke, etc., Co., (6th Cir. 1904) 131 Fed. 215, 65 C. C. A. 201, 12 Am. Bankr. Rep. 610.

*Intent may be established by circumstances.*—An intent may be inferred from the acts done and surrounding circumstances, notwithstanding the debtor's denial. *In re* Larkin, (N. D. N. Y. 1909) 168 Fed. 100, 21 Am. Bankr. Rep. 711.

*A conveyance without consideration can have no other purpose than that of hindrance and delay, and if it has that purpose, even though no fraudulent intention is proved or suspected, this is enough to render it obnoxious to the Bankruptcy Act.* *In re* Hughes, (S. D. N. Y. 1910) 183 Fed. 872; *In re* Leland, (W. D. Mich. 1910) 185 Fed. 830.

*Intent in disjunctive.*—It is not necessary that a conveyance or transfer be with the intent to hinder, delay and defraud creditors. It is sufficient if it be with either intent. *In re* Muir, (M. D. Pa. 1914) 212 Fed. 495.

*Absence of fraudulent intention.*—*In general.*—Where the intention to hinder, delay, or defraud creditors is absent, and the transaction itself is not such as to result inevitably in the hindrance, delay, or defrauding of creditors, it will not be held to constitute an act of bankruptcy within the language of the statute. *Githens v. Shiffer*, (M. D. Pa. 1902) 112 Fed. 505, 7 Am. Bankr. Rep. 453; *In re* Wilmington Hosiery Co., (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581; *Lansing Boiler, etc., Works v. Ryerson*, (6th Cir. 1904) 128 Fed. 701, 63 C. C. A. 253, 11 Am. Bankr. Rep. 558; *In re* Belknap, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326; *Wilder v. Watts*, (D. C. S. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57; *In re* Cutting, (W. D. N. Y. 1906) 145 Fed. 388, 16 Am. Bankr. Rep. 751; *Richmond Standard Steel Spike, etc., Co. v. Allen*, (4th Cir. 1906) 148 Fed. 657, 78 C. C. A. 389,

17 Am. Bankr. Rep. 583; *Acme Food Co. v. Meier*, (6th Cir. 1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550; *In re* McLoon, (D. C. Me. 1908) 162 Fed. 575, 20 Am. Bankr. Rep. 719.

*Giving security for loan.*—Where a debtor while solvent made an equitable assignment of insurance policies to be issued as security for certain losses then made to him, but failed to make an actual delivery and assignment of the policies to the creditor until after loss, when he was insolvent, it was held that the assignment thereof at that time did not constitute an act of bankruptcy. *Wilder v. Watts*, (D. C. S. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57. See also *Acme Food Co. v. Meier*, (C. C. A. 6th Cir. 1907) 153 Fed. 74, 18 Am. Bankr. Rep. 550; *In re* McLoon, (D. C. Me. 1908) 162 Fed. 575, 20 Am. Bankr. Rep. 719.

*Intent to avoid bankruptcy.*—The Bankruptcy Act nowhere denounces a mere intent on the part of an insolvent debtor not to become a bankrupt. Nor does section 3a (1) provide that the commission or permission of any of the acts therein specified with intent not to become bankrupt shall constitute an act of bankruptcy. While such intent involves a purpose that the debtor's property shall not be distributed under the provisions of the Act, and that his creditors shall not enjoy its benefits, it is not in all cases equivalent to an "intent to hinder, delay, or defraud his creditors, or any of them," within the meaning of the statute. *In re* Wilmington Hosiery Co., (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581.

*Unrecorded mortgage.*—Where one brother has given another brother a mortgage securing the latter on indorsements made for the former, the mortgage, at the mortgagor's request, not having been recorded for more than a year, the mortgagor not being insolvent at the time of the execution of the mortgage, and the mortgagee having no reason to believe him to be so, such mortgage does not come within the section. *Asbury Park Bldg., etc., Assoc. v. Shepherd*, (N. J. 1901) 50 Atl. 65.

*Insolvency.*—The solvency of the debtor constitutes a good defense to a petition asking for his adjudication as a bankrupt, under section 3a (1). *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463; *Acme Food Co. v. Meier*, (6th Cir. 1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550. And see section 3c, and the annotation thereunder. Hence it is not necessary for the petitioning creditor to prove the insolvency of the debtor when the alleged act of bankruptcy is that set out in this section. *In re* West, (C. C. A. 1901) 108 Fed. 940, reversing decree of District Court without costs.

*As to what constitutes insolvency, see the annotation under section 1a (15).*

*Insolvency at time of transfer unnecessary.*—But it is not necessary that the debtor should be insolvent at the time the conveyance or transfer of property is made, in order to constitute an act of bankruptcy under section 3a (1); and if a solvent person conveys, conceals, or removes, or permits the conveyance, concealment, or removal of any part of his property, with the intent to hinder, delay, or defraud his creditors, or any of them, he commits an act of bankruptcy; and if within the ensuing four months he becomes insolvent, and a petition in bankruptcy is thereupon filed against him, he may be adjudged a bankrupt. *In re Larkin*, (N. D. N. Y. 1909) 168 Fed. 100, 21 Am. Bankr. Rep. 711.

*Refusal to pay debts—absconding partner.*—The mere fact that an individual or a copartnership refuses to pay his or its debts is not an act of bankruptcy, and "the fact that one partner of a copartnership embezzles the funds of a copartnership, and absconds and conceals himself, constitutes no act of bankruptcy of that partnership." *Davis v. Stevens*, (1900) 104 Fed. 235.

*Removal of property.*—The word "removed," as employed in section 3a (1), whether taken by itself or viewed in the light of the context, signifies an actual or physical change in the position or locality of the property constituting the subject of the removal. *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581.

*The removal of property to a vessel about to leave for a foreign country, while owing more than \$1,000, is, in the absence of a satisfactory explanation, a fraud on creditors.* *Hoffschlaeger Co. v. Young Nap*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 517.

*The absconding of an insolvent debtor, who carries with him nonexempt property, constitutes both concealment and removal of property with intent to defraud creditors within the section.* *In re Filer*, (S. D. N. Y. 1900) 108 Fed. 209, 5 Am. Bankr. Rep. 332.

*Unavoidable removal.*—One does not permit a removal of property, within the meaning of section 3a (1), who has neither power nor right to prevent its removal. *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581.

(2) [Preferences through transfers.] transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or [(1898) 30 Stat. L. 546.]

*As to*

Preferences generally, see section 60a.

Voidable preferences, see section 60b.

The word "transfer" is defined in section 1a (25).

*Insolvency.*—A transfer, in order to come within the language of section 3a (2) as an act of bankruptcy, must have been made while the debtor was insolvent. *Troy Wagon Works v. Vastbinder*, (M. D. Pa. 1904) 130 Fed. 232, 12 Am. Bankr. Rep. 353; *Blue Mountain Iron, etc., Co. v. Portner*, (4th Cir. 1904) 131 Fed. 57, 65 C. C. A. 295, 12 Am. Bankr. Rep. 559; *In re McLoon*, (D. C. Me. 1908) 162 Fed. 575, 20 Am. Bankr. Rep. 719; *In re Kassel*, (C. C. A. 2nd Cir. 1912) 195 Fed. 492; *Johansen Bros. Shoe Co. v. Alles*, (C. C. A. 8th Cir. 1912) 197 Fed. 274; *In re Berkeley*, (C. C. A. 2nd Cir. 1913) 203 Fed. 7. See also *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142.

*The burden of proving insolvency is upon the creditors if the alleged bankrupt appears and produces his books as required by section 3d.* *In re Electron Chemical Co.*, (E. D. N. Y. 1913) 208 Fed. 954.

*As to what constitutes insolvency, see the annotation under section 1a (15).*

*What petitioning creditors must prove.*

—In involuntary bankruptcy proceedings under this section it is necessary for the petitioning creditors to prove a transfer of the property to a creditor, the debtor's intention to prefer such creditor, and the debtor's insolvency at the time of transfer; the burden of proof being upon the petitioners, except in the contingency provided for in section 3d, where a presumption of insolvency is raised against a debtor who refuses to produce his books and papers and submit to an examination. *In re Rome Planing Mill*, (1899) 96 Fed. 812.

*Preferences in general.*—A debtor who, while insolvent, transfers any portion of his property to one or more of his creditors, with the intent to prefer such creditor over his other creditors, commits an act of bankruptcy under section 3a (2). *Mather v. Coe*, (N. D. Ohio 1899) 92 Fed. 333, 1 Am. Bankr. Rep. 504; *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266; *Johnson v. Wald*, (5th Cir. 1899) 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231; *In re McGee*, (N. D. N. Y. 1901) 105 Fed. 895,

5 Am. Bankr. Rep. 262; *Stern v. Louisville Trust Co.*, (6th Cir. 1901) 112 Fed. 501, 50 C. C. A. 387, 7 Am. Bankr. Rep. 306; *In re Beerman*, (N. D. Ga. 1901) 112 Fed. 663, 7 Am. Bankr. Rep. 434; *Boyd v. Lemon, etc., Co.*, (5th Cir. 1902) 114 Fed. 647, 52 C. C. A. 343, 8 Am. Bankr. Rep. 81; *In re Ed. W. Wright Lumber Co.*, (W. D. Ark. 1902) 114 Fed. 1011, 8 Am. Bankr. Rep. 345; *Swarts v. St. Louis Fourth Nat. Bank*, (8th Cir. 1902) 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; *Troy Wagon Works v. Vastbinder*, (M. D. Pa. 1904) 130 Fed. 232, 12 Am. Bankr. Rep. 352; *In re Riggs Restaurant Co.*, (2nd Cir. 1904) 130 Fed. 691, 66 C. C. A. 48, 11 Am. Bankr. Rep. 508; *In re Edelman*, (2nd Cir. 1904) 130 Fed. 700, 65 C. C. A. 665, 12 Am. Bankr. Rep. 228; *In re O'Donnell*, (D. C. Mass. 1904) 131 Fed. 150, 12 Am. Bankr. Rep. 621; *Rex Buggy Co. v. Hearick*, (8th Cir. 1904) 132 Fed. 310, 65 C. C. A. 676, 12 Am. Bankr. Rep. 726; *In re Bogen*, (S. D. Ohio 1904) 134 Fed. 1019, 13 Am. Bankr. Rep. 529; *Naylon v. Christiansen Harness Mfg. Co.*, (6th Cir. 1908) 158 Fed. 290, 85 C. C. A. 522, 19 Am. Bankr. Rep. 789; *Mills v. Fisher*, (6th Cir. 1908) 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656, 20 Am. Bankr. Rep. 237; *United Surety Co. v. Iowa Mfg. Co.*, (8th Cir. 1910) 179 Fed. 55, 102 C. C. A. 623, 24 Am. Bankr. Rep. 726; *In re Pangborn*, (W. D. Mich. 1910) 185 Fed. 673; *Crooks v. People's Nat. Bank*, (1899) 3 Am. Bankr. Rep. 242, 46 App. Div. 335, 61 N. Y. S. 604; *In re New Chattanooga Hardware Co.*, (E. D. Tenn. 1911) 190 Fed. 241; *In re Condon*, (S. D. N. Y. 1912) 198 Fed. 947. And see generally section 60, subdivisions a and b, and the annotation thereunder, for a general discussion of preferential transfers.

"The Bankrupt Law does not require an insolvent to cease business. It does not prohibit him from borrowing money and securing the borrower [lender?], or from buying goods and securing the seller. What it forbids is the giving of a preference to an existing or prior creditor, or securing a previous debt." *In re Little River Lumber Co.*, (1899) 92 Fed. 585.

For cases upon this subject decided under earlier Acts, see *Harrison v. Sterry*, (1809) 5 Cranch 289, 3 U. S. (L. ed.) 104; *Matter of Craft*, 2 Ben. 214, 1 Nat. Bankr. Reg. 378, 6 Fed. Cas. No. 3,316; *Matter of Dibblee*, 3 Ben. 283, 2 Nat. Bankr. Reg. 617, 7 Fed. Cas. No. 3,884; *In re Merchants' Ins. Co.*, 3 Biss. 162, 6 Nat. Bankr. Reg. 43, 17 Fed. Cas. No. 9,441; *In re Broich*, 7 Biss. 303, 15 Nat. Bankr. Reg. 11, 4 Fed. Cas. No. 1,921; *Ex p. Shouse*, *Crabbe* 482, 22 Fed. Cas. No. 12,815; *In re Holland*, 2 Hask. 90, 12 Fed. Cas. No. 6,603; *In re Hapgood*, 2 Lowell 200, 11 Fed. Cas. No. 6,044; *In re Ryan*, 2 Sawy. 411, 21 Fed. Cas. No. 12,183; *In re Oregon Bulletin Printing*,

*etc., Co.*, 3 Sawy. 614, 14 Nat. Bankr. Reg. 405, 18 Fed. Cas. No. 10,561; *Arnold v. Maynard*, 2 Story 349, 1 Fed. Cas. No. 561; *Knower v. Haines*, 31 Fed. 513; *Moore v. American L. & T. Co.*, 80 Fed. 49; *Brock v. Terrell*, 2 Nat. Bankr. Reg. 643, 4 Fed. Cas. No. 1,914; *In re Drummond*, 1 Nat. Bankr. Reg. 231, 7 Fed. Cas. No. 4,093; *Farrin v. Crawford*, 2 Nat. Bankr. Reg. 602, 8 Fed. Cas. No. 4,686; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131, 13 Fed. Cas. No. 7,496; *Knickerbocker Ins. Co. v. Comstock*, 9 Nat. Bankr. Reg. 484, 14 Fed. Cas. No. 7,879; *Payne v. Solomon*, 14 Nat. Bankr. Reg. 162, 19 Fed. Cas. No. 10,856; *In re Rogers*, 2 Nat. Bankr. Reg. 397, 20 Fed. Cas. No. 12,002; *Smith v. Teutonia Ins. Co.*, 22 Fed. Cas. No. 13,115; *Stewart v. Loomis*, 23 Fed. Cas. No. 13,433; *In re Kenyon*, 6 Nat. Bankr. Reg. 238, 30 Fed. Cas. No. 17,780, note.

*Compared with Act of 1867.*—"The second act of bankruptcy under the Act of 1898 is substantially the same as was the eighth under that of 1867. There may be some cases which will fall under the former and not under the latter, or vice versa. Speaking generally, however, under the law of 1867 the eighth act of bankruptcy was committed whenever an insolvent debtor with intent to prefer one of his creditors did anything which gave that creditor a preference or which aided such creditor in obtaining a preference. Under the law of 1898, under like circumstances, the second act of bankruptcy is committed." *In re Truitt*, (D. C. Md. 1913) 203 Fed. 550.

*The test of preference* is the payment out of the bankrupt's estate of a larger percentage of the claim of a creditor than other creditors of the same class receive. *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 1902) 117 Fed. 1.

*A conditional transfer of property*, such as a pledge, mortgage, or security, is within the meaning of section 3a (2). *In re Edelman*, (2d Cir. 1904) 130 Fed. 700, 65 C. C. A. 665, 12 Am. Bankr. Rep. 238.

Thus it has been held that a debtor who, knowing he is insolvent, executes a deed of trust to secure a creditor on a pre-existing debt, commits an act of bankruptcy, within section 3a (2). *In re Ed. W. Wright Lumber Co.*, (W. D. Ark. 1902) 114 Fed. 1011, 8 Am. Bankr. Rep. 345.

So, also, a mortgage made by an insolvent, and recorded within four months prior to the filing of a petition in bankruptcy against him, if given with intent to prefer a creditor, constitutes an act of bankruptcy. *In re Edelman*, (2d Cir. 1904) 130 Fed. 700, 65 C. C. A. 665, 12 Am. Bankr. Rep. 238.

*Preference by partnership.*—In Washington Cotton Co. v. Morgan, (C. C. A. 5th Cir. 1911) 192 Fed. 310, the alleged

act of bankruptcy was that the firm, within four months of the filing of the petition, had transferred a portion of its property to named creditors with the intent to prefer said creditors over other creditors. The evidence showed that the firm had, as alleged, paid certain creditors in full, and that the debts of the firm were slightly in excess of the firm's assets; but it was also shown that the individual members of the firm, all residing within the jurisdiction of the court, were amply solvent—that their property was sufficient to pay more than ten times all of their debts, individual and partnership. On these facts the court said: "The property of the individual members of the firm, after the payment of the debts of the individual members, is liable to the satisfaction of the firm's debts. It appears from the evidence, therefore, that all of the creditors of the firm could collect their claims in full. The creditors which the firm had paid as alleged were not enabled to obtain any 'greater percentage' of their claims than any other creditors, for all can be paid in full. This fact alone, without referring to others commented on by the learned district judge, fully sustains the decree dismissing the petition."

It has been held that an act by one member of a firm, within the scope of his authority, in relation to joint property or joint debts, such as giving a preference, or making a fraudulent transfer, should be imputed to all the members of the firm in this as in all other civil cases. *In re Forbes*, (D. C. Mass. 1904) 128 Fed. 137, 11 Am. Bankr. Rep. 787.

But it is not an act of bankruptcy, for which a firm may be adjudged a bankrupt, that one of its members, out of his individual estate, prefers one of his own or one of the firm's creditors. *Mills v. Fisher*, (6th Cir. 1908) 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656, 20 Am. Bankr. Rep. 237.

*Transfer by surviving partners.*—The estate of a deceased partner being sufficient, after paying his individual debts, to satisfy the firm debts, an unlawful preference under the section is not created by the transfer in payment of a firm debt of partnership property by the surviving partners. *Vaccaro v. Security Bank*, (C. C. A. 1900) 103 Fed. 436.

*Transfer by member of insolvent firm.*—Upon the proof it was held that the conveyance by a member of an insolvent firm to his father-in-law of considerable property within four months of the bankruptcy proceedings, in consideration of an antecedent debt, was with intent to prefer such creditor. *In re Grant*, (1901) 106 Fed. 496.

*Transaction not depleting estate.*—A substitution of creditors of an alleged bankrupt, advantageous to the debtor's estate, is not such a transfer of property as to make an act of bankruptcy. Thus

where an insolvent person is sued as an indorser on a promissory note and the settlement with his consent is conducted by his counsel, who personally pays a much smaller amount and receives a transfer of the note in favor of the indorser without recourse, such payment and the obligation it creates constitute a business transaction merely, involving the relation of debtor and creditor, and it is not a case of a transfer of property to a creditor. The fact that such transaction does not deplete the defendant's estate, but on the contrary reduces the indebtedness and to that extent increases the estate, is opposed to the idea of intent to prefer. As applied to such a state of facts there is no distinction between the preference defined by section 60 and the preference forbidden by section 2. *In re Kerlin*, (C. C. A. 6th Cir. 1913) 209 Fed. 42, wherein the court said: "It is helpful to bear in mind that the transaction did not deplete Kerlin's estate (Continental, etc., Trust, etc., *Bank v. Chicago Title, etc., Co.*, 229 U. S. 435, 443, 445, 33 S. Ct. 829, 57 U. S. (L. ed.) 1268); on the contrary, as already stated, the settlement reduced the indebtedness, and to that extent in effect increased the estate. Such a fact is apparently opposed to the idea of an intent to prefer. However, it is insisted that the case just cited, and kindred cases, are not applicable, because they relate only to voidable transactions covered by section 60 of the Bankruptcy Act. Hence, distinction is urged between the preference defined by that section and the preference forbidden by section 3, art. 2. The difference between a transfer 'with intent to prefer,' which is made an act of bankruptcy by the latter provision, and the 'preference' denounced by the former, even since the amendment of 1910 (Act June 25, 1910, c. 412, § 11, 36 Stat. L. 842) of section 60b, is, as respects the present issue, formal rather than material. True, 'intent to prefer' within the meaning of section 3, art. 2, relates to the debtor, while 'reasonable cause to believe,' under section 60b, refers to the creditor; but this difference can affect only the evidence calculated to reveal the debtor's intent in the one instance, and the creditor's belief in the other; for there is complete identity between the object of a preference made under the one and that received under the other. Their ultimate effect upon the debtor's estate and his other creditors is obviously the same, and so the question of depletion of estate is alike relevant and important in either case (see *Swarts v. Fourth National Bank of St. Louis*, 117 Fed. 1, 3, 54 C. C. A. 387 [C. C. A. 8th Cir.], respecting similarity of such preferences)."

A transfer to a trustee for the creditors should be treated as if made direct to the creditors and the giving of a mortgage to a trustee for a creditor, instead of direct



to the creditor is within the plain terms of the statute. *Fulkerson v. Shaffer*, (C. C. A. 8th Cir. 1914) 217 Fed. 355.

**Payment as preference.**—The payment of an existing indebtedness by an insolvent debtor, with the intention of preferring the creditor so paid over the other creditors of such debtor, constitutes a preference; and is, therefore, an act of bankruptcy within the meaning of section 3a (2). *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266; *Johnson v. Wald*, (5th Cir. 1899) 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Baker-Ricketson Co.*, (D. C. Mass. 1899) 97 Fed. 489, 4 Am. Bankr. Rep. 605; *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123; *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101; *In re Ed. W. Wright Lumber Co.*, (W. D. Ark. 1902) 114 Fed. 1011, 8 Am. Bankr. Rep. 345; *Rex Buggy Co. v. Hearick*, (8th Cir. 1904) 132 Fed. 310, 65 C. C. A. 676, 12 Am. Bankr. Rep. 726; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *In re Flint Hill Stone, etc., Co.*, (N. D. N. Y. 1907) 149 Fed. 1007, 18 Am. Bankr. Rep. 81; *Naylon v. Christiansen Harness Mfg. Co.*, (6th Cir. 1908) 158 Fed. 290, 85 C. C. A. 522, 19 Am. Bankr. Rep. 789. See also *Preference Created by Payment*, a black-letter caption in division I of the note to section 60a.

Thus it has been held that a merchant, hopelessly insolvent, who within four months prior to the filing of an involuntary petition in bankruptcy against him, and with knowledge of such condition of insolvency, pays substantial sums of money to certain of his creditors in full satisfaction of their claims, while refusing payment to others whose claims are due and equally entitled to payment, commits an act of bankruptcy. *Rex Buggy Co. v. Hearick*, (8th Cir. 1904) 132 Fed. 310, 65 C. C. A. 676, 12 Am. Bankr. Rep. 726.

And it is an act of bankruptcy for an insolvent debtor to sell all of his property to one not a creditor, and then to apply the proceeds to the full payment of a part of his creditors, leaving others unpaid; such transaction being a transfer of property with intent to prefer certain creditors, within the intent and meaning of section 3a (2). *Boyd v. Lemon, etc., Co.*, (5th Cir. 1902) 114 Fed. 647, 52 C. C. A. 343, 8 Am. Bankr. Rep. 81.

So, also, it has been held that the payment and discharge of a debt, by an insolvent debtor, by a conveyance to the creditor of personal property of greater value than the debt, the debtor receiving the difference in cash, is a preference of such creditor, and, as such, an act of bankruptcy. *Johnson v. Wald*, (5th Cir. 1899) 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84.

*But payments made in the usual course of business*, where there is no intention to prefer one creditor over another, are not acts of bankruptcy. *In re Pearson*, (S. D. N. Y. 1899) 95 Fed. 425, 2 Am. Bankr. Rep. 482; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; *In re Cutting*, (W. D. N. Y. 1906) 145 Fed. 388, 16 Am. Bankr. Rep. 751; *Richmond Standard Steel Spike, etc., Co. v. Allen*, (4th Cir. 1906) 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583; *Macon Grocery Co. v. Beach*, (S. D. Ga. 1907) 156 Fed. 1009, 19 Am. Bankr. Rep. 558; *In re Morgan*, (N. D. Ga. 1911) 184 Fed. 938. See also division I of the note to section 60a.

**Payment of rent, taxes, and incidental expenses under renting agreement.**—Where a debtor, being the owner of a leasehold interest in real property having a term of years to run, but not assignable without the consent of the landlord, sells the same, and applies part of the proceeds in paying the arrears of rent due, taxes on the property, and the incidental expenses of the sale, such payment does not constitute a preference of the creditors paid, but merely a means of realizing the value of the leasehold, and therefore is not an act of bankruptcy. *In re Pearson*, (S. D. N. Y. 1899) 95 Fed. 425, 2 Am. Bankr. Rep. 482.

**Payment of salaries.**—If the salary of the chief officer of a corporation has accumulated and thus become an existing debt, and the corporation, being insolvent, and in contemplation of such insolvency, pays the debt with intent to prefer it over their other creditors, this constitutes an act of bankruptcy. But it is a very different case when a corporation carrying on the business of manufacturer, at a time when it is unable to pay all of its debts, uses a part of its assets to pay current expenses; and the current salary of the president of a corporation, if confined within a reasonable amount, is a part of the necessary running expenses, and it has to be paid in order to keep the establishment in operation. *Richmond Standard Steel Spike, etc., Co. v. Allen*, (4th Cir. 1906) 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583.

**Payments of comparatively small sums of money** by an insolvent corporation to each of a number of its creditors, made in the usual course of business, do not raise a presumption of an intent to prefer such creditors over its other creditors, so as to establish an act of bankruptcy by a transfer of property with intent to prefer. *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539.

**Necessity of intent to prefer.**—Under section 3a (2), an intent to prefer one creditor over another is necessary, in order to constitute an act of bankruptcy. *Wilson v. Nelson*, (1901) 183 U. S. 191, 22

S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142; Johnson v. Wald, (5th Cir. 1899) 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84; *In re Wolf*, (N. D. Ia. 1899) 98 Fed. 84, 3 Am. Bankr. Rep. 555; Sabin v. Camp, (D. C. Ore. 1900) 98 Fed. 974, 3 Am. Bankr. Rep. 578; *In re Bloch*, (2d Cir. 1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101; Clark v. Henne, (5th Cir. 1904) 127 Fed. 288, 62 C. C. A. 172, 11 Am. Bankr. Rep. 583; Brake v. Callison, (5th Cir. 1904) 129 Fed. 201, 63 C. C. A. 359, 11 Am. Bankr. Rep. 797; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; Merchants' Nat. Bank v. Cole, (6th Cir. 1907) 149 Fed. 708, 79 C. C. A. 414, 18 Am. Bankr. Rep. 44; Martin v. Hulen, (8th Cir. 1906) 149 Fed. 982, 79 C. C. A. 492, 17 Am. Bankr. Rep. 510; *In re Flint Hill Stone, etc., Co.*, (N. D. N. Y. 1907) 149 Fed. 1007, 18 Am. Bankr. Rep. 81; *In re McLoon*, (D. C. Me. 1908) 162 Fed. 575, 20 Am. Bankr. Rep. 719; *In re Morgan*, (N. D. Ga. 1911) 184 Fed. 938; *In re Freeman Cotting Coat Co.*, (D. C. Mass. 1913) 212 Fed. 548; *In re Columbia Real Estate Co.*, (D. C. N. J. 1913) 205 Fed. 980.

*Intent is that of debtor.*—"A creditor who relies on the commission of the second act must show affirmative action on the debtor's part and must prove that it was taken with intent to prefer the creditor. If such showing is made and the effect of what the debtor did was to give a preference, the commission of the second act of bankruptcy has been established. It may be that what is proved constituted a part of a chain of events which culminated in the commission of the third act also. They have features in common. Neither of them can be committed unless the debtor is insolvent nor unless the preference has actually resulted from it. In other respects they are radically different. In determining whether the second act has been committed, it is not important to inquire what the creditor did or intended. It is the debtor's act and purpose which is material. On the other hand, the third act may be proved without showing that the debtor ever did or tried to do anything, or even that he had ever given the matter a thought." *In re Truitt*, (D. C. Md. 1913) 203 Fed. 550.

The intent of the creditor is immaterial, as also whether or not he had reasonable ground to believe that a preference was intended. *In re Rome Planing Mill*, (1899) 96 Fed. 812.

*Must be other creditors.*—A conveyance of property by a debtor to creditors cannot be charged as an act of bankruptcy where he had at the time no other creditors. Brake v. Callison, (5th Cir. 1904) 129 Fed. 201, 63 C. C. A. 359, 11 Am. Bankr.

Rep. 797; Beers v. Hanlin, (1900) 99 Fed. 605.

*The giving of a chattel mortgage to secure an antecedent debt* is not a preferential transfer which constitutes an act of bankruptcy, where it is given in good faith in renewal of a prior mortgage and covering the same property; and in such case the fact of the mortgagor's insolvency is immaterial, where the mortgagor receives a further present consideration sufficient to warrant the additional security. *In re Cutting*, (W. D. N. Y. 1906) 145 Fed. 388, 16 Am. Bankr. Rep. 751.

*Intent inferred.*—A debtor will, however, be presumed to have intended the necessary and natural consequences of his acts; and where, during insolvency, he makes a transfer to a creditor, the necessary result of which is to prefer such creditor over other creditors, it will be presumed to have been so intended. Goldman v. Smith, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266; Johnson v. Wald, (5th Cir. 1899) 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Schmechel Cloak, etc., Co.*, (W. D. Mo. 1900) 104 Fed. 64, 4 Am. Bankr. Rep. 719; *In re McGee*, (N. D. N. Y. 1901) 105 Fed. 895, 5 Am. Bankr. Rep. 262; *In re Grant*, (S. D. N. Y. 1901) 106 Fed. 496, 5 Am. Bankr. Rep. 837; *In re Bloch*, (2d Cir. 1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101; Boyd v. Lemon, etc., Co., (5th Cir. 1902) 114 Fed. 647, 52 C. C. A. 343, 8 Am. Bankr. Rep. 81; *In re Ed. W. Wright Lumber Co.*, (W. D. Ark. 1902) 114 Fed. 1011, 8 Am. Bankr. Rep. 345; *In re Edelman*, (2d Cir. 1904) 130 Fed. 700, 65 C. C. A. 665, 12 Am. Bankr. Rep. 238; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; Rex Buggy Co. v. Hearick, (8th Cir. 1904) 132 Fed. 310, 65 C. C. A. 676, 12 Am. Bankr. Rep. 726; *In re Flint Hill Stone, etc., Co.*, (N. D. N. Y. 1907) 149 Fed. 1007, 18 Am. Bankr. Rep. 81; Macon Grocery Co. v. Beach, (S. D. Ga. 1907) 156 Fed. 1009, 19 Am. Bankr. Rep. 558; Naylor v. Christiansen Harness Mfg. Co., (6th Cir. 1908) 158 Fed. 290, 85 C. C. A. 522, 19 Am. Bankr. Rep. 789; *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864; *In re Freeman Cotting Coat Co.*, (D. C. Mass. 1913) 212 Fed. 548, where, however, the court said: "The presumption that a transfer which effects a preference was intended as a preference is not a conclusive one. It has been held not to arise where the payments were comparatively small and in the ordinary course of a going business and to be rebutted where the debtor established his ignorance of his insolvency and his honest belief that he was solvent."

Inference of intent under section 3a (1), see the note to that clause.

Where a bankrupt made a payment to a creditor who had previously furnished personal necessities and comforts for himself and family, although he was insolvent and there was no actual, as distinguished from an inferential, intent to prefer, it was held to be an act of bankruptcy under this section. *In re Condon*, (C. C. A. 2d Cir. 1913) 209 Fed. 800.

Where an insolvent after the return of a verdict against him in an action at law, but before the entry of judgment, sent for a creditor and executed a mortgage to him to secure the debt, it was held that the preference thus given to the mortgagee over the judgment creditor must be presumed to have been intentional and, therefore, an act of bankruptcy. *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864.

**Amount of transfer considered.**—The presumption of an intent to prefer creditors, arising from a transfer of property by an insolvent, is affected by the amount of such transfer; and it is not as strong where the transfer is of a comparatively small part of the debtor's property. *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101. See also *Macon Grocery Co. v. Beach*, (S. D. Ga. 1907) 156 Fed. 1009, 19 Am. Bankr. Rep. 558; *In re Stovall Grocery Co.*, (N. D. Ga. 1908) 161 Fed. 882, 20 Am. Bankr. Rep. 537.

**Transfer while insolvent.**—“As the insolvent debtor is to be presumed to intend the natural consequences of his act, the existence of intent in such case on the part of the debtor may be inferred *prima facie* from the fact of the transfer having been made ‘while insolvent.’” *In re Schmechel Cloak, etc., Co.*, (1900) 104 Fed. 64. To the same effect see *Johnson v. Wald*, (C. C. A. 1899) 93 Fed. 640, *affirming* judgment of District Court.

A debtor is presumed to know his own

financial condition as to solvency; “but this is a disputable presumption, and if the debtor honestly believes himself to be solvent, or if he establishes his want of knowledge as to his insolvency, he then rebuts the presumption of an intent to prefer which arises from the fact of actual insolvency.” *In re Gilbert*, (1902) 112 Fed. 951.

Payment by an insolvent operating as a preference is *prima facie* evidence that a preference is intended; but it may be rebutted by evidence that the debtor was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts, the burden of proof of intent to prefer still being upon the petitioner in involuntary bankruptcy. *In re Bloch*, (C. C. A. 1901) 109 Fed. 790, *reversing* judgment of District Court.

The debtor's intent to give a preference may be presumed from a transfer, while insolvent, of a large part of his property to a single creditor; and, when this is proved, the burden is upon the debtor to show that he was ignorant of his insolvency, and had reason to believe that he could pay his debts in full. *In re Rome Planing Mill*, (1899) 96 Fed. 812.

**Transfer of large part of property conclusive evidence of intent.**—“Where an insolvent debtor transfers a large portion of his property to one creditor, to the exclusion of all the rest, such a transaction must be taken as conclusive evidence of his intent to prefer that creditor.” *In re McGee*, (1901) 105 Fed. 895.

If a firm while insolvent take the money, proceeds of the sale of all their property and apply the same to the full payment of the debts due by them to several of their creditors, leaving others unpaid, it is sufficient to prove that they thereby made a transfer with intent to prefer. *Boyd v. Lemon, etc., Co.*, (C. C. A. 1902) 114 Fed. 647.

(3) [Preferences through legal proceedings.] suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or [(1898) 30 Stat. L. 546.]

As to

Liens obtained through legal proceedings generally, and the annulment thereof, see section 67f.

Other relevant provisions, see sections 60a and 67c.

“The words ‘or permitted’ are of no vital signification.” *Loeser v. Savings Deposit Bank, etc., Co.*, (1906) 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233.

**Preference through legal proceedings, in general.**—A debtor who, while insolvent, suffers or permits any creditor to obtain

a preference through legal proceedings, and fails to vacate or discharge such preference at least five days before a sale or final disposition of the property affected thereby, commits an act of bankruptcy within the meaning of section 3a (3). *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142; *In re Reichman*, (E. D. Mo. 1899) 91 Fed. 624, 1 Am. Bankr. Rep. 17; *In re Moyer*, (E. D. Pa. 1899) 93 Fed. 188, 1 Am. Bankr. Rep. 577; *In re Ferguson*, (S. D. N. Y. 1899) 95

Fed. 429, 2 Am. Bankr. Rep. 586; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *Parmenter Mfg. Co. v. Stoeve*, (1st Cir. 1899) 97 Fed. 330, 38 C. C. A. 200, 3 Am. Bankr. Rep. 220; *In re Empire Metallic Bedstead Co.*, (2d Cir. 1899) 98 Fed. 981, 39 C. C. A. 372, 3 Am. Bankr. Rep. 575; *In re Thomas*, (W. D. Pa. 1900) 103 Fed. 272, 4 Am. Bankr. Rep. 571; *Vaccaro v. Security Bank*, (8th Cir. 1900) 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; *In re Storm*, (E. D. N. Y. 1900) 103 Fed. 618, 4 Am. Bankr. Rep. 601; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140; *In re Harper*, (N. D. Ill. 1900) 105 Fed. 900, 5 Am. Bankr. Rep. 567; *Duncan v. Landis*, (3d Cir. 1901) 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649; *In re Kersten*, (E. D. Wis. 1901) 110 Fed. 929, 6 Am. Bankr. Rep. 516; *Scheuer v. Smith, etc., Book, etc., Co.*, (5th Cir. 1901) 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; *Bradley Timber Co. v. White*, (5th Cir. 1903) 121 Fed. 779, 58 C. C. A. 55, 10 Am. Bankr. Rep. 329; *Bogen v. Protter*, (6th Cir. 1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288; *In re Rung Furniture Co.*, (2d Cir. 1905) 139 Fed. 526, 71 C. C. A. 342, 14 Am. Bankr. Rep. 12; *In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598; *Holmes v. Baker*, (9th Cir. 1908) 160 Fed. 922, 88 C. C. A. 104, 20 Am. Bankr. Rep. 252; *In re Tupper*, (N. D. N. Y. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824; *In re Gallagher*, (D. C. Mass. 1901) 6 Am. Bankr. Rep. 255; *Matter of Rung Furniture Co.*, (W. D. N. Y. 1903) 10 Am. Bankr. Rep. 44; *Matter of Toledo Portland Cement Co.*, (E. D. Mich. 1906) 17 Am. Bankr. Rep. 375; *In re McCartney*, (M. D. Pa. 1911) 188 Fed. 815; *Johansen Bros. Shoe Co. v. Alles*, (C. C. A. 8th Cir. 1912) 197 Fed. 274; *Citizens' Banking Co. v. Ravenna Nat. Bank*, (C. C. A. 6th Cir. 1912) 202 Fed. 892.

*For a general discussion of preferences obtained through legal proceedings, and the annulment thereof, see the annotation under section 67f, which section contains the phrase "through legal proceedings."*

*The purpose of the law is that no one creditor shall be preferred over the others, by an insolvent person, but that all creditors shall share equally except as to honest liens created more than four months prior to the filing of a petition in bankruptcy. It was not intended that a creditor should obtain a lien on the property of an insolvent person by a judgment filed and docketed, and then lie still, without issuing execution or making a levy and advertising the property for sale for four months and until such judgment had become unimpeachable under the Bankruptcy Act or otherwise, thereby gaining a preference, an absolute security for the debt, and it might be to the extent of the entire property of*

*the insolvent person, and thus excluding other creditors from any share in the estate. In re Tupper*, (N. D. N. Y. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824.

*Essential elements.*—Looking at the terms of this provision, it is manifest that the act of bankruptcy which it defines consists of three elements. The first is the insolvency of the debtor; the second is suffering or permitting a creditor to obtain a preference through legal proceedings; that is, to acquire a lien upon property of the debtor by means of a judgment, attachment, execution, or kindred proceeding, the enforcement of which will enable the creditor to collect a greater percentage of his claim than other creditors of the same class; and the third is the failure of the debtor to vacate or discharge the lien and resulting preference five days before a sale or final disposition of any property affected. Only through the combination of the three elements is the act of bankruptcy committed. Insolvency alone does not suffice, nor is it enough that it be coupled with suffering or permitting a creditor to obtain a preference by legal proceedings. The third element must also be present, else there is no act of bankruptcy within the meaning of this provision. *Citizens' Banking Co. v. Ravenna Nat. Bank*, (1914) 234 U. S. 360, 34 S. Ct. 806, 58 U. S. (L. ed.) 1352. See to the same effect *In re Fisher*, (E. D. Pa. 1915) 219 Fed. 638.

*The words "legal proceedings"* used in this section have reference to any proceedings in a court of justice, interlocutory or final, by which the property of the debtor is seized and diverted from his general creditors. *In re Rome Planing Mill*, (1899) 96 Fed. 812.

*Legal proceedings within the meaning of the statute clearly include attachment proceedings. In re Putnam*, (N. D. Cal. 1911) 193 Fed. 464.

*The failure of an insolvent debtor to file a voluntary petition in bankruptcy at least five days before a sale of his property under a judgment entered against him upon an irrevocable power of attorney, given years before, constitutes the suffering or permitting of the creditor to obtain a preference which amounts to an act of bankruptcy, though the judgment is entered without the knowledge or consent of the debtor, and he is unable to prevent its enforcement in any other way than by filing his petition in bankruptcy. Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142; *In re Moyer*, (E. D. Pa. 1899) 93 Fed. 185, 1 Am. Bankr. Rep. 577. *Contra*, prior to the above cited decision of the Supreme Court, *Duncan v. Landis*, (1901) 106 Fed. 839, 45 C. C. A. 666.

*Liens not discharged by voluntary proceedings for dissolution of corporation.*—The institution of voluntary proceedings for the dissolution of a manufacturing corporation does not discharge the liens of all

levies on executions against its property, and thus relieve the corporation from the operation of the section. *In re Storm*, (1900) 103 Fed. 618.

Where a corporation while insolvent has suffered or permitted some of its creditors to obtain preference through legal proceedings, and then its stockholders and officers sue for and obtain a dissolution for the express purpose of hindering and delaying creditors, and the effect of the proceedings is to permit the alleged preferences to stand in full force, and to hinder and delay other creditors, it has committed an act of bankruptcy within the section. *Scheuer v. Smith, etc., Book, etc., Co.*, (C. C. A. 1901) 112 Fed. 407, *reversing* judgment of District Court.

*The permitting by a manufacturing corporation of several judgments against it, of the issue of execution thereon, and of the advertisement for sale of property thereunder, together with the institution of proceedings by itself for its dissolution, is an act of bankruptcy within the section. In re Storm*, (1900) 103 Fed. 618.

A debtor who does not pay a lawful debt when due, upon which the creditor obtains a judgment against him and levies on his property, "suffers and permits" the creditor to obtain a preference through legal proceedings which, if he is insolvent, and unless he discharges the preference at least five days before the time for sale under the levy, constitutes an act of bankruptcy. *Bogen v. Protter*, (6th Cir. 1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288.

An insolvent debtor who made no defense to suits brought against him, upon which judgments were obtained shortly before the petition in involuntary bankruptcy was presented, and who allowed the sale of his personal property under an execution to be held without applying to be adjudged a bankrupt, has committed an act of bankruptcy under the section. *In re Cliffe*, (1899) 94 Fed. 354.

Where a creditor of a bankrupt removed certain goods from the bankrupt's store during his absence, and retained possession thereof over the bankrupt's protest, it was held that the failure to take legal proceedings to recover possession of the goods, in the absence of evidence of collusion, did not constitute an act of bankruptcy. *In re Belknap*, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326.

Where a partnership was insolvent at the date of its dissolution, and thereafter an execution was levied on the firm's property for a partnership debt, the duty devolved on the retiring partner to discharge such levy, as well as on any other members of the firm, and a failure so to do constituted an act of bankruptcy, justifying an adjudication against the firm, and also against its members, including such retiring partner. *Holmes v. Baker*, (9th

Cir. 1908) 160 Fed. 922, 88 C. C. A. 104, 20 Am. Bankr. Rep. 252.

The members of an insolvent firm having appeared in a suit against them for the appointment of a receiver, and having named persons for such position, it must be held that any preference thereby obtained by certain creditors was "suffered or permitted" by them, within the meaning of the section. *In re Kersten*, (1901) 110 Fed. 929. Compare *Davis v. Stevens*, (1900) 104 Fed. 235.

*Burden of proof.*—Upon a petition in involuntary bankruptcy under section 3a (3), the petitioning creditors must assume the burden of proving that a preference was obtained by a creditor through legal proceedings; that the debtor suffered or permitted the preference, and did not vacate or discharge it at least five days before a sale or final disposition of the property affected; and that he was insolvent at the time the preference was obtained. Proof that he was insolvent at the time of filing the petition is insufficient. *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123.

Obtaining of preference essential.—It does not necessarily follow, because a lien has been obtained through legal proceedings, and the debtor has failed to vacate or discharge the same, that a preference has been acquired. In order to commit the act of bankruptcy specified in section 3a (3), it is essential that the proceeding actually result in a preference; that is, that it shall enable some one or more of the creditors of an insolvent debtor to obtain a greater percentage of his debt than other creditors. *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Chapman*, (N. D. Ga. 1900) 99 Fed. 395, 3 Am. Bankr. Rep. 607; *In re Kersten*, (E. D. Wis. 1901) 110 Fed. 929, 6 Am. Bankr. Rep. 516; *In re Belknap*, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326; *Richmond Standard Steel Spike, etc., Co. v. Allen*, (4th Cir. 1906) 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583; *In re Crafts-Riordan Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931.

And see the annotation under section 60a.

*Insufficient petition.*—In *In re Pressed Steel Wagon Goods Co.*, (W. D. Mich. 1911) 193 Fed. 811, a petition was held insufficient where it alleged generally that a specified corporation while insolvent committed an act of bankruptcy, in that it suffered and permitted while insolvent a certain named creditor to obtain a preference through legal proceedings, and alleged specifically only the rendition of a judgment against the alleged bankrupt and in favor of one of the creditors for a certain amount and upon a date named. The court said: "There is no averment of the issuance of an execution upon such

judgment, or of the levying thereof upon any property of the judgment debtor. The petition is silent upon the subject of the sale of any property or a notice of such sale. No property affected by such judgment, or any preference thereby created, is described. No date of sale, or proposed sale, is specified. In short, except as to the judgment itself, the allegations of the petition with respect to any act of bankruptcy are mere conclusions, rather than averments of particular facts from which such conclusions could be inferred, or upon which they could be based. Upon both reason and authority the petition must state the particular facts which, under the statute, constitute the claimed act of bankruptcy. The respondent in these proceedings has the right to be informed of the exact charge made against him which he is to be called upon to meet, and, if he so demands, is entitled to a trial of the issue thus presented by the court or a jury. An averment couched in the very general language of the statute conveys no such information and presents no triable issue, and therefore is insufficient."

The act of bankruptcy is complete, under section 3a (3), where the debtor fails to vacate a legal proceeding within five days before the sale or disposition of the property affected thereby, providing, of course, that it effects a preference. *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140; *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484; *Scheuer v. Smith, etc., Book, etc., Co.*, (5th Cir. 1901) 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; *Bradley Timber Co. v. White*, (5th Cir. 1903) 121 Fed. 779, 58 C. C. A. 55, 10 Am. Bankr. Rep. 329; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *Bogen v. Protter*, (6th Cir. 1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288; *In re Vetterman*, (D. C. N. H. 1906) 135 Fed. 443, 14 Am. Bankr. Rep. 245; *In re National Hotel, etc., Co.*, (E. D. Pa. 1905) 138 Fed. 947, 15 Am. Bankr. Rep. 69; *In re Rung Furniture Co.*, (2d Cir. 1905) 139 Fed. 526, 71 C. C. A. 342, 14 Am. Bankr. Rep. 12; *Richmond Standard Steel Spike, etc., Co. v. Allen*, (4th Cir. 1906) 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583; *In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598; *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.*, (3d Cir. 1907) 154 Fed. 662, 83 C. C. A. 486, 18 Am. Bankr. Rep. 756; *Holmes v. Baker*, (9th Cir. 1908) 160 Fed. 922, 88 C. C. A. 104, 20 Am. Bankr. Rep. 252; *In re Tupper*, (N. D. N. Y. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824; *In re Windt*, (D. C. Conn. 1910) 177 Fed. 584, 24 Am. Bankr. Rep. 536; *In re Crafts-Riordan Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931.

*Failure to discharge.*—While the failure to discharge a levy five days before sale is an act of bankruptcy, an independent act of bankruptcy is also committed by a failure to discharge the levy on each succeeding day including the day of the sale. *In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598.

*It is not the mere obtaining of a judgment and levying execution on the property of the debtor while insolvent that makes him liable as a bankrupt, but the failure on his part, within five days before a sale or final disposition of the property levied on, to have the same vacated or discharged.* *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *In re Tupper*, (N. D. N. Y. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824.

Merely suffering an execution to be levied is not an act of bankruptcy; failure to discharge the lien of the execution before it ripens into an indissoluble preference, and an imminent probability that the lien will ripen into such a preference, are absolutely essential to constitute an act of bankruptcy under the terms of the section. *In re R. L. Radke Co.*, (N. D. Cal. 1911) 193 Fed. 735.

*Resistance immaterial.*—That an insolvent resists legal proceedings by a creditor to obtain a preference does not prevent such preference constituting an act of bankruptcy, if the bankrupt fails to discharge the preference within the time provided. *Bradley Timber Co. v. White*, (5th Cir. 1903) 121 Fed. 779, 58 C. C. A. 55, 10 Am. Bankr. Rep. 329.

*"Sale or final disposition."*—In *Citizens' Banking Co. v. Ravenna Nat. Bank*, (1914) 234 U. S. 360, 34 S. Ct. 806, 58 U. S. (L. ed.) 1352, the court, construing the clause relating to the time within which a preference must be vacated, said: "Without any doubt this clause shows that the debtor is to have until five days before an approaching or impending event within which to vacate or discharge the lien out of which the preference arises. What, then, is the event which he is required to anticipate? The statute answers, 'a sale or final disposition of any property affected by such preference.' As these words are part of a provision dealing with liens obtained through legal proceedings, and as the enforcement of such a lien usually consists in selling some or all of the property affected, and applying the proceeds to the creditor's demand, it seems quite plain that it is to such a sale that the clause refers. And as there are instances in which the property affected does not require to be sold, as when it is money seized upon execution or attachment, or reached by garnishment, it seems equally plain that the words 'or final disposition' are intended to include the act whereby the debtor's title is passed to another when a sale is not required. No doubt, the terms 'sale or final disposition,'

explained as they are by the context, are comprehensive of every act of disposal, whether by sale or otherwise, which operates as an enforcement of the lien or preference. But we do not perceive anything in the clause which suggests that the time when the lien is obtained has any bearing upon when the property must be freed from it to avoid an act of bankruptcy. On the contrary, the natural and plain import of the language employed is that it will suffice if the lien is lifted five days before a sale or final disposition of any of the property affected. This is the only point of time that is mentioned, and the implication is that it is intended to be controlling."

But where a person, while insolvent, voluntarily confessed judgment in favor of certain creditors, and permitted them to levy executions on and to sell the property thereunder without having vacated such sale, it was held that such proceedings constituted a "transfer" within clauses 1 and 2 of section 3, independent of clause 3; and, therefore, that the limitations against the creditor's right to file a bankruptcy petition ran from the day of the sale, and not from a period five days prior thereto. *In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598.

In *Citizens' Banking Co. v. Ravenna Nat. Bank*, (1914) 234 U. S. 360, 34 S. Ct. 806, 58 U. S. (L. ed.) 1352, the court, construing the words "final disposition," said: "When one speaks of a sale or final disposition of property, he means by final disposition an act having substantially the effect of a sale,—a transfer of ownership and control from one to another,—and especially is this true when he is referring to a sale or final disposition in the enforcement of a lien. We regard it as entirely clear that the term is so used in this instance, and that it signifies an affirmative act of disposal, not a mere lapse of time which leaves the lien intact and still requiring enforcement. To illustrate, let us take the instance of a provisional attachment of real property, which the creditor is not entitled to enforce unless he sustains the demand which is the subject of the principal suit; and let us suppose that the debtor defends against the demand, and that the suit is pending and undetermined four months after the levy. Of course, an adjudication in bankruptcy upon a petition filed thereafter would not disturb the attachment. But could it be said that the property attached was finally disposed of at the end of the four months? An affirmative answer seems quite inadmissible."

"Final disposition" is not a gift of the property to some third person, or a voluntary transfer to the creditor in satisfaction of the preferential judgment, as that would be merely a sale in payment. There are different ways or modes of disposing

of property, of enforcing execution, judgments, and liens, and the words "or final disposition" cover every other method of passing the control and dominion of the property from the debtor to another, either absolutely or as security. *In re Tupper*, (N. D. N. Y. 1908) 163 Fed. 766, 20 Am. Bankr. Rep. 824.

In the case of *In re Fineman*, (E. D. Pa. 1915) 223 Fed. 652, wherein a petition in bankruptcy was held sufficient on a motion to dismiss, the court said: "A statement of the record facts in this case is necessary to bring out the question involved. On November 7, 1914, a petition in an involuntary proceeding was filed. The act of bankruptcy intended to be averred was the third of those set forth in section 3a of the Act. The ground of bankruptcy is that usually referred to as an act of 'preference.' It may be noted here that three things together constitute the act of bankruptcy. The alleged bankrupt must have been insolvent; he must have suffered or permitted a creditor to obtain a preference through legal proceedings; and he must have failed to have had such preference vacated at least five days before a final sale or other disposition of the property affected by such preference. The averments of the petition by means of which the insolvent is to be made subject to the provisions of the Bankruptcy Act are that the alleged bankrupt is insolvent and has suffered and permitted certain of his creditors to obtain a preference through legal proceedings. The preference set forth is the suffering of a judgment and an attachment in execution to be issued thereon against an insurance company as garnishee, and that judgment had been obtained against the garnishee in the proceedings, the amount of which is about to be paid over to the creditor thus preferred. There is a further averment of the failure of the alleged bankrupt to have the preference thus obtained vacated. No other ground of bankruptcy is suggested. It is evident that no decree of adjudication can be entered unless the above averments bring the proceeding within the quoted section of the Bankruptcy Law. It is equally clear that the securing by a creditor of the amount of his claim through attachment in execution proceedings is a 'final disposition of property affected by such preference' as effectually as if he had received payment from the proceeds of a sale under a writ of fieri facias or venditioh exponas. There is no necessity or excuse even for discussing the question, as it has been set at rest in a number of adjudications. *In re Harper*, (D. C.) 105 Fed. 900. Essentially the same question was disposed of in *Re Goldie Fisher*, (D. C.) 219 Fed. 638. The difference of views expressed by the respective counsel is due to the overlooking

by counsel for the bankrupt of the distinction between cases in which the attachment in execution proceedings have gone no further than the issuance of the writ and those in which they have progressed beyond the point of a judgment against the garnishee. It is to be observed that the distinction is analogous to that between cases in which a judgment has been recovered, but no sale or other disposition of the property of the alleged bankrupt threatened, and those in which a sale through execution process is impending. It seems to be an extremely technical view (although there is some sanction for it in judicial expressions) to take of a petition that, because there is no averment of the fact that the debt attached is the property of the defendant in the judgment, there is therefore no averment that any property of the alleged bankrupt is affected 'by a preference.' In the first place, the averments are on the fact of the preference; and in the second place, the averment of a judgment and issuing of an attachment in execution upon that judgment, and following this a judgment against the garnishee, necessarily carries a statement of the fact that there was property of the defendant out of which the preference was obtained. The motion to dismiss the petition is, therefore, disallowed."

In *In re Truitt*, (1913) 203 Fed. 550, a petition in involuntary bankruptcy charged that the debtor owned real estate in a certain county, and that while insolvent and on a date particularly specified, which was two or three days less than four months before the filing of the petition in bankruptcy, he permitted named creditors to obtain judgments against him in the Circuit Court for that county; that he had done nothing to satisfy or discharge such judgments or the liens created by them; and that within five days after the filing of the petition the lien created by them would become absolute and unavoidable by the trustee in bankruptcy and the property would thereby become finally disposed of and sequestered by such judgment creditors. Sustaining a demurrer to the petition on the ground that no act of bankruptcy under section 3a (3) was alleged, the court said: "Stated briefly, the contention of the petitioning creditors is that whenever a creditor of an insolvent debtor secures a preference by obtaining a lien through legal proceedings upon the property of his debtor, and the latter does not within five days before the expiration of four months thereafter pay, discharge, satisfy or vacate such lien, an act of bankruptcy has been committed. This contention has been made before. It was held unsound in *Seaboard Steel Casting Co. v. William R. Trigg Co.*, (1903) 124 Fed. 75; *In re Vastbinder*, (1903) 126 Fed. 417; *In re Vetterman*, (1905) 135

Fed. 443. It has been upheld in *In re Tupper*, (1908) 163 Fed. 766, and in *Folger v. Putnam*, (1912) 194 Fed. 793, 114 C. C. A. 513."

*Compare Folger v. Putnam*, (C. C. A. 9th Cir. 1912) 194 Fed. 793, 114 C. C. A. 513 [writ of certiorari dismissed 235 U. S. 712, 35 S. Ct. 202, 59 U. S. (L. ed.) 436], wherein it was held that it is incumbent upon an insolvent person to discharge or vacate a lien secured by an attachment upon his property at least five days before a period of four months expires following the date of the levy of such attachment, and if he fails therein he commits an act of bankruptcy described in this section. The court said: "It may be and has been suggested that this will sometimes force a person into bankruptcy, when the attachment is acquired upon an invalid or spurious claim, or one not provable against the bankrupt's estate; but it seems to us better that this contingency should obtain than that the very statute itself should be defeated in its fundamental purpose. Of course, unless the person against whom the attachment is secured is insolvent, the conclusion reached cannot apply."

*Computation of time.*—Where property of a bankrupt was advertised for sale under an execution on Aug. 22, 1906, the bankrupt has the entire day of the 17th in which to vacate or discharge the execution before he will be guilty of an act of bankruptcy. *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.*, (3d Cir. 1907) 154 Fed. 662, 83 C. C. A. 486, 18 Am. Bankr. Rep. 756. And see section 31, and the annotation thereunder, as to computation of time generally.

*An actual levy on property need not necessarily be made*, in order to constitute an act of bankruptcy under the section, the payment of money by the debtor or some one at his instance to the officer who has the execution, and the officer's application thereof upon the execution, being a final disposition of property such as to complete the preference of the judgment creditor over other creditors. *In re Miller*, (1900) 104 Fed. 764.

*Creditors are not required to wait until a sale has actually taken place*, but may file a petition, and, on the proper showing, have the sale enjoined. *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484. And see to the same effect *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140; *In re Harper*, (N. D. Ill. 1900) 105 Fed. 900, 5 Am. Bankr. Rep. 567; *Scheuer v. Smith, etc., Book, etc., Co.*, (5th Cir. 1901) 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; *In re National Hotel, etc., Co.*, (E. D. Pa. 1905) 138 Fed. 947, 15 Am. Bankr. Rep. 69.



**Debtor's participation unnecessary.**—

The suffering or permitting a preference through legal proceedings, by the failure to vacate or discharge the same, does not imply anything more than the mere passive nonresistance of an insolvent debtor to regular judicial proceedings directed against him. It is not necessary that the debtor should procure, or actively participate in, the proceedings. *In re Reichman*, (E. D. Mo. 1899) 91 Fed. 624, 1 Am. Bankr. Rep. 17; *In re Moyer*, (E. D. Pa. 1899) 93 Fed. 188, 1 Am. Bankr. Rep. 577; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *Scheuer v. Smith*, etc., Book, etc., Co., (5th Cir. 1901) 112 Fed. 467, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; *Bogen v. Protter*, (6th Cir. 1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288; *In re Rung Furniture Co.*, (2d Cir. 1905) 139 Fed. 526, 71 C. C. A. 342, 14 Am. Bankr. Rep. 12; *In re Gallagher*, (D. C. Mass. 1901) 6 Am. Bankr. Rep. 255.

"The words 'procure or suffer his property to be taken on legal process,' used by the Act of 1867 in defining the eighth act of bankruptcy, have a suggestive resemblance to 'suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings,' which in the Act of 1898 formed part of the description of the third act. Nevertheless, the acts themselves are radically different. Under the law of 1867 the act of bankruptcy was not committed unless the debtor actively and knowingly had a part in it. Under the Act of 1898 it is not essential that he shall do anything at all." *In re Truitt*, (D. C. Md. 1913) 203 Fed. 550.

**Actual result, not specific intent, controls.**—Distinguishing cases decided under the Bankruptcy Acts of 1867 and 1841, and noting "the careful change in the language of all the provisions of the Bankrupt Act of 1898 from those of the former Bankrupt Acts upon the subject," the federal Supreme Court said (*per Mr. Justice Gray*): "The Act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact." *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147 (four justices dissenting). To the same point see the following cases: *In re Reichman*, (E. D. Mo. 1899) 91 Fed. 624, 1 Am. Bankr. Rep. 17; *In re Ferguson*, (S. D. N. Y. 1899) 95 Fed. 429, 2 Am. Bankr. Rep. 586; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Moyer*, (E. D. Pa. 1899) 97 Fed. 324, 1 Am. Bankr. Rep. 577; *Parmenter Mfg. Co. v. Stoeber*, (1st Cir. 1899) 97 Fed. 330, 38 C. C. A. 200, 3 Am. Bankr. Rep. 220;

*In re Thomas*, (W. D. Pa. 1900) 103 Fed. 272, 4 Am. Bankr. Rep. 571; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140; *In re Harper*, (N. D. Ill. 1900) 105 Fed. 900, 5 Am. Bankr. Rep. 567; *Scheuer v. Smith*, etc., Book, etc., Co., (5th Cir. 1901) 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; *Bradley Timber Co. v. White*, (5th Cir. 1903) 121 Fed. 779, 58 C. C. A. 55, 10 Am. Bankr. Rep. 329; *Bogen v. Protter*, (6th Cir. 1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288; *In re Rung Furniture Co.*, (2d Cir. 1905) 139 Fed. 526, 71 C. C. A. 342, 14 Am. Bankr. Rep. 12; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931; *In re Moyer*, (1899) 93 Fed. 188; *In re Chapman*, (1900) 99 Fed. 395; *In re Baker-Ricketson Co.*, (1899) 97 Fed. 489; *In re Harper*, (1900) 105 Fed. 900.

For cases decided under earlier Acts see *In re Schick*, 2 Ben. 5, 1 Nat. Bankr. Reg. 177, 21 Fed. Cas. No. 12,455; *Fisher v. Currier*, 1 Pa. L. J. 279, 9 Fed. Cas. No. 4,818; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131, 13 Fed. Cas. No. 7,496; *Rankin v. Florida*, etc., R. Co., 1 Nat. Bankr. Reg. 647, 20 Fed. Cas. No. 11,567; *Wakeman v. Hoyt*, 5 Law Rep. 309, 28 Fed. Cas. No. 17,051; *In re Wells*, 3 Nat. Bankr. Reg. 371, 29 Fed. Cas. No. 17,388; *In re Reichman*, 91 Fed. 624.

**Lien obtained beyond four months' period.**—"Priority is obtained when a lien attaches, not when it is enforced." *Colston v. Austin Run Mining Co.*, (C. C. A. 3d Cir. 1912) 194 Fed. 929. And the failure to discharge valid liens, acquired through legal proceedings more than four months prior to the filing of the petition in bankruptcy, does not constitute an act of bankruptcy under section 3a (3). *In re Ferguson*, (S. D. N. Y. 1899) 95 Fed. 429, 2 Am. Bankr. Rep. 586; *In re Chapman*, (N. D. Ga. 1900) 99 Fed. 395, 3 Am. Bankr. Rep. 607; *Owen v. Brown*, (8th Cir. 1903) 120 Fed. 812, 57 C. C. A. 180, 9 Am. Bankr. Rep. 717; *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171.

The statute does not mean that valid judgment liens on real property acquired before the passage of the Act, or more than four months before the filing of the petition in bankruptcy, shall be vacated; or that the due enforcement of such liens by execution shall constitute an illegal preference or an act of bankruptcy. *In re Deer Creek Water & Water Power Co.*, (M. D. Pa. 1913) 205 Fed. 205; *Owen v. Brown*, (8th Cir. 1903) 120 Fed. 812, 57 C. C. A. 180, 9 Am. Bankr. Rep. 717. See also *In re Chapman*, (N. D. Ga. 1900) 99 Fed. 395, 3 Am. Bankr. Rep. 607. See also the note to section 67f.

(4) [General assignment — appointment of receiver or trustee.] made a general assignment for the benefit of his creditors, or, being insolvent,

applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States; or [(amended 1903, which excepted pending cases) 32 Stat. L. 797.]

As originally enacted this clause read as follows: "(4) made a general assignment for the benefit of his creditors; or" [30 Stat. L. 546.] It was amended in 1903 to read as in the text.

- I. Assignment for benefit of creditors.
- II. Appointment of receiver or trustee.

#### I. ASSIGNMENT FOR BENEFIT OF CREDITORS.

In general.—The making of a general assignment for the benefit of creditors constitutes an act of bankruptcy, on the part of the assignor, under section 3a (4). George M. West Co. v. Lea, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463, *affirming* (D. C. Va. 1899) 91 Fed. 237, 1 Am. Bankr. Rep. 261; Randolph v. Scruggs, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1; Bray v. Cobb, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153; *In re* Sievers, (E. D. Mo. 1899) 91 Fed. 366, 1 Am. Bankr. Rep. 117; *In re* Smith, (1899) 92 Fed. 135; Davis v. Bohle, (8th Cir. 1899) 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; *In re* Gutwillig, (2d Cir. 1899) 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388; *In re* Romanow, (D. C. Mass. 1899) 92 Fed. 510, 1 Am. Bankr. Rep. 461; Chemical Nat. Bank v. Meyer, (E. D. N. Y. 1899) 92 Fed. 896, 1 Am. Bankr. Rep. 565; Leidigh Carriage Co. v. Stengel, (6th Cir. 1899) 95 Fed. 645, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; *In re* Meyer, (2d Cir. 1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 550; Rumsey, etc., Co. v. Novelty, etc., Mfg. Co., (E. D. Mo. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704; Clark v. American Mfg., etc., Co., (4th Cir. 1900) 101 Fed. 962, 42 C. C. A. 120, 4 Am. Bankr. Rep. 351; *In re* Green, (E. D. Pa. 1901) 106 Fed. 313, 5 Am. Bankr. Rep. 848; Green River Deposit Bank v. Craig, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381; Day v. Beck, etc., Hardware Co., (5th Cir. 1902) 114 Fed. 834, 52 C. C. A. 468, 8 Am. Bankr. Rep. 175; Summers v. Abbott, (8th Cir. 1903) 122 Fed. 36, 58 C. C. A. 352, 10 Am. Bankr. Rep. 254; *In re* Chase, (1st Cir. 1903) 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677; *In re* Knight, (W. D. Ky. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 6; Anniston Iron, etc., Co. v. Anniston Rolling Mill Co., (N. D. Ala. 1903) 125 Fed. 974, 11 Am. Bankr. Rep. 200; *In re* Moench, etc., Co., (2d Cir. 1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240; *In re* Salmon, (W. D. Mo. 1906) 143 Fed. 395, 16 Am. Bankr. Rep. 122; *In re* Thomlinson Co., (8th Cir. 1907) 154 Fed. 834, 83

C. C. A. 550, 18 Am. Bankr. Rep. 691, *explaining* Rumsey, etc., Co. v. Novelty, etc., Mfg. Co., (E. D. Mo. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704; *In re* Fish Bros. Wagon Co., (8th Cir. 1908) 164 Fed. 553, 90 C. C. A. 427, 26 L. R. A. (N. S.) 433, 21 Am. Bankr. Rep. 149; Griffin v. Dutton, (1st Cir. 1908) 165 Fed. 626, 91 C. C. A. 614, 21 Am. Bankr. Rep. 449; Lennox v. Allen-Lane Co., (1st Cir. 1908) 167 Fed. 114, 92 C. C. A. 566, 21 Am. Bankr. Rep. 648; Canner v. Webster Tapper Co., (1st Cir. 1909) 168 Fed. 519, 93 C. C. A. 541, 21 Am. Bankr. Rep. 872; *In re* Hersey, (N. D. Ia. 1909) 171 Fed. 998, 22 Am. Bankr. Rep. 856; Yungbluth v. Slipper, (C. C. A. 9th Cir. 1911) 185 Fed. 773; *In re* Federal Lumber Co., (D. C. Mass. 1910) 185 Fed. 926; *In re* Courtenay Mercantile Co., (D. C. N. D. 1911) 186 Fed. 352.

For cases to the same effect, decided under the Act of 1867, see *In re* Kraft, 4 Fed. 523; Jones v. Sleeper, 2 N. Y. Leg. Obs. 131, 13 Fed. Cas. No. 7,496; *In re* Randall, Deady 557, 3 Nat. Bankr. Reg. 18, 20 Fed. Cas. No. 11,551; *In re* Burt, 1 Dill. 439, 4 Fed. Cas. No. 2,210; Spicer v. Ward, 3 Nat. Bankr. Reg. 512, 22 Fed. Cas. No. 13,241; Cragin v. Thompson, 2 Dill. 513, 12 Nat. Bankr. Reg. 81, 6 Fed. Cas. No. 3,320; *In re* Mendelsohn, 3 Sawy. 342, 12 Nat. Bankr. Reg. 533, 17 Fed. Cas. No. 9,420; Matter of Frisbee, 14 Blatchf. 185, 15 Nat. Bankr. Reg. 522, 9 Fed. Cas. No. 5,129; *In re* Croft, 8 Biss. 188, 17 Nat. Bankr. Reg. 324, 6 Fed. Cas. No. 3,404; Matter of Smith, 4 Ben. 1, 3 Nat. Bankr. Reg. 377, 22 Fed. Cas. No. 12,974; Perry v. Langley, 1 Nat. Bankr. Reg. 559, 19 Fed. Cas. No. 11,006; *In re* Chamberlain, 3 Nat. Bankr. Reg. 710, 5 Fed. Cas. No. 2,574; Wakeman v. Hoyt, 5 Law Rep. 309, 28 Fed. Cas. No. 17,051; *Ex p.* Breneman, Crabbe 456, 4 Fed. Cas. No. 1,830; Gassett v. Morse, 21 Vt. 627, 10 Fed. Cas. No. 5,264; Grow v. Ballard, 2 Nat. Bankr. Reg. 194, 11 Fed. Cas. No. 5,848.

"When a general assignment for the benefit of creditors is made by a debtor, *eo instanti* there is generated by the statute a right in his creditors to have his affairs wound up, and his estate administered in the Bankruptcy Court, pursuant to the Bankrupt Law, which has suspended the operation of all state insolvency laws; and if the enforcement of this right is demanded by a proper proceeding within

four months after its inception, no action in any court in any suit brought after the commission of the act of bankruptcy can defeat it, without the consent of the Bankrupt Court." *In re Knight*, (1903) 125 Fed. 35. As to suspension by the Bankrupt Act of state laws regulating assignments for benefit of creditors see note preceding section 1.

The "general assignment," contemplated by section 3a (4), is to be taken in its generic sense, and embraces any conveyance, at common law or by statute, by which the parties intend to make an absolute and unconditional appropriation of the property conveyed, to raise funds to pay the debts of the vendor, share and share alike. *In re Thomlinson Co.*, (8th Cir. 1907) 154 Fed. 834, 83 C. C. A. 550, 18 Am. Bankr. Rep. 691; *Courtenay Mercantile Co. v. Finch*, (C. C. A. 8th Cir. 1912) 194 Fed. 368; *In re Heleker Bros. Mercantile Co.*, (D. C. Kan. 1914), 216 Fed. 963, wherein the court said: "The term 'general assignment for the benefit of creditors' as employed in clause 4, subdivision 'a,' section 3, of the Bankruptcy Act, does not concern itself merely with such acts of a debtor as would constitute an assignment for the benefit of creditors under the laws of the state in which it is made, or merely with the form of the written instrument employed to effectuate such purpose; on the contrary, the Act does concern itself with, and does contemplate, all acts of a debtor, regardless of the manner or form of their accomplishment, by which he parts with the title and possession of all his property of every kind and nature for the benefit of his creditors, to be disposed of as his trustee or assignee by him selected and named may employ, independent of the Bankruptcy Act."

A valid assignment for all purposes is not necessary, under section 3a (4), in order to constitute the act of bankruptcy therein specified; but it is sufficient that the debtor assigns all of his property for the benefit of his creditors, and that the assignment was so intended. *Canner v. Webster Tapper Co.*, (1st Cir. 1909) 168 Fed. 519, 93 C. C. A. 541, 21 Am. Bankr. Rep. 872; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 998, 22 Am. Bankr. Rep. 856; *In re Federal Lumber Co.*, (D. C. Mass. 1910) 185 Fed. 926; *Courtenay Mercantile Co. v. Finch*, (C. C. A. 8th Cir. 1912) 194 Fed. 368, affirming (1911) 186 Fed. 35.

**Confession of judgment.**—Under the law of Pennsylvania a confession of judgment by a debtor to a trustee for all creditors amounts to a general assignment for the benefit of creditors, and is an act of bankruptcy under the section. *In re Green*, (1901) 106 Fed. 313.

A direct transfer to creditors, without the intervention of a trustee, is not an assignment for the benefit of creditors.

*Anniston Iron, etc., Co. v. Anniston Rolling Mill Co.*, (N. D. Ala. 1903) 125 Fed. 974, 11 Am. Bankr. Rep. 200.

**Creditor not precluded from filing petition.**—A creditor who has attacked in the state courts as fraudulent alleged preferences in a debtor's general assignment does not preclude himself from filing his petition in involuntary bankruptcy or from attacking these preferences in bankruptcy proceedings. *Leidigh Carriage Co. v. Stengel*, (C. C. A. 1899) 95 Fed. 637.

**Assignment by corporation.**—Where the officers of a corporation, acting under the authority of a resolution of the board of directors, and in pursuance of a vote taken at a meeting of the stockholders, though against the objection of a minority of the stockholders, make a general assignment of all its property to trustees for distribution among its creditors, this constitutes an act of bankruptcy. *Clark v. American Mfg., etc., Co.*, (4th Cir. 1900) 101 Fed. 962, 42 C. C. A. 120, 4 Am. Bankr. Rep. 351. See also *In re C. Moench, etc., Co.*, (2d Cir. 1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240.

But it has been held that a corporation's adoption of resolutions authorizing the treasurer to convert the corporate assets into cash, to be deposited with a trust company for the creditors' benefit, does not constitute an act of bankruptcy as a general assignment for creditors where the plan is not executed. *In re Federal Lumber Co.*, (D. C. Mass. 1910) 185 Fed. 926.

A voluntary application for dissolution and for the appointment of a receiver, on the ground of insolvency, filed in a state court and under a state statute by a corporation, such application being granted and a receiver being appointed, is not a "general assignment" for the benefit of creditors within the section, the "equivalency" of result, if equivalency exists, not being important. *In re Empire Metallic Bedstead Co.*, (C. C. A. 1899) 98 Fed. 981, affirming (1899) 95 Fed. 957.

**Partnerships**, and the individual members thereof, may be adjudicated bankrupt as a result of the making of a general assignment for the benefit of creditors. *Chemical Nat. Bank v. Meyer*, (E. D. N. Y. 1899) 92 Fed. 896, 1 Am. Bankr. Rep. 565; *In re Meyer*, (2d Cir. 1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381; *In re Knight*, (W. D. Ky. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 6; *Yungbluth v. Slipper*, (C. C. A. 9th Cir. 1911) 185 Fed. 773.

**Assignment by some, but not all, firm members.**—Where two of the three partners of a firm had executed a general assignment for the benefit of creditors, the other partner having purposely left the jurisdiction after having considered the matter and advised such assignment,

it was held that there was under the section a valid assignment. *In re Grant*, (1901) 106 Fed. 496.

**Partnership general assignment.**—An assignment which purported to transfer all the partnership property is a "general assignment" by the partnership, though, as it purported to transfer only their joint and not their individual property, it was but a partial assignment by the individual partners. *In re Meyer*, (C. C. A. 1899) 98 Fed. 980, *affirming* judgment of District Court.

Where a partnership and the individuals composing it make an assignment for the benefit of creditors, the act of bankruptcy is committed by all. *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381.

**Appointment of receiver.**—The appointment by a court of chancery, upon the application of the administrator of a deceased partner (the surviving partners, however, not objecting), of a receiver of a partnership which has been dissolved by the decease of such partner, is not a "general assignment" under the section, such general assignment being necessarily the voluntary act of the debtor, whereby he transfers his property to a trustee for the benefit of the creditors. *Vaccaro v. Security Bank*, (C. C. A. 1900) 103 Fed. 436.

A stipulation, made in good faith by one partner, for the appointment of a receiver for the firm, and the subsequent transfer of its assets by him to such receiver, is not a general assignment within the Bankruptcy Act, and is not an act of bankruptcy. *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101.

**Preferential or fraudulent intention unnecessary.**—A general assignment for the benefit of creditors is an act of bankruptcy, although made without preferences, and without actually intending to defraud creditors. *In re Meyer*, (2d Cir. 1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; *Pelton v. Sheridan*, (1914) 74 Ore. 176, 144 Pac. 410. See also *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142.

**Insolvency unnecessary.**—In order to constitute an act of bankruptcy, the making of a general assignment for the benefit of creditors need not be because of insolvency, nor is there any necessity that the assignor should be actually insolvent, as such an assignment will of itself, without the element of insolvency, warrant an adjudication of bankruptcy. *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463, *affirming* (E. D. Va. 1899) 91 Fed. 237, 1 Am. Bankr. Rep. 261; *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153; *Leidigh Carriage Co. v. Stengel*, (6th Cir.

1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 385; *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381; *Couts v. Townsend*, (W. D. Ky. 1903) 126 Fed. 249, 11 Am. Bankr. Rep. 126; *In re Sully*, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304; *In re Farthing*, (E. D. N. C. 1913) 202 Fed. 557; *In re Columbia Real Estate Co.*, (D. C. N. J. 1913) 205 Fed. 980; *Hill v. Western Elec. Co.*, (C. C. A. 6th Cir. 1914) 214 Fed. 243.

A denial of insolvency therefore, by way of defense, to a petition based upon the making of a deed of general assignment is not warranted by the Bankrupt Law. *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098. See also *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814; *Green River Deposit Bank v. Craig*, (1901) 110 Fed. 137; *Bray v. Cobb*, (1898) 91 Fed. 102.

## II. APPOINTMENT OF RECEIVER OR TRUSTEE.

**In general.**—Where an insolvent debtor applies for the appointment of a receiver or trustee for his property, or where because of insolvency a receiver or trustee has been put in charge of his property, under the laws of the state or territory, or of the United States, the debtor becomes amenable to adjudication as a bankrupt under section 3a (4). *In re Knight*, (W. D. Ky. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 6; *Lowenstein v. Henry McShane Mfg. Co.*, (D. C. Md. 1904) 130 Fed. 1007, 12 Am. Bankr. Rep. 601; *Blue Mountain Iron, etc., Co. v. Portner*, (4th Cir. 1904) 131 Fed. 57, 65 C. C. A. 295, 12 Am. Bankr. Rep. 559; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 543 (see master's report); *In re Hercules Atkin Co.*, (E. D. Pa. 1904) 133 Fed. 813, 13 Am. Bankr. Rep. 369; *In re Spalding*, (2d Cir. 1905) 139 Fed. 244, 71 C. C. A. 370, 14 Am. Bankr. Rep. 129; *In re C. H. Bennett Shoe Co.*, (D. C. Conn. 1905) 140 Fed. 687, 15 Am. Bankr. Rep. 497; *In re International Coal Min. Co.*, (E. D. Pa. 1906) 143 Fed. 665, 16 Am. Bankr. Rep. 309; *Hooks v. Aldridge*, (5th Cir. 1906) 145 Fed. 865, 76 C. C. A. 409, 16 Am. Bankr. Rep. 658; *Beatty v. Andersen Coal Min. Co.*, (1st Cir. 1906) 150 Fed. 293, 80 C. C. A. 181, 17 Am. Bankr. Rep. 738; *In re Belfast Mesh Underwear Co.*, (D. C. Conn. 1907) 153 Fed. 224, 18 Am. Bankr. Rep. 620; *In re Sterlingworth R. Supply Co.*, (E. D. Pa. 1908) 164 Fed. 591, 21 Am. Bankr. Rep. 342; *In re Perry Aldrich Co.*, (D. C. Mass. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244; *In re Electric Supply Co.*, (S. D. Ga. 1909) 175 Fed. 612, 23 Am. Bankr. Rep. 647; *In re Kennedy Tailoring Co.*, (E. D. Tenn. 1909) 175 Fed. 871,

23 Am. Bankr. Rep. 656; *Matter of Edward G. Milbury Co.*, (S. D. N. Y. 1904) 11 Am. Bankr. Rep. 523; *Matter of International Mercantile Agency*, (D. C. N. J. 1905) 13 Am. Bankr. Rep. 725; *In re Pickens Mfg. Co.*, (N. D. Ga. 1908) 20 Am. Bankr. Rep. 202; *In re Hecox*, (8th Cir. 1908) 21 Am. Bankr. Rep. 314; *Schumert v. Security Brewing Co.*, (E. D. La. 1912) 199 Fed. 358; *In re Wenatchee Heights Orchard Co.*, (W. D. Wash. 1913) 204 Fed. 674; *Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co.*, (W. D. Ark. 1913) 206 Fed. 813; *In re Rankin*, (N. D. Ohio 1913) 210 Fed. 529; *In re Muir*, (N. D. Pa. 1914) 212 Fed. 495; *Pugh v. Loisel*, (C. C. A. 5th Cir. 1915) 219 Fed. 417.

A state court does not acquire priority of jurisdiction, to administer the property of a debtor, to the exclusion of the Bankruptcy Act, by appointment of a receiver on the ground of insolvency. *In re Knight*, (1903) 125 Fed. 35.

Receivers are "put in charge" of the property of a defendant when the decree appointing them is entered, although they do not qualify nor take actual possession of the property until later; and the four months period within which a petition in bankruptcy based on such appointment as an act of bankruptcy must be filed, runs from the date of such decree. *In re Perry Aldrich Co.*, (D. C. Mass. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244.

**Appointment of temporary receiver.**—The Bankruptcy Act draws no distinction between temporary and permanent receivers; but it makes the simple fact of a receiver having been placed in charge of the defendant's property, on the ground of insolvency, an act of bankruptcy. *Blue Mountain Iron, etc., Co. v. Portner*, (4th Cir. 1904) 131 Fed. 57, 65 C. C. A. 295, 12 Am. Bankr. Rep. 559; *In re Kennedy Tailoring Co.*, (E. D. Tenn. 1909) 175 Fed. 871, 23 Am. Bankr. Rep. 656; *In re Columbia Real Estate Co.*, (D. C. N. J. 1913) 205 Fed. 980.

**Mere consent to the appointment of a receiver does not constitute an act of bankruptcy.** *In re Gold Run Mining & Tunnel Co.*, (D. C. Colo. 1912) 200 Fed. 162.

**Appointment in foreclosure suit.**—Where a receiver was appointed in a suit to foreclose a mortgage on allegations of breach of covenants this does not constitute an act of bankruptcy. *In re Douglas Coal, etc., Co.*, (1904) 131 Fed. 769.

**Appointment on a defendant's application.**—Although an insolvent corporation is a defendant in an action in which a receiver is appointed for it the appointment constitutes an act of bankruptcy provided the corporation applied for it. *James Supply, etc., Co. v. Dayton Coal, etc., Co.*, (C. C. A. 6th Cir. 1915) 223 Fed. 991.

#### **Receiver asked for by stockholders.**

A petition for the appointment of a receiver of a corporation constitutes an act of bankruptcy although the petition is not filed in the name of the corporation but in the name of a majority of the stockholders in number and in amount of stock without opposition by the other stockholders. *Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co.*, (W. D. Ark. 1913) 206 Fed. 813.

**Authority to make application.**—Express authorization by formal action of the board of directors or stockholders of an insolvent corporation is not necessary to make an application for a receiver by the corporation an act of bankruptcy. *James Supply, etc., Co. v. Dayton Coal, etc., Co.*, (C. C. A. 6th Cir. 1915) 223 Fed. 991.

**Allegation of appointment of receiver.**—The allegation in a petition that a corporation had made an assignment, by filing a petition admitting its insolvency and inability to pay its debts, and asking for the appointment of a receiver, is in effect an allegation that the corporation, being insolvent, applied for a receiver for its property. *Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co.*, (W. D. Ark. 1913) 206 Fed. 813.

**Liquidating trustees.**—Section 3a (4) does not mean exclusively that a trustee must have been put in charge by order of a court; but it embraces as well a case where liquidating trustees have been elected by an insolvent company or corporation, as provided by the statute under which it is organized. *In re Hercules Atkin Co.*, (E. D. Pa. 1904) 133 Fed. 813, 13 Am. Bankr. Rep. 369. See also *In re C. H. Bennett Shoe Co.*, (D. C. Conn. 1905) 140 Fed. 687, 15 Am. Bankr. Rep. 497.

**Sheriff substituted for receiver or trustee.**—Where, under a state statute, the property of an insolvent is placed in the hands of the sheriff who was required to distribute the net proceeds thereof among the creditors according to the rules established in insolvency cases, it was said that the sheriff, in such case, was merely a substitute for the receiver or trustee specified in the Bankruptcy Law. *In re International Coal Min. Co.*, (E. D. Pa. 1906) 143 Fed. 665, 16 Am. Bankr. Rep. 309.

#### **Appointment in judgment creditor's suit.**

—The provision that an act of bankruptcy takes place, when because of insolvency a receiver or trustee has been put in charge of a person's property under the laws of a state, etc., does not only apply to those cases in which a receiver or trustee has been appointed under the laws of the state providing for the administrator of an insolvent's estate, but applies to the appointment of a receiver in a judgment creditor's suit in a state court where insolvency was one of the grounds of the appointment. *In re Spalding*, (1905) 134 Fed. 507.

**Showing ground of appointment.**—The appointment of a receiver by a state court

is not subject to collateral attack on the ground of want of jurisdiction of the person. The ground of such appointment is shown by the written order making it, and none other can be added thereto by parol evidence, and where such appointment is alleged as an act of bankruptcy, the record is admissible to show both the appointment and the grounds thereof. *Blue Mountain Iron, etc., Co. v. Portner*, (C. C. A. 1904) 131 Fed. 57.

No "intent" is necessary under section 3a (4). *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142.

**Insolvency essential—In general.**—The mere appointment of a receiver or trustee does not of itself constitute an act of bankruptcy. In order to come within the meaning of section 3a (4) it is necessary that the appointment of a receiver or trustee be made because of the debtor's insolvency, or that such receiver or trustee was applied for by the debtor while insolvent. *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; *In re Spalding*, (2d Cir. 1905) 139 Fed. 244, 71 C. C. A. 370, 14 Am. Bankr. Rep. 129; *Zugalla v. International Mercantile Agency*, (3d Cir. 1906) 142 Fed. 927, 16 Am. Bankr. Rep. 67; *Moss Nat. Bank v. Arend*, (6th Cir. 1906) 146 Fed. 351, 76 C. C. A. 629, 16 Am. Bankr. Rep. 867; *In re Golden Malt Cream Co.*, (7th Cir. 1908) 164 Fed. 326, 90 C. C. A. 258, 21 Am. Bankr. Rep. 36; *In re Perry Aldrich Co.*, (D. C. Mass. 1908) 165 Fed. 249, 21 Am. Bankr. Rep. 244; *In re Edward Ellsworth Co.*, (W. D. N. Y. 1909) 173 Fed. 699, 23 Am. Bankr. Rep. 284; *In re Hudson River Electric Power Co.*, (N. D. N. Y. 1909) 173 Fed. 934, 21 Am. Bankr. Rep. 915; *In re Boston, etc., Min. Co.*, (D. C. Mass. 1909) 181 Fed. 422, 24 Am. Bankr. Rep. 923; *In re Gold Run Mining & Tunnel Co.*, (D. C. Colo. 1912) 200 Fed. 162; *In re Wm. S. Butler & Co.*, (C. C. A. 1st Cir. 1913) 207 Fed. 705; *In re Commonwealth Lumber Co.*, (1915) 223 Fed. 667.

As to what constitutes insolvency, see the annotation under section 1a (15).

It is only where a receiver has been appointed in another court because of insolvency, as that term is defined in the Bankruptcy Law, or where the debtor on his own initiative has applied for the appointment of a receiver or custodian of his property, that an act of bankruptcy under section 3a (4) has been committed. *In re Edward Ellsworth Co.*, (W. D. N. Y. 1909) 173 Fed. 699, 23 Am. Bankr. Rep. 284.

Where a receiver is appointed for a corporation on a bill filed in a state court alleging insolvency, it has committed an act of bankruptcy within this section. *Lowenstein v. Henry McShane Mfg. Co.*, (1904) 130 Fed. 1007.

**Appointment on ground other than insolvency.**—A receivership in a state court in order to constitute an act of bankruptcy must have been established or the receiver appointed on the ground of insolvency. If made on any other ground it does not constitute an act of bankruptcy. *Blue Mountain Iron, etc., Co. v. Portner*, (C. C. A. 1904) 131 Fed. 57; *In re Douglas Coal, etc., Co.*, (1904) 131 Fed. 769. But see *James Supply, etc., Co. v. Dayton Coal, etc., Co.*, (1915) 223 Fed. 991, 139 C. C. A. 367, where the court said: "It is immaterial that the receivership was not ordered because of insolvency. If the corporation was actually insolvent at the time receivership was applied for [by the corporation], it is enough."

**Insolvency need not be sole reason for appointment of receiver.**—If insolvency, either as a distinct ground of proceeding, or as coupled with others, was one of the substantial reasons for the appointment of a receiver, the case comes within the reasonable construction of the statute. *Beatty v. Andersen Coal Min. Co.*, (1st Cir. 1906) 150 Fed. 293, 80 C. C. A. 181, 17 Am. Bankr. Rep. 738.

**Conclusiveness of finding of state court.**

—In *In re Commonwealth Lumber Co.*, (W. D. Wash. 1915) 223 Fed. 667, it appeared that a receiver was appointed in a state court of Washington on the ground of the insolvency of a corporation and it was held that the act did not of itself constitute an act of bankruptcy. The court said: "The act of bankruptcy alleged in the petition is putting the corporation in charge of a receiver by the state court. . . . The petitioners contend that the state court having appointed a receiver 'for the reason that said corporation is utterly insolvent and unable to meet or pay its obligations' is a finding which is conclusive, and adjudication must now follow. There is no doubt that a receiver may be appointed in the state court for a corporation in financial depression, when bankruptcy proceedings could not be entertained. The statute of Washington authorizes the appointment of a receiver when a corporation is in *imminent danger* of insolvency (section 741, Rem. & Bal. Washington Code), and the state court holds that a corporation is insolvent when it is unable to meet its obligations as they mature in the ordinary course of business (*State ex rel. v. Superior Court*, 20 Wash. 575, 59 Pac. 483; *Nixon v. Hendy Machine Works*, 51 Wash. 419, 99 Pac. 11); while under the Bankruptcy Act, when the assets at a fair valuation do not equal the liabilities, a corporation is insolvent (section 1, subd. 15, Bankr. Act). Petitioners rely on *In re Maplecroft Mills* (D. C. 218 Fed. 661, in which the District Court of the Fourth District held the appointment of a receiver under the South Carolina code provision that a

receiver may be appointed when a corporation is 'in imminent danger' of insolvency, and at page 673, the court says: 'Under the evidence in the case now before the court it is found that the only ground upon which the state court, to wit, the court of common pleas for Pickens county, could possibly have made the order of appointment of a receiver and taken possession of, to operate and eventually liquidate and marshal and distribute, the assets of the Maplecroft Mills, under the allegations of the complaint, was because of insolvency. The Supreme Court of the state of South Carolina has approved, for the state courts of the state of South Carolina, the same definition of insolvency as that given in the Bankruptcy Act (citing case). Where the court of common pleas for Pickens county appointed a receiver because of insolvency, it must be presumed that it found under the laws of South Carolina it was such an insolvency as is defined to be insolvency in the Bankruptcy Act, and that it adjudicated that question as against the Maplecroft Mills, so as to determine it as well for these proceedings as for those in the state court.' The Circuit Court of Appeals of the First Circuit (*In re Wm. S. Butler & Co., Inc.*, 207 Fed. 705, 125 C. C. A. 223), Judge Putnam dissenting, held that the appointment of a receiver to assume control of the business and conduct the affairs of a corporation until further ordered, on a complaint, answer, and decree, for the reason that the corporation was unable to meet its obligations as they matured in the ordinary course of business, in the absence of an allegation that the corporation's property, at a fair valuation, was insufficient to pay its debts, was not a finding of insolvency within the act of bankruptcy. The Supreme Court of Washington recognizes a distinction be-

tween insolvency under the Bankruptcy Act and state statute. *State ex rel. v. Superior Court, supra*. I do not think that the finding of the state court upon the allegations of the complaint, in the absence of testimony, is conclusive of the insolvency of the corporation in issue, under the Bankruptcy Act, in this proceeding."

Until the amendment of 1903 to the Bankruptcy Act the appointment of a receiver for the property of an insolvent, whether an individual or a corporation, was not of itself an act of bankruptcy; and this was so whether the appointment was made upon the application of the insolvent or upon the application of creditors. *In re Baker-Ricketson Co.*, (D. C. Mass. 1899) 97 Fed. 489, 4 Am. Bankr. Rep. 605; *In re Empire Metallic Bedstead Co.*, (2d Cir. 1899) 98 Fed. 981, 39 C. C. A. 372, 3 Am. Bankr. Rep. 575; *In re Harper*, (S. D. N. Y. 1900) 100 Fed. 266, 3 Am. Bankr. Rep. 804; *In re Henry Zeltner Brewing Co.*, (S. D. N. Y. 1902) 117 Fed. 799, 9 Am. Bankr. Rep. 63; *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 179, 9 Am. Bankr. Rep. 579, (D. C. Del. 1903) 120 Fed. 180, 9 Am. Bankr. Rep. 581; *In re Burrell*, (2d Cir. 1903) 123 Fed. 414, 59 C. C. A. 508, 9 Am. Bankr. Rep. 625; *Seaboard Steel Casting Co. v. William R. Trigg Co.*, (E. D. Va. 1903) 124 Fed. 75, 10 Am. Bankr. Rep. 594; *In re Spalding*, (2d Cir. 1905) 139 Fed. 244, 71 C. C. A. 370, 14 Am. Bankr. Rep. 129.

The appointment of a receiver because of insolvency, made by a state court prior to this amendment, will not support a petition filed after the amendment, though the receivership still continues. *Seaboard Steel Casting Co. v. William R. Trigg Co.*, (1903) 124 Fed. 75.

(5) [Admitting inability to pay.] admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground. [(1898) 30 Stat. L. 546.]

In general.—An admission in writing of the inability to pay debts, and the willingness to be adjudged a bankrupt on that ground, constitutes an act of bankruptcy, under section 3a (5), which will warrant an adjudication of bankruptcy on a petition filed in involuntary proceedings. *In re Bates Mach. Co.*, (D. C. Mass. 1899) 91 Fed. 625, 1 Am. Bankr. Rep. 129; *In re Marine Mach., etc., Co.*, (S. D. N. Y. 1899) 91 Fed. 630, 1 Am. Bankr. Rep. 421; *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528; *In re Peter Paul Book Co.*, (W. D. N. Y. 1900) 104 Fed. 786, 5 Am. Bankr. Rep. 105; *In re Kersten*, (E. D. Wis. 1901) 110 Fed. 929, 6 Am. Bankr. Rep. 516; *In re Mutual Mercantile Agency*,

(S. D. N. Y. 1901) 111 Fed. 152, 6 Am. Bankr. Rep. 607; *In re Wilmington Hosiery Co.*, (D. C. Del. 1903) 120 Fed. 179, 9 Am. Bankr. Rep. 579; *In re C. Moench, etc., Co.*, (W. D. N. Y. 1903) 123 Fed. 965, 10 Am. Bankr. Rep. 590; *Brinkley v. Smithwick*, (E. D. N. C. 1903) 126 Fed. 686, 11 Am. Bankr. Rep. 500; *In re C. Moench, etc., Co.*, (2d Cir. 1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240; *In re Duplex Radiator Co.*, (S. D. N. Y. 1906) 142 Fed. 906, 15 Am. Bankr. Rep. 324; *Cresson, etc., Coal, etc., Co. v. Stauffer*, (3d Cir. 1906) 148 Fed. 981, 78 C. C. A. 609, 17 Am. Bankr. Rep. 573; *In re Lisk Mfg. Co.*, (W. D. N. Y. 1908) 167 Fed. 411, 21 Am. Bankr. Rep. 674;

Matter of Riley, (E. D. Mich. 1905) 15 Am. Bankr. Rep. 159.

**Insolvency unnecessary.**—Where a corporation by a vote of its directors declared its inability to pay its debts, and its willingness to be adjudged a bankrupt on request of certain creditors, it was held that the latter were entitled to have the corporation adjudged a bankrupt without regard to its solvency. *In re C. Moench, etc., Co.*, (W. D. N. Y. 1903) 123 Fed. 965, 10 Am. Bankr. Rep. 590; *In re Duplex Radiator Co.*, (S. D. N. Y. 1906) 142 Fed. 906, 15 Am. Bankr. Rep. 324; *In re Russell Wheel, etc., Co.*, (E. D. Mich. 1915) 222 Fed. 569.

**The test of the admission as an act of bankruptcy** is not that of ultimate sufficiency or insufficiency of assets, but of present inability to pay. *In re Kersten*, (1901) 110 Fed. 929.

**Admission must be in writing.**—An averment that "the debtor admitted his inability to pay his debts" has been held to be insufficient; it being necessary, under section 3a (5), that the admission of inability to pay should be in writing, together with a written acknowledgment of willingness to be adjudged bankrupt on that ground. *Conway v. German*, (4th Cir. 1908) 166 Fed. 67, 91 C. C. A. 653, 21 Am. Bankr. 577.

**Qualified admission insufficient.**—Where a letter was written by the president of an alleged bankrupt corporation, admitting that the floating indebtedness could not be met promptly because too much capital was invested in the plant in proportion to the working capital, and requesting a conference with its creditors, it was held that it was not an admission warranting an adjudication in bankruptcy. *Lackawanna Leather Co. v. La Porte Carriage Co.*, (C. C. A. 7th Cir. 1914) 211 Fed. 318.

Where a corporation authorized one of its officers to appear on behalf of the company in the federal court, and make the admission of insolvency contemplated by the statute, "in the event of an involuntary petition in bankruptcy being filed against said company," it was held that this was not such an unqualified admission as is required by the Act, and therefore not an act of bankruptcy on the part of the corporation. *In re Baker-Ricketson Co.*, (D. C. Mass. 1899) 97 Fed. 489, 4 Am. Bankr. Rep. 605.

**Authority to make admission, in general.**—In order to warrant an adjudication, under section 3a (5), it must appear that the necessary admission was made by one having ample authority for that purpose; thus where the admission has been made by a partner, or by an officer of a corporation, in excess of his powers, an adjudication cannot be based thereon. *In re Bates Mach. Co.*, (D. C. Mass. 1899) 91 Fed. 625, 1 Am. Bankr. Rep. 129; *In re Kersten*, (E. D. Wis. 1901) 110

Fed. 929, 6 Am. Bankr. Rep. 516; *In re Quartz Gold Min. Co.*, (D. C. Ore. 1907) 157 Fed. 243, 19 Am. Bankr. Rep. 667; *In re Burbank Co.*, (D. C. N. H. 1909) 168 Fed. 719, 21 Am. Bankr. Rep. 838; *In re Southern Steel Co.*, (N. D. Ala. 1909) 169 Fed. 702, 22 Am. Bankr. Rep. 476.

**Admission by corporation — In general.**—This clause requires no technical form of proof of assent by a corporation any more than by an individual. The only requisite is that the admission and consent be in writing. *In re Marine Mach., etc., Co.*, (1899) 91 Fed. 630.

"It was originally contended that there was no power in the board of directors, as distinguished from the stockholders, to commit the act of bankruptcy by admitting the inability of the corporation to pay its debts and its willingness to be adjudged a bankrupt. The law requires that the corporation admit in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, and in every case the question is one of authority of the agent, which must be determined by an examination of the special charter or the general laws of the state of the residence of the corporation and the articles of incorporation and the by-laws lawfully adopted." *Home Powder Co. v. Geis*, (C. C. A. 8th Cir. 1913) 204 Fed. 568.

**An officer of a corporation cannot commit an act of bankruptcy in its name and behalf by admitting its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, without express authority.** *In re Burbank Co.*, (D. C. N. H. 1909) 168 Fed. 719, 21 Am. Bankr. Rep. 838; *In re Southern Steel Co.*, (N. D. Ala. 1909) 169 Fed. 702, 22 Am. Bankr. Rep. 476.

**It is within the authority of the director charged with the affairs of a corporation to admit inability to pay debts and willingness to be adjudged bankrupt within the section, such admission not being a corporate function to be exercised only by the whole body of corporate members.** *In re Rollins Gold, etc., Min. Co.*, (1900) 102 Fed. 982.

**By authority of directors.**—An unqualified admission made by resolution adopted by the board of directors of a corporation and by the stockholders is sufficient to constitute an act of bankruptcy. *In re American Guaratee, etc., Co.*, (D. C. Cal. 1911) 192 Fed. 405.

**In *In re Mutual Mercantile Agency*, (1901) 111 Fed. 152, the admission was signed by the president of a corporation by order of the directors, such admission being apparently within their authority. It was held that this sufficed to constitute an act of bankruptcy.**

**In *In re Marine Mach., etc., Co.*, (1899) 91 Fed. 630, it appeared that the president of a corporation, in the corporate**



name, wrote letters to its creditors saying that the company was unable to pay its debts and was willing to be adjudged bankrupt. This was authorized by the directors at a meeting of which three members of the board were not notified. It appeared, however, that these three directors had never given any attention to the affairs of the company, had not attended a meeting for a long time, and that all of them had promoted, or were interested in, suits against the company. It was held that such admission was sufficient to uphold a petition for adjudication in bankruptcy.

*De facto* officers have the power, at a legally convened meeting, to admit in writing the inability of their corporation to pay its debts and its willingness to be adjudged bankrupt. *In re Lisk Mfg. Co.*, (W. D. N. Y. 1908) 167 Fed. 411, 21 Am. Bankr. Rep. 674; *Matter of Riley*, (E. D. Mich. 1905) 15 Am. Bankr. Rep. 159.

But an admission by the directors of a corporation personally and not as a corporate act is not sufficient under this section to constitute an act of bankruptcy. *In re Gold Run Mining, etc., Co.*, (D. C. Colo. 1912) 200 Fed. 162.

A resolution adopted by the board of directors of a corporation authorizing an attorney to represent the corporation gen-

erally in any bankruptcy proceedings pending or that may be brought, and in his discretion to agree to the appointment of receivers, does not constitute an act of bankruptcy on the part of the corporation, nor does it authorize the attorney to commit such act in its behalf. *In re Southern Steel Co.*, (N. D. Ala. 1909) 169 Fed. 702, 22 Am. Bankr. Rep. 476.

A written admission by an officer of a corporation, in pursuance of a vote by the stockholders, that the company is unable to pay its debts and wishes to be adjudged bankrupt on that ground, is not sufficient to constitute an act of bankruptcy under the section, when this writing was not signed until after the filing of an involuntary petition in bankruptcy. *In re Baker-Ricketson Co.*, (1899) 97 Fed. 489.

**Admission by partnership.**—An admission signed by one member, and purporting to be made on behalf of the partnership, that the two members thereof are unable to pay their debts and are willing to be adjudged bankrupt, is an act of bankruptcy under the section; nor is the force of such admission impaired by the allegation as the cause thereof that they have been dispossessed of their property by proceedings under the state Banking Law. *In re Kersten*, (1901) 110 Fed. 929.

**b [Petition to be filed within four months.]** A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after [(1898) 30 Stat. L. 546.]

As to

Computation of time generally, see section 31.

Preparation and filing of the petition in bankruptcy generally, and practice thereon, see the several subdivisions of section 18, and section 59.

Section 3b has no relation to the proving of debts against the bankrupt's estate, or to the surrender of preferences, but only fixes a limitation for the filing of an involuntary petition. *Little v. Holley-Brooks Hardware Co.*, (5th Cir. 1904) 133 Fed. 874, 67 C. C. A. 46, 13 Am. Bankr. Rep. 422.

**Computation of time.**—In computing the time within which an involuntary petition in bankruptcy must be filed, it has been quite generally held that, in accordance with section 31, the time is to be so computed as to exclude the day on which the act of bankruptcy was committed, and to include the day on which the petition was filed. *In re Stevenson*, (D. C. Del. 1899) 94 Fed. 110, 2 Am. Bankr. Rep. 66; *In re Dupree*, (E. D. N. C. 1899) 97 Fed. 28, 8 Am. Bankr. Rep. 321 note; *Citizens' Bank v. W. C. De Pauw Co.*, (7th Cir. 1901) 105 Fed. 926, 5 Am. Bankr. Rep. 345;

*In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598; *In re Tonawanda St. Planing Mill Co.*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 38. See also *In re Mingo Valley Creamery Assoc.*, (1900) 100 Fed. 282, and *Murray v. Beal*, (1901) 23 Utah 548, 65 Pac. 726, in which it was held that the preference was not within the four months; *In re Lewis*, (1899) 91 Fed. 632, where it was held that the proceedings were begun in time notwithstanding the delay in issuing the subpoena; *Landis v. McDonald*, (1901) 88 Mo. App. 335, where a chattel mortgage was held an act of bankruptcy, as possession was given within the four months.

Thus where a general assignment was made on Oct. 1, at 10.08 A. M., and the petition in bankruptcy was filed at 4.45 P. M. on Feb. 1 following, it was held that the filing was within the four months period. *In re Tonawanda St. Planing Mill Co.*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 38.

In involuntary bankruptcy the duplicate originals of the petition must both be filed within four months after the alleged act of bankruptcy was committed; otherwise the court has no jurisdiction in the proceedings; and therefore it was held

upon the proof that where only one copy was filed by the creditors within the required time, they could not be given authority by the court to file the other

thereafter, and their petition to be allowed to do so was dismissed on the respondent's motion. *In re Dupree*, (1899) 97 Fed. 28.

(1) [Date of recording transfer.] the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment. [(1898) 30 Stat. L. 546.]

The provisions of sections 3 and 6o are to be read together. When so read there can be no permissible question but that the date of the preference referred to in section 6o, subdivisions a and b, is the same as that referred to in section 3b. *Long v. Farmers' State Bank*, (8th Cir. 1906) 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 585, 17 Am. Bankr. Rep. 103; *In re Bird*, (D. C. Minn. 1910) 180 Fed. 229.

The words "takes notorious, exclusive, or continuous possession" must be construed to mean such possession as the property is susceptible of, and such as is usual and ordinary, unaccompanied by acts or conduct tending to conceal its ownership. Any construction which would

place intangible forms of personal property on a plane with tangible property would lead to mischievous and serious interference with business and commercial transactions, which it cannot be assumed was contemplated by Congress. *In re Bogan*, (S. D. Ohio 1904) 134 Fed. 1019, 13 Am. Bankr. Rep. 529.

The words contemplate only that kind of notoriousness, exclusiveness, and continuousness which the nature of the property will permit or of which it is susceptible. *Jones v. Coates*, (C. C. A. 8th Cir. 1912) 196 Fed. 860.

Whether recording or registering is required depends on the law of the state. See the cases cited to this effect under section 60a.

c [Defense of solvency.] It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt. [(1898) 30 Stat. L. 547.]

As to

Setting up defense to petition, see section 18b, c, and d.

What constitutes insolvency, see section 1a (15).

Solvency as a defense.—*In general*.—Under section 3c, the solvency of the debtor constitutes a complete defense to a proceeding in bankruptcy instituted under section 3a (1). *In re Block*, (2d Cir. 1901) 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101; *In re Doscher*, (E. D. N. Y. 1902) 120 Fed. 408, 9 Am. Bankr. Rep. 547; *Troy Wagon Works v. Vastbinder*, (M. D. Pa. 1904) 130 Fed. 232, 12 Am. Bankr. Rep. 352; *McGowan v. Knittel*, (3d Cir. 1905) 137 Fed. 453, 69 C. C. A. 595, 15 Am. Bankr. Rep. 1, reversing (E. D. Pa. 1905) 134 Fed. 498, 14 Am.

Bankr. Rep. 209; *In re Hartwell Oil Mills*, (N. D. Ga. 1908) 165 Fed. 555, 21 Am. Bankr. Rep. 586; *In re C. W. Aschenbach Co.*, (2d Cir. 1909) 174 Fed. 396, 98 C. C. A. 290, 23 Am. Bankr. Rep. 95; *In re Pickens Mfg. Co.*, (D. C. Ga. 1908) 20 Am. Bankr. Rep. 202.

*Prima facie evidence of intent to prefer may be rebutted* by proof that the debtor was ignorant of his insolvency. *In re Bloch*, (2d Cir. 1901) 109 Fed. 790, 6 Am. Bankr. Rep. 300; *In re Gilbert*, (D. C. Ore. 1902) 112 Fed. 951, 8 Am. Bankr. Rep. 101.

*Admission of insolvency in answer*.—Where a bankrupt admitted his insolvency in his answer to an involuntary bankruptcy petition, it was held that his willingness to be adjudged a bankrupt on that ground might be inferred. *Brinkley v.*

Smithwick, (E. D. N. C. 1903) 128 Fed. 686, 11 Am. Bankr. Rep. 500.

The words "under the first subdivision of this section" do not refer to paragraph *a* of the section, defining acts of bankruptcy, as a whole, but to subdivision 1 of such paragraph, which makes the conveyance, transfer, concealment, or removal of property with intent to hinder, delay, or defraud creditors, an act of bankruptcy. *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 46 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463; *Acme Food Co. v. Meier*, (6th Cir. 1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550.

What constitutes insolvency has been considered under section 1a (15).

*Value of property fraudulently and preferentially transferred.*—Where conveyances of property by an alleged bankrupt are charged as acts of bankruptcy, under

both subdivisions 1 and 2 of section 3, as made with intent to defraud, and also as preferences, the value of the property thus conveyed is not to be computed in determining the question of solvency at the time of the filing of the petition as a defense under the first subdivision; but if the conveyances are found not to have been fraudulent, the value of such property is to be considered in determining the question of solvency or insolvency when the conveyances were made under subdivision 2. *Acme Food Co. v. Meier*, (6th Cir. 1907) 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550.

The burden of pleading and proving solvency is on the alleged bankrupt where removal and concealment are the acts of bankruptcy charged. *In re Schenkein*, (1902) 113 Fed. 421.

**d [Person denying insolvency.]** Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him. [(1898) 30 Stat. L. 547.]

**As to**

Duty of bankrupt to submit to examination when required, see section 7a (9).

Examination of persons other than the bankrupt, see section 21a.

**Production of books, papers, and accounts.**—Under section 3d an alleged bankrupt is required to produce such books, invoices, etc., as should properly be kept in his business, and which are necessary to show the amount of his assets and liabilities, and his failure to do so, without satisfactory explanation, casts upon him the burden of proving his solvency. *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *Bogen v. Protter*, (6th Cir. 1904) 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288; *Cummins Grocer Co. v. Talley*, (C. C. A. 6th Cir. 1911) 187 Fed. 507.

"Except as to the question of insolvency, the burden of proof is on the petitioners to show an act of bankruptcy." *Davis v. Stevens*, (1900) 104 Fed. 235.

A simple denial of insolvency by the debtors who had made a general assignment, without the production of affidavits, schedules, or other evidence, does not, under the section, raise a *bona fide* issue of insolvency or sustain the burden of proof. *Bray v. Cobb*, (1898) 91 Fed. 102.

The bankrupt may be called as if under cross-examination under section 3d, and the evidence given by the bankrupt on such examination may of itself form a sufficient foundation for a finding of his insolvency. *In re Coddington*, (M. D. Pa. 1902) 118 Fed. 281, 9 Am. Bankr. Rep. 243.

**e [Petitioner to give bond.]** Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case

such petition is dismissed, to the respondent, his or her personal representatives, [of] all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt. [(1898) 30 Stat. L. 547.]

As to obtaining possession of assets on giving of bond, generally, see section 69.

**Bond required.**—A court of bankruptcy is authorized to appoint a receiver to take possession of the property of one against whom a petition in involuntary bankruptcy has been filed, and is pending, only upon the giving of a bond by the petitioners therefor, as required by section 3e. *Beach v. Macon Grocery Co.*, (5th Cir. 1902) 116 Fed. 143, 53 C. C. A. 463, 8 Am. Bankr. Rep. 751; *In re McKane*, (E. D. N. Y. 1907) 152 Fed. 733, 18 Am. Bankr. Rep. 594.

*The bond is a prerequisite to the making of an order for taking charge of the bankrupt's property.* *In re Hines*, (D. C. Ore. 1906) 144 Fed. 147, 16 Am. Bankr. Rep. 538.

**Scope of section.**—This section created a new right in the debtor. He is to be reimbursed in case such seizure and detention occasioned him pecuniary loss. It has no application where the seizure and detention occasions no loss; and such section cannot be invoked to recover costs and expenses occasioned in making a successful defense to the charge of bankruptcy. *In re Ward*, (D. C. N. J. 1913) 203 Fed. 769.

*The function of section 3e is to save harmless from all damages, costs and expenses a debtor against whom involuntary proceedings have been filed, and whose property is seized and detained, if it should prove upon final trial that the debtor was not bankrupt, and that his custody of the property should not have been disturbed.* *In re McKenzie*, (W. D. Wash. 1915) 219 Fed. 630.

Section 3e creates a cause of action whereby damages and costs may be recovered under the bond required, if the petition is dismissed, without malice and probable cause being shown. *T. E. Hill Co. v. United States Fidelity & Guaranty Co.*, (1911) 250 Ill. 242, 95 N. E. 150.

The purpose of requiring a bond, either under section 3e or under section 69, is to indemnify the alleged bankrupt before his property may be taken from his possession by petitioning creditors prior to an adjudication of bankruptcy. *In re Haff*, (2d Cir. 1905) 135 Fed. 742, 68 C. C. A. 380, 13 Am. Bankr. Rep. 362.

"It is the evident purpose of this stat-

ute to protect the alleged bankrupt from all costs, expenses, and damages incident to the seizure of his property—not only up to the time of appeal, if there be an appeal, but until final adjudication or an order of the court turning back the property. In fact, if no bond should be given under said section 3e, or if a bond be given and it proves to be inadequate, the applicant for the appointment of the receiver would still be liable, and, independent of the bond, he could be compelled to pay the costs and expenses of the receivership. Upon the appointment of a receiver on the application of a creditor the alleged bankrupt can be indemnified only by the provisions of said section 3e, and the bond there required to be given is the only one he can look to to recover his damages and expenses upon the discharge of the receiver." *T. E. Hill Co. v. United States Fidelity, etc., Co.*, (1914) 265 Ill. 534, 107 N. E. 194.

**Time of giving bond.**—The bond required by section 3e should be given at the time of the making of an order appointing a receiver, or the issuing of a warrant to the marshal for the taking possession of the bankrupt's property. *In re Haff*, (2d Cir. 1905) 135 Fed. 742, 68 C. C. A. 380, 13 Am. Bankr. Rep. 362.

Section 3e and section 69 are cognate, and they clearly mean that the bankrupt shall be protected from expense and injury in consequence of a seizure of his property, which may subsequently be made to appear to have been unwarranted. *T. E. Hill Co. v. United States Fidelity & Guaranty Co.*, (1911) 250 Ill. 242, 95 N. E. 150; *In re Haff*, (2d Cir. 1905) 135 Fed. 742, 68 C. C. A. 380, 13 Am. Bankr. Rep. 362. See also section 69, and the annotation thereunder.

**Additional bond.**—If at any time it becomes apparent that the bond given upon the application for the appointment of the receiver is insufficient, and not ample to indemnify the alleged bankrupt for all damages which might grow out of the seizure and detention of his property he has the right to apply to the court to require the creditor making the application to give an additional and sufficient bond. *T. E. Hill Co. v. United States Fidelity, etc., Co.*, (1914) 265 Ill. 534, 107 N. E. 194.

**[Allowance of costs, damages, etc.]** If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses,

and damages shall be fixed and allowed by the court, and paid by the obligors in such bond. [(1898) 30 Stat. L. 547.]

**As to**

Costs and expenses of administration generally, see section 62.

Costs and expenses entitled to priority, see section 64b (1), (2), (3).

**A right to recover on the bond,** given under section 3e, accrues to a respondent whose property has been wrongfully taken out of his possession. *In re Nixon*, (D. C. Mont. 1901) 110 Fed. 633, 6 Am. Bankr. Rep. 693.

**The remedy given here is cumulative.**—*T. E. Hill Co. v. United States Fidelity & Guaranty Co.*, (1911) 250 Ill. 242, 95 N. E. 150, holding that remedy may be had on the bond without first obtaining an allowance of damages by the Bankruptcy Court.

**Bond runs only in favor of respondents.**—The only liability for costs is upon the bond, which runs only in favor of the respondent or respondents who were such when it was given. *In re Spalding*, (2d Cir. 1906) 150 Fed. 120, 80 C. C. A. 74, 17 Am. Bankr. Rep. 667.

**Persons subsequently becoming respondents,** if they desire to be protected, are required to move for an additional bond. *In re Spalding*, (2d Cir. 1906) 150 Fed. 120, 80 C. C. A. 74, 17 Am. Bankr. Rep. 667.

**Amount of recovery.**—On the dismissal of the bankruptcy proceedings, the alleged bankrupts can only recover on the bond such costs, expenses, and damages as are incident to the taking and withholding of the property, as distinguished from costs, expenses, and damages incident to the institution of the bankruptcy proceedings. *Selkregg v. Hamilton*, (W. D. Pa. 1906) 144 Fed. 557, 16 Am. Bankr. Rep. 474.

Only in cases where the proceedings resulting in a receivership have been instituted improvidently or without reasonable cause, or without good faith, or the like, can the moving party be held liable for the payment of the excess of the costs of the receivership over and above the assets of the same. *In re Metals Extraction & Refining Co.*, (C. C. A. 7th Cir. 1911) 195 Fed. 226.

**Neither costs nor counsel fees are allowable,** under section 3e, where property has not been seized or taken out of the possession of the bankrupt in accordance with the provisions thereof; costs and expenses generally are not within the meaning of this section. *In re Ghiglione*, (S. D. N. Y. 1899) 93 Fed. 186, 1 Am. Bankr. Rep. 580; *In re Morris*, (E. D. Pa. 1902) 115 Fed. 591, 7 Am. Bankr. Rep. 709; *In re Williams*, (E. D. Ark. 1903) 120 Fed. 34, 9 Am. Bankr. Rep. 736; *In re Hines*, (D. C. Ore. 1906) 144 Fed. 147, 16 Am. Bankr. Rep. 538; *In re Shon*, (D. C. Mass. 1913) 212 Fed. 797,

in which the court, on a motion to tax costs so as to include an allowance for counsel fees, said: "No American decision granting them has been called to my attention. To allow this motion would open the door to inquiry as to the good faith of the losing party in prosecuting or defending almost any equity suit or bankruptcy petition, and would establish a far-reaching precedent. The case is no doubt a hard one for the respondent, who has been put to much trouble and expense; but his situation is no worse than it would be if an unwarranted and fraudulent action at law had been instituted against him, in which event only a small part of his loss could be recovered as costs. It seems to me unwise to establish a different rule in bankruptcy or equity, or to attempt to determine on this motion questions which can be more properly raised by an action for malicious prosecution of the bankruptcy petition."

**Attorney's fees under Revised Statutes.**

—This section does not preclude the taxation of attorney's fees under R. S. sec. 824 (in title Costs in this work) in connection with General Order XXXIV, which provides that in case of involuntary bankruptcy, where the debtor resists adjudication, the same costs that are allowed to a successful party in a suit in equity shall be taxed. *In re Wise*, (W. D. Wash. 1914) 212 Fed. 567.

**Stipulation between parties as to costs and expenses.**—In *King Hardware Co. v. J. G. Christopher Co.*, (C. C. A. 5th Cir. 1915) 222 Fed. 224, it appeared that a stipulation was executed between the petitioning creditors, the intervening creditors and the alleged bankrupt, providing that all costs in the bankruptcy proceedings should be taxed against the petitioning and the intervening creditors and not against the respondent, and that all costs and expenses, including receiver's certificates, allowances, etc., should be taxed, one-half against the petitioning and intervening creditors and one-half against the alleged bankrupt. There was no provision in the stipulation in regard to or regulating the apportioning of costs and expenses, etc., as between the petitioning and intervening creditors themselves. The court held that under such stipulation the petitioning creditors were relieved of primary liability, and that the court was left free to follow equity rules and principles in taxing and apportioning the costs, expenses, etc., and that if the petitioning creditors, who under the law were primarily liable for all costs and expenses, etc., should not be able to respond, it would then be in order for the court to inquire whether under the stipulation the intervening creditors would be called on to pay.

**SEC. 4. WHO MAY BECOME BANKRUPTS.—a. [Voluntary bankrupts.]** Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt. [*(Amended 1910, which excepted pending cases)* 36 Stat. L. 839.]

As originally enacted section 4a read as follows: "SEC. 4. WHO MAY BECOME BANKRUPTS.—a. Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." [30 Stat. L. 547.] The amendment of 1910 made it "to read as" in the text.

**Constitutionality.**—Prior to the enactment of the amendment of June 25, 1910, it was held that the Bankruptcy Act was not lacking in the "uniformity" required by the Constitution, although it discriminated, in respect to the right to file a voluntary petition, between natural and artificial persons. *Leidigh Carriage Co. v. Stengel*, (6th Cir. 1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 385.

The Bankruptcy Act is not unconstitutional because it provides that others than traders may be adjudged bankrupts, and that this may be done on a voluntary petition. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1.

As to voluntary proceedings, the Bankruptcy Act is not in violation of the Fifth Amendment of the Federal Constitution in that it deprives creditors of their property without due process of law in failing to provide for notice. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113.

The purpose of a voluntary proceeding in bankruptcy is in consideration that the bankrupt promptly surrender all of his nonexempt property to the Bankrupt Court, to the end that all of his creditors, without preference or priority, may take share and share alike in percentage of the property thus surrendered; then the bankrupt is given an acquittance of such percentages of his debts not thus paid, and may commence his business life anew. *Baylor v. Rawlings*, (C. C. A. 8th Cir. 1912) 200 Fed. 131. See also as to the general purpose of the Bankruptcy Act the note immediately preceding section 1. The word "person" is defined in section 1a (19).

The word "debts," as used in section 4, must be construed in accordance with the definition given in section 1, subd. 11, as limited to a "debt, demand, or claim, provable in bankruptcy." *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365, 8 Am. Bankr. Rep. 69.

A debtor having but one debt, and no assets to which the trustee can take title, may become a voluntary bankrupt, section 1, subd. 29, providing that words importing the plural number may be applied to and mean only a single person or thing. *In re Schwaninger*, (E. D. Wis. 1906) 144 Fed. 555, 16 Am. Bankr. Rep. 427. See also *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365, 8 Am. Bankr. Rep. 69.

Partnerships may be adjudicated bankrupts in either voluntary or involuntary proceedings. See the several subdivisions of section 5.

Assignment for benefit of creditors as an act of bankruptcy by a partnership, see note to section 3a (4).

**Filing of petition not act of bankruptcy.**—The filing of a petition in bankruptcy by one partner against his copartners is not an act of bankruptcy on the part of the firm. *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459.

**Corporations.**—Prior to the amendment of 1910, corporations were not entitled to take advantage of section 4a as voluntary bankrupts; but under that amendment, any corporation may become a voluntary bankrupt, excepting municipal, railroad, insurance, and banking corporations. *In re Jefferson Casket Co.*, (N. D. N. Y. 1910) 182 Fed. 689; *In re Weedman Stave Co.*, (E. D. Ark. 1912) 199 Fed. 948.

**Directors of a corporation** have the power to put the corporation into bankruptcy. *In re Kenwood Ice Co.*, (D. C. Minn. 1911) 189 Fed. 525, wherein the court said: "A board of directors ought to have the power to put the company into bankruptcy. They have care of the general business of the corporation. They are the persons who know whether the corporation is able to go on or not. It might very well happen that under the articles and by-laws of the corporation it would be impossible to hold a meeting of the stockholders for months. Under these circumstances the bankruptcy of the corporation might be delayed so long that in many cases the purposes of the Bankrupt Law would be defeated and preferences given. I am satisfied that the board of directors at a duly called meeting has the power to put the corporation into bankruptcy."

**President.**—Going into bankruptcy is a "special act" requiring "special" action, and is not a "general" duty of the president or "the business" of a corporation. It is a cessation and an abandonment of business, and a surrender of its property to a trustee to be appointed by its creditors and approved by the court for the payment of such creditors according to law. This is a power which resides in the directors. The president of a corporation has no such general or implied power. *In re Jefferson Casket Co.*, (N. D.

N. Y. 1910) 182 Fed. 689, where Ray, J., said: "I do not think the court has jurisdiction to adjudge a corporation a voluntary bankrupt until it has a verified petition before it showing that the board of directors, at a meeting duly held, has determined to make and file such a petition and has authorized or designated the officer or officers making it to execute same on behalf of the corporation."

*The amendment of June 25, 1910, is not retroactive. In re New Amsterdam Motor Co., (S. D. N. Y. 1910) 180 Fed. 943, 24 Am. Bankr. Rep. 757.*

A farmer may become a voluntary bankrupt and therefore he cannot make a valid voluntary assignment under a state insolvent law. *Rockville Nat. Bank v. Latham, (1914) 88 Conn. 70, 89 Atl. 1117.*

Suspension of state insolvency laws by the enactment of the Bankruptcy Act, see the note immediately preceding section 1.

"An officer in the army falls within this

description ["any person who owes debts, except"], and it may be that he is not bound to include his pay in his schedule." *Audubon v. Shufeldt, (1901) 181 U. S. 575, 21 S. Ct. 735, 45 U. S. (L. ed.) 1009.*

**Persons under disability.**—The objection to persons under general disability, such as infants, insane persons, aliens, married women, and Indians, becoming voluntary bankrupts, is equally available as to their becoming involuntary bankrupts, and is considered under the following subdivision of this section.

An insufficient petition may be amended at any time before adjudication. *Dodge v. Kenwood Ice Co., (C. C. A. 8th Cir. 1913) 204 Fed. 577.* And see *In re Jefferson Casket Co., (1910) 182 Fed. 689* (end of opinion).

As to amendment of petitions in involuntary bankruptcy see the note to section 59b.

**b [Involuntary bankrupts.]** Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. [(Amended 1910, which excepted pending cases) 36 Stat. L. 839.]

As originally enacted this part of section 4b read as follows: "b Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts." [30 Stat. L. 547.]

In 1903 this part of section 4b was amended "to read as follows:" "b Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts." [32 Stat. L. 797.]

In 1910 it was amended "to read as" in the text.

As to amenability of partnerships to bankruptcy proceedings, see section 5a.

I. Generally, 569.

II. Statutory exceptions, 570.

III. Natural persons, 573.

IV. Corporations and unincorporated companies, 574.

#### I. GENERALLY.

**Constitutionality.**—The Bankruptcy Act is not unconstitutional because it provides that others than traders may be adjudged bankrupts. *Hanover Nat. Bank v. Moyses,*

(1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1.

The Act is not unconstitutional in respect to amenability to involuntary proceedings between different classes of corporations; nor is the classification adopted by Congress unreasonable, or beyond the limits of its discretion. *Leidigh Carriage Co. v. Stengel, (6th Cir. 1899) 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 385,* holding that under Const. U. S., art. 1, § 8, providing that Congress shall have power to establish "uniform laws on the subject of bankruptcies throughout the

United States," the uniformity required is geographical, and not personal; and no limitation is imposed upon Congress as to the classification of persons who are to be affected by such laws, provided only that the laws shall have uniform operation throughout the United States.

#### Effect of prior bankruptcy proceedings.

— The fact that one has been discharged from his debts within six years cannot possibly be an objection to the institution of involuntary proceedings by creditors. *In re Little*, (7th Cir. 1905) 137 Fed. 521, 70 C. C. A. 105, 13 Am. Bankr. Rep. 640. And see the annotation under section 14b (5), as to the effect of a previous discharge within six years.

But creditors who have proved their claims in bankruptcy are not entitled, while the estate is still in process of administration, but after the bankrupt has been refused a discharge, to maintain proceedings to have him adjudged a bankrupt a second time on account of the same debts, on the ground that he acquired property after the first adjudication, which he is alleged to have conveyed in fraud of his creditors. *In re Barton*, (W. D. Ark. 1906) 144 Fed. 540, 16 Am. Bankr. Rep. 569.

And see the annotation under section 70a as to the ownership of property acquired after adjudication; and as to the effect of a former discharge as *res adjudicata*, see note to section 14b.

## II. STATUTORY EXCEPTIONS.

### Date of status of statutory exceptions.

— Whether an alleged bankrupt is within the exceptions specified in section 4b, and therefore not amenable to involuntary bankruptcy, is to be determined as of the date of the commission of the alleged act of bankruptcy. If the debtor belonged to a nonexempt class when the act of bankruptcy was committed he may be adjudged bankrupt, notwithstanding the fact that he came to belong to a class which the statute exempts from adjudication before the petition in bankruptcy was filed. *In re New York, etc., Water Co.*, (S. D. N. Y. 1900) 98 Fed. 711, 3 Am. Bankr. Rep. 508; *In re Luckhardt*, (D. C. Kan. 1900) 101 Fed. 807, 4 Am. Bankr. Rep. 307; *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355, 361, 6 Am. Bankr. Rep. 577; *In re Tontine Surety Co.*, (D. C. N. J. 1902) 116 Fed. 401, 8 Am. Bankr. Rep. 421; *Tiffany v. La Plume Condensed Milk Co.*, (M. D. Pa. 1905) 141 Fed. 444, 15 Am. Bankr. Rep. 413; *Flickinger v. Vandalia First Nat. Bank*, (6th Cir. 1906) 145 Fed. 162, 76 C. C. A. 132, 16 Am. Bankr. Rep. 678; *In re Crenshaw*, (S. D. Ala. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502; *In re Burgin*, (N. D. Ala. 1909) 173 Fed. 726, 22 Am. Bankr. Rep. 574; *Bollinger v. Central Nat. Bank*, (9th Cir. 1910) 177 Fed. 609, 101 C. C. A. 235, 24 Am. Bankr.

Rep. 44; *In re Naroma Chocolate Co.*, (D. C. R. I. 1910) 178 Fed. 383, 24 Am. Bankr. Rep. 154; *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870, 24 Am. Bankr. Rep. 927; *In re Wakefield*, (N. D. Cal. 1910) 182 Fed. 247; *In re Leland*, (W. D. Mich. 1910) 185 Fed. 830; *In re Disney*, (D. C. Md. 1915) 219 Fed. 294, wherein the court said: "The fact that a particular farmer will not suffer if he be adjudicated, and many of his creditors will if he be not, is therefore no reason for construing the exemption narrowly. Nor does the probability or reverse of such an outcome give even in a close case much help in determining whether a debtor was or was not chiefly engaged in farming. It is settled, at least in this circuit, that whether a debtor was or was not chiefly engaged in farming is to be determined as of the time at which he committed the act of bankruptcy charged against him. *Counts v. Columbus Buggy Co.*, 210 Fed. 748, 127 C. C. A. 298; *Flickinger v. Vandalia First Nat. Bank*, 145 Fed. 162, 76 C. C. A. 132."

One who incurs debts in a nonexempt occupation, changes to an exempt occupation, and thereafter commits an act that in a nonexempt occupation would be an "act of bankruptcy," is not subject to adjudication of involuntary bankruptcy because thereof, and of such debts still existing, or at all. *In re Folkstad*, (D. C. Mont. 1912) 199 Fed. 363, wherein the court said: "Petitioners contend that, since it appears the debts involved were incurred while respondent was engaged in the mercantile business, his subsequent change of occupation and his occupation when the alleged act of bankruptcy was committed are immaterial, and he is still subject to be adjudicated a bankrupt—citing *In re Burgin*, (D. C.) 173 Fed. 726; *In re Crenshaw*, (D. C.) 156 Fed. 638. *In re Burgin* clearly so holds, but it would seem that therein it is not justified by the cases on which it relies. *In re Crenshaw* merely determines that one who incurs debts in an occupation subject to adjudication of bankruptcy cannot escape by changing to an exempt occupation. It does not hold, however, that, if the alleged act of bankruptcy is committed only after such change, involuntary proceedings will lie; and the cases therein relied on merely decide that a change to an exempt occupation after an act of bankruptcy is committed affords no defense to involuntary proceedings. The law of bankruptcy is what Congress has made it, and not what expediency and convenience might desire it. The statute is clear and unambiguous. It declares that certain persons, having committed 'an act of bankruptcy,' may on petition filed within four months thereafter be adjudged involuntary bankrupts. It expressly excepts persons engaged chiefly in farming or tillage. The effect



is that these excepted persons cannot commit an 'act of bankruptcy.' An act is an 'act of bankruptcy' for the reason that he who commits it can because thereof be adjudicated an involuntary bankrupt. It is an 'act of bankruptcy' when the act is committed, or not at all. If the act is committed by one who then is not of the class that the law says may be adjudicated an involuntary bankrupt, it is not an 'act of bankruptcy,' and furnishes no foundation for involuntary proceedings. No former occupation can make the act of an exempt person an 'act of bankruptcy.' No subsequent change of occupation can deprive the act of a non-exempt person of its quality as an 'act of bankruptcy.' The act takes color only from the *bona fide* occupation of the actor at the time it is committed, and not from his occupation prior or subsequent thereto. Otherwise, a farmer of ten years' standing might be adjudicated an involuntary bankrupt because of debts incurred prior thereto in the vocation of merchant."

"No construction of the Bankruptcy Act is admissible which would permit an insolvent person who had committed an act of bankruptcy within four months next preceding the filing of the petition to evade the provisions of the statute by engaging in farming after the commission of the act and before the filing of the petition." *In re Mackey*, (1901) 110 Fed. 355.

If a petition is duly filed by creditors within the required time, a merchant who is chargeable with an act of bankruptcy cannot, by leaving his business and engaging chiefly in farming, avoid the provisions of the Bankruptcy Act. *In re Luckhardt*, (1901) 101 Fed. 807.

**Debtor's business—sufficiency of petition.**—If the petition in involuntary bankruptcy does not show what the debtor's business is or set out that he does not come within the exceptions, it is demurrable. *In re Taylor*, (C. C. A. 1900) 102 Fed. 728.

**Wage-earners** being expressly excepted from the operation of section 4b, cannot be adjudged bankrupt in involuntary proceedings. *In re Pilger*, (E. D. Wis. 1902) 118 Fed. 206, 9 Am. Bankr. Rep. 244; *In re Yoder*, (E. D. Pa. 1904) 127 Fed. 894, 11 Am. Bankr. Rep. 445.

**When status of wage-earner must have existed**, see paragraphs on "date of status of statutory exceptions," *supra*, this note.

"**Wage-earner**" is defined in section 1a (27) as "an individual who works for wages, salary or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year."

**The test in determining whether a person is a wage-earner or not is:** Does the person claiming to be a wage-earner depend upon the return from his personal service for his maintenance and support? *Matter of Remaley*, (E. D. Pa. 1909) 23 Am. Bankr. Rep. 29.

*In Carpenter v. Cudd*, (4th Cir. 1909) 174 Fed. 603, 20 Ann. Cas. 977, 98 C. C. A. 449, 23 Am. Bankr. Rep. 463, it appeared that an alleged involuntary bankrupt nominally drew \$900 a year as salary, but owned two-thirds of the stock of the corporation, and drew more than \$2,000 a year preceding the institution of bankruptcy proceedings against him, and was also in the business of buying and selling real estate, his holdings outside the corporation being worth nearly \$90,000, and it was held that he was not a wage-earner.

**A music teacher giving lessons at so much an hour is not a wage-earner.** *Wilkes-Barre First Nat. Bank v. Barnum*, (M. D. Pa. 1908) 160 Fed. 245, 20 Am. Bankr. Rep. 439.

**Salary and traveling expenses.**—*In re Hurley*, (D. C. Minn. 1913) 204 Fed. 126, where Hurley was adjudged a bankrupt in an involuntary proceeding, it appeared that his salary was \$100 a month and his traveling expenses. His employer did not make him an allowance of a certain sum, but reimbursed him for such traveling expenses as he incurred, which included his hotel bills or what he paid out for food and lodging. The court said: "Hurley was employed by a company located at St. Louis, Mo. If that employer had agreed to pay him \$100 a month, and to board and lodge him at St. Louis, and if it were proven that this board and lodging was worth to Hurley \$40 a month, it must be clear that the compensation which he received by reason of his employment would be \$140 a month. In the present instance he received this board and lodging while he was traveling. In a case where an employee maintained a household establishment at his place of residence, from which place of residence he traveled for his employer, it might be difficult to determine just what the board and lodging furnished him while he was so traveling would be worth to him, for the expenses of his household establishment would still go on during his absence. This difficulty is not presented here, for, in the first instance, Hurley maintained no household establishment in St. Paul; and, in the second place, both he and his wife testified from their experience that the agreement on the part of his employer to pay his traveling expenses was worth \$40 a month to him. It thus appears that he was in fact at the time the petition was filed against him receiving compensation at the rate of \$140 a month, or more than \$1,500 a year, and was therefore not a wage-earner."

**Persons engaged chiefly in farming or the tillage of the soil—In general.**—These are not amenable to involuntary bankruptcy proceedings. *In re Thompson*, (N. D. Ia. 1900) 102 Fed. 287, 4 Am. Bankr. Rep. 340; *In re Mackey*, (D. C. Del.

1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577; *In re Drake*, (D. C. S. C. 1902) 114 Fed. 229, 8 Am. Bankr. Rep. 137; *Wulbern v. Drake*, (4th Cir. 1903) 120 Fed. 493, 56 C. C. A. 643, 9 Am. Bankr. Rep. 695; *Couts v. Townsend*, (W. D. Ky. 1903) 126 Fed. 249, 11 Am. Bankr. Rep. 126; *In re Hoy*, (N. D. Ia. 1905) 137 Fed. 175, 14 Am. Bankr. Rep. 648; *Rise v. Bordner*, (M. D. Pa. 1905) 140 Fed. 566, 15 Am. Bankr. Rep. 297; *Gregg v. Mitchell*, (6th Cir. 1909) 166 Fed. 725, 16 Ann. Cas. 510, 92 C. C. A. 415, 20 L. R. A. (N. S.) 148, 21 Am. Bankr. Rep. 659; *Olive v. Armour*, (5th Cir. 1909) 167 Fed. 517, 93 C. C. A. 153, 21 L. R. A. (N. S.) 109, 21 Am. Bankr. Rep. 901; *Robertson v. Dwyer*, (C. C. A. 7th Cir. 1911) 184 Fed. 880; *E. E. Sutherland Medicine Co. v. Rich*, (S. D. Ga. 1909) 22 Am. Bankr. Rep. 85; *Counts v. Columbus Buggy Co.*, (C. C. A. 4th Cir. 1913) 210 Fed. 748; *In re Sherwoods*, (C. C. A. 2d Cir. 1913) 210 Fed. 754.

A state law under which persons engaged chiefly in the tillage of the soil may be proceeded against by their creditors was not superseded by the Bankrupt Act of 1898. *Lace v. Smith*, (1912) 34 R. I. 1, 82 Atl. 268.

A private banker, it has been held, is not subject to involuntary bankruptcy where his principal occupation is farming. *Couts v. Townsend*, (W. D. Ky. 1903) 126 Fed. 249, 11 Am. Bankr. Rep. 126.

But corporations are not within the exception of persons "engaged chiefly in farming or the tillage of the soil." *In re Lake Jackson Sugar Co.*, (S. D. Tex. 1904) 129 Fed. 640, 11 Am. Bankr. Rep. 458.

A partnership engaged chiefly in farming may not be adjudged a bankrupt. *Still v. American Nat. Bank*, (C. C. A. 4th Cir. 1913) 209 Fed. 749.

A partnership formed for the purpose of tilling the soil and engaging in agricultural pursuits, upon which occupation the copartners depend for a livelihood, is farming. *E. E. Sutherland Medicine Co. v. Rich*, (S. D. Ga. 1909) 22 Am. Bankr. Rep. 85.

"A person engaged chiefly in farming is one whose chief occupation or business is farming. The chief occupation or business of one, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature, and on which he chiefly relies for his livelihood or as the means of acquiring wealth, great or small." *In re Mackey*, (1901) 110 Fed. 355.

"It is evident that it is impracticable, if not impossible, to define with precision the facts which will in all cases determine whether one is engaged chiefly in farming, and that each case must be decided on its own circumstances;" the fact that the greater part of one's time, or physical energy, or capital is absorbed in farming

not being alone conclusive evidence on the question. *In re Mackey*, (1901) 110 Fed. 355.

In *American Agricultural Chemical Co. v. Brinkley*, (C. C. A. 4th Cir. 1912) 194 Fed. 411, the following facts appeared: The debtor was carrying on three country stores. By himself, or in partnership with others, he tilled five farms. He was a member of four distinct partnerships. Each of these cultivated a separate farm. In the conduct of one farm he had no associate. The Circuit Court of Appeals affirmed a decree denying an adjudication, saying: "There is no question that this mercantile business far exceeded in importance the agricultural operations conducted by him individually. This proceeding is against him as an individual. No one of the firms of which he was a member is a party to it. The creditors say that the so-called entity theory requires that, in determining whether the debtor was engaged chiefly in farming, we must exclude from consideration anything he did in connection with any of the partnerships. We cannot assent to this contention. Whether a debtor is or is not chiefly engaged in farming or tilling the soil is a question of fact, to be determined in each case in which it is sought to have him individually adjudicated. In passing upon that question, all the debtor's activities and pursuits must be considered as a whole. No part of them may be ignored merely because they concern themselves with the affairs of copartnerships of which he was a member. Doubtless a firm may be adjudicated an involuntary bankrupt when it is engaged in a nonexempt business, in spite of the fact that the principal occupation of some of its partners protects them from individual adjudication. Such is not the case before us. The creditors, however, insist that the evidence shows that the mercantile business of the debtor exceeded in importance all the agricultural operations in which he was engaged, whether severally or in copartnership with others. The case in this aspect is undoubtedly close. The learned judge below had the witnesses before him. He saw and heard them testify. He was of opinion that the debtor was chiefly engaged in farming. We do not see any sufficient reason for coming to a different conclusion."

What is farming or tillage of soil.—Because a man who produces food products by cultivating the soil markets these products by carting the same from door to door, or by selling to merchants at wholesale, or at retail upon his own premises, he cannot be said to be a huckster and not a tiller of the soil. Neither will the fact that a tiller of the soil engages so extensively in cultivating plants for "setting" as to require the aid of a greenhouse for said purpose change the

nature of his vocation, for it is then a necessary part of the business. *In re Terry*, (M. D. Pa. 1913) 208 Fed. 162.

In *In re Drake*, (D. C. S. C. 1902) 114 Fed. 229, 8 Am. Bankr. Rep. 137, the court said: "Within the purview of this statute it [farming] is understood to mean the business of cultivating land or employing it for the purpose of husbandry; and a farm is a tract devoted to cultivation under a single control, whether it be large or small, isolated, or made up of many parcels."

Conducting a "stock farm," as well as conducting a "grain farm," is farming. *In re Dwyer*, (C. C. A. 7th Cir. 1911) 184 Fed. 880. See also *In re Thompson*, (N. D. Ia. 1900) 102 Fed. 287, 4 Am. Bankr. Rep. 340.

In *In re Drake*, (D. C. S. C. 1902) 114 Fed. 229, 8 Am. Bankr. Rep. 137, it appeared that the alleged bankrupt, who owned 1,100 acres of land, cultivated one-third of the land with hired labor, and rented another third on shares, and the remaining third at a stipulated rental, but that he maintained supervision of all of the land; he also kept a store where he sold goods to his laborers and tenants, and some goods to outsiders, but his chief income was from his lands; and it was held that he was within the exception.

In *Rise v. Bordner*, (M. D. Pa. 1905) 140 Fed. 566, 15 Am. Bankr. Rep. 297, the defendant kept a small store, and owned a farm of 240 acres which he cultivated with the aid of his son and one laborer. His income from his business outside of farming amounted to sixty or seventy dollars a year, and the farm furnished most of his livelihood. The court held that the defendant was within the exception, as being chiefly engaged in farming, etc.

A farmer does not cease to be "engaged chiefly in farming," because he establishes a dairy, as one of the branches of his industry, to utilize the products of his farm and convert them to profitable uses, nor because he may sell the products of his dairy at retail. *Gregg v. Mitchell*, (6th Cir. 1909) 166 Fed. 725, 16 Ann. Cas. 510, 92 C. C. A. 415, 20 L. R. A. (N. S.) 148, 21 Am. Bankr. Rep. 659.

*What is not farming or tillage of soil.*—In *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577, the court held that a person keeping a stall at a public market, where during a year he sold products raised by him of the value of \$850, and other products worth over \$5,000, was not a person engaged chiefly in farming.

A person who buys and sells cattle, using his farm merely as a feeding place for the cattle, and purchasing most of the feed for them, is not engaged chiefly in farming if his income is mostly derived from such buying and selling of cattle. *Dearborn Bank v. Matney*, (W. D. Mo.

1904) 132 Fed. 75, 12 Am. Bankr. Rep. 482; *In re Brown*, (S. D. Ia. 1904) 132 Fed. 706, 13 Am. Bankr. Rep. 140.

Where a husband deeds a farm upon which he resides with his family to his wife to defraud his creditors, but continues to operate the farm as before, the wife merely attending to the ordinary duties of a farmer's wife, the wife does not thereby become a person engaged chiefly in farming, and is not exempt from involuntary proceedings in bankruptcy. *In re Johnson*, (N. D. N. Y. 1907) 149 Fed. 864, 18 Am. Bankr. Rep. 74.

The owner of a farm upon which he resides, but who has leased the same for a year for a money rental, is not engaged in farming, and may be adjudged an involuntary bankrupt. *In re Matson*, (M. D. Pa. 1903) 123 Fed. 743, 10 Am. Bankr. Rep. 473.

The words, "or the tillage of the soil," do not limit the preceding words, "in farming," but refer to market gardeners, nurserymen, and such like, who till the soil and yet are not, strictly speaking, farmers. *In re Thompson*, (1901) 102 Fed. 287.

### III. NATURAL PERSONS.

Private bankers are amenable to involuntary bankruptcy. *Burkhart v. German-American Bank*, (S. D. Ohio 1904) 137 Fed. 958, 14 Am. Bankr. Rep. 222. See also *Davis v. Stevens*, (D. C. S. D. 1900) 104 Fed. 235, 4 Am. Bankr. Rep. 763.

But a private banker who was chiefly engaged in farming was held to be exempt from involuntary bankruptcy proceedings because of such chief occupation. *Couts v. Townsend*, (W. D. Ky. 1903) 126 Fed. 249, 11 Am. Bankr. Rep. 126.

**Married women.**—The statute authorizes the adjudication of a married woman as an involuntary bankrupt, where she is engaged in business on her own account, and owes business obligations of the amount required by the statute, for which her separate property is liable. *MacDonald v. Tefft-Weller Co.*, (5th Cir. 1904) 128 Fed. 381, 63 C. C. A. 123, 65 L. R. A. 106, 11 Am. Bankr. Rep. 800; *In re Johnson*, (N. D. N. Y. 1907) 149 Fed. 864, 18 Am. Bankr. Rep. 74; *Matter of Remaley*, (E. D. Pa. 1909) 23 Am. Bankr. Rep. 29.

An alien, domiciled within the United States, may be adjudged bankrupt. *In re Clisdell*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 424.

**Indians.**—In the following cases it appears that Indians were adjudged bankrupts: *In re Russie*, (D. C. Ore. 1899) 96 Fed. 609, 3 Am. Bankr. Rep. 6; *In re Rennie*, (S. D. Ind. Ter.) 2 Am. Bankr. Rep. 182.

**Infants.**—It has been held that the creditors of an infant, whose debts he is entitled to repudiate at majority, cannot

have him adjudged an involuntary bankrupt, since they are not creditors in the sense of the Bankruptcy Act. *In re Eide-miller*, (N. D. Ill. 1900) 105 Fed. 595, 53 L. R. A. 118, 5 Am. Bankr. Rep. 570. See also *In re Pensansky*, (D. C. Mass. 1902) 8 Am. Bankr. Rep. 99.

And in *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794, it was said that an infant cannot be adjudged bankrupt in either voluntary or involuntary proceedings.

An infant partner, though he may not be adjudicated himself, does not prevent an adjudication of the firm of which he is a member as a bankrupt. *In re Dunnigan*, (D. C. Mass. 1899) 95 Fed. 428, 2 Am. Bankr. Rep. 628; *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794.

But the infant partner cannot join in a voluntary petition by the firm, nor be included in an adjudication made thereon. *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794.

The test as to whether an infant may be adjudicated an involuntary bankrupt seems to be whether the debts from which he seeks to be discharged are based upon contracts or obligations which he can disaffirm upon coming of age, or upon such as render him absolutely liable. *In re Penzansky*, (D. C. Mass. 1902) 8 Am. Bankr. Rep. 99.

Thus it has been held that if a minor engages in business as a merchant, and parties consequently assume that he is of full age, and deal with him in that belief, no inquiry or representation being made as to his minority, and by construction of the state statute he thereby becomes absolutely liable for the debts contracted in such business, he may be adjudged bankrupt on his own petition, though still an infant. *In re Brice*, (S. D. Ia. 1899) 93 Fed. 942, 2 Am. Bankr. Rep. 197.

Insane persons cannot be adjudged bankrupt. See *In re Funk*, (N. D. Ia. 1900) 101 Fed. 244, 4 Am. Bankr. Rep. 96; *In re Burka*, (W. D. Tenn. 1901) 107 Fed. 674, 5 Am. Bankr. Rep. 843; *In re Eisenberg*, (S. D. N. Y. 1902) 117 Fed. 786, 8 Am. Bankr. Rep. 551; *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482; *In re Kehler*, (2d Cir. 1908) 162 Fed. 674, 89 C. C. A. 466, 20 Am. Bankr. Rep. 609, reversing (2d Cir. 1908) 159 Fed. 55, 86 C. C. A. 245, 19 Am. Bankr. Rep. 513; *In re Ward*, (D. C. N. J. 1908) 20 Am. Bankr. Rep. 482; *In re Ward*, (D. C. N. J. 1911) 194 Fed. 174.

As to adjudging lunatics to be bankrupts under the Act of 1867, see *In re Weitzel*, (1876) 7 Biss. 289, 29 Fed. Cas. No. 17,365; *In re Pratt*, (1872) 2 Lowell 96, 19 Fed. Cas. No. 11,371; *In re Marvin*, (1871) 1 Dill. 178, 16 Fed. Cas. No. 9,178.

But the insanity of a partner does not prevent the adjudication of the copartner-

ship of which he was a member. *In re Stein*, (7th Cir. 1904) 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 536.

*Subsequent insanity*.—Insanity occurring after an adjudication of bankruptcy does not abate the proceeding. See the annotation under section 8a.

#### IV. CORPORATIONS AND UNINCORPORATED COMPANIES.

**Corporations**—*In general*.—All moneyed, business, or commercial corporations, excepting municipal, railroad, insurance, or banking corporations, are, since the enactment of the amendment of June 25, 1910, amenable to involuntary bankruptcy proceedings. The amendment is not retroactive. *In re New Amsterdam Motor Co.*, (S. D. N. Y. 1910) 180 Fed. 943, 24 Am. Bankr. Rep. 757; *In re U. S. Restaurant, etc., Co.*, (C. C. A. 2d Cir. 1911) 187 Fed. 118.

What is a "moneyed" corporation.—"We cannot do otherwise than follow the definition of the terms 'moneyed,' 'business' and 'commercial' which were adopted and approved by the federal courts when called upon to interpret the earlier statute." *In re R. L. Radke Co.*, (N. D. Cal. 1911) 193 Fed. 735.

Section 37 of the Act of 1867 provided that it should apply to all moneyed, business, or commercial corporations, and in discussing this provision it was said that such language was intended to include all corporations of a private nature organized for pecuniary profit. See *Winter v. Iowa, etc., R. Co.*, (1873) 2 Dill. 487, 30 Fed. Cas. No. 17,890. See also *Rankin v. Florida, etc., R. Co.*, (1868) 1 Nat. Bankr. Reg. 647, 20 Fed. Cas. No. 11,567; *In re Lady Bryan Min. Co.*, (1870) 4 Nat. Bankr. Reg. 394, 1 Sawy. 349, 14 Fed. Cas. No. 7,978; *In re Jefferson Ins. Co.*, (1877) 11 Nat. Bankr. Reg. 287, 2 Hughes 255, 13 Fed. Cas. No. 7,253; *Davis v. Alabama, etc., R. Co.*, (1873) 13 Nat. Bankr. Reg. 258, 1 Woods 661, 7 Fed. Cas. No. 3,648; *In re Detroit Car Works*, (1876) 14 Nat. Bankr. Reg. 243, 7 Fed. Cas. No. 3,833; *Freeman's Nat. Bank v. Smith*, (1875) 13 Blatchf. 220, 9 Fed. Cas. No. 5,089; *In re Collateral Loan, etc., Bank*, (1878) 5 Sawy. 331, 6 Fed. Cas. No. 2,997; *Jones v. Watkins*, (1827) 1 Stew. (Ala.) 81.

In discussing what constituted a moneyed corporation under the Kansas Crimes Act, it was held that a company incorporated for the purpose of pecuniary profit, although having no power to engage in banking, or in loaning money, or in writing insurance, is a moneyed corporation. *State v. Chance*, (1910) 82 Kan. 392, 20 Ann. Cas. 134 (see also note at p. 136), 108 Pac. 791.

In *State v. Fidelity, etc., Co.*, (1904) 35 Tex. Civ. App. 214, 80 S. W. 544, a statute providing for the taxation of

"moneyed corporations," was held to mean all classes of corporations organized and created for business purposes, as distinguished from public, or charitable, or other corporations which were exempted by law from taxation.

**Corporate name not conclusive as to business.**—There is no judicial presumption that the corporate name denotes the business in which the corporation is engaged. *U. S. v. Freed*, (S. D. N. Y. 1910) 179 Fed. 236.

**Corporations engaged in farming.**—A corporation is not exempt from the operation of the Bankruptcy Law, under the provision relating to the exemption of persons engaged chiefly in farming or the tillage of the soil, although its chief business may be farming. *In re Lake Jackson Sugar Co.*, (S. D. Tex. 1904) 129 Fed. 640, 11 Am. Bankr. Rep. 458.

**Banking corporations.**—Prior to the amendment of 1910 the provision of section 4b, relative to bankers, read: "Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts." Under that provision it was held that banks organized under the laws of the state were not subject to involuntary bankruptcy. *In re Surety Guarantee, etc., Co.*, (7th Cir. 1902) 121 Fed. 73, 56 C. C. A. 654, 9 Am. Bankr. Rep. 129; *In re Oregon Trust, etc., Bank*, (D. C. Ore. 1907) 156 Fed. 319, 19 Am. Bankr. Rep. 484.

**Private bankers**, however, were held to be subject to involuntary proceedings. *Burkhart v. German-American Bank*, (S. D. Ohio 1904) 137 Fed. 958, 14 Am. Bankr. Rep. 222. See also *Davis v. Stevens*, (D. C. S. D. 1900) 104 Fed. 235, 4 Am. Bankr. Rep. 763.

But in *Couts v. Townsend*, (W. D. Ky. 1903) 126 Fed. 249, 11 Am. Bankr. Rep. 126, it was held that a private banker was exempted from involuntary bankruptcy because his chief occupation was that of farming.

**Municipal, railroad, insurance, and banking corporations** are expressly excepted from the operation of section 4b, and therefore are not subject to adjudication as involuntary bankrupts. To be entitled to such immunity, however, it would seem that, as under the law prior to the amendment of 1910, it is essential that the alleged bankrupt shall have been within the statutory exceptions at the time of the commission of the alleged act of bankruptcy. See the cases cited to this effect in subdivision II of this annotation, paragraph *Date of Status of Statutory Exceptions*.

**Winding-up or dissolution proceedings.**—A corporation does not cease to exist from the fact that proceedings for winding up its affairs, or for its dissolution, have been instituted in a state court; and, notwithstanding such proceedings, a corpora-

tion still remains amenable to involuntary bankruptcy under section 4b. *Lea v. George M. West Co.*, (E. D. Va. 1899) 91 Fed. 237, 1 Am. Bankr. Rep. 261; *In re Empire Metallic Bedstead Co.*, (N. D. N. Y. 1899) 95 Fed. 957, 1 Am. Bankr. Rep. 136; *In re Storm*, (E. D. N. Y. 1900) 103 Fed. 618, 4 Am. Bankr. Rep. 601; *White Mountain Paper Co. v. Morse*, (1st Cir. 1904) 127 Fed. 643, 62 C. C. A. 369, 11 Am. Bankr. Rep. 633; *In re Hercules Atkin Co.*, (E. D. Pa. 1904) 133 Fed. 813, 13 Am. Bankr. Rep. 369; *In re International Coal Min. Co.*, (E. D. Pa. 1906) 143 Fed. 665, 16 Am. Bankr. Rep. 309, *affirmed* (3d Cir. 1906) 148 Fed. 981, 78 C. C. A. 609, 17 Am. Bankr. Rep. 573; *In re Adams, etc., Co.*, (N. D. Ga. 1908) 164 Fed. 489, 21 Am. Bankr. Rep. 161; *Matter of Edward G. Milbury Co.*, (S. D. N. Y. 1904) 11 Am. Bankr. Rep. 523.

**The fact that the property of a corporation is in the possession of receivers appointed by a state court does not affect the jurisdiction of a court of bankruptcy to adjudicate such corporation a bankrupt.** *In re C. Moench, etc., Co.*, (2d Cir. 1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240; *In re Sterlingworth R. Supply Co.*, (E. D. Pa. 1908) 164 Fed. 591, 21 Am. Bankr. Rep. 341.

An order appointing receivers of a corporation's property and enjoining the corporation, its officers and creditors from interfering with the receiver's possession, and from instituting or prosecuting any suits or proceedings to enforce the claims of creditors, does not bar the corporation or any of its creditors from instituting proceedings to have it adjudged a bankrupt. *In re Yaryan Novel Stores Co.*, (C. C. A. 6th Cir. 1914) 214 Fed. 563, wherein the court said: "In the appointment of the receivers and the issuance of the injunction, the powers of the court in Georgia were . . . properly exercised. There the solvency of the company was averred and admitted. The necessary element of involuntary bankruptcy was wanting. Only a court of equity could give the desired relief. But the order of that court must be read and interpreted in the light of, and in connection with, the relevant and explicit provisions of the controlling act of Congress. When so read and interpreted, it contains nothing which indicates an intention to prohibit a due application being made to the appropriate Bankruptcy Court, or the exercise by the latter court of its special jurisdiction and powers, whenever the requisite statutory conditions might be found to exist. This language [of section 4] is so broad and comprehensive as to be all-embracing and all-inclusive. It clearly manifests the intention of Congress to confer the rights and privileges of the Bankruptcy Act upon all persons and all corporations except those expressly exempted from its operation. Rights and

privileges so positively bestowed cannot be destroyed, denied, or abridged by any power save that which created and brought them into being. Nor, in the absence of specific declaration, will it be presumed that any court intends to make an order which must be ineffective because in direct conflict with the legislative will and mandate. The settled rule is that the jurisdiction of the courts in bankruptcy in the administration of the affairs of insolvent persons and corporations is exclusive and paramount."

Prior to the enactment of the amendment of June 25, 1910, section 4b, with respect to the amenability of corporations thereto, read that "any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits," might be adjudged bankrupt. As to what constituted any one of the various classes of corporations mentioned there was not, and probably could not have been, any fixed rule; so that, under the old law, there existed a wide difference of opinion. These decisions, however, are now only of value with respect to cases commenced prior to the time of the passage of the amendment, and are appended without comment.

*Manufacturing corporations.*—*In re Riggs*, (1909) 214 U. S. 9, 29 S. Ct. 598, 53 U. S. (L. ed.) —; *Friday v. Hall, etc., Co.*, (1910) 216 U. S. 449, 30 S. Ct. 261, 26 L. R. A. (N. S.) 475; *In re San Gabriel Sanatorium Co.*, (S. D. Cal. 1899) 95 Fed. 271, 2 Am. Bankr. Rep. 408; *In re Rollins Gold, etc., Min. Co.*, (S. D. N. Y. 1900) 102 Fed. 983, 4 Am. Bankr. Rep. 327; *In re Morton Boarding Stables*, (S. D. N. Y. 1901) 108 Fed. 791, 5 Am. Bankr. Rep. 763; *In re Tecopa Min., etc., Co.*, (S. D. Cal. 1901) 110 Fed. 120, 6 Am. Bankr. Rep. 250; *In re White Star Laundry Co.*, (E. D. Wis. 1902) 117 Fed. 570, 9 Am. Bankr. Rep. 30; *Columbia Ironworks v. National Lead Co.*, (6th Cir. 1904) 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645, 11 Am. Bankr. Rep. 340; *In re White Mountain Paper Co.*, (D. C. N. H. 1903) 127 Fed. 180, 11 Am. Bankr. Rep. 491; *White Mountain Paper Co. v. Morse*, (1st Cir. 1904) 127 Fed. 643, 62 C. C. A. 369, 11 Am. Bankr. Rep. 633; *In re Niagara Contracting Co.*, (W. D. N. Y. 1904) 127 Fed. 782, 11 Am. Bankr. Rep. 643; *In re Marine Constr., etc., Co.*, (2d Cir. 1904) 130 Fed. 446, 64 C. C. A. 648, 11 Am. Bankr. Rep. 640; *In re C. Moench, etc., Co.*, (2d Cir. 1904) 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240, *affirming* (W. D. N. Y. 1903) 123 Fed. 965, 10 Am. Bankr. Rep. 656; *In re Troy Steam Laundering Co.*, (N. D. N. Y. 1904) 132 Fed. 266, 13 Am. Bankr. Rep. 97; *Butt v. C. F. MacNichol Constr. Co.*, (4th Cir. 1905) 140 Fed. 840, 72 C. C. A. 252, 15 Am. Bankr. Rep. 515, *affirming* (E. D. Va. 1905) 134 Fed. 979, 14 Am. Bankr. Rep. 188; *In re Mathews Consol. Slate Co.*,

(D. C. Mass. 1905) 144 Fed. 724, 16 Am. Bankr. Rep. 350; *Burdick v. Dillon*, (1st Cir. 1906) 144 Fed. 737, 75 C. C. A. 603, 16 Am. Bankr. Rep. 407; *In re T. E. Hill Co.*, (7th Cir. 1906) 148 Fed. 832, 78 C. C. A. 522, 17 Am. Bankr. Rep. 517; *In re Belle Fourche First Nat. Bank*, (8th Cir. 1907) 152 Fed. 64, 81 C. C. A. 260, 18 Am. Bankr. Rep. 265, 11 Ann. Cas. 355; *In re Toledo Portland Cement Co.*, (E. D. Mich. 1907) 156 Fed. 83, 19 Am. Bankr. Rep. 117, *reversing* 17 Am. Bankr. Rep. 375; *In re Rutland Realty Co.*, (S. D. N. Y. 1907) 157 Fed. 296, 19 Am. Bankr. Rep. 546; *In re Church Constr. Co.*, (S. D. N. Y. 1907) 157 Fed. 298, 19 Am. Bankr. Rep. 549; *Hall, etc., Co. v. Friday*, (3d Cir. 1907) 158 Fed. 593, 87 C. C. A. 23, 19 Am. Bankr. Rep. 841; *In re Kingston Realty Co.*, (2d Cir. 1908) 160 Fed. 445, 87 C. C. A. 406, 19 Am. Bankr. Rep. 845, *reversing* (E. D. N. Y. 1907) 157 Fed. 299, 19 Am. Bankr. Rep. 465; *United Surety Co. v. Iowa Mfg. Co.*, (8th Cir. 1910) 179 Fed. 55, 102 C. C. A. 623, 24 Am. Bankr. Rep. 726; *In re Charles Town Light, etc., Co.*, (N. D. W. Va. 1910) 183 Fed. 160; *In re Hudson River Power Transmission Co.*, (2d Cir. 1910) 183 Fed. 701, 106 C. C. A. 139, 25 Am. Bankr. Rep. 504; *In re Eagle Steam Laundry Co.*, (E. D. N. Y. 1911) 184 Fed. 949; *In re Alaska American Fish Co.*, (W. D. Wash. 1908) 20 Am. Bankr. Rep. 712.

*Trading and mercantile corporations.*—*In re San Gabriel Sanatorium Co.*, (S. D. Cal. 1899) 95 Fed. 271, 2 Am. Bankr. Rep. 408; *In re Cameron Town Mut. F., etc., Ins. Co.*, (W. D. Mo. 1899) 96 Fed. 756, 2 Am. Bankr. Rep. 372; *In re New York, etc., Water Co.*, (S. D. N. Y. 1900) 98 Fed. 711, 3 Am. Bankr. Rep. 508, *affirmed* (2d Cir. 1900) 102 Fed. 1004, 43 C. C. A. 91; *In re Chicago-Joplin Lead, etc., Co.*, (W. D. Mo. 1900) 104 Fed. 67, 4 Am. Bankr. 712; *In re Oriental Soc.*, (E. D. Pa. 1900) 104 Fed. 975, 5 Am. Bankr. Rep. 219; *In re Morton Boarding Stables*, (S. D. N. Y. 1901) 108 Fed. 791, 5 Am. Bankr. Rep. 763; *In re Mutual Mercantile Agency*, (S. D. N. Y. 1901) 111 Fed. 152, 6 Am. Bankr. Rep. 607; *In re Chesapeake Oyster, etc., Co.*, (D. C. Colo. 1902) 112 Fed. 960, 7 Am. Bankr. Rep. 173; *In re Fulton Club*, (N. D. Ga. 1902) 113 Fed. 997, 7 Am. Bankr. Rep. 670; *In re Philadelphia, etc., Transp. Co.*, (E. D. Pa. 1902) 114 Fed. 403, 7 Am. Bankr. Rep. 707; *In re Tontine Surety Co.*, (D. C. N. J. 1902) 116 Fed. 401, 8 Am. Bankr. Rep. 421; *In re Parmelee Library*, (7th Cir. 1903) 120 Fed. 235, 56 C. C. A. 583, 9 Am. Bankr. Rep. 568; *In re Surety, etc., Co.*, (7th Cir. 1902) 121 Fed. 73, 56 C. C. A. 654, 9 Am. Bankr. Rep. 129; *In re H. J. Quimby Freight Forwarding Co.*, (D. C. Mass. 1903) 121 Fed. 139, 10 Am. Bankr. Rep. 424; *In re Pacific Coast Warehouse Co.*, (N. D. Cal. 1903) 123 Fed. 749, 10 Am. Bankr. Rep. 474; *Philpot v. O'Brien*,

(1st Cir. 1903) 126 Fed. 167, 61 C. C. A. 111, 11 Am. Bankr. Rep. 205, *appeal dismissed* (1905) 196 U. S. 643, 25 S. Ct. 785, 49 U. S. (L. ed.) 631; *In re New York Bldg.-Loan Banking Co.*, (S. D. N. Y. 1904) 127 Fed. 471, 11 Am. Bankr. Rep. 51; *In re Snyder, etc., Co.*, (N. D. Ill. 1904) 133 Fed. 806, 13 Am. Bankr. Rep. 325; *In re Hercules Atkin Co.*, (1904) 133 Fed. 813; *In re U. S. Hotel Co.*, (6th Cir. 1904) 134 Fed. 225, 67 C. C. A. 153, 68 L. R. A. 588, 13 Am. Bankr. Rep. 403; *In re Bay City Irrigation Co.*, (S. D. Tex. 1905) 135 Fed. 850, 14 Am. Bankr. Rep. 370; *Wilkes Barre First Nat. Bank v. Wyoming Valley Ice Co.*, (M. D. Pa. 1905) 136 Fed. 466, 14 Am. Bankr. Rep. 448; *Zugalla v. International Mercantile Agency*, (3d Cir. 1906) 142 Fed. 927, 74 C. C. A. 97, 16 Am. Bankr. Rep. 67; *In re New York, etc., Ice Lines*, (2d Cir. 1906) 147 Fed. 214, 77 C. C. A. 440, 16 Am. Bankr. Rep. 832, *affirming* (S. D. N. Y. 1905) 14 Am. Bankr. Rep. 61; *In re Leighton*, (S. D. W. Va. 1906) 147 Fed. 311, 17 Am. Bankr. Rep. 275; *In re Kingston Realty Co.*, (E. D. N. Y. 1907) 157 Fed. 299, 19 Am. Bankr. Rep. 845; *Gallagher v. Delancy Stables Co.*, (E. D. Pa. 1908) 158 Fed. 381, 19 Am. Bankr. Rep. 801; *In re Wentworth Lunch Co.*, (2d Cir. 1908) 159 Fed. 413, 86 C. C. A. 393, 20 Am. Bankr. Rep. 29; *In re Willis Cab, etc., Co.*, (S. D. N. Y. 1910) 178 Fed. 113; *In re Eagle Steam Laundry Co.*, (E. D. N. Y. 1910) 178 Fed. 308; *In re Imperial Film Exchange*, (C. C. A. 2d Cir. 1912) 198 Fed. 80; *Toxaway Hotel Co. v. Smathers*, (1910) 216 U. S. 439, 30 S. Ct. 263, 54 U. S. (L. ed.) 558. And see to the same effect under former bankruptcy laws, *In re Ryan*, (D. C. Ore. 1873) 2 Sawy. 411, 21 Fed. Cas. No. 12,183; *In re Kingston Realty Co.*, (2d Cir. 1908) 160 Fed. 445, 87 C. C. A. 406, 19 Am. Bankr. Rep. 845; *Altonwood Park Co. v. Gwynne*, (2d Cir. 1908) 160 Fed. 448, 87 C. C. A. 409, 20 Am. Bankr. Rep. 31; *In re New England Breeders' Club*, (D. C. N. H. 1908) 165 Fed. 517, 21 Am. Bankr. Rep. 349; *Laker v. George H. Stapely Co.*, (S. D. Ohio 1908) 21 Am. Bankr. Rep. 303.

**Mining corporations.**—*In re San Gabriel Sanatorium Co.*, (S. D. Cal. 1899) 95 Fed. 271, 2 Am. Bankr. Rep. 408; *In re Elk Park Min., etc., Co.*, (D. C. Colo. 1899) 101 Fed. 422, 4 Am. Bankr. Rep. 131; *In re Rollins Gold, etc., Min. Co.*, (S. D. N. Y. 1900) 102 Fed. 982, 4 Am. Bankr. Rep. 327; *In re Chicago-Joplin Lead, etc., Co.*, (W. D. Mo. 1900) 104 Fed. 67, 4 Am. Bankr. Rep. 712; *In re Woodside Coal Co.*, (E. D. Pa. 1900) 105 Fed. 56, 5 Am. Bankr. Rep. 186; *In re Keystone Coal Co.*, (W. D. Pa. 1901) 109 Fed. 872, 6 Am. Bankr. Rep. 377; *In re Tecopa Min., etc., Co.*, (S. D. Cal. 1901) 110 Fed. 120, 6 Am. Bankr. Rep.

250; *In re Mathews Consol. Slate Co.*, (D. C. Mass. 1905) 144 Fed. 724, 16 Am. Bankr. Rep. 350; *Burdick v. Dillon*, (1st Cir. 1906) 144 Fed. 737, 75 C. C. A. 603, 16 Am. Bankr. Rep. 407; *In re Quincy Granite Quarries Co.*, (D. C. Mass. 1904) 147 Fed. 279, 16 Am. Bankr. Rep. 823.

**Printing and publishing corporations.**—*In re Mutual Mercantile Agency*, (S. D. N. Y. 1901) 111 Fed. 152, 6 Am. Bankr. Rep. 607; *In re Parmelee Library*, (7th Cir. 1903) 120 Fed. 235, 56 C. C. A. 583, 9 Am. Bankr. Rep. 568; *Zugalla v. International Mercantile Agency*, (3d Cir. 1906) 142 Fed. 927, 74 C. C. A. 97, 16 Am. Bankr. Rep. 67.

**Collateral attack on adjudication.**—An adjudication of involuntary bankruptcy against a corporation on petition by creditors and service of process thereon cannot be collaterally attacked upon the ground that the corporation was not in fact within the statutory description of corporations judicable as involuntary bankrupts. *In re Belle Fourche First Nat. Bank*, (1907) 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355.

**Unincorporated companies or associations** may, under the express provision of the statute, be adjudged bankrupt. *In re Hercules Atkin Co.*, (E. D. Pa. 1904) 133 Fed. 813, 13 Am. Bankr. Rep. 369; *In re Seaboard Fire Underwriters*, (S. D. N. Y. 1905) 137 Fed. 987, 13 Am. Bankr. Rep. 722; *In re Associated Trust*, (D. C. Mass. 1914) 222 Fed. 1012.

Any unincorporated company may be adjudged an involuntary bankrupt, even though it be engaged chiefly in farming or in the tillage of the soil. *Cleage v. Laidley*, (8th Cir. 1906) 149 Fed. 346, 79 C. C. A. 284, 17 Am. Bankr. Rep. 598 (*obiter*).

**Petition as to corporation.**—The petition must allege, and it must be proved, that the corporation has been engaged principally in one of the businesses enumerated; and the burden of proof is on the petitioning creditor. It is not sufficient to allege or prove that the corporation is authorized under its charter to carry on such business. *In re Chicago-Joplin Lead, etc., Co.*, (1900) 104 Fed. 67.

The character of the business of an alleged bankrupt corporation need not be set forth in the phraseology of the Bankruptcy Act. *Sabin v. Blake-McFall Co.*, (C. C. A. 9th Cir. 1915) 223 Fed. 501, wherein the court said: "It is alleged in the amended petition that the Equal Rights Company, Incorporated, is a corporation duly organized and existing under and by virtue of the laws of the state of Oregon, with its principal place of business in the city of St. Johns, county of Multnomah, state of Oregon; that the corporation, for the greater part of six months preceding the date of the filing of the original petition herein, has had its

principal place of business in the city of St. Johns, county of Multnomah, state of Oregon, and as such was engaged in the general retail merchandise business; that the company is insolvent and is neither a wage-earner nor a person engaged in farming or tillage of the soil, nor a municipal, railroad, insurance, or banking corporation. The objection to the petition is that it does not allege that the company is a 'moneyed, business, or commercial corporation,' in the language of section 4b of the Bankruptcy Act of 1898, as amended by the Act of June 25, 1910. That section provides that: 'Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt.' The respondents in their petition having negatived the exceptions set forth in the above section, and having alleged that the company was engaged in the 'general retail merchan-

dise business,' the question is: Was it necessary that they also allege that the corporation sought to be adjudged bankrupt was a 'moneyed, business, or commercial' corporation? Counsel for the petitioner refer us to no decision, and our own research reveals none, in which it has been held that the character of the business of an alleged bankrupt corporation must be set forth in the phraseology of the Bankrupt Act. While such would undoubtedly be the better practice, we think that any language, the fair and reasonable import of which is that the alleged bankrupt is a moneyed, or a business, or a commercial corporation, is sufficient. The allegation in the present petition that the alleged bankrupt is engaged in the 'general retail merchandise business' undoubtedly brings the corporation within the class of 'business' corporations which under the Act may be adjudged involuntary bankrupts. To place upon the language used any other construction would be hypercritical."

*Form, averments, and amendment of petition*, see in general the note to section 59b.

**[Liability of officers and stockholders of corporations.]** The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States. [(*Inserted 1903 and excepting pending cases*) 32 Stat. L. 797.]

This paragraph of section 4b, inserted by amendment in 1903, was re-enacted without change when the preceding part of the section was amended in 1910 (36 Stat. L. 839).

The express provision of the Bankruptcy Act forbids that the secondary liability of the officers, stockholders, or directors of a corporation, under a state statute or constitution, should be affected by a corporation's discharge in bankruptcy. *In re Marshall Paper Co.*, (1st Cir. 1900) 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468, (D. C. Mass. 1899) 95 Fed. 419, 2 Am. Bankr. Rep. 653; *Klipstein v. Allen-Miles Co.*, (5th Cir.

1906) 136 Fed. 385, 69 C. C. A. 229, 14 Am. Bankr. Rep. 15; *Firestone Tire, etc., Co. v. Agnew*, (N. Y. 1909) 21 Am. Bankr. Rep. 292; *In re Flood-Pratt Dairy Co.*, (N. D. Ohio 1909) 23 Am. Bankr. Rep. 148; *Way v. Barney*, (1911) 116 Minn. 285, 133 N. W. 801, Ann. Cas. 1913A 719, 38 L. R. A. (N. S.) 648.

*As to the effect of a discharge on co-debtors generally*, see section 16 and the annotation thereunder.

**SEC. 5. PARTNERS.—a [Partnership.]** A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt. [(1898) 30 Stat. L. 547.]

As to

Petitions in bankruptcy against other than partnership debtors, and procedure thereon, see the several subdivisions of sections 18 and 59.

Transfer of proceedings in the case of partnerships, see section 32a.

**Compared with former Acts.**—Section 5 differs significantly in its phraseology from that of the former Acts in regard to the bankruptcy of partners. It takes the

place of section 14 of the Bankruptcy Act of 1841, and of section 30 of the Bankruptcy Act of 1867. These sections of the earlier Acts authorized an adjudication of bankruptcy of "persons who are partners in trade," instead of "a partnership;" and, while providing for the administration of the joint and separate estates substantially like section 5, provided, as section 5 does not, for granting or refusing a discharge to each partner. By the lan-



guage of these Acts, it is a prerequisite that all persons comprising the partnership should be adjudged bankrupt before the warrant could issue entitling the assignee to administer the joint estate, and the provisions respecting a discharge show that such an adjudication was contemplated. The differences indicate that Congress intended that a partnership should be, for the purpose of the Bankrupt Act, in all respects "a person" as defined by section 1, entitled to a discharge under section 14, and subject to be adjudged a bankrupt in involuntary proceedings if it has committed any of the acts of bankruptcy specified in section 3. There are many provisions in the Act which refer to the personal immunities and duties of bankrupts, and are not applicable to an entity like a partnership, but these are equally inapplicable to a corporation. *In re Meyer*, (C. C. A. 1899) 98 Fed. 979, *affirming* Chemical Nat. Bank v. Meyer, (1899) 92 Fed. 896. See also for a history of the various Acts of Congress in this connection, *In re Carleton*, (1902) 115 Fed. 246; and for cases under the Act of 1867, see *Hunt v. Pooke*, 5 Nat. Bankr. Reg. 161, 12 Fed. Cas. No. 6,896; *In re Moore*, 5 Biss. 79, 17 Fed. Cas. No. 9,750; *In re Gorham*, 9 Biss. 23, 18 Nat. Bankr. Reg. 419, 10 Fed. Cas. No. 5,624; *Medsker v. Bonebrake*, 108 U. S. 66; *Matter of Pitt*, 8 Ben. 389, 14 Nat. Bankr. Reg. 59, 19 Fed. Cas. No. 11,188; *Matter of Plumb*, 9 Ben. 279, 17 Nat. Bankr. Reg. 76, 19 Fed. Cas. No. 11,231.

Partnership as an entity, see note to section 5c.

**Adjudication of partnerships as bankrupts, in general.**—Under the authority conferred by section 5a, a partnership, as such, may be adjudged bankrupt where it is chargeable with the commission of any of the acts of bankruptcy enumerated in the several subdivisions of section 3a. *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463; *Francis v. McNeal*, (1913) 228 U. S. 695, 33 S. Ct. 701, 57 U. S. (L. ed.) 1029, L. R. A. 1915E 706; *Chemical Nat. Bank v. Meyer*, (E. D. N. Y. 1899) 92 Fed. 896, 1 Am. Bankr. Rep. 565; *In re Dunnigan*, (D. C. Mass. 1899) 95 Fed. 428, 2 Am. Bankr. Rep. 628; *In re Levy*, (N. D. N. Y. 1899) 95 Fed. 812, 2 Am. Bankr. Rep. 21; *In re Hirsch*, (S. D. N. Y. 1899) 97 Fed. 571, 3 Am. Bankr. Rep. 344; *In re Meyer*, (2d Cir. 1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794; *In re Barden*, (E. D. N. C. 1900) 101 Fed. 553, 4 Am. Bankr. Rep. 31; *Vaccaro v. Security Bank*, (6th Cir. 1900) 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; *Davis v. Stevens*, (D. C. S. D. 1900) 104 Fed. 235, 4 Am. Bankr. Rep. 763; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr.

Rep. 140; *Strause v. Hooper*, (E. D. N. C. 1901) 105 Fed. 590, 5 Am. Bankr. Rep. 225; *In re Stokes*, (E. D. Pa. 1901) 106 Fed. 312, 6 Am. Bankr. Rep. 262; *In re Hale*, (E. D. N. C. 1901) 107 Fed. 432, 6 Am. Bankr. Rep. 35; *In re Harris*, (N. D. Ohio 1899) 108 Fed. 517, 4 Am. Bankr. Rep. 132; *In re Sanderlin*, (E. D. N. C. 1901) 109 Fed. 857, 6 Am. Bankr. Rep. 384; *In re Kersten*, (E. D. Wis. 1901) 110 Fed. 929, 6 Am. Bankr. Rep. 516; *In re Carleton*, (D. C. Mass. 1902) 115 Fed. 246, 8 Am. Bankr. Rep. 274; *In re Farley*, (W. D. Va. 1902) 115 Fed. 359, 8 Am. Bankr. Rep. 267; *In re Mercur*, (3d Cir. 1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505, *affirming* (E. D. Pa. 1902) 116 Fed. 655, 8 Am. Bankr. Rep. 275; *In re McLaren*, (N. D. N. Y. 1903) 125 Fed. 835, 11 Am. Bankr. Rep. 144; *In re Stein*, (7th Cir. 1904) 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 536; *Burkhart v. German-American Bank*, (S. D. Ohio 1904) 137 Fed. 958, 14 Am. Bankr. Rep. 222; *In re Perley*, (E. D. Mo. 1905) 138 Fed. 927, 15 Am. Bankr. Rep. 54; *In re Borelli*, (D. C. Conn. 1906) 142 Fed. 296, 16 Am. Bankr. Rep. 115; *In re Hudson Clothing Co.*, (D. C. Me. 1906) 148 Fed. 305, 17 Am. Bankr. Rep. 826; *Manson v. Williams*, (1st Cir. 1907) 153 Fed. 525, 82 C. C. A. 475, 18 Am. Bankr. Rep. 674; *In re Coe*, (S. D. N. Y. 1907) 157 Fed. 308, 19 Am. Bankr. Rep. 618; *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 19 Am. Bankr. Rep. 577; *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459; *In re Culver*, (D. C. Minn. 1909) 176 Fed. 450, 23 Am. Bankr. Rep. 779; *In re Pinson*, (N. D. Ala. 1910) 180 Fed. 787, 24 Am. Bankr. Rep. 804; *In re Corcoran*, (S. D. Ohio 1904) 12 Am. Bankr. Rep. 285; *Matter of Livingston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357; *In re McMurtrey*, (W. D. Tex. 1905) 15 Am. Bankr. Rep. 430; *In re Pincus*, (S. D. N. Y. 1906) 17 Am. Bankr. Rep. 331.

**Domicile, residence, and place of business**, in the case of a partnership, see section 2.

**Acts of bankruptcy on the part of firm**, as to what are, see section 3a.

**Partnership engaged chiefly in farming.**—It has been held that this section should be construed in connection with section 4b and not separately and as so construed does not authorize an adjudication against a partnership engaged chiefly in farming. *Still v. American Nat. Bank*, (C. C. A. 4th Cir. 1913) 209 Fed. 749, wherein the court said: "If section 5a is complete in itself and means, as is claimed, that a partnership of farmers can be forced into bankruptcy, because of the partnership, it results that the exemption granted in the former section is taken away by the latter. It can scarcely be doubted, we think, that

a construction should be adopted which avoids such a plain contradiction."

*Member of partnership a farmer.*—A firm may be adjudicated a bankrupt although one of the firm was principally engaged in farming and could not therefore be adjudicated a bankrupt in his individual capacity. *In re Duke*, (N. D. Ga. 1912) 199 Fed. 199.

*The insanity of a partner* and the appointment of a conservator of his estate will not prevent adjudication of bankruptcy against the partnership on petition of its creditors. *In re Stein*, (7th Cir. 1904) 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 536. See also the annotation under section 8.

*Adjudication not dependent on possession of assets.*—It is no defense to a bankruptcy proceeding against a partnership, on petition of one of its members, that the firm is without assets. *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459.

*Infant partner.*—Where proceedings in involuntary bankruptcy are instituted against a firm, and it appears that one of the partners is a minor, an adjudication should be made against the firm as such, but as to the infant partner, the petition should be dismissed. *In re Dunnigan*, (D. C. Mass. 1899) 95 Fed. 428, 2 Am. Bankr. Rep. 628; *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794.

*The commission of an act of bankruptcy by the individuals composing the firm* is not a necessary prerequisite to the adjudication of the partnership entity as a bankrupt. *Chemical Nat. Bank v. Meyer*, (E. D. N. Y. 1899) 92 Fed. 896, 1 Am. Bankr. Rep. 565; *In re Meyer*, (2d Cir. 1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; *In re McMurtrey*, (W. D. Tex. 1905) 142 Fed. 853, 15 Am. Bankr. Rep. 427; *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 19 Am. Bankr. Rep. 577; *Mills v. Fisher*, (6th Cir. 1908) 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656, 20 Am. Bankr. Rep. 237; *In re Everybody's (Grocery, etc., Market)*, (D. C. Okla. 1908) 173 Fed. 492, 21 Am. Bankr. Rep. 925; *Matter of Wing Yik Co.*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 757; *In re Sanderlin*, (1901) 109 Fed. 857.

*Existence of partnership necessary.*—As required by the statute, a partnership, as such, may be adjudged bankrupt only "during the continuation of the partnership business, or after its dissolution and before the final settlement thereof;" and, in accordance with this language, it has been held that in order to warrant the adjudication as a bankrupt of the partnership entity, it is necessary to show the actual existence of such partnership at the time of the filing of the petition in bankruptcy against it. *Royston v. Weis*,

(5th Cir. 1902) 112 Fed. 962, 50 C. C. A. 638, 1 Am. Bankr. Rep. 584; *In re Schenkein*, (W. D. N. Y. 1902) 113 Fed. 421, 7 Am. Bankr. Rep. 162; *In re McLaren*, (N. D. N. Y. 1903) 125 Fed. 835, 11 Am. Bankr. Rep. 141; *Jones v. Burnham*, (3d Cir. 1905) 138 Fed. 986, 71 C. C. A. 240, 15 Am. Bankr. Rep. 85; *Buffalo Milling Co. v. Lewisburg Dairy Co.*, (M. D. Pa. 1908) 159 Fed. 319, 20 Am. Bankr. Rep. 279; *In re Pinson*, (N. D. Ala. 1910) 180 Fed. 787, 24 Am. Bankr. Rep. 804.

*The burden of proof* in an issue to determine whether or not the respondent is a partnership, rests upon the petitioners. *Jones v. Burnham*, (3d Cir. 1905) 138 Fed. 986, 71 C. C. A. 240, 15 Am. Bankr. Rep. 85.

*There is no final settlement of the affairs of a partnership until its debts are paid*, or in some other way extinguished; and in the absence of a showing to that effect, the other elements being present, a partnership may be adjudged bankrupt. *In re Levy*, (N. D. N. Y. 1899) 95 Fed. 812, 2 Am. Bankr. Rep. 21; *In re Hirsch*, (S. D. N. Y. 1899) 97 Fed. 571, 3 Am. Bankr. Rep. 344; *In re Pinson*, (N. D. Ala. 1910) 180 Fed. 787, 24 Am. Bankr. Rep. 804.

*If a partnership has been dissolved by the partners, inter sese*, before the filing of the petition, it is not thereafter an existing partnership, and proceedings in bankruptcy cannot be maintained against it. *In re Pinson*, (N. D. Ala. 1910) 180 Fed. 787, 24 Am. Bankr. Rep. 804.

*Adjudication after dissolution by death.*—A partnership, after its dissolution by the death of one partner, may be adjudged a bankrupt; and in such case the proceedings are not invalidated by the fact that the petition does not refer to the deceased partner, nor disclose that the partners named were surviving partners, where the business was being continued as provided for in the partnership articles. *In re Coe*, (S. D. N. Y. 1907) 157 Fed. 308, 19 Am. Bankr. Rep. 618. See also *In re Pierce*, (D. C. Wash. 1900) 102 Fed. 977, 4 Am. Bankr. Rep. 489.

But where, on an application for an adjudication of bankruptcy against a firm, it appeared that both of the original partners had died, leaving their interests to certain others, some of whom were minors, and it did not appear by whom or under what arrangement the firm was subsequently conducted, except that two persons conducted the business and committed the acts of bankruptcy alleged, and the continuance of the partnership was denied by the alleged infant members, an adjudication was denied until the parties, by a proper proceeding or pleading, removed the uncertainties of the situation. *In re McLaren*, (N. D. N. Y. 1903) 125 Fed. 835, 11 Am. Bankr. Rep. 141.

**Necessity of showing insolvency of individuals composing firm.**—Insolvency of a partnership cannot coexist with solvency of any member of the firm. *Francis v. McNeal*, (1913) 228 U. S. 695, 33 S. Ct. 701, 57 U. S. (L. ed.) 1029, L. R. A. 1915E 706, *affirming* (1911) 186 Fed. 481, 108 C. C. A. 459; *Vaccaro v. Memphis Security Bank*, (1900) 103 Fed. 436, 43 C. C. A. 279; *Tumlin v. Bryan*, (1908) 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960. *Contra, In re Bertenshaw*, (1907) 157 Fed. 363, 85 C. C. A. 61, 13 Ann. Cas. 986, 17 L. R. A. (N. S.) 886.

Accordingly, it has been held that where the act of bankruptcy charged against a partnership entity is one involving insolvency, it is necessary, in order to warrant an adjudication, to allege and prove that the assets of the partnership, plus the assets of its members in excess of their individual debts, are insufficient to pay the partnership debts. *In re Blair*, (S. D. N. Y. 1900) 99 Fed. 76, 79, 3 Am. Bankr. Rep. 588; *Vaccaro v. Security Bank*, (6th Cir. 1900) 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; *Davis v. Stevens*, (D. C. S. D. 1900) 104 Fed. 235, 4 Am. Bankr. Rep. 763; *In re Forbes*, (D. C. Mass. 1904) 128 Fed. 137, 11 Am. Bankr. Rep. 787; *In re Perley*, (E. D. Mo. 1905) 138 Fed. 927, 15 Am. Bankr. Rep. 54; *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 84 C. C. A. 61, 17 L. R. A. (N. S.) 886, 19 Am. Bankr. Rep. 577; *Tumlin v. Bryan*, (5th Cir. 1908) 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960, 21 Am. Bankr. Rep. 319; *In re Everybody's Grocery, etc., Market*, (D. C. Okla. 1908) 173 Fed. 492, 21 Am. Bankr. Rep. 925; *Matter of Wing Yick Co.*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 757.

In *In re Young*, (D. C. Mass. 1915) 223 Fed. 659, the court said: "I do not think that in this district a partnership can be adjudicated bankrupt, even under section 5a of the Bankruptcy Act, and after its dissolution, as long as there is a solvent partner, or former partner."

But it has also been held that a partnership is insolvent and subject to adjudication as a bankrupt when the partnership property is insufficient to pay its debts, regardless of the individual property of the partners. *In re McMurtrey*, (W. D. Tex. 1905) 142 Fed. 853, 15 Am. Bankr. Rep. 427.

A solvent partnership may be adjudged a bankrupt if it has made a general assignment for the benefit of its creditors. *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098; *In re Bertenshaw*, (1907) 157 Fed. 363, 85 C. C. A. 61, 13 Ann. Cas. 986, 17 L. R. A. (N. S.) 886.

**Sufficient evidence of insolvency.**—The inability of a partnership to meet its matured obligations, together with its dissolution, and the transfer of practically

all of its property to creditors, either by way of payment or security, leaving other debts unpaid, were held to be facts sufficient to establish its insolvency. *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140.

**Both individuals and partnership making assignment.**—The proper rule seems to be that where both the partnership and each of the individuals who compose it make an assignment, this act of bankruptcy is committed by all of them. The adjudication should therefore embrace both the firm and the individual members. *Green River Deposit Bank v. Craig*, (1901) 110 Fed. 137, *citing In re Meyer*, (C. C. A. 1899) 98 Fed. 976, and *In re Grant*, (1901) 106 Fed. 497.

**Petition—Form.**—Official Form No. 2 is a "partnership petition." No official form having been prescribed for a petition in involuntary bankruptcy against a partnership, form No. 3 (the general form of a creditors' petition) is to be used for that purpose, with such changes as are necessary to meet the exigencies of the particular case. *Mather v. Coe*, (N. D. Ohio 1899) 92 Fed. 333, 1 Am. Bankr. Rep. 504.

**A partnership is a distinct entity, which requires a petition specifically directed against it**, alleging an act of bankruptcy in which it is expressly involved, and resulting in an adjudication against the partnership itself, irrespective of and in addition to any that may be made against the individual members; and simultaneous proceedings against the individual members of a partnership do not necessarily bring the partnership into court, so as to authorize an amendment calling for an adjudication against it. *In re Mercur*, (3d Cir. 1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505.

**Only one petition need be filed upon the voluntary application of a partnership for the benefit of the Bankruptcy Act, and all that is done thereupon constitutes but one proceeding, although it includes granting a discharge to each of the partners.** *In re Langslow*, (N. D. N. Y. 1899) 98 Fed. 869, 1 Am. Bankr. Rep. 258; *In re Gay*, (D. C. N. H. 1899) 98 Fed. 870, 3 Am. Bankr. Rep. 529.

**Necessity of notice to nonassenting partner.**—Members of a partnership who do not join in, or assent to, the filing of a petition in bankruptcy against the partnership, and who have not been notified thereof, cannot be adjudicated bankrupt. *In re Murray*, (N. D. Ia. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601; *In re Russell*, (N. D. Ia. 1899) 97 Fed. 32, 3 Am. Bankr. Rep. 91; *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298. See also General Order 8.

In *In re Altman*, (1899) 95 Fed. 263, it was held that the adjudication of the petitioners as bankrupts, both as copartners and as individuals, was erroneous and

would be vacated on motion, as only certain members of the firm had filed their petitions and no notice of the proceedings had been given to the other partners.

Where some, but not all, of the members of a partnership file a petition in bankruptcy asking for the adjudication of the firm, the proceeding is a voluntary one as to the firm and the petitioners, but it is involuntary as to nonassenting partners. *In re Murray*, (N. D. Ia. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601; *In re Carleton*, (D. C. Mass. 1902) 115 Fed. 246, 8 Am. Bankr. Rep. 270; *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459; *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298.

General Order No. 8 provides that a nonconsenting partner may resist the petition.

**Who may file petition.**—A member of the partnership may file a petition seeking the adjudication of his firm as a bankrupt. *In re Murray*, (N. D. Ia. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601; *In re Russell*, (N. D. Ia. 1899) 97 Fed. 32, 3 Am. Bankr. Rep. 91; *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794; *In re Carleton*, (D. C. Mass. 1902) 115 Fed. 246, 8 Am. Bankr. Rep. 270; *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298.

But a single partner cannot maintain a petition to have his partnership adjudged a voluntary or an involuntary bankrupt, in the sense in which these terms are generally used. *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459.

An objection that the petitioner and the alleged bankrupts are partners cannot be determined on a preliminary objection to the jurisdiction of the court, where the arrangement between the parties goes to the merits of the controversy. *In re Schenkein*, (1902) 113 Fed. 421.

An objecting partner cannot be adjudicated against his will. *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298. See also *Steiner v. Faulke*, (C. C. A. 5th Cir. 1915) 222 Fed. 61.

But such nonconsenting partner does not hold a veto on the jurisdiction of the court over the partnership as an entity. *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298.

Thus while the objecting partner may prevent his own adjudication, he cannot escape an accounting which is necessary to facilitate the jurisdiction of the court over the partnership case. *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298.

The firm creditors may also file a petition in bankruptcy against the partnership entity, as well as against the individual members thereof. *Chemical Nat. Bank v. Meyer*, (E. D. N. Y. 1899) 92

Fed. 896, 1 Am. Bankr. Rep. 565; *In re Mercur*, (E. D. Pa. 1899) 95 Fed. 634, 2 Am. Bankr. Rep. 626; *In re Meyer*, (2d Cir. 1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; *In re Schenkein*, (W. D. N. Y. 1902) 113 Fed. 421, 7 Am. Bankr. Rep. 162; *In re Salmon*, (W. D. Mo. 1906) 143 Fed. 395, 16 Am. Bankr. Rep. 122; *Matter of L. Hee*, (D. C. Hawaii 1904) 13 Am. Bankr. Rep. 8.

"The court acquires jurisdiction of the proceeding on the filing of the petition. If it is filed by all the partners, the adjudication is made at once; if by less than all, the partner who refuses to join in the petition may oppose the adjudication as he might if the proceeding was involuntary; and he may make every defense open to a debtor upon such a petition. It is open to him or his personal representatives to move to set aside an adjudication after it has been made; but a creditor has no right to oppose an adjudication in bankruptcy except such right may be expressly given to him by the statute." *In re Ives*, (C. C. A. 1902) 113 Fed. 911.

**Individual petitions.**—A petition having been filed against one member of a firm individually, the other members thereof will not be adjudicated bankrupt thereon, even although they came in of their own motion and consented to be adjudged bankrupt. If such other persons wish to be adjudged bankrupt, they must present their own individual petition, pay the fees, and observe all statutory requirements. *Mahoney v. Ward*, (1900) 100 Fed. 278.

**Individual petition seeking discharge from partnership debts.**—Where a member of a partnership files a petition in bankruptcy, and seeks thereby to obtain a discharge from his liability for the payment of partnership obligations, as well as his individual debts, the petition, schedules, and notices to creditors should contain the averments and information necessary to lay a foundation for discharge effectual as against firm creditors. *In re Laughlin*, (N. D. Ia. 1899) 96 Fed. 589, 3 Am. Bankr. Rep. 1; *In re McFaun*, (N. D. Ia. 1899) 96 Fed. 592, 3 Am. Bankr. Rep. 66; *In re Hartman*, (N. D. Ia. 1899) 96 Fed. 593, 3 Am. Bankr. Rep. 65; *In re Carmichael*, (N. D. Ia. 1899) 96 Fed. 594, 2 Am. Bankr. Rep. 815; *In re Russell*, (N. D. Ia. 1899) 97 Fed. 32, 3 Am. Bankr. Rep. 91; *In re Gay*, (D. C. N. H. 1899) 98 Fed. 870, 3 Am. Bankr. Rep. 529; *In re Hale*, (E. D. N. C. 1901) 107 Fed. 432, 6 Am. Bankr. Rep. 35; *In re Farley*, (W. D. Va. 1902) 115 Fed. 359, 8 Am. Bankr. Rep. 266; *In re Fiegenbaum*, (2d Cir. 1903) 121 Fed. 69, 57 C. C. A. 409, 9 Am. Bankr. Rep. 595; *In re Morrison*, (W. D. Tex. 1904) 127 Fed. 186, 11 Am. Bankr. Rep. 498; *Matter of L. Hee*, (D. C. Hawaii 1904) 13 Am. Bankr. Rep. 8; *New York Inst.*, etc., *v. Crockett*, (1907) 17 Am.

Bankr. Rep. 233, 117 App. Div. 269, 102 N. Y. S. 412.

**Discharge.**—As to the effect of a discharge with respect to partnership debts,

see the annotation under the first subdivision of section 17a.

*Fraud of a partner* and its effect on right to a discharge, see section 14b (2).

**b [Administration of estate.]** The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates. [(1898) 30 Stat. L. 547.]

As to appointment of trustees generally, see section 44a.

**Trustee of partnership estate.**—Where a firm is adjudicated a bankrupt the trustee is entitled to an order that the separate estate of the partners be turned over to him for administration, especially where no objection is made by the member who has not been adjudicated a bankrupt. *Francis v. McNeal*, (1913) 228 U. S. 695, 33 S. Ct. 701, 57 U. S. (L. ed.) 1029, L. R. A. 1915E 706, wherein the court said: "We should infer from § 5, clauses c through g, that the assumption of the Bankruptcy Act was that the partnership and individual estates both were to be administered, and that the only exception was that in h, 'in the event of one or more, but not all of the members of a partnership being adjudged bankrupt.' In that case naturally the partnership property may be administered by the partners not adjudged bankrupt and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes on further than that."

The statute contemplates that the trustee elected for a partnership shall also be the trustee of the individual partners; and

there is no authority for the election of separate trustees for the partners. *In re Coe*, (S. D. N. Y. 1907) 154 Fed. 162, 18 Am. Bankr. Rep. 715. And see generally the annotation under the following subdivision of this section.

See, however, *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577, wherein it was said that where a partnership is adjudged bankrupt, and the members of the partnership are not, the trustee takes title to the partnership property and to that only, and his full duty is discharged and all the power which he has is exercised when he collects and converts the partnership property into money and distributes its proceeds among the creditors.

**Appointment of trustee — separate petition.**—The provision that "the creditors of the partnership shall appoint the trustee" applies only in the case of a joint petition; in the case of a separate petition, although the assets are partnership assets, the separate creditors have the right to vote. *In re Beck*, (1901) 110 Fed. 140.

**Third party proving claim.**—Where one of the members of a bankrupt partnership has a claim against the partnership, and assigns this as collateral for a debt to a third party, this third party cannot prove the claim or vote on it in the election of a trustee, not being the owner of the claim. *In re Eagles*, (1900) 99 Fed. 695.

**c [Jurisdiction over one partner sufficient.]** The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. [(1898) 30 Stat. L. 547.]

**Entity doctrine — Adjudication of partnership without adjudication of members.**—It has been held that a partnership is a "person" or entity which may be adjudged bankrupt upon its voluntary petition, or in involuntary proceedings, if it has committed an act of bankruptcy, irrespective of any adjudication of the individual partners as bankrupts. See *In re Meyer*, (2d Cir. 1899) 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; *In re Stokes*, (E. D. Pa. 1901) 106 Fed. 312, 6 Am. Bankr. Rep. 262; *In re Mercur*, (3d Cir. 1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505; *Dickas v. Barnes*, (6th Cir. 1905) 140 Fed. 849, 72 C. C. A. 261, 15 Am. Bankr. Rep.

566; *Mills v. Fisher*, (6th Cir. 1908) 159 Fed. 897, 899, 87 C. C. A. 77, 79, 16 L. R. A. (N. S.) 656, 20 Am. Bankr. Rep. 237; *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459; *In re Everybody's Grocery*, etc., Market, (D. C. Okla. 1908) 173 Fed. 492, 21 Am. Bankr. Rep. 925; *In re Lattimer*, (E. D. Pa. 1909) 174 Fed. 824, 23 Am. Bankr. Rep. 388; *In re Morgan*, (N. D. Ga. 1911) 184 Fed. 938; *Francis v. McNeal*, (C. C. A. 3d Cir. 1911) 186 Fed. 481; *Menke v. Sunderman*, (C. C. A. 3d Cir. 1911) 186 Fed. 486; *Matter of Wing Yick Co.*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 757; *American Steel*, etc., Co. v. Coover, (1910) 27 Okla. 131, 111 Pac.

217, 30 L. R. A. (N. S.) 787; *Fidelity Trust Co. v. Gaskell*, (1912) 193 Fed. 865, 115 C. C. A. 527; *In re Springer*, (E. D. N. C. 1912) 199 Fed. 294.

But in *Francis v. McNeal*, (1913) 228 U. S. 695, 33 S. Ct. 701, 57 U. S. (L. ed.) 1029, L. R. A. 1915E 706, affirming a decree in (1911) 186 Fed. 481, 108 C. C. A. 459, requiring a partner (Francis) to turn over his separate estate for administration to the trustee in bankruptcy of the partnership, Mr. Justice Holmes said: "Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates. The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is, so far as may be, to preserve, not to upset, existing relations. It is true that by sec. 1, the word 'person,' as used in the act, includes partnerships; that by the same section, a person shall be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by sec. 5a, a partnership may be adjudged a bankrupt, and that by sec. 14a, any person may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debt on partnership assets, and that of individual debts upon the individual estate. Sec. 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequences admitted to attach to the partnerships elsewhere than in the bankruptcy courts. On the contrary, we should infer from sec. 5, clauses c through g, that the assumption of the bankruptcy act was that the partnership and individual estates both were to be administered, and that the only exception was that in *h*, 'in the

event of one or more, but not all, of the members of a partnership being adjudged bankrupt.' In that case, naturally, the partnership property may be administered by the partners not adjudged bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that. On the other hand, it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private debts, is part of those assets, so far as needed. Sec. 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within sec. 5h, it is enough that Francis never has objected to the firm property being administered by the trustee. If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, in an able opinion (*In re Forbes*, (1904) 128 Fed. 137), it is a sufficient answer that no such objection has been taken, but, on the contrary, Francis has consented and agreed to hand over his property according to the order of the court. So far as *Vaccaro v. Memphis Security Bank*, (1900) 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion of the majority in *Re Bertenshaw*, (1907) 17 L. R. A. (N. S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986, we regard it as sustained by the stronger reasons and as correct." As to the cases referred to at the end of the foregoing quotation, *Vaccaro v. Memphis Security Bank*, (1900) 103 Fed. 436, 43 C. C. A. 279 held that "the insolvency of the firm and every member would have to be averred and shown before the firm could be adjudged bankrupt," while the opposite was held in *Re Bertenshaw*, (1907) 157

Fed. 363, 85 C. C. A. 61, 13 Ann. Cas. 986, 17 L. R. A. (N. S.) 886.

"I think it may be regarded as definitely settled that a court of bankruptcy in proceedings against a partnership has no jurisdiction to administer upon the estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent." *Per* Thompson, J., in *In re Kramer*, (E. D. Pa. 1914) 218 Fed. 138.

But it has been held that when a partnership is adjudged bankrupt, the individual estates of the partners, although these partners are not individually adjudged bankrupts, are drawn to the Bankruptcy Court for administration; and the latter court can, by a summary order, compel the assignee for the benefit of creditors of one of the partners to transfer to the trustee the property so assigned, such assignee not holding by an adverse title, but in the assignor's right. *In re Stokes*, (1901) 106 Fed. 312.

*Question discussed and authorities reviewed.*—A court of bankruptcy may draw to itself for administration the estate of a partner, not adjudicated, as part of the administration of the firm bankruptcy. *In re Samuels*, (S. D. N. Y. 1913) 207 Fed. 195, wherein Hand, J., said: "This motion presents a question which has been much contested in the books; i. e., may a court of bankruptcy draw to itself for administration the estate of a partner, not adjudicated, as part of the administration of the firm bankruptcy? In this case two partners and the bankrupt firm have been adjudicated, but Valentine never has. The greater number of authorities appear to be in favor of the motion, but there is a strong decision to the contrary in the eighth circuit, by a divided vote. *In re Bertenshaw*, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986. The law has taken its rise from what was certainly an *obiter* remark of Judge Wallace in *Re Meyer*, 98 Fed. 976, 979, 39 C. C. A. 368, which affirmed Judge Thomas in the same case (D. C.) 92 Fed. 896. That remark was the basis of a decision of Judge McPherson, in *Re Stokes*, (D. C.) 106 Fed. 312, and it was followed by Judge Severens, for the sixth circuit, in *Dickas v. Barnes*, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654, although the actual decision went off on a question of appeal. It was likewise a basis of the decision of Judge Holland in *Re Lattimer* (D. C.) 174 Fed. 825, which was affirmed in an elaborate opinion by Judge Lanning, for the third circuit, in *Francis v. McNeal*, 186 Fed. 481, 108 C. C. A. 459. The doctrine in that case was limited to a case where the firm adjudication involved the insolvency of the partnership; the theory being that the firm could not be insolvent unless the partners were also insolvent, under the rule in *Re Blair* (D. C.) 99 Fed. 76; *Vaccaro v. Security Bank*, 103 Fed.

436, 43 C. C. A. 279, and other cases. It was the basis also, of Judge Hook's dissent in *Re Bertenshaw*, *supra*. Judge Quarles, in *Re Junck & Balthazard*, (D. C.) 169 Fed. 481, ruled in the same way, as did Judge Lanning in *Re Ceballos & Co.*, (D. C.) 161 Fed. 445. In *Re Kaufman*, 176 Fed. 96, 99 C. C. A. 107, in our own Circuit Court of Appeals, expressly reserved this question from the decision, and, so far as it bears upon the question at all, favors the rule in *Re Meyer*, *supra*. I have found nothing to the contrary unless it be in *Re Solomon*, (D. C.) 163 Fed. 140, where Judge Chatfield ruled that the partner should administer the estate, yet file schedules in this court. I do not understand that he did not think *In re Meyer* controlling. On principle, the entity theory forbids considering the solvency of the partners, in determining the firm adjudication. They are guarantors of the firm's solvency, and though they may have to pay the whole deficiency of the firm's debts, they still have a right against the firm. While from the point of view of the creditors the partner's liability is an asset, the firm books would show it as a liability of the firm to the contributing partners. It is only when the firm entity is forgotten that the partner's liability may be regarded as a firm asset. If the firm be regarded as an individual for a moment the thing is plain. Suppose that A. guarantees all of B's debts and B. then becomes bankrupt. From the point of view of the creditors the claim against A. is an asset, and it might be thought that A.'s insolvency was a necessary condition of B.'s bankruptcy. However, this is not true, because, though A. could not prove in competition with any of the creditors against B.'s estate, having guaranteed all equally, still he would have a claim in case he took up all the debts, or in case he paid the deficiency after the assets were exhausted. Precisely the same relations exist between the firm and the partners. If this be so, then it follows that the separate estates should not be drawn into bankruptcy administration without separate adjudication. The firm as an entity may be solvent or insolvent, as its assets are sufficient, and the deficiency which the partners will have to pay will be great or small according to this insufficiency. That deficiency is an individual liability of the partners, and under any adequate grasp of the entity theory ought to be a provable claim against the separate estate, though, of course, the law has been settled to the contrary for 100 years, unless section 5g may some day be held to effect the more consistent rule. In determining the partner's solvency, that liability would, of course, be reckoned, even though under the law the individual debts are preferred claims, and his solvency would depend upon whether his estate can answer all these debts. It seems to me

obvious justice that this whole separate estate ought not to be drawn into the bankruptcy court for administration unless that be true; and so far, indeed, Judge Lanning felt bound to go in *Francis v. McNeal*, *supra*, to avoid unjust results. The whole subject of partnership has undoubtedly always been exceedingly confused, simply because our law has failed to recognize that partners are not merely joint debtors. It could be straightened out into great simplicity, and in accordance with business usages and business understanding, if the entity of the firm, though a fiction, were consistently recognized and enforced. Like the concept of a corporation, it is for many purposes a device of the utmost value in clarifying ideas and in making easy the solution of legal relations. It would, moreover, avoid what must appear to every unsophisticated person the very grave injustice of seizing the separate estate of a man who has committed no act of bankruptcy or who may even be solvent, and administering it in this court. Nevertheless, the law was too well fixed until 1898 to allow a change, at which time the present act gave an opportunity to construe the law in accordance with principle. Yet I cannot disregard the language of *In re Meyer*, *supra*, even though it was *obiter* in the case there at bar. It was probably intended as a direction for the future conduct of that very case, and as such it was perhaps followed. Nor do I think that Judge Lanning's distinction ought to be followed, though it would somewhat mend the hardship of the rule." See also the discussion in *Hewitt v. Hayes*, (1910) 204 Mass. 586, 90 N. E. 985, 27 L. R. A. (N. S.) 154.

"It is to be observed that a solvent partnership may be adjudged a bankrupt if it has made a general assignment for the benefit of its creditors . . . and perhaps in such a case adjudication of bankruptcy of the individual members would not be necessary (see *Dickas v. Barnes*, (1905) 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; *In re Bertenshaw*, (1907) 157 Fed. 363, 85 C. C. A. 61, 13 Ann. Cas. 986, 17 L. R. A. (N. S.) 886), especially if the order of adjudication of the partnership expressly states that it binds only the partnership entity and not the partners as individuals (such was the order in the case of *In re Bertenshaw*, (1907) 157 Fed. 363, 85 C. C. A. 61, 13 Ann. Cas. 986, 17 L. R. A. (N. S.) 886)." 3 R. C. L. 210.

Where one of the partners is adjudged bankrupt and the court thus acquires jurisdiction of him, the partnership is dissolved; and if the partnership also is adjudged bankrupt, the Bankruptcy Court is given jurisdiction by clause c of the partnership and of all its members, because it then becomes necessary to marshal the properties and the liabilities of the partnership and its members, and to distribute the proceeds of the properties

among the creditors in accordance with the equitable rule recited in clause f. *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577.

**Jurisdiction as to estate of deceased partner.**—Upon the filing of a petition in bankruptcy by one individually, and as surviving partner of a late copartnership, the Bankruptcy Court has complete jurisdiction over the partnership estate, although such estate, together with the personal estate of the deceased partner, was in course of administration in a state court before the petition in bankruptcy was filed, provided possession of the partnership assets can be obtained by the referee without forcibly interfering with the custody of the administrator. *In re Pierce*, (D. C. Wash. 1900) 102 Fed. 977, 4 Am. Bankr. Rep. 489.

On an adjudication of bankruptcy against a firm, the firm property vests in the trustee in bankruptcy, and the surviving partner thereafter has no power to consent to an allowance to the widow and children of the deceased partner out of the assets of the firm, prior to the payment of the firm's debts. *In re Doberst*, (W. D. Tex. 1908) 165 Fed. 749, 21 Am. Bankr. Rep. 634.

**Necessity of partnership being adjudged bankrupt.**—The uniform current of authority is that a partnership is a distinct entity separate from the individuals who compose it; that it owns its property and owes its debts, which are respectively separate and distinct from the individual property and the individual debts of its partners; and that an adjudication of the partnership as a bankrupt, apart from or in addition to the adjudication of its partners as bankrupts, is indispensable to the jurisdiction of a court of bankruptcy to administer the partnership property. *In re Meyers*, (S. D. N. Y. 1899) 96 Fed. 408; *In re McFaun*, (N. D. Ia. 1899) 96 Fed. 592, 3 Am. Bankr. Rep. 66; *In re Russell*, (N. D. Ia. 1899) 97 Fed. 32, 3 Am. Bankr. Rep. 91; *In re Meyers*, (S. D. N. Y. 1899) 97 Fed. 757; *In re Meyer*, (2d Cir. 1899) 98 Fed. 976, 979, 39 C. C. A. 368, 371, 3 Am. Bankr. Rep. 559; *In re Barden*, (E. D. N. C. 1900) 101 Fed. 553; *Strause v. Hooper*, (E. D. N. C. 1901) 105 Fed. 590; *In re Hale*, (E. D. N. C. 1901) 107 Fed. 432; *In re Sanderlin*, (E. D. N. C. 1901) 109 Fed. 857, 859; *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137; *In re Farley*, (W. D. Va. 1902) 115 Fed. 359, 361; *In re Mercur*, (3d Cir. 1903) 122 Fed. 384, 388, 58 C. C. A. 472, 476, 10 Am. Bankr. Rep. 505; *In re Stein*, (7th Cir. 1904) 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 536, 538; *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577; *Mills v. Fisher*, (6th Cir. 1908) 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656, 20 Am. Bankr. Rep. 237.



Where all the members of a firm are adjudicated bankrupts, but there has been no adjudication against the firm, the trustee appointed in the individual cases has no authority to interfere with firm assets, though all the cases were instituted simultaneously by the same creditor, and the same trustee appointed for all the partners. *In re Mercur*, (3d Cir. 1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505.

But see *In re Mitchell*, (1914) 219 Fed. 690, 135 C. C. A. 362, holding that under section 5c a court which has jurisdiction over one partner can take to itself jurisdiction over the firm of which he is a member without reference to whether the firm is six months old or three months old, and without there being any specific allegation as to the firm's principal place of business. This case affirms (S. D. N. Y. 1914) 211 Fed. 778, wherein the court said: "This section seems to me to leave no doubt that wherever you have jurisdiction over one partner you have over the whole firm, whether or not the firm is over three months old. Its first purpose probably was territorial convenience, but

the words are general, and there is no reason to limit them so that you may not bring in the firm if any partner has for three months resided in the district. A contrary ruling would be very inconvenient; for, in a case like this, all the partners individually could be adjudicated bankrupts, but as a firm they could not, a very undesirable result practically. I agree that for all purposes of administration the entity theory should be observed as rigidly as possible; but I am satisfied that section 5c did not mean to keep the firm entity out of the bankruptcy court when, as here, all the partners were bankrupt and had done business for more than three months in the district in question."

**Necessity of partner being adjudged bankrupt.**—"The plain provisions of the Bankruptcy Law alike forbid the court of bankruptcy to draw to itself and administer the individual property of unadjudicated partners upon a mere adjudication of the bankruptcy of their partnership." *In re Bertenshaw*, (8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577.

**d [Trustee's duty — partnership accounts.]** The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners. [(1898) 30 Stat. L. 547.]

**e [Distribution of expenses.]** The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine. [(1898) 30 Stat. L. 547.]

**Filing fees.**—It has been held that a deposit of the statutory filing fee of \$25 must be made not only for the partnership, but also for each member of the firm who seeks an adjudication. *In re Barden*, (E. D. N. C. 1900) 101 Fed. 553, 4 Am. Bankr. Rep. 31; *In re Farley*, (W. D. Va. 1902) 115 Fed. 359, 8 Am. Bankr. Rep. 266.

But it has also been held that only one deposit of the filing fee is necessary, and that it cannot be demanded of the partners, as a prerequisite to discharging them, that they should each separately

deposit a like fee. *In re Langslow*, (N. D. N. Y. 1899) 98 Fed. 869, 1 Am. Bankr. Rep. 258; *In re Gay*, (D. C. N. H. 1899) 98 Fed. 870.

**Officers' fees.**—So, also, it has been held that the clerk, referee, and trustee, respectively, are entitled to separate fees, as though there were separate and distinct cases as to each partner in addition to the partnership case, although no individual petitions were filed. *In re Farley*, (W. D. Va. 1902) 115 Fed. 359, 8 Am. Bankr. Rep. 266, following *In re Barden*, (E. D. N. C. 1900) 101 Fed. 555.

**f [Payment of debts — surplus.]** The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership. [(1898) 30 Stat. L. 548.]

**Distribution.**—The net proceeds of the partnership property must be appropri-

ated by the trustee first to the payment of partnership debts, and the net proceeds

of the individual estate of each partner to the payment of his individual debts, and any surplus in either fund may then be applied to the other. *In re Denning*, (D. C. Mass. 1902) 114 Fed. 219, 8 Am. Bankr. Rep. 133; *In re Gillette*, (1900) 104 Fed. 789; *In re James*, (2d Cir. 1904) 133 Fed. 912, 67 C. C. A. 216, 13 Am. Bankr. Rep. 341; *In re Henderson*, (N. D. W. Va. 1906) 142 Fed. 588, 16 Am. Bankr. Rep. 91, *affirmed* Euclid Nat. Bank v. Union Trust, etc., Co., (4th Cir. 1906) 149 Fed. 975, 79 C. C. A. 485, 17 Am. Bankr. Rep. 838; *Sargent v. Blake*, (8th Cir. 1908) 160 Fed. 57, 15 Ann. Cas. 58, 87 C. C. A. 213, 20 Am. Bankr. Rep. 115; *In re Pinson*, (N. D. Ala. 1910) 180 Fed. 787, 24 Am. Bankr. Rep. 804; *In re Telfer*, (6th Cir. 1910) 184 Fed. 224, 106 C. C. A. 366; *Crawford v. Sternberg*, (C. C. A. 8th Cir. 1915) 220 Fed. 73; *In re Knowlton & Co.*, (C. C. A. 3d Cir. 1913) 202 Fed. 480.

"The old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate," is recognized in this subdivision *f*. *Francis v. McNeal*, (1913) 228 U. S. 695, 33 S. Ct. 701, 57 U. S. (L. ed.) 1029, L. R. A. 1915E 706. To the same effect, see *Sargent v. Blake*, (1908) 160 Fed. 57, 87 C. C. A. 213, 15 Ann. Cas. 58, 17 L. R. A. (N. S.) 1040; *In re Telfer*, (6th Cir. 1910) 184 Fed. 224, 106 C. C. A. 366.

"Partnership creditors have a lien, in equity, upon partnership property for the payment of the partnership debts. . . . This right is expressly provided for in the bankrupt law (section 5f). But individual creditors have no lien, at common law or in equity, upon individual property, against partnership creditors for individual debts. . . . That right is provided for, and rests wholly upon, the bankrupt law." *In re Mosier*, (1901) 112 Fed. 138; *In re Denning*, (1902) 114 Fed. 219.

*The rule of distribution prescribed by section 5f is not to be varied* by anything permissible under section 5g, where the partnership and the individual members are all adjudged bankrupts and the estates of all are before the court and are unaffected by preference or fraud. This is but applying the general rule, that where all the partners become bankrupt the separate estate of one partner shall not claim against the joint estate of the partnership in competition with the joint creditors, nor shall the joint estate claim against the separate estate in competition with the separate creditors. *In re Telfer*, (6th Cir. 1910) 184 Fed. 224, 106 C. C. A. 366.

Section 5f directs how the assets shall be marshaled. The language is plain, explicit, and unambiguous; its phraseology conveys no intimation that any exception is contemplated. *In re Janes*, (2d Cir.

1904) 133 Fed. 912, 67 C. C. A. 216, 13 Am. Bankr. Rep. 341.

*Partnership creditors have a lien, in equity*, upon partnership property for the payment of the partnership debts. This right is expressly provided for in the Bankrupt Law. Partners in an insolvent partnership have no interests of their own in the partnership property, but the whole is subject to the lien of the partnership creditors. There is nothing in the partnership property of such a partnership out of which the surviving partner is entitled to any exemptions. *In re Abrams*, (D. C. S. D. 1912) 193 Fed. 271.

Firm creditors are entitled to be first paid out of firm assets before the individual creditors have any right to share therein. If a surplus should remain, however, after the payment of partnership debts, creditors of the individual partners may share therein. *In re Carmichael*, (N. D. Ia. 1899) 96 Fed. 594, 2 Am. Bankr. Rep. 815; *In re Jones*, (E. D. Mo. 1900) 100 Fed. 781, 4 Am. Bankr. Rep. 141; *Wallerstein v. Ervin*, (3d Cir. 1901) 112 Fed. 124, 50 C. C. A. 129, 7 Am. Bankr. Rep. 256; *In re Denning*, (D. C. Mass. 1902) 114 Fed. 219, 8 Am. Bankr. Rep. 133; *In re Groetzing*, (3d Cir. 1904) 127 Fed. 814, 62 C. C. A. 494, 11 Am. Bankr. Rep. 723; *In re Rice*, (E. D. Pa. 1908) 164 Fed. 509, 21 Am. Bankr. Rep. 205; *In re Terens*, (E. D. Wis. 1910) 175 Fed. 495; *In re Effinger*, (D. C. Md. 1911) 184 Fed. 728; *Mayes v. Palmer*, (C. C. A. 8th Cir. 1913) 208 Fed. 97; *Moses v. Pond*, (N. Y. 1900) 4 Am. Bankr. Rep. 655; *Matter of Flatau*, (S. D. N. Y. 1909) 21 Am. Bankr. Rep. 352.

The general scheme of the Bankrupt Act contemplates that partnership assets "shall be in good faith applied first to the payment of partnership debts; therefore any scheme or device resorted to by persons in contemplation of bankruptcy for the purpose of charging partnership assets with the individual liabilities of the partners is, in substance and effect, violative of the provisions of the Act." *In re Jones*, ((1900) 100 Fed. 781.

*A dissolution of, and transfer by one of two partners to the other of all of his interest in*, an insolvent partnership, although without actual fraudulent intent, is fraudulent in law as against partnership creditors, and does not debar them from the right to be first paid from the partnership property, and for that purpose to have a marshaling of assets between the partnership and individual estates in bankruptcy. *In re Terens*, (E. D. Wis. 1910) 175 Fed. 495.

*Sale of interest by one partner to co-partner.*—In the case of *In re Suprenant*, (N. D. N. Y. 1914) 217 Fed. 470, the court held that when one of two partners sold out his entire interest in the property of the firm to the remaining or other partner, such purchasing partner took the

absolute title as though the property had always been his and subject to no lien in favor of partnership creditors. The court suggested that partnership creditors might have some equities as against the individual creditors, but to what extent, if any, did not decide. In its opinion the court said: "In the state of New York and many other jurisdictions it seems to be the well-settled law, in the absence of fraud making the sale or transfer voidable, one of two partners may sell or relinquish to the other all his interest in the partnership property, such other agreeing to pay the firm debts, and that in such case the purchasing partner acquires the same ownership and dominion of the property as if it had ever been his own separate property, and that, the sale being made in good faith, the title vests in the purchasing partner as his own private estate, free from any lien or equity in favor of partnership creditors. This assumes, of course, that the law had not at the time of such transfer taken the partnership property into its custody for purposes of administration and distribution. This is true even if the purchasing partner turns out to be insolvent at the time of buying out the other partner, and this seems to be the rule as well laid down by the Supreme Court of the United States. Partnership creditors have no lien on partnership assets growing out of the partnership, at least until the property passes into *custodia legis* and is being administered and a lien is declared. Prior to that time partnership creditors may have an equity to have the partnership property applied to the payment of partnership debts, but this equity of the creditors of the partnership is a derivative one. It is not held or enforceable in their own right. It is derived from the right of the partners to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. So long as the partnership exists and the partners are in a situation to enforce this right, the creditors may appeal to the courts, or either partner may, but when there are two partners and the one has sold out to the other, the purchasing partner taking the property as his own individual property, the creditors are in no situation or condition to enforce the right or equity referred to. The leading case in New York on this subject is *Dimon, Receiver, etc., v. Hazard*, 32 N. Y. 65, where it is held: 'Where one of two partners retires from business, relinquishing to the other all his interest in the partnership property, the remaining partner acquires the same dominion as if it had ever been his own separate property. The assignment being made in good faith, the title vests in the assignee as his own private estate, free from any lien or equity in favor of partnership creditors. Such assignee may lawfully

transfer such property in payment of his individual debts.' This case is cited, approved, and followed in *Stanton, as Receiver, etc., v. Westover et al.*, 101 N. Y. 265, 267, 4 N. E. 529, where it was held one of two partners, on retiring from the business, transferred to his copartner his interest in the firm property, each agreeing to pay one-half of its debts. The firm was solvent, but the remaining partner was in fact insolvent at the time. This, however, was not known to him or the retiring partner, and the transfer was made in good faith. In an action wherein creditors of the firm claimed a preference over the individual creditors of the remaining partner, held that by the transfer the title vested in the remaining partner as his own private estate; that he acquired the same dominion over it as if it had always been his own separate property, free from any lien or equity on the part of the partnership creditors, and that transfers by him of the property in payment of individual debts were lawful."

Where one partner sells out to his copartner, taking notes for his interest, and subsequently the continuing partner files a petition in bankruptcy, the trustees should be directed to keep separate accounts. The property belonging to the firm at the time of the dissolution of the partnership should be applied first to the payment of the joint debts, and the separate estate of the bankrupt should be applied first to the payment of the separate debts. If there is any surplus, that is to be distributed as provided in section 5f. The provision of section 5h, that if one partner only is adjudged bankrupt the partnership property shall not be administered in bankruptcy unless by consent of the other partners, has no application to such a case. *In re Denning*, (1902) 114 Fed. 219.

*Silent partner.*—If it is meant to debar a party from the rights of a creditor of a bankrupt firm on the alleged grounds that he was a silent partner, although there had been no holding out as such, a clear and actual agreement thereto must be proved binding on all parties. *In re Clark*, (1901) 111 Fed. 893. See also *Metcalf v. Officer*, (1879) 5 Dill. 565, 17 Fed. Cas. No. 9,496.

The creditors of the individual partners are entitled to be first paid out of the assets of the separate estates, and such assets cannot be distributed to firm creditors excepting where there is a surplus remaining after such payment has been made. *In re Wilcox*, (D. C. Mass. 1899) 94 Fed. 84, 2 Am. Bankr. Rep. 117; *In re Mills*, (D. C. Ind. 1899) 95 Fed. 269, 2 Am. Bankr. Rep. 667; *In re Lehigh Lumber Co.*, (W. D. Pa. 1900) 101 Fed. 216, 4 Am. Bankr. Rep. 221; *Lamoille County Nat. Bank v. Stevens*, (D. C. Vt. 1901) 107 Fed. 245, 6 Am. Bankr. Rep. 164; *In re Daniels*, (D. C. R. I. 1901) 110 Fed.

745, 6 Am. Bankr. Rep. 699; *In re Mosier*, (D. C. Vt. 1901) 112 Fed. 138, 7 Am. Bankr. Rep. 268; *In re Denning*, (D. C. Mass. 1902) 114 Fed. 219, 8 Am. Bankr. Rep. 133; *In re Janes*, (2d Cir. 1904) 133 Fed. 912, 67 C. C. A. 216, 13 Am. Bankr. Rep. 341; *Euclid Nat. Bank v. Union Trust, etc., Co.*, (4th Cir. 1906) 149 Fed. 975, 79 C. C. A. 485, 17 Am. Bankr. Rep. 834; *In re Effinger*, (D. C. Md. 1911) 184 Fed. 728; *In re Chandler*, (7th Cir. 1911) 184 Fed. 887, 107 C. C. A. 209; *In re Corcoran*, (S. D. Ohio 1904) 12 Am. Bankr. Rep. 283.

It would confound all distinctions between partnership and individual estates to hold that a particular firm creditor, who was given a priority over other firm creditors, should also have a like priority over individual creditors. *In re Daniels*, (D. C. R. I. 1901) 110 Fed. 745, 6 Am. Bankr. Rep. 699.

"The bankrupt law makes a sharp distinction between partnership debts and individual debts in respect to participation in partnership and individual assets." *Lamoille County Nat. Bank v. Stevens*, (1901) 107 Fed. 245.

If a transfer of his individual property by a member of a partnership afterward adjudicated bankrupt is recovered as an unlawful preference in regard to the partnership, "the trustee will hold the fund as an asset of the estate of the individual member, and primarily for the benefit of his creditors." *Miller v. New Orleans Acid, etc., Co.*, (1909) 211 U. S. 496, 29 S. Ct. 176, 53 U. S. (L. ed.) 300.

In *In re Knowlton & Co.*, (E. D. Pa. 1912) 196 Fed. 837, it was held that where one of the partners of a bankrupt

partnership was itself a partnership its assets should first be applied to liquidating the claims of its own creditors.

A note or a bond signed individually and under separate signatures and seals was held to be an individual liability and was not allowed to be proved against partnership estate. *In re Jones*, (1902) 116 Fed. 431.

As to what constitutes individual debts and partnership debts, see *In re Stevens*, (1900) 104 Fed. 323; *In re Lehigh Lumber Co.*, (1900) 101 Fed. 216.

**Pro rata distribution between firm and individual creditors.**—Where there are no partnership assets and no solvent partner it has been held that partnership creditors are entitled to share ratably with individual creditors in the individual assets of a bankrupt. *In re Green*, (N. D. Ia. 1902) 116 Fed. 118, 8 Am. Bankr. Rep. 553; *Conrader v. Cohen*, (3d Cir. 1903) 127 Fed. 801, 58 C. C. A. 249, 9 Am. Bankr. Rep. 619, affirming (W. D. Pa. 1902) 118 Fed. 676, 9 Am. Bankr. Rep. 85; *In re Janes*, (W. D. N. Y. 1904) 128 Fed. 527, 11 Am. Bankr. Rep. 792. See also *In re Dillon*, (D. C. Mass. 1900) 100 Fed. 627, 4 Am. Bankr. Rep. 63. *Contra*, *In re Corcoran*, (S. D. Ohio 1904) 12 Am. Bankr. Rep. 283.

Where a partnership and the individual partners are all insolvent and all in bankruptcy, and where no partnership assets are available for distribution among partnership creditors, the creditors have the right to share *pari passu* with the separate creditors of one partner in the net proceeds of his separate property. *In re Gray*, (E. D. Pa. 1913) 208 Fed. 959.

**g [Claims against various estates — marshaling assets.]** The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates. [(1898) 30 Stat. L. 548.]

As to

Proof of claims generally, see the several subdivisions of section 57.

What are provable claims, see the several subdivisions of section 63.

**Construction.**—Subsection 5g must be construed with reference to the rest of section 5, especially 5d, e, and f. *In re Telfer*, (6th Cir. 1910) 184 Fed. 224, 106 C. C. A. 366.

**Proof of claims.**—Section 5g allows the filing and proof of claims of the partnership estate against the individual estates and vice versa, and removes all technical obstacles in the way of bringing those claims before the court to be dealt with as justice and equity require. *In re Carmichael*, (N. D. Ia. 1899) 96 Fed. 594, 2 Am. Bankr. Rep. 815; *In re Bates*,

(D. C. Vt. 1900) 100 Fed. 263, 4 Am. Bankr. Rep. 56; *In re Stevens*, (D. C. Vt. 1900) 104 Fed. 323, 5 Am. Bankr. Rep. 9; *Davis v. Turner*, (4th Cir. 1903) 120 Fed. 605, 56 C. C. A. 669, 9 Am. Bankr. Rep. 704; *Merchants' Bank v. Thomas*, (5th Cir. 1903) 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299; *Hibberd v. McGill*, (C. C. A. 3d Cir. 1904) 129 Fed. 590, 12 Am. Bankr. Rep. 101; *Buckingham v. Chicago First Nat. Bank*, (6th Cir. 1904) 131 Fed. 192, 65 C. C. A. 498, 12 Am. Bankr. Rep. 465; *In re Speer*, (D. C. Ore. 1906) 144 Fed. 910, 16 Am. Bankr. Rep. 524; *In re Stoddard Bros. Lumber Co.*, (D. C. Idaho 1909) 169 Fed. 190, 22 Am. Bankr. Rep. 435; *In re Effinger*, (D. C. Md. 1911) 184 Fed. 728.

**Equitable distribution secured.**—"Proof

of the claim of the partnership estate against individual estates, and *vice versa*, is permitted. Both the individual estates and partnership estate may be marshaled, so as to prevent preferences, and secure an equitable distribution of the property of the several estates." *In re Gillette*, (1900) 104 Fed. 769.

*Official Form No. 34* is "proof of debt by partnership."

*Existence of assets immaterial.*—A partnership debt, on which a bankrupt partner remains liable, is none the less provable against his estate because there may be no surplus of his individual assets over his separate debts. The provability of a debt depends on the nature of the liability, not on the existence or the prospect of assets for its satisfaction. *In re Bates*, (D. C. Vt. 1900) 100 Fed. 263, 4 Am. Bankr. Rep. 56.

*The real nature of a transaction may be shown* to determine whether the debt is one provable against the firm or the individual partners. *In re Stevens*, (D. C. Vt. 1900) 104 Fed. 323, 5 Am. Bankr. Rep. 9; *Davis v. Turner*, (4th Cir. 1903) 120 Fed. 605, 56 C. C. A. 669, 9 Am. Bankr. Rep. 704; *Hibberd v. McGill*, (3d Cir. 1904) 129 Fed. 590, 64 C. C. A. 158, 12 Am. Bankr. Rep. 101.

*Notes.*—*Notes signed by a bankrupt firm*, which include claims on which one of the partners is not primarily liable, are *prima facie* debts provable against the firm. *Merchants' Bank v. Thomas*, (5th Cir. 1903) 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299. See also *Lamoille County Nat. Bank v. Stevens*, (D. C. Vt. 1901) 107 Fed. 245, 6 Am. Bankr. Rep. 164; *In re Speer*, (D. C. Ore. 1906) 144 Fed. 910, 16 Am. Bankr. Rep. 524.

*But notes signed by the members of a partnership*, which do not purport to be obligations of the firm, although given by the partners for money borrowed and put into the firm as capital, are not provable against the estate of the partnership in bankruptcy. *Strause v. Hooper*, (E. D. N. C. 1901) 105 Fed. 590, 5 Am. Bankr. Rep. 225. See also *In re Stevens*, (D. C. Vt. 1900) 104 Fed. 323, 5 Am. Bankr. Rep. 9.

*Firm notes indorsed by partners.*—*Holders of notes of a bankrupt partner-*

*ship*, also indorsed by the individual partners, may, at their election, prove the same as individual debts of one of the partners. *Buckingham v. Chicago First Nat. Bank*, (6th Cir. 1904) 131 Fed. 192, 65 C. C. A. 498, 12 Am. Bankr. Rep. 465.

*Holders of joint and several notes.*—*In re Mosier*, (1901) 112 Fed. 138, it was held, upon the proof, that the holders of the joint and several notes given by the partners for partnership debts could not share in the individual estate of a partner.

*Where the members of a firm borrow money on their individual credit for the benefit of the firm*, the lender, after having obtained a dividend from the firm's assets in bankruptcy, may have his claim allowed for the balance as a claim against the individual partners. *In re McCoy*, (7th Cir. 1906) 150 Fed. 106, 80 C. C. A. 60, 17 Am. Bankr. Rep. 760.

*Proof of claims by partners.*—The amount contributed by a partner to the capital of a partnership cannot, on the bankruptcy of the firm, be proved as a debt entitled to share ratably with general creditors. *In re Floyd*, (E. D. N. C. 1907) 156 Fed. 206, 19 Am. Bankr. Rep. 438; *In re Effinger*, (D. C. Md. 1911) 184 Fed. 728.

A solvent partner in a firm is not entitled to claim interest against the estate in bankruptcy of his partner on the balances in his favor shown by the partnership books, in the absence of a mutual agreement that such interest should be charged. *In re Stevens*, (D. C. Vt. 1900) 104 Fed. 323, 5 Am. Bankr. Rep. 9.

*Set-off of partnership debt.*—A solvent partnership which is indebted to a bankrupt cannot set off against such indebtedness a claim due from the bankrupt estate to one of the partners. *In re Shults*, (W. D. N. Y. 1904) 132 Fed. 573, 13 Am. Bankr. Rep. 84.

*Assets marshaled.*—The firm and both partners having been adjudged bankrupt upon a fraudulent transfer constituting an act of bankruptcy, it was held, upon the proof, that the firm and individual assets should be marshaled, as if no transfer had been made. *In re Shapiro*, (1901) 106 Fed. 495.

**h [Administration where all partners not bankrupt.]** In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt. [(1898) 30 Stat. L. 548.]

**When section 5h applies.**—Section 5h contemplates a case where one or more but not all of the members of a partner-

ship are adjudged bankrupt, while the partnership as such is not before the court. *In re Bertenshaw*, (8th Cir. 1907) 157

Fed. 363, 13 Ann. Cas. 986, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577; *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459; *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298; *Francis v. McNeal*, (C. C. A. 3d Cir. 1911) 186 Fed. 481, *affirmed* (1913) 228 U. S. 695, 33 S. Ct. 701, 57 U. S. (L. ed.) 1029, L. R. A. 1915E 706; *Fidelity Trust Co. v. Gaskell*, (C. C. A. 8th Cir. 1912) 195 Fed. 865; *In re Schwartz*, (E. D. N. Y. 1913) 204 Fed. 326; *Marnet Oil, etc., Co. v. Staley*, (C. C. A. 5th Cir. 1914) 218 Fed. 45, wherein the court said: "The situation brought about by one member only of the partnership being adjudged bankrupt was one contemplated by subsection 'h' of section 5 of the Bankruptcy Act.

"The plain language of this provision negatives the existence of a right of the court as a court of bankruptcy to draw to itself the administration of the partnership estate when only one of the partners has been adjudged bankrupt, except in the event of the partner or partners not adjudged bankrupt consenting to its doing so. The right in such a case of a solvent partner to have the partnership business administered elsewhere than in bankruptcy is absolute unless waived by him." *Marnet Oil, etc., Co. v. Staley*, (C. C. A. 5th Cir. 1914) 218 Fed. 45.

But in *In re Everybody's Grocery, etc., Market*, (D. C. Okla. 1908) 173 Fed. 492, 21 Am. Bankr. Rep. 925, it was said that section 5h has reference to cases where one or more but not all of the members of a partnership are adjudged bankrupts either with or without the adjudication of the partnership: and that it is the administration of the partnership assets, rather than the adjudication, that is made to depend upon the consent of the solvent members of the partnership.

Section 5h, being exceptional and negative, cannot be construed into affirmative authority for the administration of the firm assets in individual proceedings against all the partners; but it rather recognizes the absence of any inherent necessity for throwing a firm into bankruptcy merely because its members have been adjudicated. *In re Mercur*, (3d Cir. 1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505; *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459.

Section 5h does not apply to a case where the infancy of the partner not adjudged bankrupt was the only ground for dismissing the petition as to him. *In re Dunnigan*, (D. C. Mass. 1899) 95 Fed. 428, 2 Am. Bankr. Rep. 628; *In re Du-*

*guid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794.

This subdivision, read in connection with the preceding parts of the section, clearly shows that although all the partners may not be adjudged bankrupt in a given case, and therefore the firm and its property do not become subject to the jurisdiction of the court, unless by consent of all the partners, yet the partners not adjudged to be bankrupt are required to account for the interest of the bankrupt partner in the firm business. Therefore, if one partner only is adjudged a bankrupt, but the other partners agree that the partnership property may be administered in the bankruptcy proceedings, or, not consenting thereto, they, in obedience to the Act, account to the trustee for the interest of the bankrupt in the firm property, the firm creditors will receive the benefit thereof; and certainly it is not the intent of the Act that the firm creditors shall be enabled to reach and subject to the payment of their claims the firm property, or the bankrupt partner's interest and share in the firm property, but that the bankrupt partner cannot obtain a discharge against the firm debts, because the firm was not adjudged bankrupt. *In re Laughlin*, (1899) 96 Fed. 590.

**Right of unadjudicated partner to settle partnership business.**—Where a partner and his partnership have not been adjudged bankrupts, but his copartners have, subdivision h reserves to him the right to close up the partnership business. *Francis v. McNeal*, (C. C. A. 3d Cir. 1911) 186 Fed. 481.

"The provision of section 5, par. h, of the Act of 1898, that where one member of a firm, but not all, becomes bankrupt, the partners not adjudged bankrupt shall wind up the business and account to the trustee for the bankrupt's share in the firm, although it introduces no new rule of law, does, however, clearly show that all the bankrupt's property—his individual as well as his beneficial interest in the partnership assets—passes to the trustee." *Jarecki Mfg. Co. v. McElwaine*, (1901) 107 Fed. 249.

The inherent right of a solvent partner to close up the affairs of the firm must be recognized by the court of bankruptcy. This right was not conferred by the Bankruptcy Act, neither can it be abridged or taken away by it. *In re Junck*, (E. D. Wis. 1909) 169 Fed. 481, 22 Am. Bankr. Rep. 298.

**Discharge from firm and individual debts.**—See note to section 17a.

## SEC. 6. EXEMPTIONS OF BANKRUPTS.—a [Exemptions under state laws.]

This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the

petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition. [(1898) 30 Stat. L. 548.]

**As to**

- Dower and allowances to widow and children, see section 8.
- Jurisdiction with respect to exemptions, see section 2 (11).
- Setting apart of exemptions, etc., by the trustee, see section 47a (11).
- Title to exempt property, see section 70a and 70a (5).

- I. Constitutionality and construction, 593.
- II. Claiming exemption, 593.
- III. Matters affecting right to exemption, 596.
- IV. Recognition of state and federal exemption laws, 601.

**I. CONSTITUTIONALITY AND CONSTRUCTION.**

**Constitutionality.**—The constitutional requirement that bankruptcy laws be uniform throughout the United States is not violated by the Bankruptcy Act because by the sixth section thereof bankrupts are allowed the exemptions prescribed by the state law in force at the time of the filing of the petition in bankruptcy. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1.

**Construction.**—Courts of bankruptcy should enforce the provisions of the law relating to exemptions liberally, to effectuate their purpose, both in construing the state statutes, and in the manner of allowing the exemption. *In re Tilden*, (S. D. Ia. 1899) 91 Fed. 500, 1 Am. Bankr. Rep. 300; *In re Kane*, (7th Cir. 1904) 127 Fed. 552, 62 C. C. A. 816, 11 Am. Bankr. Rep. 533.

*Section 6 must be construed with section 70a*, in so far as exempt property is concerned, so that both provisions may be given effect. *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061, 10 Am. Bankr. Rep. 107. See also the annotation under section 70a (5) (second paragraph) with respect to exempt insurance policies.

**II. CLAIMING EXEMPTION.**

**Necessity of claiming.**—The exemptions to which a bankrupt is entitled under the laws of the state, in accordance with the provisions of section 6 of the Bankruptcy Act, must be claimed in the schedule which an involuntary bankrupt is required to file, under section 7a (8), within ten days after his adjudication, unless further time has been granted therefor, and which a voluntary bankrupt must file with his petition in bankruptcy. *In re Friedrich*, (7th Cir. 1900) 100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801; *In re Brown*,

(W. D. Pa. 1899) 100 Fed. 441, 4 Am. Bankr. Rep. 46; *In re Bolinger*, (W. D. Pa. 1901) 108 Fed. 374, 6 Am. Bankr. Rep. 171; *McGahan v. Anderson*, (C. C. A. 4th Cir. 1902) 113 Fed. 115, 7 Am. Bankr. Rep. 641; *In re Sloan*, (E. D. Pa. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435; *In re Blanchard*, (E. D. N. C. 1908) 161 Fed. 797, 20 Am. Bankr. Rep. 422; *In re Highfield*, (M. D. Pa. 1908) 163 Fed. 924, 21 Am. Bankr. Rep. 92; *In re Jennings*, (N. D. Ga. 1909) 166 Fed. 639, 22 Am. Bankr. Rep. 160; *In re Donahey*, (M. D. Pa. 1910) 176 Fed. 458, 23 Am. Bankr. Rep. 796; *In re Baughman*, (D. C. Pa. 1910) 183 Fed. 668; *In re Exum*, (S. D. Ala. 1913) 209 Fed. 716; *In re Webb*, (N. D. Ga. 1915) 219 Fed. 349; *In re Nunn*, (S. D. Ga. 1899) 2 Am. Bankr. Rep. 664; *In re Groves*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 728; *Matter of McClintock*, (N. D. Ohio 1904) 13 Am. Bankr. Rep. 606; *Matter of Fletcher*, (N. D. Ohio 1906) 16 Am. Bankr. Rep. 491. And see the cases cited, *infra*, this note, under the heading, *Time and manner of claiming*.

*The failure to claim the exemptions is, in the absence of a good reason therefor, considered to be a waiver of the right to make such claim.* *In re Duffy*, (M. D. Pa. 1902) 118 Fed. 926, 9 Am. Bankr. Rep. 358; *In re Wunder*, (E. D. Pa. 1905) 133 Fed. 821, 13 Am. Bankr. Rep. 701; *Burke v. Guarantee Title, etc., Co.*, (3d Cir. 1905) 134 Fed. 562, 67 C. C. A. 486, 14 Am. Bankr. Rep. 31; *In re Von Kerm*, (E. D. Pa. 1905) 135 Fed. 447, 14 Am. Bankr. Rep. 403; *In re Pfeiffer*, (W. D. Pa. 1907) 155 Fed. 892, 19 Am. Bankr. Rep. 230; *In re Gerber*, (C. C. A. 9th Cir. 1911) 186 Fed. 693; *In re Strauch*, (N. D. Ohio 1913) 208 Fed. 842; *In re Harrington*, (N. D. N. Y. 1912) 200 Fed. 1010; *In re Mathews*, (E. D. Okla. 1908) 20 Am. Bankr. Rep. 369.

Thus it has been held that where a bankrupt neglected to file a claim for exemptions until after a sale of his assets, his claim thereto was not saved by his having appeared and objected to the order of sale on the ground that his exemptions had not been allowed. *In re Wunder*, (E. D. Pa. 1905) 133 Fed. 821, 13 Am. Bankr. Rep. 701.

**Time and manner of claiming.**—While the exemptions which a bankrupt may claim, under section 6, are those provided for by the statutes of the several states, the time and manner of claiming such exemptions, and of awarding them, are regulated by the Bankruptcy Act; thus the exemptions must be claimed in accordance with section 7a (8), and set apart by the trustee in accordance with section 47a (11). *In re Friedrich*, (7th Cir. 1900)

100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801; *In re Le Vay*, (M. D. Pa. 1903) 125 Fed. 990, 11 Am. Bankr. Rep. 114; *In re Kane*, (7th Cir. 1904) 127 Fed. 552, 62 C. C. A. 616, 11 Am. Bankr. Rep. 533; *In re Stein*, (E. D. Pa. 1904) 130 Fed. 629, 12 Am. Bankr. Rep. 384; *Lipman v. Stein*, (3d Cir. 1905) 134 Fed. 235, 67 C. C. A. 17; *In re Culwell*, (D. C. Mont. 1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614; *In re Gerber*, (C. C. A. 9th Cir. 1911) 186 Fed. 693; *In re Groves*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 728. And see the cases cited under the heading, *Necessity of claiming, supra*, this note.

*Courts of bankruptcy are not controlled by the state law as to the time or manner in which claims for exemption may be preferred in bankruptcy.* *In re Kane*, (7th Cir. 1904) 127 Fed. 552, 62 C. C. A. 616; *In re Culwell*, (D. C. Mont. 1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614.

*An extension of time for filing schedules also extends the time for claiming the exemption.* *In re O'Hara*, (M. D. Pa. 1908) 162 Fed. 325, 20 Am. Bankr. Rep. 714.

*Where the exemption is personal to the debtor, it can only be demanded by him.* *Mitchell v. Mitchell*, (E. D. N. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382.

*Allowance of exemption claim after filing of schedules.*—Although section 7a (8) is the guide as to the strictly regular time and manner of asserting in the Bankruptcy Court the claim for exemptions, nevertheless it has been held that such section is directory; and that, taken in connection with the express right to allow amendments, there is some discretion in the Bankruptcy Court to allow claims of exemption to be made after the original schedules have been filed. *In re Fisher*, (W. D. Va. 1905) 142 Fed. 205, 15 Am. Bankr. Rep. 652. See also *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53. And see the cases cited, *infra*, this note, under the heading, *Amendment of schedules*.

*Agreement that mortgagee shall select exempt property for debtor.*—A bankrupt who mortgages his exempt property may, if permitted by the state law, agree that the mortgagee may select the property which shall be set aside as exempt; and such authority, given upon a valuable consideration and coupled with an interest, cannot be revoked by the failure of the bankrupt to claim the exemptions in his own name, or even by his express waiver thereof. *In re National Grocer Co.*, (6th Cir. 1910) 181 Fed. 33, 104 C. C. A. 47.

*Necessity of claiming specific property.*—It has been held that the bankrupt should claim the specific property which he desires to have set apart to him as exempt; and that his failure to do so, unless his schedules are subsequently amended in this respect, will preclude him

from the recovery of such exemption thereafter. *In re Haskin*, (E. D. Pa. 1901) 109 Fed. 789, 6 Am. Bankr. Rep. 485; *In re Staunton*, (E. D. Pa. 1902) 117 Fed. 507, 9 Am. Bankr. Rep. 79; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680; *In re Ansley*, (E. D. N. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457; *In re Baughman*, (M. D. Pa. 1910) 183 Fed. 668.

But in *Burke v. Guarantee Title, etc., Co.*, (3d Cir. 1905) 134 Fed. 562, 67 C. C. A. 486, 14 Am. Bankr. Rep. 31, it was said that there is not a word in the statute to warrant the conjecture that Congress intended that the bankrupt himself should make an itemization and estimate which the trustee, in performing the function expressly assigned to him, might wholly disregard; and that while it is true that among the forms promulgated by the Supreme Court is "Schedule B (5)," in which is contained the words, "Property claimed to be exempted by the state laws, its valuation," etc., that is nothing more than a direction.

*Claim in bulk.*—A claim by a bankrupt of an exemption out of a stock of goods in bulk is insufficient. *In re Wilson*, (W. D. Va. 1901) 108 Fed. 197, 6 Am. Bankr. Rep. 287.

*Amendment of schedules.*—The bankrupt may, upon proper application, be permitted to amend his schedules so as to remedy defects therein with respect to the claiming of his exemptions. *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53; *In re White*, (E. D. Pa. 1904) 128 Fed. 513, 11 Am. Bankr. Rep. 556; *In re Berman*, (N. D. Ohio 1905) 140 Fed. 761, 15 Am. Bankr. Rep. 463; *In re Fisher*, (W. D. Va. 1905) 142 Fed. 205, 15 Am. Bankr. Rep. 652; *In re Culwell*, (D. C. Mont. 1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614; *In re Maxson*, (N. D. Ia. 1909) 170 Fed. 356, 22 Am. Bankr. Rep. 424; *In re Irwin*, (W. D. Pa. 1909) 177 Fed. 284, 22 Am. Bankr. Rep. 165, reversing (3d Cir. 1909) 174 Fed. 642, 98 C. C. A. 396, 23 Am. Bankr. Rep. 487.

*Showing to be made.*—Under authority given in the Bankruptcy Act to amend the schedules, in which under the bankruptcy rules adopted the claim to exemptions should be made, the courts have been liberal in the matter of allowing amendments, where the original schedules had not made exemption claims; but they have uniformly required, before doing so, that the omission to make the claim to exemption had occurred through inadvertence, and that there had been diligence in seeking to cure the defect. *In re Burnham*, (W. D. Wash. 1913) 202 Fed. 762.

General Order 11 is a regulation of applications for leave to amend schedules, and requires a statement of the cause of the error.

*Insertion of exemption claim by amend-*



*ment.*—The statute does not preclude the court, in its discretion, from allowing claims of exemption to be made by amendment after the original schedule has been filed. *In re Fisher*, (W. D. Va. 1905) 142 Fed. 205, 15 Am. Bankr. Rep. 652. See also *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53.

*Amendment on discovery of additional assets.*—Where, after the trustees were discharged, the bankrupts, acting in good faith, assisted by their counsel, found additional assets of which they had hitherto been ignorant, it was held that the bankrupts, not having received the full amount of their exemptions under the state statute, were entitled within a reasonable time to leave to amend the schedule of exempt property, and to an allowance out of the fund so obtained of an amount necessary to complete the exemption. *In re Irwin*, (W. D. Pa. 1909) 177 Fed. 284, 22 Am. Bankr. Rep. 165, reversing (3d Cir. 1909) 174 Fed. 642, 98 C. C. A. 396, 23 Am. Bankr. Rep. 487.

So also it has been held that the bankrupt may amend his schedules so as to include a sum of money subsequently surrendered to the trustee by a creditor, as the proceeds of property transferred to him by the bankrupt and constituting a preference, and may at the same time claim the remainder of his exemption therefrom. *In re Falconer*, (8th Cir. 1901) 110 Fed. 111, 49 C. C. A. 50, 6 Am. Bankr. Rep. 557.

*Accident or mistake.*—Where a bankrupt's schedules contained a waiver of exemptions, it was held on an application to amend that it was admissible to show that the waiver was the result of accident and mistake. *In re White*, (E. D. Pa. 1904) 128 Fed. 513, 11 Am. Bankr. Rep. 556.

*Mistake of counsel.*—A bankrupt does not lose his right to claim the exemptions, by his failure, through the mistake of his attorney, to specifically claim them in his schedule; and, on application at any seasonable time while the property remains in the hands of the trustee unaffected by adverse rights, he should be permitted to amend his schedule in that respect. *Goodman v. Curtis*, (5th Cir. 1909) 174 Fed. 644, 98 C. C. A. 398, 23 Am. Bankr. Rep. 504.

So also it has been held that where a debtor, shortly before filing his petition in bankruptcy, acting in good faith on the advice of his attorney, voluntarily conveyed his homestead to his wife, and afterwards, before his examination, receiving different advice, secured a reconveyance to himself, and on obtaining leave amended his schedule by including the homestead therein, such homestead should be set aside to the bankrupt in the bankruptcy proceedings, since the conveyance to his wife was not fraudulent in fact; and as his creditors had no interest in or

claim on his homestead interest in the land, the conveyance of such interest could not injure, or be fraudulent, as to them. *In re Tollett*, (6th Cir. 1901) 106 Fed. 866, 46 C. C. A. 11, 5 Am. Bankr. Rep. 404.

*Oversight.*—The failure of a bankrupt through oversight to make a claim to a homestead exemption in his schedule does not deprive him of the exemption allowed to himself and his family by the laws of the state, where timely application is otherwise made to the court of bankruptcy therefor, and such application, although not such in form, may properly be treated as an amendment of the schedule. *In re Maxson*, (N. D. Ia. 1909) 170 Fed. 356, 22 Am. Bankr. Rep. 424.

*Matters of form.*—Where a bankrupt undertook in good faith to claim his exemption, but failed to make the claim in the form required by the statute, in consequence of which it was all sold by the trustee, it was held that he might be permitted to amend his schedules thereafter, so as to claim the exemption from its proceeds. *In re Duffy*, (M. D. Pa. 1902) 118 Fed. 926, 9 Am. Bankr. Rep. 358; *In re Berman*, (N. D. Ohio 1905) 140 Fed. 761, 15 Am. Bankr. Rep. 463; *In re Culwell*, (D. C. Mont. 1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614.

But a bankrupt cannot amend his schedules relating to exemptions so as to claim something which he could not have claimed at the time his petition was filed. *Matter of Neal*, (N. D. Ohio 1905) 14 Am. Bankr. Rep. 550.

Nor will an amendment be allowed for the purpose of preferring certain creditors to whom the bankrupt has given notes, in which he waived his exemption privilege. *Moran v. King*, (4th Cir. 1901) 111 Fed. 730, 49 C. C. A. 578, 7 Am. Bankr. Rep. 176, affirming (W. D. Va. 1900) 105 Fed. 901, 5 Am. Bankr. Rep. 472. See also *In re Garner*, (W. D. Va. 1902) 115 Fed. 200, 8 Am. Bankr. Rep. 263.

But see *In re Batten*, (E. D. Va. 1909) 170 Fed. 688, wherein it was held that the fact that a creditor had waived his exemption did not authorize the refusal of its allowance.

*Amendment for creditors' benefit.*—The courts in bankruptcy as a rule exercise great liberality in permitting amendments. But it is clear that bankruptcy courts do not favor the extension of exemptions by amendment, when such extension works solely for the benefit of a creditor, and not for the benefit of the bankrupt and his family. *In re Merry*, (D. C. Me. 1913) 201 Fed. 369.

*Laches — Application after discharge.*—Claims to exemptions may be amended if seasonably done, but it is too late to wait until after a discharge has been obtained. *In re Webb*, (N. D. Ga. 1915) 219 Fed. 349.

### III. MATTERS AFFECTING RIGHT TO EXEMPTION.

**Death.**—On the death of a debtor, property which would have been set apart to him under his exemption, had he lived, remains a part of his estate, and goes to his administrator. *In re Seabolt*, (W. D. N. C. 1902) 113 Fed. 766, 8 Am. Bankr. Rep. 57.

**Residence.**—The bankrupt must be a resident of the state the benefit of whose exemption laws are claimed by him. *In re Dinglehoef*, (E. D. N. C. 1901) 109 Fed. 866, 6 Am. Bankr. Rep. 242; *In re Owings*, (E. D. N. C. 1905) 140 Fed. 739, 15 Am. Bankr. Rep. 472; *In re O'Hara*, (M. D. Pa. 1908) 162 Fed. 325, 20 Am. Bankr. Rep. 714; *In re Donahey*, (M. D. Pa. 1910) 176 Fed. 458, 23 Am. Bankr. Rep. 796.

The burden of proving a change of residence is upon those asserting the change. *In re Bassett*, (E. D. Wash. 1911) 189 Fed. 410.

**Land located outside the district.**—A court of bankruptcy is without jurisdiction to allot a bankrupt, domiciled within its district, a homestead in lands situated in another district. *In re Owings*, (E. D. N. C. 1905) 140 Fed. 739, 15 Am. Bankr. Rep. 472.

**Removal from state after right to exemption accrues.**—The right of a bankrupt to his exemption is to be determined as of the date when it is claimed; and his removal from the state after the claim has been made is immaterial, although the right is only given to residents by the state law. *In re Donahey*, (M. D. Pa. 1910) 176 Fed. 458, 23 Am. Bankr. Rep. 796.

**Sale of property.**—Where the trustee erroneously sells exempt property, the bankrupt may claim the amount of his exemptions from the proceeds of the sale. *In re Brown*, (W. D. Pa. 1899) 100 Fed. 441, 4 Am. Bankr. Rep. 46; *In re Zack*, (E. D. Pa. 1912) 196 Fed. 909.

**Sale of exempt property for benefit of estate.**—Where a bankrupt, by agreement with the trustee, allowed exempt property to be sold for the benefit of the estate, it was held that the trustee should allow the exemption out of the proceeds of the sale. *In re Richard*, (E. D. N. C. 1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506; *In re Sloan*, (E. D. Pa. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435; *In re Renda*, (M. D. Pa. 1906) 149 Fed. 614, 17 Am. Bankr. Rep. 521. See also *In re Park*, (W. D. Ark. 1900) 102 Fed. 602, 4 Am. Bankr. Rep. 432.

In the case of *In re Hutchinson*, (W. D. Mich. 1912) 197 Fed. 1021, it appeared that the property of the bankrupt consisted of a small stock of groceries, tools and store fixtures, some accounts receivable, less than \$20 in cash, and exempt household goods. In his schedules the bankrupt claimed an exemption of \$250

in the stock of goods. The trustee attempted to set off that amount of the goods in bulk, and not in specific articles. The bankrupt assigned his exemption to a grocery company and the assignee refused to permit the trustee to sell the stock of goods as an entirety and to accept a *pro rata* share of the proceeds. Thereupon the trustee, believing that more could be secured for the creditors by selling the entire stock and paying the assignee the sum of \$250 than could be obtained by selling the remnant of the stock after setting apart the exemption, entered into a written contract with the assignee, by which the assignee agreed to allow the trustee to sell the entire stock and the trustee agreed to pay over to the assignee the sum of \$250, the value of the exemption. The stock of goods, including the exemption, was appraised at \$600, and was sold by the trustee for \$427.55. The sale was confirmed. Thereupon the trustee paid to the assignee of the bankrupt the sum of \$250, and asked the referee to allow such amount as a disbursement. The referee refused so to do, but did allow the sum of \$177.50, upon the theory that, the entire stock of goods having brought but 71 per cent of the appraised value, the bankrupt or his assignee was not entitled to more than 71 per cent of the amount of his exemption. The court said: "The precise question here presented does not appear to have been decided in any reported case. While the action of the trustee was somewhat irregular, yet the course pursued by him was undoubtedly for the best interests of the estate. The bankrupt claimed and insisted upon the full amount of his exemption, and consented to the sale of his property solely upon the condition and agreement that he would receive the full amount in cash. No creditor has objected. The trustee having paid out the money pursuant to his contract, made in good faith, and the estate and its creditors having profited by his action, he ought in justice and equity to be reimbursed."

**Sale of perishable property.**—The mere fact that exempt property has been sold by a receiver, under the direction of the court, as perishable, will not deprive the bankrupt of the right to his exemption out of the proceeds; notwithstanding that, under the state law, a debtor is not entitled to his exemption out of the proceeds of a sale, but must elect the goods he wishes to retain and have them set aside to him. *In re Le Vay*, (M. D. Pa. 1903) 125 Fed. 990, 11 Am. Bankr. Rep. 114; *In re Coddington*, (M. D. Pa. 1904) 126 Fed. 891, 11 Am. Bankr. Rep. 122; *In re Stein*, (E. D. Pa. 1904) 130 Fed. 629, 12 Am. Bankr. Rep. 384, affirmed (3d Cir. 1905) 134 Fed. 235, 67 C. C. A. 17.

**Sale without prejudice to claim exemption.**—Where exempt property was sold by order of the court, but without prejudice to the rights of the bankrupt to

apply for the proceeds of the sale, the court will surrender such proceeds in lieu of the exemption. *In re Bolinger*, (W. D. Pa. 1901) 108 Fed. 374, 6 Am. Bankr. Rep. 171.

**Sale to avoid loss of exemption.**—Where a bankrupt's exemption, allowed by the state for the benefit of the family, would be defeated unless its allowance is made in cash out of the proceeds of a sale, it will, if practicable, be ordered paid out of such proceeds. *In re Luby*, (S. D. Ohio 1907) 155 Fed. 659, 18 Am. Bankr. Rep. 801 (sale of stock of liquors).

Thus it has been held that where all the land of a bankrupt is so encumbered by mortgages, under which the mortgagees have the right to sell the homestead, the court may sell the land and make the allotment of the homestead out of the proceeds. *In re Paramore*, (E. D. N. C. 1907) 156 Fed. 208, 19 Am. Bankr. Rep. 130.

**Creditors with notice**, who make no objection to a sale of all of the property for the purpose of permitting the bankrupt to take his exemption from the proceeds, cannot afterward object to its allowance therefrom. *Dunlap Hardware Co. v. Huddleston*, (5th Cir. 1909) 167 Fed. 433, 93 C. C. A. 69.

**Rights of creditors as to exemptions allowed out of proceeds of sale.**—Where a bankrupt elects to take his exemption out of the proceeds of a sale of real estate, the amount thereof while in the hands of the trustee is subject to seizure under a judgment containing a waiver of exemption. *In re MacKissic*, (E. D. Pa. 1909) 171 Fed. 259, 22 Am. Bankr. Rep. 817.

Money allowed a bankrupt "in lieu of his exemption," may be attached in the hands of the trustee in bankruptcy on a judgment rendered against a bankrupt, on a note wherein the bankrupt waived the benefits of the exemption law. *Zumpfe v. Schultz*, (1907) 20 Am. Bankr. Rep. 916, 35 Pa. Super. Ct. 106.

Where the exemption is claimed from the proceeds of a sale, the court may consider and determine any claim made by others to the fund while it remains in the hands of the trustee. *In re Renda*, (M. D. Pa. 1906) 149 Fed. 614, 17 Am. Bankr. Rep. 521. And see annotation under section 2 (11).

**Solvency of bankrupt when homestead acquired.**—It is the duty of a bankrupt claiming a homestead as exempt to show by clear and conclusive proof that when he secured the same by taking money from his business within four months preceding the filing of his petition in bankruptcy, he was solvent and able to pay all claims against him. *McGahan v. Anderson*, (C. C. A. 1902) 113 Fed. 115, reversing *In re Anderson*, (1900) 103 Fed. 854.

**Preferential transfer.**—The right of a bankrupt to claim his exemption from

property which he has preferentially transferred in violation of the provisions of section 60b, where such property has been subsequently recovered by the trustee, presents a conflict of opinion; in the following cases it has been held that he is not entitled to his exemption in such cases: *In re Tollett*, (E. D. Tenn. 1900) 105 Fed. 425, 5 Am. Bankr. Rep. 306; *In re White*, (W. D. Mo. 1901) 109 Fed. 635, 6 Am. Bankr. Rep. 451; *In re Long*, (E. D. Pa. 1902) 116 Fed. 113, 8 Am. Bankr. Rep. 591; *In re Evans*, (E. D. N. C. 1902) 116 Fed. 909; *In re Coddington*, (M. D. Pa. 1904) 126 Fed. 891, 11 Am. Bankr. Rep. 122; *In re Wishnefsky*, (D. C. N. J. 1910) 181 Fed. 896; *Matter of Neal*, (N. D. Ohio 1905) 14 Am. Bankr. Rep. 550.

So in *In re Boorstin*, (1902) 114 Fed. 696, the right of a bankrupt to have an exemption allowed by the laws of Georgia out of his stock of merchandise which passed into the hands of his trustee in bankruptcy was considered, and in view of probable fraud and concealment the exemption was refused.

An undoubted swindler after making away with a great part of his stock of goods and getting it out of the jurisdiction cannot come into court and ask that he have an exemption from the remainder of the stock. "The statute of exemptions is made for honest debtors," said the court. *In re Taylor*, (1901) 114 Fed. 607.

On the other hand, it has also been held that where property preferentially transferred has been recovered back by the trustee, it then forms a part of the estate in bankruptcy from which the bankrupt may claim his exemption. *In re Falconer*, (8th Cir. 1901) 110 Fed. 111, 49 C. C. A. 50, 6 Am. Bankr. Rep. 557; *Bashinski v. Talbott*, (5th Cir. 1902) 119 Fed. 337, 56 C. C. A. 241, 9 Am. Bankr. Rep. 513; *In re Soper*, (D. C. Neb. 1909) 173 Fed. 116, 22 Am. Bankr. Rep. 868.

The fact that the bankrupt has not accounted for all his assets, or has fraudulently conveyed away property, does not defeat his right to exemptions; the trustee being obliged, under section 47a (11), to set them apart and report thereon as soon as practicable. *In re Park*, (1900) 102 Fed. 602; *In re Grimes*, (1899) 96 Fed. 529; *In re Oderkirk*, (1900) 103 Fed. 779.

In *In re Tollett*, (C. C. A. 1901) 106 Fed. 866, it was held that the conveyance of property without fraud in fact, even though there was constructive legal fraud, does not bar the right of the bankrupt to claim a homestead in the property when it is recovered by the trustee.

Where a bankrupt's transfer of property to a creditor operated as a preference, and the creditor sold the property and surrendered the proceeds to the

trustee, it was held that the bankrupt was entitled to exemption in the money to the amount which the state law would have allowed him in the property conveyed. *In re Falconer*, (C. C. A. 1901) 110 Fed. 111, followed in *In re Talbott*, (1902) 116 Fed. 417, where it was held that the fact that an insolvent debtor made a preference and thus became bankrupt did not deprive him of the benefit of his homestead exemption under the bankrupt law, although such homestead had been previously assigned for the benefit of creditors and recovered by the trustee in bankruptcy.

In *In re Thompson*, (1902) 115 Fed. 924, under a Georgia statute, the bankrupt was allowed his homestead exemption although he had been formerly guilty of fraud in attempting to make a conveyance of the homestead to his wife.

The fact that a bankrupt made certain premises his homestead when he knew he was insolvent and in contemplation of bankruptcy does not deprive him and his family of the benefit of the exemption laws. *In re Stone*, (1902) 116 Fed. 35.

A valid lien upon property of a bankrupt which is exempt under the state law is not affected by bankruptcy proceedings, and will not be set aside as an illegal preference under the federal Bankruptcy Law. *Morris v. Covey*, (1912) 104 Ark. 226, 148 S. W. 257.

Under the Bankruptcy Act of 1867, if the assignee recovered property which had been conveyed in fraud of the provisions of the Act, the bankrupt could successfully assert any homestead exemption right which he originally possessed in the property recovered by the assignee. *Cox v. Wilder*, (1872) 2 Dill. 45, 6 Fed. Cas. No. 3,308; *In re Detert*, 11 Nat. Bankr. Reg. 293, (1875) 7 Fed. Cas. No. 3,829; *McFarland v. Goodman*, (1874) 6 Biss. 111, (1874) 16 Fed. Cas. No. 8,789; *Penny v. Taylor*, (1874) 10 Nat. Bankr. Reg. 200, 19 Fed. Cas. No. 10,957; *In re Poleman*, (1874) 5 Biss. 526, 19 Fed. Cas. No. 11,247.

**Fraud.**—In several jurisdictions it has been held that a bankrupt who has been guilty of fraud is not entitled to the exemption provided for by the laws of the state; and in such cases the bankrupt will also be denied the exemption in a court of bankruptcy. *In re Waxelbaum*, (N. D. Ga. 1900) 101 Fed. 228, 4 Am. Bankr. Rep. 120; *In re White*, (W. D. Mo. 1901) 109 Fed. 635, 6 Am. Bankr. Rep. 451; *In re Williamson*, (N. D. Ga. 1901) 114 Fed. 190, 8 Am. Bankr. Rep. 43; *In re Taylor*, (D. C. Colo. 1901) 114 Fed. 607, 7 Am. Bankr. Rep. 410; *In re Boorstin*, (N. D. Ga. 1902) 114 Fed. 696, 8 Am. Bankr. Rep. 89; *In re Long*, (E. D. Pa. 1902) 116 Fed. 113, 8 Am. Bankr. Rep. 591; *In re Yost*, (M. D. Pa. 1902) 117 Fed. 792, 9 Am. Bankr. Rep. 153; *In re Duffy*, (M. D. Pa. 1902) 118 Fed. 926,

9 Am. Bankr. Rep. 358; *In re Woolcott*, (E. D. N. C. 1905) 140 Fed. 460, 15 Am. Bankr. Rep. 386; *In re Alex*, (E. D. Pa. 1905) 141 Fed. 483, 15 Am. Bankr. Rep. 450; *In re Leverton*, (M. D. Pa. 1907) 155 Fed. 925, 19 Am. Bankr. Rep. 434; *In re Dobbs*, (N. D. Ga. 1909) 172 Fed. 682, 22 Am. Bankr. Rep. 801; *In re Wishnfsky*, (D. C. N. J. 1910) 181 Fed. 896; *In re Sussman*, (M. D. Pa. 1910) 183 Fed. 331; *In re Peacock*, (S. D. Ga. 1913) 203 Fed. 191.

In the case of *In re Hammonds*, (E. D. Ky. 1912) 198 Fed. 574, there arose a question whether provisions bought by a bankrupt with no intention to pay for them were exempt, in view of the manner in which they were obtained. The court said: "The ground upon which the creditors claim that the provisions allowed should not have been set apart as exempt is that they had been purchased with no intention to pay for them. The referee found against this claim in matter of fact—i. e., he held that they had not been so purchased—and on this ground denied the claim. If the necessities of this case required that I should pass on this question of fact, of course, I would have to have before me the evidence heard by the referee, but the necessities of the case do not so require. Even if it be a fact that the provisions set apart to the bankrupt had been purchased by him with the intention of not paying for them, the creditors, as such, have no right to complain of the action of the referee in setting them apart. Notwithstanding such intention, the title thereto passed from the sellers to the bankrupt. Because thereof the sellers were entitled to reclaim their property. But this right did not prevent the passage of the title. The effect thereof was to make the title which the bankrupt acquired what is termed in *Donaldson v. Farwell*, 93 U. S. 631, 23 U. S. (L. ed.) 993, a 'defeasible title.' In order to reinvest the sellers with title, a rescission of the contract of sale was essential. The fact that immediately upon the sale the sellers had the right to recover their goods in replevin is not against this. The bringing of such a suit is a 'judicial rescission,' which is a substitute for 'a rescission in pais' effected by a mere demand. 1 Bigelow on Fraud, p. 77. This right of rescission and recovery of the goods were personal to the sellers. It could not have been asserted as against the trustee had not the provisions been set apart as exempt, and can be asserted as against the bankrupt, notwithstanding they have been set apart as exempt. It follows from this that the petitioning creditors, as such, are not interested in the question as to whether the provisions were purchased with an intention not to pay for them."

Courts of bankruptcy proceed on equitable principles and will not sustain a

positive fraud committed by the bankrupt, in an endeavor to extend his exemptions, any more than it would be sustained by a court of equity. *In re Gerber*, (C. C. A. 9th Cir. 1911) 186 Fed. 693.

*But the foregoing rule as to the effect of fraud is not general*; thus it has been held that where a conveyance in fraud of creditors has been set aside, the property is administered as that of the debtor; and, as a matter of general law, he is not precluded by the void conveyance from asserting his right to a homestead exemption therein as against his creditors. *In re Thompson*, (E. D. Wash. 1905) 140 Fed. 257, 15 Am. Bankr. Rep. 283.

So, also, in this connection, it has been said that a debtor may claim his exemptions out of fraudulently conveyed property, recovered back by a trustee, for the reason that he never in fact parted with the title. *Matter of Neal*, (N. D. Ohio 1905) 14 Am. Bankr. Rep. 550.

And in *In re Park*, (W. D. Ark. 1900) 102 Fed. 602, 4 Am. Bankr. Rep. 432, it was held that a bankrupt cannot be denied his exemptions because he has not accounted for all his assets or has fraudulently transferred his property.

*Fraudulent intention necessary.*—Even in those states wherein the bankrupt's fraud constitutes a bar to the allowance of his exemptions, it is necessary, in order to warrant a refusal of the exemption, that there be a fraudulent intention on the part of the bankrupt; and where fraud has been made a statutory bar, the facts must be brought within the terms of the statute. *In re Thompson*, (S. D. Ga. 1902) 115 Fed. 924, 8 Am. Bankr. Rep. 283; *Fields v. Karter*, (5th Cir. 1902) 115 Fed. 950, 53 C. C. A. 432, 8 Am. Bankr. Rep. 351; *In re West*, (N. D. Ga. 1902) 116 Fed. 767, 8 Am. Bankr. Rep. 564; *In re Castleberry*, (N. D. Ga. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159; *In re Diamond*, (N. D. Ala. 1908) 158 Fed. 370, 19 Am. Bankr. Rep. 811; *In re Cotton*, (S. D. Ga. 1910) 183 Fed. 190; *In re Rothschild*, (S. D. Ga. 1901) 6 Am. Bankr. Rep. 43; *Matter of Cotton*, (S. D. Ga. 1909) 23 Am. Bankr. Rep. 586.

*Fraudulent claim to homestead exemption.*—"If not strictly an equity court, a bankruptcy court proceeds on equitable principles, and is not bound to lend itself to the establishment of an undetermined claim for exemption, even though asserted in the sacred name of homestead, in favor of a fraudulent claimant who stands in confessed defiance of the court, and of the law under which the claim is asserted." *In re Mayer*, (C. C. A. 1901) 108 Fed. 604.

*Failure to pay for property claimed as exempt.*—In some jurisdictions, under statutes prevailing therein, a debtor is not entitled to the exemption out of prop-

erty for which he has not paid. *Cannon v. Dexter Broom, etc., Co.*, (4th Cir. 1903) 120 Fed. 657, 57 C. C. A. 327, 9 Am. Bankr. Rep. 724.

So, where the bankrupt conducted a tailor-shop, but the material on hand at the time of the bankruptcy was not paid for, and the state statute provided that a property shall be exempt from execution issued on a judgment for the price thereof, it was held that the bankrupt was not entitled to any exemption from the stock of material on hand. *In re Phillips*, (W. D. Wash. 1913) 209 Fed. 490.

In this connection it is to be observed that the bankrupt's right to such exemptions as are permitted by state laws is referable to the condition of things as they existed "at the time of the filing of the petition." *Mullinix v. Simon*, (C. C. A. 8th Cir. 1912) 196 Fed. 775.

It has also been held that the exemption will not be allowed as against an execution issued for the purchase money of property claimed to be exempt. *In re Boyd*, (N. D. Ia. 1903) 120 Fed. 999, 10 Am. Bankr. Rep. 337.

See also *In re Butler*, (N. D. Ga. 1902) 120 Fed. 100, 9 Am. Bankr. Rep. 539. In this case, however, it was held that the exemption could not be denied where the creditor's claim had not been reduced to judgment, and no steps had been taken to fix a lien on the property for the purchase money.

But the fact that the purchase price of the goods claimed as exempt has not been paid gives the seller no right to enforce his vendor's lien in a court of bankruptcy. *In re Wells*, (W. D. Ark. 1900) 105 Fed. 762, 5 Am. Bankr. Rep. 308.

*Annulment of liens.*—Whatever benefit results from the annulment of attachment liens, under the provisions of section 67c and f, extends to exempt property as well as to that which is not exempt. It is the policy of the law to allow the bankrupt, as well as creditors, the benefit of the changed status. *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285.

Thus it has been held that where a garnishee has knowledge that the property or credits in his hands are exempt, it is his duty to interpose such defense; otherwise a judgment rendered against him, or his payment of the money into court, will not discharge his liability to the defendant, where the defendant had no actual knowledge of the proceeding. *In re Beals*, (D. C. Ind. 1902) 116 Fed. 630, 8 Am. Bankr. Rep. 639. And see also the annotation under section 67e and f.

*Abandonment — By assignment.*—It has been held that where, under the law of the state, a bankrupt's exemption is personal to him, it is nonassignable, and that in such case an assignment thereof operates as an abandonment. *In re Sloan*,

(E. D. Pa. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435.

On the other hand, in *In re National Grocer Co.*, (Mich. 1910) 181 Fed. 33, 104 C. C. A. 47, 30 L. R. A. (N. S.) 982, it was held that there is nothing in the Bankruptcy Act or the General Orders expressly or impliedly limiting the right of exemptions to the specific claim thereto presented by the bankrupt himself, and that the bankrupt's assignment conferring in express terms authority to make the selection in his name will be recognized by the court in favor of the assignee.

*Effect of abandonment.*—Where a claim for exemption has been abandoned, the property goes to the bankrupt's creditors generally, even though some creditors claim under an execution wherein the right of exemption has been waived. *In re Baughman*, (M. D. Pa. 1910) 183 Fed. 668. See also *In re Pfeiffer*, (W. D. Pa. 1907) 155 Fed. 892, 19 Am. Bankr. Rep. 230.

*Waiver.*—Where the bankrupt has waived his right of exemption, he will not be entitled, as against such debt, to have property set apart to him under section 6 of the Bankruptcy Act. *In re Garden*, (N. D. Ala. 1899) 93 Fed. 423, 1 Am. Bankr. Rep. 582.

A trustee in bankruptcy is not entitled to the bankrupt's exemption, as against a creditor who has attached the same by an attachment execution, issued and served within four months prior to the bankruptcy, on a judgment waiving exemption. *Sharp v. Woolslare*, (1904) 12 Am. Bankr. Rep. 396, 25 Pa. Super. Ct. 251.

The waiver of a homestead exemption in a mortgage given by a bankrupt is in favor of the mortgage creditor alone, and does not inure to the benefit of others. If the mortgage is valid, the exemption, as against the mortgage creditor, is restricted to the equity of redemption; and the rights of other creditors are subordinate to both the mortgage lien and the payment of the bankrupt's exemption allowance, given him by a statute, in case of a sale. *In re Nye*, (C. C. A. 8th Cir. 1904) 133 Fed. 33, 13 Am. Bankr. Rep. 142.

But a waiver of exemptions in a promissory note, proved against the estate of the maker in bankruptcy, but which had not been reduced to judgment prior to the bankruptcy, is ineffective, and does not defeat the right of the bankrupt to claim his exemptions or give the court of bankruptcy jurisdiction to administer the exempt property. *In re Moore*, (M. D. Ala. 1901) 112 Fed. 289, 7 Am. Bankr. Rep. 285.

A note wherein the debtor waives his exemptions creates no lien under section 67d, notwithstanding (Code Va. 1887, § 3647, providing for the waiver by a debtor of the benefit of his homestead

exemptions, and that, where he declares such waiver in an obligation, the property "which he may be entitled to claim and hold exempt . . . shall be liable to be subjected for said obligation, under legal process." *In re Moran*, (1900) 105 Fed. 901, affirmed in *Moran v. King*, (C. C. A. 1901) 111 Fed. 730, and followed in *In re Garner*, (1902) 115 Fed. 200.

But see *In re Batten*, (E. D. Va. 1909) 170 Fed. 688, holding that the fact that a bankrupt has waived his right of homestead in favor of certain creditors, as authorized by the laws of the state, does not warrant the court of bankruptcy in refusing to allow and set aside the homestead.

The court of bankruptcy has jurisdiction to enforce against property which, under the state laws of Virginia, has been set apart to the bankrupt as a homestead, exemption claims of creditors on the debtor's waiver notes not reduced to judgment, such written waiver being, under the state laws, an incumbrance, although not a specific lien, on the debtor's property. *In re Sisler*, (1899) 96 Fed. 402.

Where a landlord prior to his tenant's bankruptcy has distrained for rent overdue on a lease waiving the benefit of the exemption law of the state, the bankrupt is not entitled, as against the landlord, to claim an exemption of articles distrained, where the rest of the distrained articles are not sufficient in value to pay the rent. *In re Hoover*, (1902) 113 Fed. 136.

There is no power in the Bankruptcy Court to enforce claims on notes containing a waiver of homestead exemptions under the laws of Georgia against a homestead set apart in bankruptcy, the fact that, by efflux of time, the bankrupt is precluded from obtaining his discharge having no effect on the question; although there seems to be no reason why the creditors should not be allowed to withdraw their claims and proceed therefor in the state courts. *In re Swords*, (1901) 112 Fed. 661.

When the trustee has set apart the exemptions, with the items and values, and this has been approved by the court, the property embraced in the exemption ceases to be part of the estate assets, and the court will not retain it to enforce a creditor's right under a waiver note, but will allow the parties to settle their rights in other courts of competent jurisdiction. *In re Camp*, (1899) 91 Fed. 745. See also *In re Black*, (1900) 104 Fed. 289; *In re Hill*, (1899) 96 Fed. 185.

A creditor who has proved against the estate a judgment on a note made by the bankrupt and containing a waiver of exemptions, may not, after the debtor's discharge, levy upon exempt property. *Miller v. Black*, (1901) 10 Pa. Dist. 255.

A District Court has no jurisdiction to entertain a plenary proceeding in equity

on the part of the creditors who seek to reach exempt property in claims upon waiver notes. *Woodruff v. Cheeves*, (C. C. A. 1901) 105 Fed. 601, *reversing In re Woodruff*, (1899) 96 Fed. 317.

**Refusal to give trustee indemnity does not amount to waiver of exemption.**—Where a voluntary bankrupt demanded the exemption allowed him by the law of the state, and the property was appraised, and the claim allowed by the referee, but the bankrupt refused to accede to the trustee's demand for a bond of indemnity, as the condition upon which he would deliver the property to him, and agreed that the property might be sold by the trustee, stating that he would claim the amount of the exemptions from the proceeds, it was held that there was no waiver or forfeiture by the bankrupt of his right to claim the exemption. *In re Brown*, (W. D. Pa. 1899) 100 Fed. 441, 4 Am. Bankr. Rep. 46.

**Withdrawal of waiver.**—A waiver of exemption, inserted by accident or mistake, may be withdrawn by amendment. *In re White*, (E. D. Pa. 1904) 128 Fed. 513, 11 Am. Bankr. Rep. 556.

But a bankrupt who has filed a formal waiver of his exemption will not be permitted to withdraw it for the benefit of a single creditor to whom he has made an assignment of his claim. *In re Pfeiffer*, (W. D. Pa. 1907) 155 Fed. 892, 19 Am. Bankr. Rep. 230. See also *In re Baughman*, (M. D. Pa. 1910) 183 Fed. 668.

#### IV. RECOGNITION OF STATE AND FEDERAL EXEMPTION LAWS.

"Exemptions which are prescribed by the state laws," etc., is the language of section 6a. In *Page v. Edmunds*, (1903) 187 U. S. 596, 23 S. Ct. 200, 47 U. S. (L. ed.) 318, *affirming* (1901) 107 Fed. 89, 46 C. C. A. 160, 59 L. R. A. 94, holding that a seat in a stock exchange was not exempt under Pennsylvania statute law, Mr. Justice McKenna said: "To sustain the claim of exemption under the state law, and therefore under the bankrupt act, appellant relies upon the decisions of the Supreme Court of the State of Pennsylvania. If those decisions are interpretations of the state statute, we must yield to their authority. If they are declarations of general law—mere definitions of property—we may dispute their conclusions if their reasoning does not persuade."

For analogous rules adopted in the application of R. S. sec. 721, see the note to that section in the title JUDICIARY in this work.

As a rule, the federal courts are governed by state construction of local exemption statutes; but, in the absence of such construction, they will adopt their own interpretation. *Jennings v. Stannus*, (C. C. A. 9th Cir. 1911) 191 Fed. 347.

Where there has been no construction of the state statute by the state courts a claim to exemptions will be determined according to established rules of construction. *Richardson v. Woodward*, (C. C. A. 1900) 104 Fed. 875; *In re Beauchamp*, (1900) 101 Fed. 106.

The exemption law of the state where the bankrupt resides and where the bankruptcy proceedings are instituted controls, not the law of a state where the property happens to be located. *In re Stevens*, (1870) 2 Biss. 373, 23 Fed. Cas. No. 13,392.

"The rights of a bankrupt to property as exempt are those given to him by the state statutes, and if such exempt property is not subject to levy and sale under those statutes then it cannot be made to respond under the Act of Congress." *Smalley v. Langenour*, (1905) 196 U. S. 93, 25 S. Ct. 216, 49 U. S. (L. ed.) 400.

"An essential feature of the exemption of property is that it shall be permanently exempt in the debtor's hands from seizure by his creditors under judicial process. . . . The mere postponement for a limited period [by statute] of the right to levy upon property, with an express recognition of the right to levy thereon after such period of postponement has passed, cannot be regarded . . . as equivalent to the statutory setting apart of the property as exempt." *In re T. C. Burnett & Co.*, (E. D. Tenn. 1912) 201 Fed. 162.

Section 6 was not amended or affected by the amendment of 1910 to section 47a, but still remains one of the fundamental provisions of the Bankruptcy Act, the intention of Congress being plainly expressed that such Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by state laws. *Brandt v. Mayhew*, (C. C. A. 9th Cir. 1914) 218 Fed. 422.

Section 6 does not enlarge the exemptions available to the bankrupt under the state laws. *In re Manning*, (E. D. Pa. 1902) 112 Fed. 948, 7 Am. Bankr. Rep. 571; *Richardson v. Woodward*, (1900) 104 Fed. 873, 44 C. C. A. 235, where the court said: "The intention was to adopt the state laws governing exemptions. Hence the courts of bankruptcy will look to and be governed by the constitutions, statutes, and decisions of the several states and territories in deciding who is entitled to exemptions, and the amount and species of property to be exempt. A bankrupt is entitled to the same exemptions as if proceeded against as a debtor under the state law, and none other." *In re Durham*, (1900) 104 Fed. 233; *In re Manning*, (1902) 112 Fed. 948; *In re Woodward*, (1899) 95 Fed. 260; *In re Boyd*, (N. D. Ia. 1903) 120 Fed. 999.

The word "exemptions" in section 6 and in section 2 (11) of the Bankruptcy

Act is not limited to real estate or chattels exempted from levy and sale on execution, but extends to other property, such as income of a beneficiary under a testamentary trust, where the state law deprives a creditor of the right to appropriate it by suit in equity or otherwise. *In re Baudouine*, (1899) 96 Fed. 536, reversed in (C. C. A. 1900) 101 Fed. 574, but not on this point.

**Exemption laws are construed liberally in favor of exemptions.** *In re Friederick*, (1899) 95 Fed. 284; *In re Smith*, (1899) 96 Fed. 833; *Sellers v. Bell*, (C. C. A. 1899) 94 Fed. 811; *In re Tilden*, (1899) 91 Fed. 500.

**Additional exemptions under void statute.**—A bankrupt to whom have been awarded all the exemptions allowed by a state exemption law cannot claim any additional exemptions under an amending statute, which, although allowing such additional exemptions, is void through want of conformity to the constitutional requirements of statutes in amendment. *In re Buelow*, (1899) 98 Fed. 86.

**Exemption provided for by insolvent law not allowable.**—A bankrupt is not entitled to an allowance for the support of his family provided by the state insolvency law, pending a proceeding under such law; since such allowance is not an exemption, but relates to that part of the insolvency law which is suspended in its operation by the Bankruptcy Act. *In re Anderson*, (D. C. Mass. 1901) 110 Fed. 141.

**Federal exemption laws recognized.**—The Bankruptcy Act recognizes all exemptions, whether state or federal, as they existed at the time of the passage of the Act. *In re Russie*, (D. C. Ore. 1899) 96 Fed. 609, 3 Am. Bankr. Rep. 6 (exemption of Indian lands); *In re Cohn*, (D. C. N. D. 1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761 (homestead exemption); *In re Pears*, (C. C. A. 3d Cir. 1913) 205 Fed. 255.

**Pensions.**—Money received from the United States as a pension, and remaining unchanged in the pensioner's hands at the time of filing his petition in bankruptcy, is exempt from liability for his debts under R. S. sec. 4747, title PENSIONS herein. *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53.

A bankrupt pensioner is not entitled under the laws and decisions of *New York* to claim and have set off to him as exempt certain real property purchased in the first instance partly by the pension money, out of which property he has withdrawn by way of mortgage more money than the pension money originally put in, the money so withdrawn having been used in other ventures. *In re Ellithorpe*, (1901) 111 Fed. 163.

A pension is exempt under R. S. sec. 4747, only until it is paid to the pensioner; property purchased therewith is

not exempt. *In re Stout*, (1900) 109 Fed. 794.

Pension money in the hands of a bankrupt at the time of the adjudication, which is neither invested nor mingled with other funds, is not exempt. *In re Jones*, (D. C. Me. 1909) 166 Fed. 337, 21 Am. Bankr. Rep. 536.

**Land acquired under the United States homestead law** is exempt in respect of liabilities incurred by the bankrupt prior to the issuance of a patent to him for the land. R. S. sec. 2296, title PUBLIC LANDS herein. *In re Daubner*, (1899) 96 Fed. 805.

**Improvements on Indian lands by Indian bankrupts.**—The effect of Act (cong. May 2, 1890, 26 Stat. L. 81, 1 Supp. R. S. 720, ch. 182, sec. 31, was to exempt in favor of Indian bankrupts improvements made by them on Indian lands while the title to the lands is vested in any Indian native. *In re Grayson*, (1901) 3 Indian Ter. 497, 61 S. W. 984.

**Adoption of territorial exemption laws** to the same extent as state laws was probably within the contemplation of section 6a. *In re Grayson*, (1901) 3 Indian Ter. 497, 61 S. W. 984.

**State law adopted.**—As already stated in this note, section 6 of the Bankruptcy Law is clearly an adoption of the exemption laws of the several states; and, therefore, the bankrupt can only be allowed such exemptions as are provided for by the state exemption laws; and in determining the rights of bankrupts to their exemptions, the courts of bankruptcy will follow the construction placed upon the local statutes by the highest courts of the state. Some of the cases wherein this proposition has been announced, or acted upon, are arranged under the following state classification.

**Alabama.**—*Sellers v. Bell*, (1899) 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 522; *In re Moore*, (1901) 112 Fed. 289, 7 Am. Bankr. Rep. 285, overruling *In re Garden*, (1899) 93 Fed. 423, 1 Am. Bankr. Rep. 582; *In re Tune*, (1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *In re Diamond*, (1908) 158 Fed. 370, 19 Am. Bankr. Rep. 811; *In re McCrary*, (1909) 169 Fed. 485, 22 Am. Bankr. Rep. 161; *In re Denson*, (N. D. Ala. 1912) 195 Fed. 857.

**Arkansas.**—*In re Park*, (1900) 102 Fed. 602, 4 Am. Bankr. Rep. 432; *In re Durham*, (1900) 104 Fed. 231, 4 Am. Bankr. Rep. 760; *In re Wells*, (1900) 105 Fed. 762, 5 Am. Bankr. Rep. 308; *In re Meriwether*, (1901) 107 Fed. 102, 5 Am. Bankr. Rep. 435; *In re Falconer*, (1901) 110 Fed. 111, 49 C. C. A. 50, 6 Am. Bankr. Rep. 557; *In re Morrison*, (1901) 110 Fed. 734, 6 Am. Bankr. Rep. 488; *In re Stone*, (1902) 116 Fed. 35, 8 Am. Bankr. Rep. 416.

A vendor may not enforce in the Bankruptcy Court his lien for the price of



goods sold to the bankrupt where the latter claims exemption on such goods under the constitution and statutes of Arkansas. *In re Wells*, (1900) 105 Fed. 762.

*California*.—*In re Petersen*, (1899) 95 Fed. 417, 2 Am. Bankr. Rep. 630; *In re Diller*, (1900) 100 Fed. 931, 4 Am. Bankr. Rep. 45; *In re Hindman*, (1900) 104 Fed. 331, 43 C. C. A. 558, 5 Am. Bankr. Rep. 20; *In re Scheld*, (1900) 104 Fed. 870, 44 C. C. A. 233, 5 Am. Bankr. Rep. 102; *In re Fly*, (1901) 110 Fed. 141, 6 Am. Bankr. Rep. 550.

A bankrupt who was engaged in farming until a short time before the adjudication is entitled to the exemptions given to a farmer by the laws of the state, although he is temporarily engaged in another pursuit, but without intention to abandon permanently his former occupation. *In re Fly*, (1901) 110 Fed. 141, 6 Am. Bankr. Rep. 550.

*Delaware*.—*In re Evans*, (1907) 158 Fed. 153, 19 Am. Bankr. Rep. 752.

*Florida*.—*In re Carpenter*, (1901) 109 Fed. 558, 48 C. C. A. 545, 6 Am. Bankr. Rep. 465.

*Georgia*.—*In re Camp*, (1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165; *In re Hill*, (1899) 96 Fed. 185, 2 Am. Bankr. Rep. 798; *In re Woodruff*, (1899) 96 Fed. 317, 2 Am. Bankr. Rep. 678, *reversed* (1901) 105 Fed. 601, 44 C. C. A. 631, 5 Am. Bankr. Rep. 296; *In re Wixelbaum*, (1900) 101 Fed. 228, 4 Am. Bankr. Rep. 120; *In re Lynch*, (1900) 101 Fed. 579, 4 Am. Bankr. Rep. 262; *In re Swords*, (1901) 112 Fed. 661, 7 Am. Bankr. Rep. 436; *In re Williamson*, (1901) 114 Fed. 190, 8 Am. Bankr. Rep. 43; *In re Stephens*, (1902) 114 Fed. 192, 8 Am. Bankr. Rep. 53; *In re Boorstin*, (1902) 114 Fed. 696, 8 Am. Bankr. Rep. 89; *In re Thompson*, (1902) 115 Fed. 924, 8 Am. Bankr. Rep. 283; *In re Talbott*, (1902) 116 Fed. 417, 8 Am. Bankr. Rep. 427; *In re West*, (1902) 116 Fed. 767, 8 Am. Bankr. Rep. 564; *In re Castleberry*, (1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159; *In re Arnold*, (1909) 169 Fed. 1000, 22 Am. Bankr. Rep. 392; *In re Dobbs*, (1909) 172 Fed. 682, 22 Am. Bankr. Rep. 801; *In re Glisson*, (1910) 182 Fed. 287; *In re Maynard*, (1910) 183 Fed. 823; *In re Cochran*, (1911) 185 Fed. 913.

*Illinois*.—*In re Kane*, (1904) 127 Fed. 552, 62 C. C. A. 616, 11 Am. Bankr. Rep. 533.

*Indiana*.—*In re Beals*, (1902) 116 Fed. 530, 8 Am. Bankr. Rep. 639.

*Iowa*.—*In re Lange*, (1899) 91 Fed. 361, 1 Am. Bankr. Rep. 189; *In re Tilden*, (1899) 91 Fed. 500, 1 Am. Bankr. Rep. 300; *In re Steele*, (1899) 98 Fed. 78, 3 Am. Bankr. Rep. 549, *reversed* (1900) 104 Fed. 968, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165; *In re Pope*, (1900) 98 Fed. 722, 3 Am. Bankr. Rep. 525; *In re*

*Hatch*, (1900) 102 Fed. 280, 4 Am. Bankr. Rep. 349; *In re Little*, (1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *In re Boyd*, (1903) 120 Fed. 999, 10 Am. Bankr. Rep. 337; *In re Sullivan*, (1906) 142 Fed. 620, 16 Am. Bankr. Rep. 87; *In re Maxson*, (1909) 170 Fed. 356, 22 Am. Bankr. Rep. 424; *People's Nat. Bank of Independence v. Maxson*, (1915) 168 Ia. 318, 150 N. W. 601.

*Kentucky*.—*In re Carmichael*, (1901) 108 Fed. 789, 5 Am. Bankr. Rep. 551; *In re Downing*, (1905) 139 Fed. 590, 15 Am. Bankr. Rep. 423, (1905) 148 Fed. 120; *In re Sale*, (1906) 143 Fed. 310, 76 C. C. A. 448, 16 Am. Bankr. Rep. 235; *In re Leech*, (1909) 171 Fed. 622, 96 C. C. A. 424, 22 Am. Bankr. Rep. 599; *In re Baker*, (1910) 182 Fed. 392, 104 C. C. A. 602.

*In re Hammonds*, (E. D. Ky. 1912) 198 Fed. 574, the court, construing the section, said: "The meaning of this provision cannot be other than that, if under the state law the bankrupt would be entitled to certain exemptions as against his creditors, he is entitled to the same exemptions notwithstanding the Bankruptcy Law and the institution of bankruptcy proceedings thereunder. The question then comes to this: What is the law of Kentucky on this subject? Does it affect the debtor's right to hold a certain article of the kind prescribed as exempt that he purchased it with nonexempt property, and in order that he might have this property to that extent in an exempt condition? The statute is absolute. It provides that a debtor of the kind covered by it shall be entitled as against his creditors to the exemptions prescribed in it without any qualification whatever. Under it therefore, one who has purchased property of the kind that is nonexempt and not paid for it, may convert it into property of the kind that is exempt with the deliberate purpose of having his property in an exempt condition, and hold the property so purchased exempt as against the creditor whose creating has enabled him to acquire it. This looks hard on the creditor. But it is presumed that one so giving credit will have it in view when he gives it. What is here said has reference only to exemptions of personal property. It is not true of the homestead exemption. In the case of Northington v. Boyd, 12 Ky. Law Rep. 227, Judge Bowden of the Superior Court said arguendo: 'If a prior debtor, anticipating a levy and having three work beasts, but only one cow, sells one of the work beasts and buys another cow, we do not suppose the latter could be taken, though it were admitted that he did so in order to hold in this way the value of the work beast.' It is clear, therefore, that the bankrupt was entitled to hold the two mules and the cow, notwithstanding the circumstances under which they were acquired.

as exempt from administration herein. The referee thought that the matter was controlled by section 67, subsection 'e,' of the Bankrupt Act, providing that conveyances and transfers of property made by a debtor with intent to hinder, delay, or defraud his creditor shall be void as to them. But that section has no application. It has in view dispositions of property made by the debtor to others with such intent, and provides that such property may be followed up and subjected to his debts. A transaction which the law permits could not have been intended to be covered by the section."

*Maine.*—*Pulsifer v. Hussey*, (1903) 9 Am. Bankr. Rep. 657, 97 Me. 434, 54 Atl. 1076; *In re Mullen*, (1905) 140 Fed. 206, 15 Am. Bankr. Rep. 275.

*Maryland.*—*In re Beauchamp*, (1900) 101 Fed. 106, 4 Am. Bankr. Rep. 151; *Steiner v. Marshall*, (1905) 140 Fed. 710, 72 C. C. A. 103, 15 Am. Bankr. Rep. 486; *Burdette v. Jackson*, (1910) 179 Fed. 229, 102 C. C. A. 481, 24 Am. Bankr. Rep. 127.

*Massachusetts.*—*In re Turnbull*, (1901) 106 Fed. 667, 5 Am. Bankr. Rep. 549; *In re Anderson*, (1901) 110 Fed. 141, 6 Am. Bankr. Rep. 555; *In re Collier*, (1901) 111 Fed. 503, 7 Am. Bankr. Rep. 131; *In re Loveland*, (D. C. Mass. 1912) 192 Fed. 1005; *Eldredge v. Mutual Life Ins. Co. of New York*, (1914) 217 Mass. 444, 105 N. E. 361.

*Michigan.*—*In re National Grocer Co.*, (1910) 181 Fed. 33, 104 C. C. A. 47.

*Minnesota.*—*In re Cale*, (1910) 182 Fed. 439.

*Mississippi.*—*In re Kaplan*, (1910) 186 Fed. 242; *In re Bundy*, (S. D. Miss. 1914) 218 Fed. 711.

*Missouri.*—*In re White*, (1901) 109 Fed. 635, 6 Am. Bankr. Rep. 451; *In re Stout*, (1900) 109 Fed. 794, 6 Am. Bankr. Rep. 505.

*Montana.*—*In re Culwell*, (1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614.

*Nebraska.*—*In re Conley*, (1907) 162 Fed. 806, 19 Am. Bankr. Rep. 200; *In re Soper*, (1909) 173 Fed. 116, 22 Am. Bankr. Rep. 868.

*New Jersey.*—*In re Demarest*, (1901) 110 Fed. 638, 6 Am. Bankr. Rep. 232.

*New York.*—*In re Lewensohn*, (1900) 99 Fed. 73, 3 Am. Bankr. Rep. 594; *In re Osborn*, (1900) 104 Fed. 780, 5 Am. Bankr. Rep. 111; *In re Ellithorpe*, (1901) 111 Fed. 163, 7 Am. Bankr. Rep. 18.

*North Carolina.*—*In re Stevenson*, (1899) 93 Fed. 789, 2 Am. Bankr. Rep. 230; *In re Richard*, (1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506; *In re Grimes*, (1899) 94 Fed. 800, 2 Am. Bankr. Rep. 160; *In re Woodward*, (1899) 95 Fed. 260, 2 Am. Bankr. Rep. 339; *In re Grimes*, (1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730; *In re Duguid*, (1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794; *In re Wilson*, (1900) 101 Fed. 571, 4 Am. Bankr. Rep.

260; *In re Steed*, (1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73; *In re Dinglehoef*, (1901) 109 Fed. 866, 6 Am. Bankr. Rep. 242; *In re Royal*, (1901) 112 Fed. 135, 7 Am. Bankr. Rep. 106; *In re Seabolt*, (1902) 113 Fed. 766, 8 Am. Bankr. Rep. 57; *In re Evans*, (1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730; *In re Woolcott*, (1905) 140 Fed. 460, 15 Am. Bankr. Rep. 386; *In re Humphreys*, (E. D. N. C. 1915) 221 Fed. 997; *In re Harrell*, (E. D. N. C. 1915) 222 Fed. 160.

*North Dakota.*—*In re Cohn*, (1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761.

*Ohio.*—*In re Rhodes*, (1901) 109 Fed. 117, 6 Am. Bankr. Rep. 173; *In re Luby*, (1907) 155 Fed. 659, 18 Am. Bankr. Rep. 801; *In re Groves*, (1901) 6 Am. Bankr. Rep. 728; *In re Strauch*, (N. D. Ohio 1913) 208 Fed. 842.

*Oklahoma.*—*Matter of Golden Rule Mercantile Co.*, (1908) 21 Am. Bankr. Rep. 397.

*Oregon.*—*In re Daubner*, (1899) 96 Fed. 805, 3 Am. Bankr. Rep. 368.

*Pennsylvania.*—*In re Brown*, (1899) 100 Fed. 441, 4 Am. Bankr. Rep. 46; *In re Myers*, (1900) 102 Fed. 869, 4 Am. Bankr. Rep. 536; *In re Black*, (1900) 104 Fed. 289, 4 Am. Bankr. Rep. 776; *In re Bolinger*, (1901) 108 Fed. 374, 6 Am. Bankr. Rep. 171; *In re Haskin*, (1901) 109 Fed. 789, 6 Am. Bankr. Rep. 485; *In re Manning*, (1902) 112 Fed. 948, 7 Am. Bankr. Rep. 571; *In re Hoover*, (1902) 113 Fed. 136, 7 Am. Bankr. Rep. 330; *In re Jackson*, (1902) 116 Fed. 46, 8 Am. Bankr. Rep. 594; *In re Long*, (1902) 116 Fed. 113, 8 Am. Bankr. Rep. 591; *In re Staunton*, (1902) 117 Fed. 507, 9 Am. Bankr. Rep. 79; *In re Wunder*, (1905) 133 Fed. 821, 13 Am. Bankr. Rep. 701; *Lipman v. Stein*, (1905) 134 Fed. 235, 67 C. C. A. 17, 14 Am. Bankr. Rep. 30; *Burke v. Guarantee Title, etc., Co.*, (1905) 134 Fed. 562, 67 C. C. A. 486, 14 Am. Bankr. Rep. 31; *In re Kolber*, (E. D. Pa. 1912) 193 Fed. 281; *In re Liby*, (E. D. Pa. 1914) 218 Fed. 90.

A liquor license, though transferable only with the approval of the Court of Quarter Sessions which granted it, and not subject to seizure on execution, is not only part of the bankrupt's assets, but may be claimed by him as part of his exemption. *In re Olewine*, (1903) 125 Fed. 840, 11 Am. Bankr. Rep. 40.

*Rhode Island.*—*In re Caswell*, (1901) 6 Am. Bankr. Rep. 718.

*South Carolina.*—*In re McCutchen*, (1900) 100 Fed. 779, 4 Am. Bankr. Rep. 81; *McGahan v. Anderson*, (1902) 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641; *Cannon v. Dexter Broom, etc., Co.*, (1903) 120 Fed. 657, 57 C. C. A. 119, 9 Am. Bankr. Rep. 724; *In re McGowan*, (1909) 170 Fed. 493, 22 Am. Bankr. Rep. 469; *In re Bailes*, (1909) 176 Fed. 460, 23 Am. Bankr. Rep. 789.

*South Dakota.*—*In re Novak*, (1907) 150 Fed. 602, 18 Am. Bankr. Rep. 236; *In re Carlon*, (S. D. S. D. 1911) 189 Fed. 815.

*Tennessee.*—*In re Tollett*, (1900) 105 Fed. 425, 5 Am. Bankr. Rep. 305, *affirmed* (1901) 106 Fed. 866, 5 Am. Bankr. Rep. 404.

*Texas.*—*In re Coffman*, (1899) 93 Fed. 422, 1 Am. Bankr. Rep. 530; *In re Smith*, (1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190; *In re Smith*, (1899) 96 Fed. 832, 3 Am. Bankr. Rep. 140; *In re Harrington*, (1900) 99 Fed. 390, 3 Am. Bankr. Rep. 639; *In re Presnall*, (1909) 167 Fed. 406, 21 Am. Bankr. Rep. 905.

*Vermont.*—*In re Dawley*, (1899) 94 Fed. 795, 2 Am. Bankr. Rep. 496; *In re Bean*, (1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53; *In re Oderkirk*, (1900) 103 Fed. 770, 4 Am. Bankr. Rep. 617; *In re White*, (1900) 103 Fed. 774, 4 Am. Bankr. Rep. 613; *In re Libby*, (1900) 103 Fed. 776, 4 Am. Bankr. Rep. 615; *In re Marquette*, (1900) 103 Fed. 777, 4 Am. Bankr. Rep. 623; *In re Hopkins*, (1900) 103 Fed. 781, 4 Am. Bankr. Rep. 619; *In re Mosier*, (1901) 112 Fed. 138, 7 Am. Bankr. Rep. 268; *In re Gordon*, (1902) 115 Fed. 445, 8 Am. Bankr. Rep. 255; *In re Everleth*, (1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236; *In re Grady*, (1905) 138 Fed. 935, 14 Am. Bankr. Rep. 738; *In re Alfred*, (1899) 1 Am. Bankr. Rep. 243; *In re Trombly*, (1906) 16 Am. Bankr. Rep. 598.

Under a statute exempting to a debtor "two horses kept and used for team work," a bankrupt is not entitled to claim as exempt a horse kept and used as a racer, and not otherwise, although he has been casually used on a few occasions for work, and also in carrying members of the bankrupt's family to and from work or school. *In re Libby*, (1900) 103 Fed. 776, 4 Am. Bankr. Rep. 615.

*Virginia.*—*In re Sisler*, (1899) 96 Fed. 402, 2 Am. Bankr. Rep. 760; *In re Tobias*, (1900) 103 Fed. 68, 4 Am. Bankr. Rep. 555; *Richardson v. Woodward*, (1900) 104 Fed. 873, 5 Am. Bankr. Rep. 94; *In re Moran*, (1900) 105 Fed. 901, 5 Am. Bankr. Rep. 472, *affirmed* (1901) 111 Fed. 730, 49 C. C. A. 578, 7 Am. Bankr. Rep. 176; *In re Wilson*, (1901) 108 Fed. 197, 6 Am. Bankr. Rep. 287; *In re Garner*, (1902) 115 Fed. 200, 8 Am. Bankr. Rep. 263; *In re Campbell*, (1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723; *In re Allen*, (1904) 134 Fed. 620, 13 Am. Bankr. Rep. 518.

*Washington.*—*Smalley v. Laugenour*, (1905) 196 U. S. 93, 25 S. Ct. 216, 49 U. S. (L. ed.) 400, 13 Am. Bankr. Rep. 692; *In re Thomas*, (1899) 96 Fed. 828, 3 Am. Bankr. Rep. 99; *In re Buelow*, (1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389; *In re Holden*, (1904) 127 Fed. 980, 12 Am. Bankr. Rep. 96; *In re Thompson*, (1905) 140 Fed. 257, 15 Am. Bankr. Rep. 283.

Under Rem. & Bal. Code Wash., § 563, subd. 4, providing that a debtor shall have exempt certain domestic animals and the feed therefor for six months, and also provisions and fuel for his family, a debtor who has not the animals referred to cannot select other property in lieu thereof and hold the same exempt from his creditors. *In re Scheier*, (1911) 188 Fed. 744.

*Wisconsin.*—*In re Frederick*, (1899) 95 Fed. 282, *modified* (1900) 100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801; *In re Hoag*, (1899) 97 Fed. 543, 3 Am. Bankr. Rep. 290; *In re Jones*, (1899) 97 Fed. 773, 3 Am. Bankr. Rep. 259; *In re Schuller*, (1901) 108 Fed. 591, 6 Am. Bankr. Rep. 278; *In re Mayer*, (1901) 108 Fed. 599, 47 C. C. A. 512, 6 Am. Bankr. Rep. 117; *In re Neimann*, (1903) 124 Fed. 738, 10 Am. Bankr. Rep. 739; *In re Kaufmann*, (1906) 142 Fed. 898, 16 Am. Bankr. Rep. 118; *In re Wood*, (1906) 147 Fed. 877, 17 Am. Bankr. Rep. 93; *In re Zimmerman*, (E. D. Wis. 1913) 202 Fed. 812.

**Homestead exemptions.**—The principle heretofore announced with respect to exemptions generally, to wit, that the allowance of exemptions under the Bankruptcy Law is governed entirely by the state statutes relating thereto, has also been applied to homestead exemptions.

*Alabama.*—*In re McCrary*, (1909) 169 Fed. 485, 22 Am. Bankr. Rep. 161.

*Arkansas.*—*In re Morrison*, (1901) 110 Fed. 734, 6 Am. Bankr. Rep. 488; *In re Stone*, (1902) 116 Fed. 35, 8 Am. Bankr. Rep. 416; *In re Irvin*, (1903) 120 Fed. 733, 57 C. C. A. 147, 9 Am. Bankr. Rep. 689.

An unmarried man who owns a house in which he resides with his widowed mother and minor brother, who are not able to support themselves unaided, and to whose support he contributes from his wages, is the head of a family, and is entitled to the exemption of his homestead in bankruptcy. *In re Morrison*, (1901) 110 Fed. 734, 6 Am. Bankr. Rep. 488.

The fact that a bankrupt removed, with his family, into a building owned by him, after he became insolvent, and in contemplation of bankruptcy, does not defeat his right to claim his homestead exemption in the property. *In re Stone*, (1902) 116 Fed. 35, 8 Am. Bankr. Rep. 416.

*California.*—*In re Wilson*, (1903) 123 Fed. 20, 59 C. C. A. 100, 10 Am. Bankr. Rep. 522.

It has been held that the use of funds by an insolvent debtor to purchase a homestead or to discharge a lien thereon is not fraudulent, and does not invalidate his claim to the homestead exemption, or give his trustee in bankruptcy the right to subject the homestead to a lien for the amount so diverted from his creditors. *In re Wilson*, (1903) 123 Fed. 20, 59 C. C. A. 100, 10 Am. Bankr. Rep. 522.

*Colorado.*—*In re Nye*, (1904) 133 Fed. 33, 66 C. C. A. 139, 13 Am. Bankr. Rep. 142; *In re Youngstrom*, (1907) 153 Fed. 98, 82 C. C. A. 232, 18 Am. Bankr. Rep. 572.

*Georgia.*—*In re Swords*, (1901) 112 Fed. 661, 7 Am. Bankr. Rep. 436; *In re Reinhart*, (1902) 129 Fed. 510, 12 Am. Bankr. Rep. 78; *In re Hargraves*, (1907) 160 Fed. 758, 20 Am. Bankr. Rep. 186; *Dunlap Hardware Co. v. Huddleston*, (1909) 167 Fed. 433, 93 C. C. A. 69, 21 Am. Bankr. Rep. 731; *In re Dobbs*, (1909) 175 Fed. 319, 23 Am. Bankr. Rep. 569; *Matter of Jeffers*, (1906) 17 Am. Bankr. Rep. 368; *Matter of Jackson*, (1907) 18 Am. Bankr. Rep. 216; *Matter of Cotton*, (1909) 23 Am. Bankr. Rep. 586.

The head of the family has no power to waive his statutory homestead exemption in favor of a creditor; such power of waiver having relation solely to the exemption provided by the state constitution of 1877. *In re Reinhart*, (1902) 129 Fed. 510, 12 Am. Bankr. Rep. 78.

*Iowa.*—*In re Pope*, (1900) 98 Fed. 722, 3 Am. Bankr. Rep. 525; *In re Rafferty*, (1901) 112 Fed. 512, 7 Am. Bankr. Rep. 415; *In re Johnson*, (1902) 118 Fed. 312, 9 Am. Bankr. Rep. 257; *Ingram v. Wilson*, (1903) 125 Fed. 913, 60 C. C. A. 618, 11 Am. Bankr. Rep. 192; *In re Sullivan*, (1906) 148 Fed. 815, 78 C. C. A. 505, 17 Am. Bankr. Rep. 578, *affirming* (1906) 142 Fed. 620, 16 Am. Bankr. Rep. 87; *In re Eash*, (1907) 157 Fed. 996, 19 Am. Bankr. Rep. 738; *In re Maxson*, (1909) 170 Fed. 356, 22 Am. Bankr. Rep. 424.

Corn standing in the field on the homestead of a bankrupt, which had fully matured at the date of the bankruptcy, is not exempt under the homestead exemption statute of Iowa. *In re Sullivan*, (1906) 148 Fed. 815, 78 C. C. A. 505, 17 Am. Bankr. Rep. 578, *affirming* (1906) 142 Fed. 620, 16 Am. Bankr. Rep. 87.

*Kansas.*—*Huenergardt v. John S. Brittain Dry Goods Co.*, (1902) 116 Fed. 31, 53 C. C. A. 505, 8 Am. Bankr. Rep. 341.

The debtor may change his homestead during the four months preceding his adjudication, by abandoning one and removing to and claiming another more valuable, where it is done in good faith and without fraud. *Huenergardt v. John S. Brittain Dry Goods Co.*, (1902) 116 Fed. 31, 53 C. C. A. 505, 8 Am. Bankr. Rep. 341.

*Kentucky.*—*In re Carmichael*, (1901) 108 Fed. 789, 5 Am. Bankr. Rep. 551; *In re Sale*, (1906) 143 Fed. 310, 74 C. C. A. 448, 16 Am. Bankr. Rep. 235.

The fact that the bankrupt may have entered into a contract to sell the homestead to his wife and sister-in-law, they not at the time being in any way indebted to him, does not in any way affect his right to the exemption. *In re Carmichael*, (1901) 108 Fed. 789, 5 Am. Bankr. Rep. 551.

*Michigan.*—The mere intention to create a homestead right is not sufficient to warrant the allowance of the homestead exemption. *In re Hatch*, (1899) 2 Am. Bankr. Rep. 36.

*Minnesota.*—Proceeds derived from the sale of the crops raised upon the homestead are not exempt. *In re Friedrich*, (D. C. Minn. 1912) 199 Fed. 193.

*Missouri.*—*Matter of Hostin*, (1901) 7 Am. Bankr. Rep. 362.

*Montana.*—*In re Culwell*, (1908) 165 Fed. 828, 21 Am. Bankr. Rep. 614.

*North Carolina.*—*In re McBryde*, (1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729; *In re Owings*, (1905) 140 Fed. 739, 15 Am. Bankr. Rep. 472; *In re Paramore*, (1907) 156 Fed. 208, 19 Am. Bankr. Rep. 130.

In the case of *In re Harrell*, (E. D. N. C. 1915) 222 Fed. 160, the court said: "It is manifest, that for the purpose of ascertaining the amount, character of property, etc., which a bankrupt is entitled to have set apart to him as his homestead and personal property exemption, recourse must be had to the constitution and statutes of the state of his domicile."

*North Dakota.*—*In re Cohn*, (1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761.

*Ohio.*—*In re Giles*, (1908) 158 Fed. 596, 85 C. C. A. 418, 19 Am. Bankr. Rep. 306.

A divorced husband, living on a homestead with his minor child, for whose maintenance he is responsible, is entitled to hold the same as exempt on becoming a bankrupt. *In re Rhodes*, (1901) 109 Fed. 117, 6 Am. Bankr. Rep. 173, holding also that the Bankruptcy Court cannot interfere with the adjudication of a state court with respect to the bankrupt's right to a homestead exemption, where such adjudication was made, after a contest with creditors, in proceedings under a general assignment, and before the filing of the petition in bankruptcy.

Where at adjudication a bankrupt is unmarried and not the head of a family, and therefore not entitled to any exemptions, his marriage prior to the qualification of the trustee does not entitle him to exemptions out of property owned by him at adjudication, but which was in the custody of the Bankruptcy Court, though in the actual possession of the bankrupt at the time of his marriage. *Matter of Fletcher*, (1906) 16 Am. Bankr. Rep. 491.

*Oklahoma.*—*In re Letson*, (1907) 157 Fed. 78, 84 C. C. A. 532, 19 Am. Bankr. Rep. 506.

*Oregon.*—*In re Daubner*, (1899) 96 Fed. 805, 3 Am. Bankr. Rep. 368.

Crops growing upon the homestead of a voluntary bankrupt at the time of his adjudication are not exempt, but will pass to his trustee in bankruptcy for the benefit of the creditors. *In re Daubner*,

(1899) 96 Fed. 805, 3 Am. Bankr. Rep. 368.

*South Carolina.*—*McGahan v. Anderson*, (1902) 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641; *In re Manning*, (1903) 123 Fed. 180, 10 Am. Bankr. Rep. 498; *In re Finklea*, (1907) 153 Fed. 492, 18 Am. Bankr. Rep. 738; *In re McGowan*, (1909) 170 Fed. 493, 22 Am. Bankr. Rep. 469; *In re Bailes*, (1909) 176 Fed. 460, 23 Am. Bankr. Rep. 789.

It is the intent of the homestead laws that a homestead in real estate in kind shall be set aside whenever practicable, and a bankrupt is entitled to retain the land assigned as his homestead, although valued in excess of the limit of the exemption, on payment of the excess. *In re Manning*, (1903) 123 Fed. 180, 10 Am. Bankr. Rep. 498.

A single man, whose parents are living, is not the head of a family; nor is he entitled to the homestead exemption because he was, at the time of his bankruptcy, paying the board and expenses of his sister at a school. *In re McGowan*, (1909) 170 Fed. 493, 22 Am. Bankr. Rep. 469.

A bankrupt claiming a homestead exemption has the burden of showing by clear and conclusive proof that he was solvent, and able to pay all claims against him, when he acquired the homestead. *McGahan v. Anderson*, (1902) 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641.

*Tennessee.*—*In re Tollett*, (1901) 106 Fed. 866, 46 C. C. A. 11, 5 Am. Bankr. Rep. 404.

*In re Burnet*, (E. D. Tenn. 1912) 201 Fed. 162, construing the Tennessee statute providing that "a levy may be made upon a growing crop, but not until the fifteenth of November after such crop is matured," the court held that the statute merely postponed the right to levy upon the crop but did not make it exempt.

*Texas.*—*In re Coffman*, (1899) 93 Fed. 422, 1 Am. Bankr. Rep. 530; *In re Harrington*, (1900) 99 Fed. 390, 3 Am. Bankr. Rep. 639; *In re Flannagan*, (1902) 117 Fed. 695, 9 Am. Bankr. Rep. 140; *Burow v. Grand Lodge, etc.*, (1905) 133 Fed. 708, 66 C. C. A. 538, 13 Am. Bankr. Rep. 542; *Duncan v. Ferguson-McKinney Dry Goods Co.*, (1907) 150 Fed. 269, 80 C. C. A. 157, 18 Am. Bankr. Rep. 155; *McCarty v. Coffin*, (1907) 150 Fed. 307, 80 C. C. A. 195, 18 Am. Bankr. Rep. 148; *In re Presnall*, (1909) 167 Fed. 406, 21 Am. Bankr. Rep. 905; *In re Mussey*, (1910) 179 Fed. 1007; *In re O'Brien*, (N. D. Tex. 1913) 203 Fed. 1012.

Property exempt as a homestead under the laws of the state in which the bankrupt has his domicile is expressly recognized as exempt in bankruptcy proceedings, and the acquisition of a homestead by an insolvent debtor is not a

fraud upon his creditors. *Lacy v. Chandler*, (Tex. 1913) 163 S. W. 328.

Where a bankrupt engaged in mercantile business made an assignment of all his property, and left his place of business, and went to reside on the farm of his mother, and devoted his subsequent time and attention to his mother's farming interests, and testified that his only hope of being able to resume business was the remote contingency of his being able to compromise with his creditors, it was held that there was no fixed, definite intent to resume the business, sufficient to entitle him to have the place where he formerly carried on his business exempted to him as a business homestead. *In re Flannagan*, (1902) 117 Fed. 695, 9 Am. Bankr. Rep. 140.

A bankrupt cannot claim, as exempt property, a crop growing on his homestead at the time of the adjudication in bankruptcy. *In re Coffman*, (1899) 93 Fed. 422, 1 Am. Bankr. Rep. 530.

An assignment of shares of stock to lift a lien from the assignor's homestead, although made while he was insolvent, and was contemplating an application in bankruptcy, is valid and binding. *Southern Irr. Co. v. Wharton Nat. Bank*, (Tex. 1912) 144 S. W. 701.

*Vermont.*—*In re Dawley*, (1899) 94 Fed. 795, 2 Am. Bankr. Rep. 496; *In re Marquette*, (1900) 103 Fed. 777, 4 Am. Bankr. Rep. 623; *In re Oderkirk*, (1900) 103 Fed. 779, 4 Am. Bankr. Rep. 617; *In re Gibbs*, (1900) 103 Fed. 782, 4 Am. Bankr. Rep. 619.

It has been held that a single man or woman, without relatives even, might be a housekeeper, or the head of a family, as to a homestead; but the ability to be such is not enough; the condition must exist. *In re Dawley*, (1899) 94 Fed. 795, 2 Am. Bankr. Rep. 496.

*Virginia.*—*Moran v. King*, (1901) 111 Fed. 730, 49 C. C. A. 578, 7 Am. Bankr. Rep. 176; *In re Garner*, (1902) 115 Fed. 200, 8 Am. Bankr. Rep. 263; *In re Allen*, (1904) 134 Fed. 620, 13 Am. Bankr. Rep. 518; *In re Fisher*, (1905) 142 Fed. 205, 15 Am. Bankr. Rep. 652; *In re Batten*, (1909) 170 Fed. 688.

*Washington.*—*In re Thomas*, (1899) 96 Fed. 828, 3 Am. Bankr. Rep. 99; *In re Buelow*, (1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389; *In re Schulz*, (1905) 135 Fed. 228, 14 Am. Bankr. Rep. 317; *In re Thompson*, (1905) 140 Fed. 257, 15 Am. Bankr. Rep. 283.

*Wisconsin.*—*In re Hoag*, (1899) 97 Fed. 543, 3 Am. Bankr. Rep. 290; *In re Mayer*, (1901) 108 Fed. 599, 47 C. C. A. 512, 6 Am. Bankr. Rep. 117; *In re Kaufmann*, (1906) 142 Fed. 898, 16 Am. Bankr. Rep. 118; *In re Wood*, (1906) 147 Fed. 877, 17 Am. Bankr. Rep. 93.

The bankrupt is not entitled to the crops growing on the homestead at the time of the filing of his petition in

bankruptcy. *In re Hoag*, (W. D. Wis. 1899) 97 Fed. 543, 3 Am. Bankr. Rep. 290.

**Partnership exemptions.**—The right to claim exemptions from partnership property is, similarly to the allowance of all other exemptions, governed by the law of the state. In the following cases the right to such exemption has been recognized: *In re Camp*, (N. D. Ga. 1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165; *In re Stevenson*, (E. D. N. C. 1899) 93 Fed. 789, 2 Am. Bankr. Rep. 230; *In re Grimes*, (W. D. N. C. 1899) 94 Fed. 800, 2 Am. Bankr. Rep. 160; *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794; *In re Friedrich*, (7th Cir. 1900) 100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801; *In re Beauchamp*, (D. C. Md. 1900) 101 Fed. 106, 4 Am. Bankr. Rep. 151; *In re Wilson*, (E. D. N. C. 1900) 101 Fed. 571, 4 Am. Bankr. Rep. 260; *In re Seabolt*, (W. D. N. C. 1902) 113 Fed. 766, 8 Am. Bankr. Rep. 57; *In re Fowler*, (E. D. N. C. 1906) 145 Fed. 270, 18 Am. Bankr. Rep. 580; *In re Novak*, (D. C. S. D. 1907) 150 Fed. 602, 18 Am. Bankr. Rep. 236.

But where the laws of the state do not recognize the right to exemptions out of the partnership property, such an allowance will not be made in the court of bankruptcy. *In re Beauchamp*, (D. C. Md. 1900) 101 Fed. 106, 4 Am. Bankr. Rep. 151; *In re Demarest*, (D. C. N. J. 1901) 110 Fed. 638, 6 Am. Bankr. Rep. 232; *In re Mosier*, (D. C. Vt. 1901) 112 Fed. 138, 7 Am. Bankr. Rep. 268; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680.

**Change of domicile.**—The burden of showing that a partner at one time domiciled in the state, but not, at the time of the filing of the bankruptcy petition, a resident thereof, has changed his domicile, is on the creditor who opposes his claim to exemptions from the partnership assets. *In re Grimes*, (1899) 94 Fed. 800.

*In North Carolina and Wisconsin*, where a partnership becomes bankrupt leaving assets, each member of the partnership is, with the consent of the others, and if he had no individual assets, entitled to receive the exemptions allowed him by the state statute. *In re Stevenson*, (1899) 93 Fed. 789, holding the signing of the petition by the partners to be conclusive evidence of such consent; *In re Duguid*, (1900) 100 Fed. Rep. 274; *In re Wilson*, (1900) 101 Fed. 571, holding the filing of a voluntary petition in bankruptcy by the firm to be *prima facie* evidence of such consent; *In re Seabolt*, (1902) 113 Fed. 766; *In re Grimes*, (1899) 94 Fed. 800; *In re Steed*, (1901) 107 Fed. 682, all of which cases were controlled by North Carolina laws; *In re Friedrich*, (C. C. A. 1900) 100 Fed. 284, a case depending on Wisconsin laws and holding the consent of the other partners to be sufficiently shown by the signing by

all the partners of the schedule of assets filed with the petition and claiming exemptions.

*In Georgia*, if the member of the bankrupt firm has no individual assets, but has an interest in the firm assets to the extent of the exemption claimed, he is entitled to exemptions out of the firm assets, even although they are not sufficient to pay the firm debts. *In re Camp*, (1899) 91 Fed. 745.

*In Maryland* the individual partners are not entitled to an exemption out of the firm assets unless there is a surplus after paying all firm debts. *In re Beauchamp*, (1900) 101 Fed. 106.

*In New Jersey* a partner is not entitled to an exemption out of the firm assets. *In re Demarest*, (1901) 110 Fed. 638. See also *In re Lentz*, (1899) 97 Fed. 486.

**South Dakota.**—Under Sess. Laws S. Dak. 1890, ch. 86, giving exemptions to "the head of a family," or "a single person not the head of a family," and independently of such statute, a partnership, as such, cannot claim any exemptions when it becomes bankrupt, for the reason, *inter alia*, that, upon adjudication, the firm is dissolved. *In re Lentz*, (1899) 97 Fed. 486.

Under the statutes of South Dakota in case of the bankruptcy of a partnership, neither member of the firm can claim any portion of the firm property to be set apart to him as his individual exemptions. *In re Vickerman*, (D. C. S. D. 1912) 199 Fed. 589.

**Individual partners cannot claim exemptions from the partnership property as against partnership debts** in bankruptcy, though the other partner or partners may have consented thereto. *In re Scheier*, (E. D. Wash. 1911) 188 Fed. 744.

**In the absence of any decision of the state courts** allowing partners to claim exemptions out of the firm property, it has been held that in case of the bankruptcy of a partnership, where there is partnership property, but no individual assets, the members of the firm are not entitled to have any portion of the firm property set apart to them as their individual exemptions, unless there should remain a surplus of such property after the payment of all firm debts. *In re Beauchamp*, (D. C. Md. 1900) 101 Fed. 106, 4 Am. Bankr. Rep. 151.

**Nominal partner.**—Where a minor, though having contributed to the capital of a firm, did not participate in the assignment which constituted the act of bankruptcy, nor take any part in any of the firm's transactions, and was not a partner as to creditors, it was held that he was not entitled to an exemption allowance out of the personal property of the estate. *In re Floyd*, (E. D. N. C. 1907) 154 Fed. 757, 18 Am. Bankr. Rep. 827.

*Use of partnership name by individual.*

— Even though the state law does not permit the exemption to be claimed by partners from partnership property, still a bankrupt is entitled to the exemption out of the merchandise in a store conducted in the name of a partnership, but which is shown to have been in fact owned by him exclusively for some years prior to his bankruptcy. *In re Meriwether*, (W. D. Ark. 1901) 107 Fed. 102, 5 Am. Bankr. Rep. 435; *In re Carpenter*, (5th Cir. 1901) 109 Fed. 558, 48 C. C. A. 545, 6 Am. Bankr. Rep. 465.

*Infant partner.*— Where a member of a partnership against which bankruptcy proceedings are pending is on his petition discharged from liability or participation in the proceedings on the ground of infancy he cannot thereafter obtain exemptions because he no longer has any status as a debtor. *In re Ellenbecker*, (E. D. Wis. 1913) 205 Fed. 396.

*Under the Bankrupt Act of 1867* there was some conflict of authority as to the right of an individual partner to exemptions out of the partnership property. One of the latest cases was *In re Corbett*, (1878) 5 Sawy. 206, 6 Fed. Cas. No. 3,220, wherein it was held that members of a partnership were not entitled to exemptions of household and kitchen furniture out of furniture owned and used by the bankrupt partnership as hotel furniture; since neither partner had a definite interest in any particular, but only an interest in the surplus. In support of its ruling the court cited *In re Hafer*, (1868) 1 Nat. Bankr. Reg. 547, 11 Fed. Cas. No. 5,896; *In re Price*, 6 Nat. Bankr. Reg. 400, 19 Fed. Cas. No. 11,410; *In re Blodgett*, (1874) 10 Nat. Bankr. Reg. 145, 3 Fed. Cas. No. 1,555; *In re Handlin*, (1875) 3 Dill. 290, 11 Fed. Cas. No. 6,018; *In re Tonne*, (1875) 13 Nat. Bankr. Reg. 170, 24 Fed. Cas. No. 14,095; *In re Stewart*, (1875) 13 Nat. Bankr. Reg. 295, 23 Fed. Cas. No. 13,420; *In re Boothroyd*, (1876) 14 Nat. Bankr. Reg. 223, 3 Fed. Cas. No. 1,652; *In re Sauthoff*, (1877) 8 Biss. 35, 21 Fed. Cas. No. 12,380; *In re Croft*, (1878) 8 Biss. 188, 6 Fed. Cas. No. 3,404; *In re Melvin*, (1878) 17 Nat. Bankr. Reg. 543, 16 Fed. Cas. No. 9,406; *Wright v. Pratt*, (1872) 31 Wis. 99; *Russell v. Lennon*, (1876) 39 Wis. 570; *Pond v. Kimball*, (1869) 101 Mass. 105; *Guptil v. McFee*, (1872) 9 Kan. 35; *Kingsley v. Kingsley*, (1870) 39 Cal. 665. The following cases cited as sanctioning the exemption were either explained or disapproved by the court: *In re Rupp*, (1870) 4 Nat. Bankr. Reg. 95, 21 Fed. Cas. No. 12,141; *In re Young*, (1869) 3 Nat. Bankr. Reg. 440, 30 Fed. Cas. No. 18,148; *In re McKercher*, 8 Nat. Bankr. Reg. 409; *In re Richardson*, 11 Nat. Bankr. Reg. 114, 20 Fed. Cas. No. 11,776; *Radcliff v. Wood*, (1857) 25 Barb. (N. Y.) 52; *Stewart v. Brown*, (1867) 37 N. Y. 350.

1 F. S. A.—39

*Wearing apparel.*— The state exemption laws with respect to wearing apparel have been recognized in the following cases: *Sellers v. Bell*, (5th Cir. 1899) 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529; *In re Smith*, (W. D. Tex. 1899) 96 Fed. 832, 3 Am. Bankr. Rep. 140; *In re Jones*, (E. D. Wis. 1899) 97 Fed. 773, 3 Am. Bankr. Rep. 259; *In re Turnbull*, (D. C. Mass. 1901) 106 Fed. 667, 5 Am. Bankr. Rep. 549; *In re Everleth*, (D. C. Vt. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236; *In re Evans*, (D. C. Del. 1907) 158 Fed. 153, 19 Am. Bankr. Rep. 752; *In re Leech*, (6th Cir. 1909) 171 Fed. 622, 96 C. C. A. 424, 22 Am. Bankr. Rep. 599; *In re Caswell*, (D. C. R. I. 1901) 6 Am. Bankr. Rep. 718.

*Jewelry.*— It has been held that the words "all the wearing apparel," being without restriction or qualification, included a gold watch, a watch chain, a set of cuff links, two watch fobs, a gold ring, a gold ring with diamond setting, a gold ring with sapphire setting, a pearl scarf pin, a ruby scarf pin, and a set of shirt studs, of the aggregate value of \$444.50. *In re Evans*, (D. C. Del. 1907) 158 Fed. 153, 19 Am. Bankr. Rep. 752. See also *In re Smith*, (W. D. Tex. 1899) 96 Fed. 832, 3 Am. Bankr. Rep. 140; *In re Jones*, (E. D. Wis. 1899) 97 Fed. 773, 3 Am. Bankr. Rep. 259; *In re Caswell*, (D. C. R. I. 1901) 6 Am. Bankr. Rep. 718.

But it has also been held that a watch is not "necessary wearing apparel." *In re Turnbull*, (D. C. Mass. 1901) 106 Fed. 667, 5 Am. Bankr. Rep. 549; *In re Everleth*, (D. C. Vt. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236.

*Regalia.*— It has been held that neither a watch and chain, nor a sword and belt, constituting a part of the Masonic regalia, are exempt to a bankrupt as wearing apparel under the Vermont statute. *In re Everleth*, (D. C. Vt. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236.

But see *In re Jones*, (E. D. Wis. 1899) 97 Fed. 773, 3 Am. Bankr. Rep. 259, wherein it was held that, under a state statute exempting from execution "all wearing apparel of the debtor," a bankrupt is entitled to claim as exempt a Masonic uniform, although he does not wear it as an ordinary and usual dress, but on special occasions only.

And a hat, although also a part of such regalia, has been held to be exempt. *In re Everleth*, (D. C. Vt. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236.

*Tools, implements of trade, etc.*— The state exemption laws have been recognized in the following cases with respect to the allowance of exemptions in the case of tools, implements of trade, etc. *In re Petersen*, (N. D. Cal. 1899) 95 Fed. 417, 2 Am. Bankr. Rep. 630; *In re Osborn*, (W. D. N. Y. 1900) 104 Fed. 780, 5 Am. Bankr. Rep. 111; *In re Collier*, (D. C. Mass. 1901) 111 Fed. 503, 7 Am.

Bankr. Rep. 131; *In re Everleth*, (D. C. Vt. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236; *In re Mullen*, (D. C. Me. 1905) 140 Fed. 206, 15 Am. Bankr. Rep. 275; *Steiner v. Marshall*, (4th Cir. 1905) 140 Fed. 710, 72 C. C. A. 103, 15 Am. Bankr. Rep. 486; *In re Conley*, (D. C. Neb. 1907) 162 Fed. 806, 19 Am. Bankr. Rep. 200; *In re Trombly*, (D. C. Vt. 1906) 16 Am. Bankr. Rep. 598; *In re Robinson*, (N. D. Idaho 1913) 206 Fed. 176.

**Failure to pay wages.**—Where a state statute provides that no property shall be exempt from execution for clerks', laborers', or mechanics' wages earned in the state, the bankrupt is not entitled to an exemption of his tools, except on condition of his paying the claims for wages. *In re Phillips*, (W. D. Wash. 1913) 209 Fed. 490.

A watch has been held to be exempt as one of the tools, implements, and fixtures necessary for carrying on a trade or business. *In re Collier*, (D. C. Mass. 1901) 111 Fed. 503, 7 Am. Bankr. Rep. 131.

But see *In re Everleth*, (D. C. Vt. 1904) 129 Fed. 620, 12 Am. Bankr. Rep. 236, wherein it was held that a watch and chain were not exempt as a timepiece,

constituting a part of the tools of his trade used by a barber, where among such tools there was also a clock.

A "candy stove" and a "marble-top table" used by the bankrupt in his business of making candy have been held to be exempt as suitable tools necessary for sustaining life. *In re Trombly*, (D. C. Vt. 1906) 16 Am. Bankr. Rep. 598.

**Canoe used by guide.**—A bankrupt who is a professional guide for hunters and fishermen, and as such registered under the laws of the state, is entitled to the exemption of a canoe as a tool of his trade or occupation. *In re Mullen*, (D. C. Me. 1905) 140 Fed. 206, 15 Am. Bankr. Rep. 275.

But a rifle does not come within the exemption allowed to such a guide. *In re Mullen*, (D. C. Me. 1905) 140 Fed. 206, 15 Am. Bankr. Rep. 275.

A bankrupt who is an undertaker is entitled to hold as exempt such tools, instruments, and appliances as are found by the court to be necessary to the practice of his profession, and used by him therein. *Steiner v. Marshall*, (4th Cir. 1905) 140 Fed. 710, 72 C. C. A. 103, 15 Am. Bankr. Rep. 486.

## SEC. 7. DUTIES OF BANKRUPTS.—a The bankrupt shall

(1) [**Attend meetings and hearings.**] attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; [(1898) 30 Stat. L. 548.]

As to

Creditors' meetings generally, see section 55.

Voters at creditors' meetings, see section 56.

**Attendance at meetings.**—The bankrupt must, when so directed by the judge, attend the first creditors' meeting, and the hearing on his application for a discharge. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 733; *In re Alphin, etc., Cotton Co.*, (E. D. Ark. 1904) 131 Fed. 824, 12 Am. Bankr. Rep. 653; *In re Shanker*, (M. D. Pa. 1905) 138 Fed. 862, 15 Am. Bankr. Rep. 109; *In re Parker*, (D. C. Kan. 1899) 1 Am. Bankr. Rep. 615; *In re Curle*, (N. D. Cal. 1914) 217 Fed. 688, wherein the court held that the bankrupt may not avoid such attendance by removing from the district. It was also the opinion of the court that even if the provision of section 7a (9) that a bankrupt may not be required to attend at a place more than 150 miles from his home or place of business did apply to a hearing upon an application for discharge, the bankrupt could not avail himself thereof if pending the bankruptcy proceedings he removed from the district.

**Referee cannot dispense with bankrupt's attendance.**—The bankrupt's attendance before the referee on the hearing

of objections to his application for a discharge, demanded by the creditors, cannot be dispensed with by the referee. *In re Shanker*, (M. D. Pa. 1905) 138 Fed. 862, 15 Am. Bankr. Rep. 109.

**Discretion as to ordering attendance.**—The statute does not give to the bankrupt or his creditors the right, as a matter of law, to a writ of habeas corpus ad testificandum to secure the bankrupt's presence and testimony at a first meeting of creditors, the issuance of such writ being discretionary. *In re Thaw*, (3d Cir. 1908) 166 Fed. 71, 91 C. C. A. 657, 22 Am. Bankr. Rep. 687.

**Ordering attendance of bankrupt confined in state institution.**—In *In re Thaw*, (3d Cir. 1908) 166 Fed. 71, 91 C. C. A. 657, 22 Am. Bankr. Rep. 687, it appears that a bankrupt, while in the custody of the proper state authorities as an insane person, instituted voluntary proceedings in bankruptcy in a federal court in another state, and that, in such bankruptcy proceeding, a writ of habeas corpus ad testificandum was issued to obtain his presence and testimony at a first meeting of his creditors, and it was held that, no issue having been raised as to the bankrupt's sanity, an order quashing the writ of habeas corpus was a proper exercise of discretion.



(2) **[Comply with orders.]** comply with all lawful orders of the court; [(1898) 30 Stat. L. 548.]

As to

Failure to comply with lawful orders as contempt, see the several subdivisions of section 41a.

Jurisdiction to compel compliance with lawful orders, see section 2 (13) and (16).

Duty to give information, and render assistance, to trustee.—Up to the time of

his discharge, the bankrupt can be compelled, by summary order of court, to give the receiver any information he may possess, or render him any assistance he can in the transfer of possession of property belonging to the bankrupt estate. *In re Wiesel*, (E. D. Pa. 1909) 173 Fed. 718, 23 Am. Bankr. Rep. 59.

(3) **[Examine proofs of claims.]** examine the correctness of all proofs of claims filed against his estate; [(1898) 30 Stat. L. 548.]

As to proof of claims generally, see the several subdivisions of section 57.

(4) **[Execute and deliver papers.]** execute and deliver such papers as shall be ordered by the court; [(1898) 30 Stat. L. 548.]

Books and papers tending to incriminate.—It has been held that the books and papers taken from the possession of the bankrupt cannot be used as evidence against him. *People v. Swarts*, (Ill. 1902) 8 Am. Bankr. Rep. 487. See generally the annotation under subdivision (9) of this section, and also under section 21a.

Order regulating use of books proper.—In *Matter of Harris*, (1911) 221 U. S. 274, 31 S. Ct. 557, 55 U. S. (L. ed.) 732, it was held that an order requiring the bankrupt to deposit his books of account in the office of the receiver, there to remain in the custody of the bankrupt, who is to afford the receiver free opportunity to inspect them, the receiver to use and permit them to be used only for the purpose of the civil administration of the bankrupt estate, and not for any criminal proceeding, is a proper exercise of the authority of the Bankruptcy Court, and does not compel the bankrupt to be a witness against himself in a criminal case in the constitutional sense, although the knowledge gained from the books may be used to procure other evidence for use against him in a criminal prosecution.

Waiver of privilege.—Where a bank-

rupt, on the commencement of the bankruptcy proceedings, surrendered his books to the receiver without raising the question of privilege as to their use against him, it was held that so far as it was a proper use of the books by the trustee in bankruptcy to allow prosecuting authorities to use them, the bankrupt was chargeable with knowledge of that right, and his surrender of the books waived his privilege. *In re Tracy*, (S. D. N. Y. 1910) 177 Fed. 532, 23 Am. Bankr. Rep. 438.

A voluntary bankrupt cannot refuse to deliver the books of account kept by him in his business, and necessary to an investigation of his affairs, to his trustee, on the ground that matter contained therein might tend to incriminate him. If the constitutional privilege extends to civil proceedings, the filing of a voluntary petition in bankruptcy operates both as a waiver of such privilege, in relation to the bankrupt's books, and as a transfer of the right of custody of the same to the court and its officers. *In re Sapiro*, (E. D. Wis. 1899) 92 Fed. 340, 1 Am. Bankr. Rep. 296.

(5) **[Execute transfers.]** execute to his trustee transfers of all his property in foreign countries; [(1898) 30 Stat. L. 548.]

(6) **[Inform trustee of evasions of law.]** immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge; [(1898) 30 Stat. L. 548.]

(7) **[Disclose false claims.]** in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; [(1898) 30 Stat. L. 548.]

Bankrupt should object to proof of false claims.—The fact that a trustee has not been appointed will not relieve the

bankrupt from the duty, nor deprive him of the right, of objecting to the allowance of any false or unjust claim against

his estate, or of moving for its expunction. *In re Ankeny*, (N. D. Ia. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72. And

see generally as to proof of claims, the several subdivisions of section 57 and the annotation thereunder.

(8) [File schedules.] prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and [(1898) 30 Stat. L. 548.]

As to

Duty of referee to examine and cause the amendment of defective schedules, see section 39a (2).

Failure to schedule debts as affecting discharge therefrom, see section 17a (3).

I. Schedule of assets, 612.

II. Schedule of creditors and liabilities, 614.

III. Form, verification, and amendment, 617.

#### I. SCHEDULE OF ASSETS.

**Duty to schedule assets.**—It is the duty of the bankrupt, in involuntary proceedings, to prepare, make oath to, and file in court, within ten days after his adjudication, unless further time has been granted therefor, a schedule of his property, showing the amount and kind of property, the location thereof, and its money value in detail. In cases of voluntary bankruptcy such a schedule must be filed with the petition in bankruptcy. *Sellers v. Bell*, (C. C. A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 529; *In re Walther*, (S. D. N. Y. 1899) 95 Fed. 941, 2 Am. Bankr. Rep. 702; *In re Wood*, (E. D. N. C. 1899) 95 Fed. 946, 3 Am. Bankr. Rep. 572; *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55; *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414; *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53; *In re Gailey*, (7th Cir. 1904) 127 Fed. 538, 62 C. C. A. 336, 11 Am. Bankr. Rep. 539; *In re Breitling*, (7th Cir. 1904) 133 Fed. 146, 66 C. C. A. 212, 13 Am. Bankr. Rep. 126; *Woods v. Little*, (3d Cir. 1905) 134 Fed. 229, 67 C. C. A. 157, 13 Am. Bankr. Rep. 742; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785; *Remmers v. Merchants' Laclede Nat. Bank*, (8th Cir. 1909) 173 Fed. 484, 97 C. C. A. 490, 23 Am. Bankr. Rep. 78; *In re Wishnfsky*, (D. C. N. J. 1910) 181 Fed. 896; *In re Harris*, (N. D. Ill. 1899) 2 Am. Bankr. Rep. 359; *Matter of Back Bay*

*Automobile Co.*, (D. C. Mass. 1907) 19 Am. Bankr. Rep. 33; *Steinhardt v. National Park Bank*, (1907) 19 Am. Bankr. Rep. 72, 120 App. Div. 255, 105 N. Y. S. 23; *Matter of Schulman*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 707; *Matter of Brady*, (W. D. Ky. 1908) 21 Am. Bankr. Rep. 364.

**Who may compel filing of schedules.**—Ordinarily the trustee is the proper person to set the machinery in motion to obtain the schedules, but in the absence of such action there is no reason why a creditor should not proceed. *In re Brockton Ideal Shoe Co.*, (C. C. A. 2d Cir. 1912) 200 Fed. 745.

**General Order No. IX** provides for filing "schedule in involuntary bankruptcy" by petitioning creditors in certain contingencies.

**Refusal on ground of incrimination.**—In *Podolin v. Leshner Warner Dry Goods Co.*, (C. C. A. 3d Cir. 1914) 210 Fed. 97, affirming (1913) 205 Fed. 563, the bankrupts refused to file their schedule in bankruptcy on the ground that their schedules might tend to incriminate them. On petition for review of an order made by the District Court requiring them to complete their schedule, the Circuit Court of Appeals said: "The giving of such information certainly does not make the bankrupts witnesses against themselves, within the meaning of the fifth amendment. To hold otherwise, it seems to us, would in a large measure hinder the efficient administration of the bankruptcy law, and would extend to confessedly dishonest persons a privilege never intended for their benefit. . . ."

"Liberal as the scope given to the fifth amendment by the court is and ought to be, it was never intended that a bankrupt, dishonest or otherwise, should be clothed with the power to decide for himself when and under what circumstances he was authorized by the amendment to interrupt the bankruptcy procedure, by refusing to conform to the requirements of the law. In the present case, there is clearly no direct and apparent self incrimination

that necessarily attaches to the information that is required to be given in the schedule, and in the absence of the facts and details of what that information would be, there is no basis upon which the court could sustain the asserted right of the bankrupts to decline to comply with the requirements of the law. There is merely a suggestion that, though not directly incriminating, it might perhaps to their disadvantage give clues for investigation in the prosecution of the indictment against them. As said by the Supreme Court in the case of *In re Harris*, (1911) 221 U. S. 274, 31 S. Ct. 557, 55 U. S. (L. ed.) 732, in deciding that the bankrupt's books belonged to the trustee in bankruptcy and cannot be withheld from him on the ground that they incriminate the bankrupt, 'that is one of the misfortunes of bankruptcy if it follows crime.'

**Failure to schedule property cannot inure to bankrupt's benefit.**—Where a bankrupt fails to schedule certain property, all knowledge of which he withholds from his trustee, he cannot assert title to such property after the estate has been closed, on the ground that the trustee has abandoned it. *Jacksboro First Nat. Bank v. Lasater*, (1905) 196 U. S. 115, 25 S. Ct. 206, 49 U. S. (L. ed.) 408, 13 Am. Bankr. Rep. 698.

**Advice of counsel as justifying omissions.**—To justify the omission, by a bankrupt, of property from his schedule on the ground that he acted on the advice of counsel, it must be shown that he fully and fairly stated the facts to his counsel, and acted on his opinion on a matter of law only. *Remmers v. Merchants' Laclede Nat. Bank*, (8th Cir. 1909) 173 Fed. 484, 97 C. C. A. 490, 23 Am. Bankr. Rep. 78.

**Good faith required.**—A bankrupt is required to show the utmost good faith, and to make the fullest disclosures of his assets. *In re Breitling*, (7th Cir. 1904) 133 Fed. 146, 66 C. C. A. 212, 13 Am. Bankr. Rep. 126.

**Every known asset must be scheduled.**—A discharge in bankruptcy upon any other condition than the complete appropriation of every known asset legally available to creditors would be not only a glaring wrong to creditors, but contrary to every conception of a just system of bankruptcy. *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

**A life insurance policy with a tontine feature, the bankrupt's interest being clear, obvious, and substantial, must be scheduled.** *In re Becker*, (1901) 106 Fed. 54, affirmed (1901) 112 Fed. 1020, 50 C. C. A. 666.

**Exempt property should be scheduled with a statement of the exemption.** See in general note to section 6.

**A remainder interest in land devised**

**should be scheduled as an asset if it is subject to levy and sale as his property under the local laws.** *In re Shenberger*, (1900) 102 Fed. 978.

**An equitable interest in land must be scheduled.** *In re Gailey*, (7th Cir. 1904) 127 Fed. 538, 62 C. C. A. 336, 11 Am. Bankr. Rep. 539.

**A vested interest, which the bankrupt has in the estate of another, must be scheduled.** *Woods v. Little*, (3d Cir. 1905) 134 Fed. 229, 67 C. C. A. 157, 13 Am. Bankr. Rep. 742.

**Commingled property.**—Where the bankrupt, previous to the adjudication, had acted as administratrix of her husband's estate, and had mingled property of her own with the property of such estate, it is her duty, in the bankruptcy proceedings, to present a correct and intelligible statement of her affairs, showing clearly what property her husband left, what she added thereto, and the disposition made of each class of property, and thereupon to account for the property that should inure to the benefit of her creditors. *In re Walther*, (S. D. N. Y. 1899) 95 Fed. 941, 2 Am. Bankr. Rep. 702.

**Partnership debts and property should be scheduled, where a petition is filed by a partner seeking a discharge from individual and firm debts.** *In re Laughlin*, (1899) 96 Fed. 589.

**Pay of bankrupt army officer.**—It may be that an officer in the United States army is not bound to include his pay in his schedule, as the Bankruptcy Act contains no such provision as the English Bankruptcy Act, authorizing the court, when the bankrupt is an officer in the army or navy, to order a portion of his pay to be applied for the benefit of his creditors in bankruptcy. *Audubon v. Shufeldt*, (1901) 181 U. S. 575, 21 S. Ct. 735, 45 U. S. (L. ed.) 1009.

**Use of schedules as evidence.**—Since the repeal of R. S. sec. 860 (in a note in title EVIDENCE), by the Act of May 7, 1910, ch. 216, 36 Stat. L. 352, a bankrupt's schedules are admissible against him in a criminal prosecution either in a state or in a federal court. *Ensign v. Pennsylvania*, (1913) 227 U. S. 592, 33 S. Ct. 321, 57 U. S. (L. ed.) 658.

Prior to the repeal of R. S. sec. 860, as above mentioned, the bankrupt's schedules were not admissible against him in a prosecution in a federal court. *Johnson v. U. S.*, (1st Cir. 1908) 163 Fed. 30, 89 C. C. A. 508, 20 Am. Bankr. Rep. 724; *Cohen v. U. S.*, 4th Cir. 1909) 170 Fed. 715, 96 C. C. A. 35, 22 Am. Bankr. Rep. 333. But they were admissible in a prosecution against him in a state court. *Ensign v. Pennsylvania*, (1913) 227 U. S. 592, 33 S. Ct. 321, 57 U. S. (L. ed.) 658.

The schedule is admissible as evidence

in an action to enforce the statutory liability of a director of the bankrupt corporation. *Smith & Thayer Co. v. Arnold*, (R. I. 1915) 93 Atl. 656.

## II. SCHEDULE OF CREDITORS AND LIABILITIES.

**Duty to schedule creditors and liabilities.**—The bankrupt must, under section 7a (8), file a list of his creditors, showing their residences, if known; and if such residence should be unknown, that fact must be stated. Such schedule must also contain the amount due to each creditor, the consideration thereof, and the security held by them, if any. *In re Lipman*, (S. D. N. Y. 1899) 94 Fed. 353, 2 Am. Bankr. Rep. 46; *Sellers v. Bell*, (5th Cir. 1899) 94 Fed. 811, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529; *In re Resler*, (D. C. Minn. 1899) 95 Fed. 804, 2 Am. Bankr. Rep. 602; *In re Brumelkamp*, (N. D. N. Y. 1899) 95 Fed. 814, 2 Am. Bankr. Rep. 318; *In re Dvorak*, (N. D. Ia. 1901) 107 Fed. 76, 6 Am. Bankr. Rep. 66; *Columbia Bank v. Birkett*, (N. Y. 1903) 9 Am. Bankr. Rep. 481; *Sutherland v. Lasher*, (1903) 11 Am. Bankr. Rep. 780, 41 Misc. 249, 84 N. Y. S. 56, *affirmed* 87 App. Div. 633, 84 N. Y. S. 1148; *Westheimer v. Howard*, (1905) 14 Am. Bankr. Rep. 547, 47 Misc. 145, 93 N. Y. S. 518; *Schiller v. Weinstein*, (1905) 15 Am. Bankr. Rep. 183, 47 Misc. 622, 94 N. Y. S. 763; *Haack v. Theise*, (1906) 16 Am. Bankr. Rep. 699, 51 Misc. 3, 99 N. Y. S. 905; *Custard v. Wiggerson*, (Wis. 1907) 17 Am. Bankr. Rep. 337; *Weindenfield v. Tillinghast*, (N. Y. 1907) 18 Am. Bankr. Rep. 531; *Murphy v. Blumenreich*, (1908) 19 Am. Bankr. Rep. 910, 123 App. Div. 645, 108 N. Y. S. 175; *Matter of David*, (1904) 44 Misc. 516, 90 N. Y. S. 85; *Feldmark v. Weinstein*, (1904) 45 Misc. 329, 90 N. Y. S. 478.

**The purpose of requiring a disclosure of the amount and the consideration of the debt, and the security held by the creditor, is to give to the other creditors and to the trustee accurate information as to the condition of the estate and to enable them to discover preferred or fraudulent debts.** See *Birkett v. Columbia Bank*, (1904) 195 U. S. 345, 25 S. Ct. 38, 49 U. S. (L. ed.) 231; *Fifth Ave. Bldg., etc., Assoc. v. Goldberg*, (1903) 22 Pa. Super. Ct. 197.

**The schedule of debts furnishes the basis for the notices which, under section 58a, are to be sent out to creditors; thus the bankrupt appears to be responsible for the correctness of the addresses of his creditors, and for their failure to receive notice in the event of a wrong address.** *Haack v. Theise*, (1906) 16 Am. Bankr. Rep. 699, 51 Misc. 3, 99 N. Y. S. 905.

**Giving out list in advance of filing, improper.**—The giving out of a list of creditors, by a bankrupt, to attorneys, before

the filing of his schedule, is a practice to be severely condemned. *In re Lloyd*, (E. D. Wis. 1906) 148 Fed. 92, 17 Am. Bankr. Rep. 96.

**The effect of improper scheduling, on the release of a bankrupt's debts by his discharge in bankruptcy, has been considered under section 17a (3).**

**Debts barred by limitation.**—Under the Bankrupt Act of 1867 it was held that outlawed debts should be scheduled. *In re Perry*, 1 Nat. Bankr. Reg. 220, 19 Fed. Cas. No. 10,998.

But the insertion of such debts in the schedule does not remove the bar of the statute. *In re Wright*, (1875) 6 Biss. 317, 30 Fed. Cas. No. 18,068; *In re Kingsley*, (1868) 1 Lowell 216, 14 Fed. Cas. No. 7,819; *In re Lipman*, (S. D. N. Y. 1899) 94 Fed. 353; *In re Resler*, (D. C. Minn. 1899) 95 Fed. 804.

It has been held, however that a person, in fact solvent, but ignorant of the fact, may not file a voluntary petition in bankruptcy, schedule outlawed debts, thereby acknowledging their existence as present, valid and existing claims, and then, on discovering his solvency, himself plead the statute of limitations to such claims on the theory that he could not as against creditors and therefore as against himself in effect waive the statute of limitations at the time of and on filing his voluntary petition in bankruptcy. *In re Currier*, (N. D. N. Y. 1912) 192 Fed. 695, wherein the court said: "I think the person alleging himself a bankrupt may, so far as he is concerned and his interests are involved, waive the statute of limitations and acknowledge the debt, otherwise barred, by inserting it as a valid, existing claim in his schedules. Should a creditor be interested and raise the question of the right of a bankrupt actually insolvent on filing his petition to then renew his outlawed debts, I should be inclined to hold that such acknowledgment made at that time would not preclude creditors from showing the debt was barred."

**Sufficiency of schedule as to name of creditor.**—In the following cases slight alterations in the spelling of names, obviously due to clerical errors, have been held to invalidate the schedule. *Marshall v. English-American L. & T. Co.*, (1907) 127 Ga. 376, 56 S. E. 449 (wherein the English-American Loan & Trust Co. was listed as "The English-American Trust Co."); *Armstrong v. Sweeney*, (1905) 73 Neb. 775, 103 N. W. 436 (wherein Swen Morrine was listed as "Swan Morise"); *Liesum v. Kraus*, (1901) 35 Misc. 376, 71 N. Y. S. 1022 (wherein George Liesum was listed as "George Liesman"); *Grosso v. Marx*, (1904) 45 Misc. 500, 92 N. Y. S. 773 (wherein the firm of Jacob Ringle & Son was listed as "Jacob Ringler & Son," and Welwood Murray as "Murray and Walter Stewart"); *Haack v. Theise*,

(1906) 51 Misc. 3, 99 N. Y. S. 905 (wherein James J. Haack was listed as "James Haack and wife"); *Custard v. Wigderson*, (1907) 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740 (where a debt due to "A. Custard" was scheduled as due to "A. Castard").

**Initial of Christian name.**—A schedule listing a creditor as "C. Ferger" is sufficient. *Kreitlein v. Ferger*, (1915) 238 U. S. 21, 35 S. Ct. 685, 59 U. S. (L. ed.) 1184, wherein the court said: "The Bankrupt Act fails to prescribe which form of designation shall be used in listing creditors in the schedule. The statute must be construed in the light of the fact that it not only applies to transactions growing out of dealings between those personally acquainted, but, in large degree, relates to matters growing out of transactions between persons living in distant states, and who may never have met. In many instances the only knowledge the debtor has as to the name of his creditor is derived from signatures, letter-heads, drafts, and like instruments—in which the name of the creditor may be designated by initials, or by abbreviation, or by full Christian name. To say that the use of an initial in listing a creditor was improper when the creditor himself may have used an initial in signing letters addressed to the bankrupt, or may himself have constantly received letters addressed to him in that manner, would not only ignore a common business practice, but would, in many instances, work a great hardship. This has been recognized in other branches of the law; for while, of course, in all legal proceedings it is safest to designate persons by their Christian names,—and in some states this is even required by statute,—yet it has likewise been held that the use of the initials is an irregularity, and not a fatal defect. *Reg. v. Dale*, 17 Q. B. 64, 20 L. J. Mag. Cas. N. S. 240, 15 Jur. 657; *State v. Webster*, 30 Ark. 166; *Perkins v. McDowell*, 3 Wyo. 203, 19 Pac. 440; *Minor v. State*, 63 Ga. 320; *State v. Johnson*, 93 Mo. 73, 5 S. W. 699.

"There have, no doubt, been multitudes of instances in which initials have been used in listing creditors in bankrupt schedules, but the only decision found which deals with this question is *Gatliff v. Mackey*, 31 Ky. L. Rep. 947, 104 S. W. 379. It holds that the listing of the creditor by an initial, instead of the full Christian name, is not sufficient to deprive the debtor of the benefit of the order discharging provable debts. See also *Matteson v. Dewar*, 146 Ill. App. 523."

In *In re Mackey*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 593, it was held that the Christian name, as well as the surname, of the creditor, should appear in the schedule.

**Listing in name of actual creditor sufficient.**—The listing of a debt in the name

of the actual instead of that of the nominal creditor is, however, sufficient. It has been so held in a case in which a bank, the actual owner of a note containing the name of the cashier of the bank as payee, was scheduled as the creditor. *Ross-Lewin v. Goold*, (1904) 211 Ill. 384, 71 N. E. 1028. See also *Longfield v. Minnesota Sav. Bank*, (1905) 95 Minn. 54, 103 N. W. 706.

**The name of the transferee of a note or a mortgage**, rather than that of the payee or mortgagee, must be inserted in the schedule as the creditor, provided the debtor has knowledge of the transfer. *Birkett v. Columbia Bank*, (1904) 195 U. S. 345, 25 S. Ct. 38, 49 U. S. (L. ed.) 231, affirming (1903) 174 N. Y. 112, 66 N. E. 652; *Fider v. Mannheim*, (1899) 78 Minn. 309, 81 N. W. 2; *Armstrong v. Sweeney*, (1905) 73 Neb. 775, 103 N. W. 436; *Broadway Trust Co. v. Manheim*, (1905) 34 Civ. Pro. 310, 95 N. Y. S. 310, 47 Misc. 415, 95 N. Y. S. 93; *Mueller v. Goerlitz*, (1907) 53 Misc. 53, 103 N. Y. S. 1037.

But see *Sellers v. Bell*, (5th Cir. 1899) 94 Fed. 801, 36 C. C. A. 502, wherein it was held that a judgment was properly listed in the name of the original creditor, even though the debtor knew that the judgment had been sold.

**Schedule of partnership debts.**—If the bankrupt is a member of a firm and wishes to be released from his firm as well as from his individual debts, the names of the creditors of the firm should also be inserted in the schedule. *In re Laughlin*, (N. D. Ia. 1899) 96 Fed. 589; *Loomis v. Wallblom*, (1905) 94 Minn. 392, 102 N. W. 1114; *New York Inst., etc. v. Crockett*, (1907) 117 App. Div. 269, 102 N. Y. S. 412. See also the annotation under section 5a.

It has been held that the name of the surviving partner of a firm holding a judgment may be inserted as the creditor. *Kaufman v. Schreier*, (1905) 108 App. Div. 298, 95 N. Y. S. 729.

**Correct addresses must be given when possible.**—*The referee should require the addresses to be furnished*, or satisfactory proof to be made that the same cannot be ascertained after due search. *In re Dvorak*, (N. D. Ia. 1901) 107 Fed. 76, 6 Am. Bankr. Rep. 66. See also *Schiller v. Weinstein*, (1905) 15 Am. Bankr. Rep. 183, 47 Misc. 622, 94 N. Y. S. 763; *Weidenfeld v. Tillinghast*, (1907) 18 Am. Bankr. Rep. 531, 54 Misc. 90, 104 N. Y. S. 712.

**Presumption as to receipt of notice incorrectly addressed.**—There is no presumption, in the face of positive evidence to the contrary, that the postal authorities will deliver a letter addressed "Mulberry Street," to the person to whom it is addressed; though in the absence of such evidence there might possibly be a presumption to that effect. *Cagliostro v.*

Indelle, (1907) 17 Am. Bankr. Rep. 685, 53 Misc. 44, 102 N. Y. S. 918.

*Use of abbreviations.*—While the ordinary and common abbreviations of the names of states may be used in stating the addresses of creditors, it is not proper to abbreviate such names of cities, towns, and villages as are not in common use. *In re Mackey*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 593.

*Ditto marks* should not be used in stating the creditors' addresses. *In re Mackey*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 593.

*Sufficiency of schedule as to addresses.*—*In general.*—Ordinarily a statement that the residence of a particular creditor is unknown is sufficient. But if it appears that the residence was ascertainable by inquiry, the schedule becomes defective, as the presumption arises that the address was omitted for the purpose of evading the duty of giving notice to such creditor. *Feldmark v. Weinstein*, (1904) 45 Misc. 329, 90 N. Y. S. 478; *Schiller v. Weinstein*, (1905) 47 Misc. 622, 94 N. Y. S. 763.

Thus it has been held that a schedule containing an erroneous address, particularly if the correct address can be ascertained, is insufficient. *Marshall v. English-American L. & T. Co.*, (1907) 127 Ga. 376, 56 S. E. 449; *Sutherland v. Lasher*, (1903) 41 Misc. 249, 84 N. Y. S. 56, *affirmed* (1903) 87 App. Div. 633, 84 N. Y. S. 1148; *Westheimer v. Howard*, (1905) 47 Misc. 145, 93 N. Y. S. 518; *Kaufman v. Schreier*, (1905) 108 App. Div. 298, 95 N. Y. S. 729; *Matter of Quackenbush*, (1907) 122 App. Div. 456, 106 N. Y. S. 773; *Murphy v. Blumenreich*, (1908) 123 App. Div. 645, 108 N. Y. S. 175.

But the mere fact that the bankrupt knew the creditor's address more than two years before the commencement of the proceeding has been held to be insufficient evidence that he knew the creditor's residence when he prepared the schedule. *Matter of Mollner*, (1902) 75 App. Div. 441, 78 N. Y. S. 281.

If the residence inserted is indefinite, the schedule is usually defective. *In re Brumelkamp*, (N. D. N. Y. 1899) 95 Fed. 814.

The words "residence, 135 Bway," are not a sufficient designation of any residence. *Sutherland v. Lasher*, (1903) 11 Am. Bankr. Rep. 780, 41 Misc. 249, 84 N. Y. S. 56.

A statement that the creditor's address is "care of New York Clipper, New York city," is too indefinite. *Haack v. Theise*, (1906) 51 Misc. 3, 99 N. Y. S. 905.

It has been held, however, that the address of the creditor's attorney, who has informed the bankrupt that communications to the creditor may be so addressed, is sufficient. *Matter of David*, (1904) 44 Misc. 516, 90 N. Y. S. 85; *Vaughn v.*

*Irwin*, (1905) 49 Misc. 611, 96 N. Y. S. 742.

*In Weidenfeld v. Tillinghast*, (1907) 54 Misc. 90, 104 N. Y. S. 712, 104 N. Y. S. 902, it was doubted whether the word "residence" includes the creditor's business address. See also *Grosso v. Marx*, (1904) 45 Misc. 500, 92 N. Y. S. 773.

It has been held, however, that this view is too narrow, especially as a large percentage of creditors is usually composed of firms and corporations. See *Sutherland v. Lasher*, (1903) 41 Misc. 249, 84 N. Y. S. 56.

For evidence sufficient to show that the bankrupt knew the creditor's address see *Guasti v. Miller*, (1911) 203 N. Y. 259, 96 N. E. 416, *affirmed* (1912) 226 U. S. 170, 33 S. Ct. 49, 57 U. S. (L. ed.) 173.

*Omission of street or street number.*—*In Kreitlein v. Ferger*, (1915) 238 U. S. 21, 35 S. Ct. 685, 59 U. S. (L. ed.) 1184, it was held that a schedule listing the creditor's residence as "Indianapolis" merely without giving the street address was at least *prima facie* sufficient. The court said: "The question as to the necessity of giving the street address has sometimes arisen in suits against indorsers, who claimed that they were relieved from liability because the notice of nonpayment and protest was addressed to them at the city where they lived, but without adding the street and number of their residence. It seems generally to have been held that mailing a notice thus addressed is *prima facie* sufficient. *True v. Collins*, 3 Allen 438; *Clarke v. Sharpe*, 3 Mees. & W. 166, 1 Horn & H. 35; *Mann v. Moors*, Ryan & M. 250; *People's Bank v. Scalzo*, 127 Mo. 188, 29 S. W. 1032; *Marton v. Westcott*, 8 Cush. 425; *Bartlett v. Robinson*, 39 N. Y. 187. See also *Bank of Columbia v. Lawrence*, 1 Pet. 578, 581, 7 U. S. (L. ed.) 269, 270; *Bank of United States v. Carneal*, 2 Pet. 550, 551, 7 U. S. (L. ed.) 516. There are only a few instances, under the Bankrupt Act, in which the courts have had occasion to deal with the subject, or to construe section 7 (8),—requiring claims to be duly listed,—in connection with section 17, which provides that a discharge shall release the debtor from all provable debts 'except such as . . . (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy . . .'. It has been held that a claim is not duly scheduled if the name of the creditor is improperly spelled (*Custard v. Wigder-son*, 130 Wis. 416, 110 N. W. 263, 10 Ann. Cas. 740); or if the street number is given, but the name of the city of his residence is omitted (*Troy v. Rudnick*, 198 Mass. 563, 85 N. E. 177); or if the creditor is listed as residing in one city when he actually lives in another (*Mar-*

shall *v. English-American Loan & T. Co.*, 127 Ga. 376, 56 S. E. 449); or if the creditor's name is given, but the schedule falsely recites "Residence unknown," (*Birkett v. Columbia Bank*, 195 U. S. 345, 49 U. S. (L. ed.) 231, 25 S. Ct. 38; *Miller v. Guasti*, 226 U. S. 170, 57 U. S. (L. ed.) 173, 33 S. Ct. 49; *Parker v. Murphy*, 215 Mass. 72, 102 N. E. 85). These decisions, however, were based on extrinsic proof and on a finding that, as a matter of fact, the name was misspelled, or the creditor's residence was improperly listed, or that the bankrupt knew the creditor's address and falsely stated that the residence was "Unknown." None of them holds that, as a matter of law, the discharge was rendered inoperative merely because the street number was not given in the schedule. Indeed, it is not claimed that the Act requires that this street address should be stated in every instance where the creditor lives in a city having a postal delivery system. *Evans v. Fleming & A. Co.*, 62 Kan. 813, 64 Pac. 591. But it is argued that this should be done where he resides in one of the very large cities of the country. And we find that in some districts the referee examines the schedule, and, in his discretion, requires it to be amended so as to give the street number (*Re Brumelkamp*, 95 Fed. 814; *Re Dvorak*, 107 Fed. 76). We also find that the bankruptcy rules of force in the southern district of New York provide (italics ours) that the schedules "as respects creditors in the city of New York should state the street and number of their address or place of business so far as known." *Weidenfeld v. Tillinghast*, 54 Misc. 93, 104 N. Y. S. 712. See also *Agliostro v. Indelle*, (1907) 53 Misc. 44, 102 N. Y. S. 918; *McKee v. Preble*, 154 App. Div. 156, 138 N. Y. S. 915. But without considering the effect of such rule, it is sufficient to say that, in the present case, there was nothing to show that any similar regulation had been made in the Indiana district, nor is there proof as to what was Ferger's street address; or that Kreitlein knew such address at the time he made the schedule; or that the notice may not have been delivered during Ferger's absence from the city, and not received by him on his return. Nor is there any evidence to show that Ferger did not constantly and promptly receive letters addressed to him at Indianapolis without the street number being given."

**Sufficiency of description of debts.**—A schedule which contains merely the names and addresses of the creditors is insufficient. *In re Schiller*, (W. D. Va. 1899) 96 Fed. 400.

But as the chief purpose of the statute is that the creditors shall receive notice of the proceedings, the strict accuracy which is required in the statement of the names and addresses is relaxed in the

description of the debt, though it has been held that the amount and consideration must be stated correctly. *Steele v. Thalheimer*, (1905) 74 Ark. 516, 86 S. W. 305; *Armstrong v. Sweeney*, (1905) 73 Neb. 775, 103 N. W. 436; *Matter of David*, (1904) 44 Misc. 516, 90 N. Y. S. 85; *Bernheim v. Bloch*, (1904) 45 Misc. 581, 91 N. Y. S. 40; *Delta County Bank v. McGranahan*, (1905) 37 Wash. 307, 79 Pac. 796.

Where the bankrupt and his wife were joint obligors in a mortgage and bond, it was held that a statement in the schedule that the mortgage and bond had been given by the wife, omitting any reference to the indebtedness of the husband, was misleading. *Fifth Ave. Bldg., etc., Assoc. v. Goldberg*, (1903) 22 Pa. Super. Ct. 197.

### III. FORM, VERIFICATION, AND AMENDMENT.

**Form.**—The official forms (see the several schedules in Form No. 1) prescribed by the Supreme Court should be observed and used in the preparation of the schedules, with such alterations as may be necessary to suit the circumstances of any particular case. *Mahoney v. Ward*, (E. D. N. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770; *Burke v. Guarantee Title, etc., Co.*, (3d Cir. 1905) 134 Fed. 562, 67 C. C. A. 486, 14 Am. Bankr. Rep. 31; *In re Soper*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 193; *Matter of McConnell*, (W. D. N. Y. 1904) 11 Am. Bankr. Rep. 418; *Matter of McClintock*, (N. D. Ohio 1904) 13 Am. Bankr. Rep. 607.

General Order No. 5 requires schedules to be "printed or written out plainly."

**Verification.**—The schedule should be verified. But the oaths to the schedules, attached to a voluntary petition, need not be signed by the bankrupt where the petition itself is properly verified by him. *Matter of McConnell*, (W. D. N. Y. 1904) 11 Am. Bankr. Rep. 418.

"It would not be claimed . . . that an attorney [at law] might make oath to a bankrupt's schedules without special authorization by law." *Per Brown, D. J.*, in *In re Blankfein*, (1899) 97 Fed. 192.

The verification should show clearly whether it was made upon oath or affirmation. *In re Brumelkamp*, (1899) 95 Fed. 814, holding that a recital that the bankrupt was "duly sworn (or affirmed)" was defective, but that it was amendable.

**Amendment of schedules.**—General Order No. 11 (see *infra*, following section 30), authorizes the court to allow amendments to schedules, regulates the form in which amendments shall be filed, and provides that the application to amend shall state the cause of the error in the original schedule. In practice amendments are liberally allowed. *In re Royal*, (1901)

112 Fed. 135; *In re Slingluff*, (1900) 105 Fed. 502; *In re Beerman*, (1901) 112 Fed. 662; *In re Falconer*, (C. C. A. 1901) 110 Fed. 111; *In re Bean*, (1900) 100 Fed. 232; *In re Laughlin*, (1899) 96 Fed. 589; *In re McFaun*, (1899) 96 Fed. 592. See also *In re Kean*, (1873) 2 Hughes 322, 14 Fed. Cas. No. 7,630; *In re Preston*, (1869) 3 Nat. Bankr. Reg. 103, 19 Fed. Cas. No. 11,392; *In re Brumelkamp*, (N. D. N. Y. 1899) 95 Fed. 814, 2 Am. Bankr. Rep. 318; *In re Ankeny*, (N. D. Ia. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72; *In re Morgan*, (W. D. Va. 1900) 105 Fed. 901, 5 Am. Bankr. Rep. 472; *In re Tollett*, (6th Cir. 1901) 106 Fed. 866, 46 C. C. A. 11, 5 Am. Bankr. Rep. 404; *In re Falconer*, (8th Cir. 1901) 110 Fed. 111, 49 C. C. A. 50, 6 Am. Bankr. Rep. 557; *Goodman v. Curtis*, (5th Cir. 1909) 174 Fed. 644, 98 C. C. A. 398, 23 Am. Bankr. Rep. 504; *In re Heller*, (1871) 5 Nat. Bankr. Reg. 46, 11 Fed. Cas. No. 6,339, following the state law and practice in respect of amendments, and holding "the better practice to be to issue an order requiring the party to show cause why the amendments as asked for should not be allowed, specifying particularly the points in which the schedules are defective." But compare *Matter of Watts*, (1869) 3 Ben. 166, 29 Fed. Cas. No. 17,293; *In re Hill*, (1881) 5 Fed. 448.

To claim further exemptions.—But amendment will not be allowed for the purpose of claiming further exemptions,

when the title to the property has vested in the trustee, and the only result will be to prefer parties holding waiver notes. *In re Moran*, (1900) 105 Fed. 901, affirmed in *Moran v. King*, (C. C. A. 1901) 111 Fed. 730. See further as to amendment of claim of exemption note to section 6a.

As to the duty of the referee to cause the amendment of defective schedules, see section 39a (2).

The right of a bankrupt to amend his schedule to supply an omission, through mistake, to claim his exemptions is a valuable legal right; and the action of the District Court in refusing such an amendment may be reviewed by the Circuit Court of Appeals on a petition to revise. *Goodman v. Curtis*, (5th Cir. 1909) 174 Fed. 644, 98 C. C. A. 398, 23 Am. Bankr. Rep. 504.

On reopening of estate.—The court may permit the reopening of an estate for the purpose of setting out additional property in the schedules. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728; *In re McKee*, (E. D. N. Y. 1908) 165 Fed. 269, 21 Am. Bankr. Rep. 306.

After a discharge, it is too late for the bankrupt to come in and include creditors not named by him in his schedules, or brought in and made parties prior to the granting of the discharge. *In re Spicer*, (W. D. N. Y. 1906) 145 Fed. 431, 16 Am. Bankr. Rep. 802.

(9) [Submit to examination.] when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence. [(1898) 30 Stat. L. 548.]

As to examination of persons other than the bankrupt, see section 21a.

"This section should be read with § 21a." *Cameron v. U. S.*, (1914) 231 U. S. 710, 34 S. Ct. 244, 58 U. S. (L. ed.) 448; *Ulmer v. United States*, (C. C. A. 6th Cir. 1915) 219 Fed. 641. Section 21a provides for examination of the bankrupt or "any designated person," etc.,

while the estate is "in process of administration." This note to section 7a (9) sets forth the rulings concerning examination of the bankrupt, though such examination was ostensibly pursuant to section 21a, the note to section 21a treating of examination of persons other than the bankrupt.

Purpose of provision and relation to



section 3d.—“The purpose of the examination [of the bankrupt under section 21a] is to develop the whereabouts of assets of the estate for the purpose of aiding its administration, and not to enable the petitioning creditors to elucidate evidence to assist them in establishing the insolvency of the bankrupt or the act or acts of bankruptcy relied upon by them . . . . Section 3d of the Bankrupt Act covers the examination of the bankrupt and the production of his books, so far as the issue of his solvency, or insolvency, is concerned. . . . The two examinations provided for by these two sections are distinct, and the purpose of each is different.” *Rawlins v. Hall-Epps Clothing Co.*, (1914) 217 Fed. 884, 133 C. C. A. 594.

**Duty to submit to examination.**—The bankrupt must, when present at a first meeting of his creditors, and at such other times as the court shall order, submit to an examination for the purposes specified in section 7a (9). *In re Price*, (S. D. N. Y. 1899) 91 Fed. 635, 1 Am. Bankr. Rep. 419; *In re Foerst*, (S. D. N. Y. 1899) 93 Fed. 190, 1 Am. Bankr. Rep. 259; *In re Jehu*, (N. D. Ia. 1899) 94 Fed. 638, 2 Am. Bankr. Rep. 498; *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re Kamsler*, (S. D. N. Y. 1899) 97 Fed. 194; *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231; *In re Mellen*, (S. D. N. Y. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 226; *In re Cliffe*, (E. D. Pa. 1899) 97 Fed. 540, 3 Am. Bankr. Rep. 257; *In re McCormick*, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340; *In re Horgan*, (2d Cir. 1899) 98 Fed. 414, 39 C. C. A. 118, 3 Am. Bankr. Rep. 253, *affirming* (S. D. N. Y. 1899) 97 Fed. 319; *In re Brundage*, (N. D. Ia. 1900) 100 Fed. 613, 4 Am. Bankr. Rep. 47; *In re Tudor*, (D. C. Colo. 1900) 100 Fed. 796, 4 Am. Bankr. Rep. 78; *In re Franklin Syndicate*, (E. D. N. Y. 1900) 101 Fed. 402, 4 Am. Bankr. Rep. 244; *In re Carley*, (D. C. Ky. 1901) 106 Fed. 862, 5 Am. Bankr. Rep. 554; *In re Grossman*, (E. D. Mich. 1901) 111 Fed. 507; *People's Bank v. Brown*, (3d Cir. 1902) 112 Fed. 652, 50 C. C. A. 411, 7 Am. Bankr. Rep. 475; *In re Leslie*, (N. D. N. Y. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561; *In re Worrell*, (E. D. Pa. 1903) 125 Fed. 159, 10 Am. Bankr. Rep. 744; *In re Hooks Smelting Co.*, (E. D. Pa. 1905) 138 Fed. 954; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785; *In re Fleischer*, (S. D. N. Y. 1907) 151 Fed. 81, 18 Am. Bankr. Rep. 194; *In re Jacobs*, (W. D. Pa. 1907) 154 Fed. 988, 18 Am. Bankr. Rep. 728; *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835; *In re Samuelsohn*, (W. D. N. Y. 1909) 174 Fed. 911, 23 Am. Bankr. Rep. 528; *In re Kaplan*, (1914) 213 Fed. 753, 130 C. C. A. 267.

**Full disclosure.**—The burden is on the bankrupt, under this section, of making a full and frank disclosure of his business dealings. *In re Grossman*, (1901) 111 Fed. Rep. 507.

**Examination to establish objection to discharge.**—A bankrupt may be ordered before the referee for examination whenever reasonably required by creditors for the purpose of establishing their objections to his discharge. *In re Price*, (S. D. N. Y. 1899) 91 Fed. 635, 1 Am. Bankr. Rep. 419; *In re Mellen*, (S. D. N. Y. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 226; *In re Peters*, (D. C. Mass. 1898) 1 Am. Bankr. Rep. 248.

**Previous examination immaterial.**—The fact that the bankrupt attended and was examined on the return of the order to show cause why his discharge should not be granted will not excuse him from undergoing a further examination, on the application of objecting creditors, if the referee shall deem it reasonable and necessary. *In re Mellen*, (S. D. N. Y. 1899) 97 Fed. 32, 3 Am. Bankr. Rep. 226. See also *In re McCormick*, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340; *In re Bryant*, (M. D. Pa. 1911) 188 Fed. 530.

The fact that an adjournment at an examination was without day does not prevent the granting of an application for a further examination. *In re Bryant*, (M. D. Pa. 1911) 188 Fed. 530.

**Testimony forms part of record.**—Testimony of a bankrupt, taken as authorized by the referee, is a part of the record; and creditors generally are entitled to access thereto, while it remains in the custody of the referee. *In re Samuelsohn*, (W. D. N. Y. 1909) 174 Fed. 911, 23 Am. Bankr. Rep. 528.

**Expense.**—The examination should be at the expense of the creditors, as respects any clerical or stenographic aid in taking notes. *In re Price*, (S. D. N. Y. 1899) 91 Fed. 635, 1 Am. Bankr. Rep. 419.

The bankrupt is not entitled to reimbursement for his expenses in returning for examination, where he has voluntarily removed his residence from the district after bankruptcy. *In re Groves*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 732.

**Application for examination.**—Any person who shows that he is a creditor of the bankrupt, either by having been named as a creditor in the bankrupt's schedule or by other evidence satisfactory to the referee, is entitled to an order for the examination of the bankrupt, although he has not formally proved his claim. *In re Jehu*, (N. D. Ia. 1899) 94 Fed. 638, 2 Am. Bankr. Rep. 498; *In re Walker*, (1899) 96 Fed. 550; *In re Kuffler*, (E. D. N. Y. 1907) 153 Fed. 667, 18 Am. Bankr. Rep. 587; *In re Samuelsohn*, (W. D. N. Y. 1909) 174 Fed. 911, 23 Am. Bankr. Rep. 528.

*A creditor who failed to prove his debt*

in the original proceedings has no right to examine the bankrupt in proceedings on a supplemental petition by the bankrupt after the estate has been closed. *In re Shaffer*, (1900) 104 Fed. 982.

The application of a trustee to be allowed an examination of a bankrupt to ascertain whether he has made a full disclosure of assets need not set forth the nature and character of the testimony intended to be adduced. *In re Bryant*, (M. D. Pa. 1911) 188 Fed. 530.

**Order for examination.**—There is an official form of "order for examination of bankrupt" and one for "examination of bankrupt as a witness." Forms Nos. 28, 29, *infra*, preceding section 31.

**Notice of examination.**—Creditors are entitled to at least ten days' notice by mail, to their respective addresses as the same appear in the list of creditors, of all examinations of the bankrupt. See section 58a (1).

**Time of examination.—Before or after adjudication.**—The estate of the bankrupt is in process of administration after the petition has been filed and a receiver appointed, and an examination may be ordered at any time thereafter under section 21a of the Bankruptcy Act. *Cameron v. U. S.*, (1914) 231 U. S. 710, 34 S. Ct. 244, 58 U. S. (L. ed.) 448, *reversing*, but on another ground, (1911) 192 Fed. 548, 113 C. C. A. 20, where the court said: "The controversy is over the meaning of the phrase [in section 21a] 'a bankrupt whose estate is in process of administration under this act.' The construction of this provision differs in the federal courts, some of them having held that there can be no such examination until after adjudication, as it is only then that the bankrupt can be subjected to such proceeding. Of this class are *Skubinsky v. Bodek*, (1909) 172 Fed. 332, 97 C. C. A. 116, 19 Ann. Cas. 1035, 24 L. R. A. (N. S.) 985; *Podolin v. McGettigan*, (1912) 193 Fed. 1021, *mem.*, 113 C. C. A. 668; *In re Thompson*, (1910) 179 Fed. 874; *In re Davidson*, (1907) 158 Fed. 678; *In re Crenshaw*, (1907) 155 Fed. 271. [See also *In re Back-Bay Automobile Co.*, (1907) 157 Fed. 679.] To the opposite view are *In re Fixen*, (1899) 96 Fed. 748; *In re Fleischer*, (1907) 151 Fed. 81; *Ex p. Bick*, (1907) 155 Fed. 908; *Wechsler v. U. S.*, (1907) 158 Fed. 579, 86 C. C. A. 37; *U. S. v. Liberman*, (1910) 176 Fed. 161," to which may be added *In re Price*, (1899) 91 Fed. 635; *In re Knopf*, (1906) 144 Fed. 245, and *In re Fullerman*, (1906) 149 Fed. 244.

"While the decision [in *Cameron v. U. S.* quoted in the preceding paragraph] may not be broad enough to extend to an involuntary bankruptcy and one in which there is no receivership, the reasoning of the court would indicate that the bankrupt court had authority to make such an order in an involuntary case in which no

receiver had been appointed. . . . In view of the language of the opinion, we are not disposed to hold that the court below was without authority to grant an order for the examination of the bankrupts, under proper terms and conditions, before adjudication and in the absence of a receivership." *Rawlins v. Hall-Epps Clothing Co.*, (1914) 217 Fed. 884, 133 C. C. A. 594.

**Reason for early examination.**—In *Cameron v. U. S.*, (1914) 231 U. S. 710, 34 S. Ct. 244, 58 U. S. (L. ed.) 448, the court said: "If such examination is postponed until after adjudication, which may not take place for at least twenty days, within which the bankrupt in involuntary bankruptcy is given leave to appear and plead the estate may be concealed and disposed of, and the purpose of the act to hold it and to distribute it for the benefit of creditors defeated. The importance of such early examination was emphasized in *Re Fleischer*, (1907) 151 Fed. 81."

In *In re Fleischer*, (S. D. N. Y. 1907) 151 Fed. 81, 18 Am. Bankr. Rep. 194, the court said: "The desirability and importance of promptly conducting an investigation into the affairs of any person petitioned into the bankruptcy court has been too often shown to be open to doubt. To wait until adjudication to ascertain from the bankrupt's own lips the situs of his property and his own explanations of the situation in which the creditors find themselves, is in many cases giving to those guilty of fraud just the necessary time to permit the fraud to be consummated and the fruits thereof secured. In my opinion it is not too much to say that a skilful and vigorous use of early examinations of involuntary bankrupts is the one thing which enables creditors to prevent this statute being easily turned into a shield for dishonesty and a potent aid to fraud."

And in *U. S. v. Liberman*, (E. D. N. Y. 1910) 176 Fed. 161, 23 Am. Bankr. Rep. 734, it was said that the reason for allowing an examination prior to adjudication is the same as the reason for allowing an examination subsequent to adjudication, and prior to the first meeting of creditors.

**Where issue of sanity is raised.**—The alleged bankrupt cannot be required to submit himself to an examination, before trial, as to his sanity; and an application for such order will be denied. *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482.

**Examination before appointment of trustee.**—It is not within the contemplation of the law, upon a motion to discover assets and to consider special questions, that an exhaustive examination of all the issues of the bankruptcy be covered before the appointment of a trustee. *In re Stark*, (E. D. N. Y. 1907) 155 Fed. 694, 18 Am. Bankr. Rep. 467.

A debtor having been adjudged an involuntary bankrupt, he may be ordered to be examined before the referee even before the first meeting of the creditors and the appointment of a trustee; and, if the scope of the examination is confined to obtaining information for the preparation of the schedule, the notice to creditors required under section 58a (1) need not be given. *In re Franklin-Syndicate*, (1900) 101 Fed. 402.

**Examination prior to creditors' meeting.**—In *In re Franklin Syndicate*, (E. D. N. Y. 1900) 101 Fed. 402, 4 Am. Bankr. Rep. 244, the bankrupt was ordered to appear before the referee for examination pending the first meeting of his creditors, but such examination was limited solely to the purpose of preparing schedules.

**To establish objections to discharge.**—The practice "is to require the bankrupt to attend for examination whenever reasonably required by creditors for the purpose of establishing their objections to his discharge." *In re Mellen*, (1899) 97 Fed. 326.

**Frequent attendance for examination.**—"In most important cases his [the bankrupt's] attendance for examination is required on numerous occasions, from time to time, not merely upon his original examination and on his examination upon the application for a discharge, but on many other questions that frequently arise with reference to his assets or to disputed or doubtful liens or claims against the estate." *In re Lewensohn*, (1900) 99 Fed. 73, affirmed (C. C. A.) 104 Fed. 1006.

**Examination after discharge.**—A creditor or trustee should have the right, even after the discharge, to examine the bankrupt to ascertain whether he has concealed, since his discharge, any property from his trustee, and this right should continue for a year, or during the period within which the discharge could be revoked. *In re Peters*, (D. C. Mass. 1898) 1 Am. Bankr. Rep. 248.

**After an estate has been closed**, a creditor who has failed to prove his claim has no standing on the reopening of the proceedings to examine the bankrupt therein. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728.

**Scope of examination.**—*Inquiry as to transactions occurring prior to four months period.*—On the examination of a bankrupt by his creditors for the purpose of determining the condition of his estate and the disposition he has made of his property, the inquiry is not limited to facts and transactions occurring within four months prior to the bankruptcy, but may be directed to matters anterior to that time, if the circumstances in question will throw any light upon the facts or issues pertinent to the proceedings. *In re Brundage*, (N. D. Ia. 1900) 100 Fed. 613, 4 Am. Bankr. Rep. 47.

But where the bankrupt, more than a

year before the enactment of the Bankruptcy Law, had made an assignment for the benefit of his creditors under a state law, it is not material or proper, in his examination in the bankruptcy proceedings, to inquire into the circumstances under which the assignment was made, nor to require the assignee to produce the books and papers turned over to him at the time, unless a foundation is first laid for the belief that property of the bankrupt was withheld by him at the time of such assignment, and was still held as his at the time of the enactment of the Bankruptcy Law. *In re Hayden*, (S. D. Fla. 1899) 96 Fed. 199, 1 Am. Bankr. Rep. 670.

**Inquiry as to combination of bankrupt's safe.**—The president and treasurer of a bankrupt corporation, on an examination before the referee, may properly be required to make known to the trustee the combination of a safe owned by the corporation and alleged to contain assets. *In re Hooks Smelting Co.*, (E. D. Pa. 1905) 138 Fed. 954, 15 Am. Bankr. Rep. 83.

**Inquiry as to statements made by bankrupt.**—A question as to whether a bankrupt did not make a certain statement in writing as to his assets, within a few months prior to his bankruptcy, upon which he obtained property on credit from certain of his creditors, is material and proper to be asked him on his examination. *In re Jacobs*, (W. D. Pa. 1907) 154 Fed. 988, 18 Am. Bankr. Rep. 728.

**Duty to answer truthfully.**—The duty of submitting to an examination involves the duty of answering truthfully, and as intelligently and connectedly and fully as the bankrupt's mental equipment will permit; and the failure to do so is a contempt of court. *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785.

**Incriminating answers.**—*Constitutional protection.*—Notwithstanding the words "no testimony given by him shall be offered in evidence against him in any criminal proceeding," the bankrupt will not be obliged, under examination before the referee, to answer questions the answers to which he says might incriminate him, as he is protected by the wider Fifth Amendment of the Constitution of the United States declaring that "no person . . . shall be compelled in any criminal case to be a witness against himself." *In re Scott*, (W. D. Pa. 1899) 95 Fed. 815, 1 Am. Bankr. Rep. 49; *In re Rosser*, (E. D. Mo. 1899) 96 Fed. 305, 2 Am. Bankr. Rep. 755; *In re Walsh*, (D. C. S. D. 1900) 104 Fed. 518, 4 Am. Bankr. Rep. 693; *In re Feldstein*, (S. D. N. Y. 1901) 108 Fed. 794, 6 Am. Bankr. Rep. 458; *In re Smith*, (S. D. N. Y. 1902) 112 Fed. 509, 7 Am. Bankr. Rep. 213; *In re Franklin Syndicate*, (E. D. N. Y. 1900) 114 Fed. 205, 4 Am. Bankr. Rep. 511; *In re Shera*, (S. D.

N. Y. 1902) 114 Fed. 207, 7 Am. Bankr. Rep. 552; *In re Nachman*, (D. C. S. C. 1902) 114 Fed. 995, 8 Am. Bankr. Rep. 180; *In re Kanter*, (S. D. N. Y. 1902) 117 Fed. 356, 9 Am. Bankr. Rep. 104; *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755; *In re Hess*, (E. D. Pa. 1905) 134 Fed. 109, 14 Am. Bankr. Rep. 559; *In re Hark*, (E. D. Pa. 1905) 136 Fed. 986, 14 Am. Bankr. Rep. 624; *In re Hooks Smelting Co.*, (E. D. Pa. 1905) 138 Fed. 954, 15 Am. Bankr. Rep. 83; *In re Rosenblatt*, (E. D. Pa. 1906) 143 Fed. 663, 16 Am. Bankr. Rep. 306; *Edelstein v. U. S.*, (C. C. A. 8th Cir. 1906) 149 Fed. 636, 17 Am. Bankr. Rep. 649; *In re Hathorn*, (E. D. La.) 2 Am. Bankr. Rep. 298; *In re Henschel*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 207; *In re Glassner*, (D. C. Md. 1902) 8 Am. Bankr. Rep. 184. But see *Mackel v. Rochester*, (C. C. A. 1900) 102 Fed. 314, where, under the circumstances, it was held that the court below was in error in refusing to require the bankrupt to give further testimony, as a bankrupt under examination cannot refuse to answer questions on matters in the suit on the ground that the answers would incriminate him. but if, "in giving such testimony, he exposes himself to prosecution and penalty, he is within the protection of the statute."

A bankrupt can avail himself of the privilege of not answering on the ground that the answers might incriminate him, "when the situation is such as seems to put him in any hazard." *In re Shera*, (1902) 114 Fed. 207.

The filing of a voluntary petition in bankruptcy does not waive the right to claim the constitutional privilege of refusing to answer an incriminating question. *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755.

**Bankrupt refusing oath.**—A bankrupt against whom criminal proceedings are pending in a state court cannot, when brought before the referee for examination under this section, refuse to take the oath unless it contains a proviso reserving his right to claim "any lawful privilege" in his examination; for such a proviso is unnecessary, and "the mere administering of an oath cannot deprive a witness of any lawful privilege he has." *In re Scott*, (1899) 95 Fed. 815.

**Cross-examination.**—A bankrupt is not protected from answering questions the answers to which might incriminate him, where such questions are clearly cross-examination of what he had volunteered himself in his petition or schedule or previous testimony. *In re Walsh*, (1900) 104 Fed. 518.

**Exception to general provisions.**—The provision in section 7a (9) that no testimony given by the bankrupt "shall be offered in evidence against him in any criminal proceeding," is "an exception to the general language of section 29b,

cl. 2, of the Act, so as to limit the operation of the provision to oaths made in or in relation to any proceeding in bankruptcy, except the examinations of the bankrupt allowed by section 7 of the Act." *In re Marx*, (1900) 102 Fed. 676.

**Necessity of foundation for claim of privilege.**—It is always a difficult thing to say at just what point a bankrupt who is compelled to answer, and who claims his privilege, should be allowed the exercise of his own unquestioned judgment of the danger of self-incrimination. *A priori* no question can be said to be outside of the range of proof of some crime, and to allow him to stand mute in all cases is to give him the privilege of keeping silent as to all his affairs, in the interest of merely pedantic and verbal integrity of principle. While in all cases he must be given the benefit of all doubts, there must be something which gives rise to a probability of damage upon which a doubt may be based. *In re Bendheim*, (S. D. N. Y. 1910) 180 Fed. 918.

If the court is convinced that the answer to the question cannot by any possibility criminate him, and especially if the witness does not swear that he believes that it would, it is the duty of the court to compel him to answer. *In re Levin*, (S. D. N. Y. 1904) 131 Fed. 388, 11 Am. Bankr. Rep. 382.

Thus where an officer of a bankrupt corporation is under indictment in a state court for embezzlement of funds of the corporation, he cannot be required, on his examination before the referee, over his claim of privilege, to state whether or not he appropriated certain money of the corporation to his own use; but he may be required to state whether or not he has in his possession or under his control any property belonging to the bankrupt estate. *In re Hooks Smelting Co.*, (E. D. Pa. 1905) 138 Fed. 954, 15 Am. Bankr. Rep. 83.

**Production of books and papers.**—The bankrupt will not be required to develop the whereabouts of papers which might be used against him in a criminal proceeding. *In re Franklin Syndicate*, (E. D. N. Y. 1900) 114 Fed. 205, 4 Am. Bankr. Rep. 511. And see the annotation under subdivision (4) of this section.

But a bankrupt is not permitted to withhold his books from his trustee or receiver on his mere assertion that they contain evidence which would tend to incriminate him; but he must produce them, so that the question may be determined by the court or referee; and if it appears that they do contain such evidence, the court may make such order as will protect the bankrupt from its use in any criminal case, and at the same time give the trustee the use of the books in the administration of the estate. *In re Harris*, (S. D. N. Y. 1908) 164 Fed. 292, 20 Am. Bankr. Rep. 911.

A bankrupt is entitled to a hearing on a petition by a trustee to compel the production of books and papers. *In re Soloway*, (D. C. Conn. 1912) 195 Fed. 100.

Participation by the bankrupt's counsel in the ordinary examinations of the bankrupt is not encouraged. *In re Kross*, (1899) 96 Fed. 819.

**Subsequent use of evidence—Admissibility of evidence in subsequent proceedings.**—The testimony of the bankrupt, so far as relevant, may be admitted in subsequent proceedings, where the person who takes the notes of the bankrupt's examination testifies that they were truly and correctly taken. *In re Bard*, (S. D. N. Y. 1901) 108 Fed. 208, 5 Am. Bankr. Rep. 810. See also *In re Wilcox*, (C. C. A. 1900) 109 Fed. 631; *U. S. v. Simon*, (W. D. Wash. 1906) 146 Fed. 89, 17 Am. Bankr. Rep. 41.

"While such testimony is primarily for the information of the trustee in aid of his administration of the estate, it is also available to parties in interest. Such testimony is not to be classed with declarations made out of court. It is judicial in its nature and with reference to it the trustee may properly be said to be in privity with the bankrupt, and, while not concluded by the bankrupt's admissions made therein, they are admissible against him in controversies arising in such bankruptcy proceedings." *In re Thompson*, (D. C. N. J. 1912) 197 Fed. 681.

The words "in any criminal proceeding," used in section 7a (9), are limited to providing immunity to the bankrupt from the use of his evidence only in such criminal proceedings as arise out of the conduct of his business or the disposition of his property, etc.; and these words do not protect the bankrupt from prosecution for false swearing in giving his evidence. *Cameron v. United States*, (1914) 231 U. S. 710, 34 S. Ct. 244, 58 U. S. (L. ed.) 448, where the court, construing this clause, said: "This section was before this court, so far as the immunity provided is concerned, in *Glickstein v. United States*, (1911) 222 U. S. 139, 32 S. Ct. 71, 56 U. S. (L. ed.) 128, where it was held not to prevent a prosecution for perjury in giving of testimony by a bankrupt, and the immunity was held to apply to past transactions concerning which the bankrupt might be examined. In the opinion in that case *Edelstein v. United States*, Circuit Court of Appeals for the Eighth Circuit, (1906) 149 Fed. 636, which had held that the words 'any criminal proceeding' in which immunity is provided are limited to such criminal proceedings as arise out of the conduct of the bankrupt's business or the disposition of his property, etc., concerning which he may be examined, was cited with approval. In *Ensign v. Pennsylvania*, (1913) 227 U. S. 592, 600, 33 S. Ct. 321, 57 U. S. (L. ed.) 658, it was held that full effect could be

given to the immunity provision by confining it to the testimony given under subdivision 9, to which it was immediately subjoined. As the present prosecution was based upon alleged false swearing in the course of the bankruptcy proceedings, section 7 of the Bankruptcy Act can have no application." See also *Wechsler v. U. S.*, (2d Cir. 1907) 158 Fed. 579, 86 C. C. A. 37, 19 Am. Bankr. Rep. 1; *U. S. v. Brod*, (N. D. Ga. 1910) 23 Am. Bankr. Rep. 740; *Daniels v. United States*, (C. C. A. 6th Cir. 1912) 196 Fed. 459; *In re Kaplan Bros.*, (C. C. A. 3d Cir. 1914) 213 Fed. 753, wherein it was also held that the provision that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding, refers to past transactions concerning which the bankrupt may be charged with criminal conduct. The court said: "But, if he should be charged with having committed perjury in the course of such examination, the necessities of the case require that his testimony may be proved in order to show in what particulars the asserted false swearing consists; and for a like reason, whenever he is charged with a punishable contempt in refusing to submit to the examination required by the Act, the necessities of the case require that his testimony be examined in order to ascertain whether in point of fact he has so refused."

But see *U. S. v. Simon*, (W. D. Wash. 1906) 146 Fed. 89, 17 Am. Bankr. Rep. 41, wherein it appears that the bankrupt was indicted for perjury committed in giving testimony under oath before a referee in support of contested claims, and, in sustaining a demurrer to the indictment the court said that the statute—section 7a (9)—was an effective obstacle to the conviction of the defendant.

**Bankruptcy schedules** are not within the description of "testimony" as the word is used in section 7a (9). It refers to oral evidence. *Ensign v. Pennsylvania*, (1913) 227 U. S. 592, 33 S. Ct. 321, 57 U. S. (L. ed.) 658, affirming a conviction of a bankrupt in a state court for the offense of receiving of deposits by an insolvent banker, wherein the court said: "And for like reasons, the evidence showing the results of an expert examination of the books of the bankers was also admissible. This conclusion renders it unnecessary for us to consider whether the prohibition with which we have dealt, that 'no testimony given by him shall be offered in evidence against him in any criminal proceeding' is not limited to criminal proceedings in the federal courts; and upon this question we express no opinion."

**Criminal prosecution in state court.**—See quotation in last preceding paragraph from *Ensign v. Pennsylvania*. Testimony given by a bankrupt in bankruptcy proceedings, under the provisions of this

section was held not admissible against such bankrupt in a criminal prosecution instituted against him for embezzlement in a state court in Florida. *Clark v. State*, (1914) 68 Fla. 433, 67 So. 135, where the court quoted section 7a (9) and said: "Even if it be true that this inhibition applies only to federal, and not to state, courts under the principle announced in *Forcheimer v. Holly*, (1872) 14 Fla. 239, which may be doubted, though it is not necessary to be determined in this case, it would not avail the prosecution. To permit the introduction of such proffered testimony would be violative of the provision of section 12 of the Declaration of Rights in our state constitution in compelling, indirectly at least, the defendant in a criminal case to be a witness against himself. See *Daniels v. State*, (1909) 57 Fla. 1, 48 So. 747."

*Use on cross-examination in criminal prosecution.*—In a prosecution of a bankrupt for the offense described in section 29b (1), where it was held reversible error to require the bankrupt on cross-examination to answer a certain question, it being apparent from the way in which the question was put, that the prosecuting attorney had in his hands the examination of the defendant before a referee under section 7a (9), and read from it in the presence of the jury, the court said: "The underlying philosophy of the statute in question is that, as a matter

of justice to the bankrupt, and also for the interests of creditors, he should be encouraged to testify freely in his examination; but he would have no encouragement thereto if, on being prosecuted for an offense, he could not undertake to absolve himself by his own testimony except at the risk of being tripped or embarrassed by what he had previously sworn to. To permit a course of cross-examination in the method here, whether the documentary evidence taken before the referee was produced in the presence of the jury or not, would be simply to permit an evasion of the statute, because to do so would involve the mischief which the statute intended to guard against, in that the witness might be more harassed and prejudiced than he would be if the whole document had been frankly put into the case."

Section 7a (9) does not exempt a bankrupt from prosecution for an offense growing out of a transaction concerning which a bankrupt has testified before the referee in bankruptcy. *Burrell v. Montana*, (1904) 194 U. S. 572, 24 S. Ct. 787, 48 U. S. (L. ed.) 1122, 12 Am. Bankr. Rep. 132, *affirming* (1902) 27 Mont. 282, 70 Pac. 982; *Edelstein v. U. S.*, (C. C. A. 8th Cir. 1906) 149 Fed. 636, 17 Am. Bankr. Rep. 649.

As to examination of third persons, see notes to section 21a.

**SEC. 8. DEATH OR INSANITY OF BANKRUPTS. — a [Not to abate proceedings.]** The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane; [(1898) 30 Stat. L. 549.]

*Death or insanity as abating proceedings.*—If the jurisdiction of the Bankruptcy Court in a given case has once rightfully attached, it cannot be defeated by the subsequent death or insanity of the alleged bankrupt. *In re Burka*, (W. D. Tenn. 1901) 107 Fed. 674, 5 Am. Bankr. Rep. 843; *In re Hicks*, (D. C. Vt. 1901) 107 Fed. 910, 6 Am. Bankr. Rep. 182, 183; *In re Risteen*, (D. C. Mass. 1903) 122 Fed. 732; *In re Miller*, (E. D. Pa. 1904) 133 Fed. 1017, 13 Am. Bankr. Rep. 345; *In re Spalding*, (C. C. A. 2d Cir. 1905) 139 Fed. 244, 14 Am. Bankr. Rep. 129; *Shute v. Patterson*, (C. C. A. 8th Cir. 1906) 147 Fed. 509, 17 Am. Bankr. Rep. 99; *In re Kehler*, (C. C. A. 2d Cir. 1908) 159 Fed. 55, *reversing* (W. D. N. Y. 1907) 153 Fed. 235, 18 Am. Bankr. Rep. 596; *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482.

*But if the debtor was insane when the alleged acts of bankruptcy were committed*, an adjudication of bankruptcy against

him is improper. *In re Kehler*, (C. C. A. 2d Cir. 1908) 159 Fed. 55, *reversing* (W. D. N. Y. 1907) 153 Fed. 235, 18 Am. Bankr. Rep. 596. And see the annotation to this effect under section 4b.

*Although the insanity of a partner and the appointment of a conservator of his estate will not prevent an adjudication of bankruptcy against the partnership on the petition of its creditors.* *In re Stein*, (7th Cir. 1904) 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 536. And see also the annotation under section 5a.

*The death of a partner prior to adjudication did not, under the Bankrupt Act of 1867, abate proceedings against the partnership.* *Hunt v. Pooke*, (1872) 5 Nat. Bankr. Reg. 161, 12 Fed. Cas. No. 6,896.

*Personal representatives brought in.*—Where an alleged voluntary bankrupt died after the filing of the petition, but before the service of process, his heirs and personal representatives should be brought in and made parties to the proceedings

before adjudication. *Shute v. Patterson*, (C. C. A. 8th Cir. 1906) 147 Fed. 509, 17 Am. Bankr. Rep. 99.

**Continuance of proceedings mandatory.**—When the proceedings are commenced, the further continuance thereof after the death of the bankrupt is mandatory; it is not left to the discretion of the court. *Shute v. Patterson*, (C. C. A. 8th Cir. 1906) 147 Fed. 509, 17 Am. Bankr. Rep. 99.

**Distribution of estate on bankrupt's death.**—Where, pending bankruptcy proceedings, the bankrupt dies, his estate is distributable according to the Bankruptcy Law, and not according to the state statutes of distribution; so that the state is not entitled to a preference in the payment of its claims by virtue of such statute. *In re Devlin*, (D. C. Kan. 1910) 180 Fed. 170.

**Exemptions in estate of deceased bankrupt.**—The property which, had the bankrupt lived, would have gone to him as his exemption, remains a part of his estate at his death, and belongs to his administrator, and not to the trustee in bankruptcy. *In re Seabolt*, (1902) 113 Fed. 768.

**Guardian ad litem of lunatic.**—Under Equity Rule 70 (old Rule 87), regulating the appointment of guardians *ad litem*, and General Order No. 37 (see *infra*, following section 30), prescribing equity practice for Bankruptcy Courts, the appointment of a guardian *ad litem* to defend

an involuntary petition in bankruptcy against a lunatic who has no regular guardian or committee is authorized; and where he has such guardian or committee the latter must be brought in by process, as well as the lunatic, and will be appointed guardian *ad litem* to defend the petition on behalf of the lunatic. *In re Burka*, (1901) 107 Fed. 674, holding also that the application for the appointment of a guardian *ad litem* to a lunatic should not be delayed because of the omission of the publication of the process, as section 18a requires such publication only "in case personal service cannot be made."

It would be premature to determine, before the appointment of a guardian *ad litem*, whether one who is insane may be adjudicated bankrupt for acts committed either before or after the lunacy began. *In re Burka*, (1901) 107 Fed. 674.

**Dissolution of corporation as affecting bankruptcy proceedings.**—Section 8 of the Bankruptcy Act, relating to the death or insanity of a bankrupt, is by analogy applicable to a corporation which seeks by a dissolution to defeat proceedings in bankruptcy; and in such case, the proceedings do not abate. *Scheuer v. Smith*, etc., Book, etc., Co., (C. C. A. 5th Cir. 1901) 112 Fed. 407, 7 Am. Bankr. Rep. 384. See also *White Mountain Paper Co. v. Morse*, (C. C. A. 1st Cir. 1904) 127 Fed. 643, 11 Am. Bankr. Rep. 633. And see the annotation to this effect under section 4b.

**[Dower and allowances for widow and children.]** *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence. [(1898) 30 Stat. L. 549.]

**Dower rights.**—The widow of a bankrupt who dies during the pendency of the bankruptcy proceedings is entitled to her dower rights as fixed by the laws of the state of the bankrupt's residence. *In re Shaeffer*, (E. D. Pa. 1900) 105 Fed. 352, 5 Am. Bankr. Rep. 248; *In re Slack*, (D. C. Vt. 1901) 111 Fed. 523, 7 Am. Bankr. Rep. 121; *In re Parschen*, (N. D. Ohio 1902) 119 Fed. 976, 9 Am. Bankr. Rep. 389; *In re Newton*, (D. C. Conn. 1903) 122 Fed. 103, 10 Am. Bankr. Rep. 345; *In re McKenzie*, (E. D. Ark. 1904) 132 Fed. 986, 13 Am. Bankr. Rep. 229; *In re McKenzie*, (C. C. A. 8th Cir. 1905) 142 Fed. 383, 15 Am. Bankr. Rep. 679; *Thomas v. Woods*, (C. C. A. 8th Cir. 1909) 173 Fed. 585, 23 Am. Bankr. Rep. 132, decree vacated (8th Cir. 1910) 178 Fed. 1005, 101 C. C. A. 664; *In re Hays*, (C. C. A. 6th Cir. 1910) 181 Fed. 674; *In re Forbes*, (N. D. Ohio 1901) 7 Am. Bankr. Rep. 42.

*It was the intention of Congress, and the public policy embodied in the Bankruptcy Law, to divide the estate of a*

bankrupt between him, and his wife and children on the one hand, and his creditors on the other hand, as the laws of the state of his domicile authorized its division under like circumstances. *In re McKenzie*, (C. C. A. 8th Cir. 1905) 142 Fed. 383, 15 Am. Bankr. Rep. 679.

*Section 8 does not confer or extend a right of dower*, but makes the right of a bankrupt's widow to dower, and its nature and extent, dependent entirely upon the local law. *In re McKenzie*, (E. D. Ark. 1904) 132 Fed. 986, 13 Am. Bankr. Rep. 229.

**Inchoate right of dower.**—While the Act does not expressly make provision for the wife's inchoate right of dower, it has been held that she is entitled to it. *Thomas v. Woods*, (C. C. A. 8th Cir. 1909) 173 Fed. 585, 23 Am. Bankr. Rep. 132; *In re Hays*, (C. C. A. 6th Cir. 1910) 181 Fed. 674; *In re Forbes*, (N. D. Ohio 1901) 7 Am. Bankr. Rep. 42. See also *Hurley v. Devlin*, (D. C. Kan. 1907) 151 Fed. 919; *Matter of Hawkins*, (D. C. R. I. 1903) 9 Am. Bankr. Rep. 598.

**Dower rights in property recovered as having been preferentially transferred.**—A wife's right of dower in her husband's real estate cannot be separated from the principal estate; and where a mortgage given by him to secure a debt of his own, in which she joined for the purpose of releasing her dower interest, is set aside after his bankruptcy as a preference and the property restored to his general estate, such mortgage is also inoperative to release or bar her dower right and cannot be enforced by the mortgagee as a conveyance of her dower interest in the property. *In re Lingafelter*, (C. C. A. 6th Cir. 1910) 181 Fed. 24, 24 Am. Bankr. Rep. 656.

**Determination of right to dower.**—In *Hurley v. Devlin*, (D. C. Kan. 1907) 151 Fed. 919, it was held that the Bankruptcy Court has exclusive jurisdiction to determine the rights of a widow to dower in the property of her husband who has died during the pendency of bankruptcy proceedings.

**Lex loci rei sitæ.**—The right of a bankrupt's widow to dower in lands owned by him is governed by the laws of the state in which the land is situated, and is not affected by the right of homestead and exemptions given by the law of his domicile. *Thomas v. Woods*, (C. C. A. 8th Cir. 1909) 173 Fed. 585, 23 Am. Bankr. Rep. 132.

**Sale of assets free of dower right.**—Where a bankrupt's wife, by letter to his trustees, agreed to extinguish her dower

interest in her husband's real estate for a specified price, she thereby consented to a sale of real estate free from her dower interest, which the court thereupon had power to order. *In re Acretelli*, (S. D. N. Y. 1909) 173 Fed. 121, 21 Am. Bankr. Rep. 537. See also section 70b and note.

**Allowance for support of widow and family of deceased bankrupt.**—There was some diversity in the decisions in the various districts in regard to the allowance to be made for the support of the widow and children of a bankrupt dying during the administration of the estate, but in *Hull v. Dicks*, (1915) 235 U. S. 584, 35 S. Ct. 152, 59 U. S. (L. ed.) 372, it was held that where a bankrupt dies after his adjudication and after the appointment, qualification and partial administration of the trustee, the estate vested in the trustee under section 70 of the Bankruptcy Law, is chargeable under this section, with the payment of the allowance to which on the death of the bankrupt, the widow and children are entitled under the laws of the state of his residence.

The former conflict in the decisions dealing with the question is illustrated in the following cases: *In re Slack*, (1901) 111 Fed. 523; *In re Seaboldt*, (1902) 113 Fed. 766; *In re Parschen*, (1902) 119 Fed. 976; *In re Newton*, (1903) 122 Fed. 103; *In re McKenzie*, (1905) 142 Fed. 383; *Thomas v. Woods*, (1909) 173 Fed. 585, vacated (1910) 178 Fed. 1005, mem.; *In re Dicks*, (1912) 198 Fed. 293.

**SEC. 9. PROTECTION AND DETENTION OF BANKRUPTS.—a [Exemption from arrest.]** A bankrupt shall be exempt from arrest upon civil process except in the following cases: [(1898) 30 Stat. L. 549.]

**Exemption from arrest.**—In accordance with the provisions of section 9a, a bankrupt is exempt from arrest upon civil process issued in an action based upon any claim which would be released by his discharge in bankruptcy. *In re Houston*, (D. C. Ky. 1899) 94 Fed. 119, 2 Am. Bankr. Rep. 107; *In re Lewensohn*, (S. D. N. Y. 1900) 99 Fed. 73, 3 Am. Bankr. Rep. 594; *Wagner v. U. S.*, (C. C. A. 6th Cir. 1900) 104 Fed. 133, 4 Am. Bankr. Rep. 596; *In re Fife*, (W. D. Pa. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258; *In re Dresser*, (S. D. N. Y. 1903) 124 Fed. 915, 10 Am. Bankr. Rep. 270; *People v. Erlanger*, (S. D. N. Y. 1904) 132 Fed. 883, 13 Am. Bankr. Rep. 197, *disapproving In re Claiborne*, (S. D. N. Y. 1901) 109 Fed. 74; *In re Chandler*, (N. D. Ill. 1904) 135 Fed. 893, 13 Am. Bankr. Rep. 614; *In re Adler*, (C. C. A. 2d Cir. 1906) 144 Fed. 659, 16 Am. Bankr. Rep. 416; *In re Wenham*, (S. D. N. Y. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690; *U. S. v. Flynn*, (S. D. N. Y. 1909) 179 Fed. 316; *Turgeon v. Emery*, (D. C. Me. 1910) 182

Fed. 1016, 25 Am. Bankr. Rep. 694; *In re Grist*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 89.

**As to what claims are released by a discharge in bankruptcy**, see the annotation under the several subdivisions of section 17a.

**Action for breach of promise to marry.**—Where a bankrupt was arrested on a writ of *capias ad satisfaciendum*, under a judgment of a state court entered after he was adjudged a bankrupt in a suit for breach of promise of marriage, on a verdict recovered before he filed his petition, it was held that he should be discharged on habeas corpus under General Order No. 30 in bankruptcy. *In re Fife*, (W. D. Pa. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258.

**Process issued from federal Circuit Court.**—A bankrupt is exempt from arrest or imprisonment upon civil process issued from a Circuit Court of the United States on a judgment of said court rendered prior to the bankruptcy proceedings. *In re*



Wenham, (S. D. N. Y. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690.

**Arrest prior to institution of bankruptcy proceedings.**—The federal courts are at variance on the proposition whether this section authorizes exemption only from arrest made after a bankruptcy petition is filed, or whether it applies to an arrest on civil process made before filing the petition. In the case of *In re Claiborne*, (S. D. N. Y. 1901) 109 Fed. 74, it was held that there is no authority either in section 9a of the Act or in General Order No. 30 (see *infra*, following section 30), for the discharge from custody upon a writ of habeas corpus of a bankrupt who has been imprisoned on a lawful civil process before the filing of the petition in bankruptcy and that both provisions applied only to cases of imprisonment after such filing. And the same rule seemed to obtain under the Bankrupt Act of 1867. *In re Walker*, (1868) 1 Lowell 222, 29 Fed. Cas. No. 17,060; *Hazleton v. Valentine*, (1868) 1 Lowell 270, 11 Fed. Cas. No. 6,287; *Minon v. Van Nostrand*, (1870) 1 Lowell 458, 17 Fed. Cas. No. 9,642. But in *Turgeon v. Emery*, (D. C. Me. 1910) 182 Fed. 1016, 25 Am. Bankr. Rep. 694, following *People v. Erlanger*, (S. D. N. Y. 1904) 132 Fed. 883, 13 Am. Bankr. Rep. 197, and *disapproving In re Claiborne*, (S. D. N. Y. 1901) 109 Fed. 74, 5 Am. Bankr. Rep. 812, it was ruled that the term "arrest" may be held to apply to the continued detention of a person in custody although the word is frequently used to mean the original taking of a person into custody; and when the statute provides for the exemption of a bankrupt from arrest upon civil process, except in certain cases, it means, not only that he shall not be detained in custody, but also that he shall not be detained in custody after he becomes a bankrupt. See also *Turgeon v. Bean*, (1912) 109 Me. 189, 83 Atl. 557, Ann. Cas. 1913E 567, wherein the court approved the construction placed upon the statute in the *Claiborne* case but followed *Turgeon v. Emery*, *supra*, as *res judicata*, the same parties being before the court.

**Exemption from arrest pending appeal.**—Bankruptcy proceedings are still pending in the District Court, notwithstanding

its dismissal of a petition to revoke an order for the discharge of the bankrupt, so as to authorize it to restrain the arrest of the bankrupt while the cause stands on review in the Circuit Court of Appeals. *In re Chandler*, (N. D. Ill. 1904) 135 Fed. 893, 13 Am. Bankr. Rep. 614.

**Protection orders.**—General Orders in bankruptcy Nos. 12 and 30, providing that, on reference of a case to the referee, the bankrupt may receive protection against arrest, to continue until the final determination of his application for discharge, unless suspended or vacated by order of the court, and declaring that a debtor, imprisoned at the time of filing a claim in bankruptcy, may be discharged if in custody under process issued for the collection of a claim provable in bankruptcy, relate to the practice of section 9a. *U. S. v. Peters*, (E. D. Ill. 1909) 166 Fed. 613, 22 Am. Bankr. Rep. 177, *reversed on other grounds* (7th Cir. 1910) 177 Fed. 885, 101 C. C. A. 99, 24 Am. Bankr. Rep. 206.

Section 9a, and General Orders in bankruptcy Nos. 12 and 30, relating to the protection of a bankrupt debtor from arrest, are *in pari materia*, and should be construed as a whole. *U. S. v. Peters*, (E. D. Ill. 1909) 166 Fed. 613, 22 Am. Bankr. Rep. 177, *reversed on other grounds* (7th Cir. 1910) 177 Fed. 885, 101 C. C. A. 99, 24 Am. Bankr. Rep. 206. See also *In re Dresser*, (S. D. N. Y. 1903) 124 Fed. 915, 10 Am. Bankr. Rep. 270.

**Imposition of terms.**—The court, in granting the protection order against arrest under General Order No. 12 (*infra*, following section 30), may impose terms, and require security that the bankrupt during its continuance will obey all the orders of the court, and not meanwhile depart from its jurisdiction. *In re Lewensohn*, (1900) 99 Fed. 73, *affirmed* (C. C. A. 1900) 104 Fed. 1006.

**Period of exemption.**—This section very plainly refers only to the period covered by the pendency of the bankruptcy proceedings, during which jurisdiction is conferred on the Bankruptcy Court to protect the bankrupt from arrest on a provable debt until a discharge has been granted or refused. *Herschman v. Justices, etc.*, (1915) 220 Mass. 137, 107 N. E. 543.

(1) [**Process issued from court of bankruptcy.**] When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; [(1898) 30 Stat. L. 549.]

As to

Contempts in bankruptcy generally, see the several subdivisions of section 41, see also section 2 (13) and (16).

(2) [**Process issued from state court.**] when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in

such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act. [(1898) 30 Stat. L. 549.]

**Arrest for nondischargeable debt.**—A bankrupt is not exempt from arrest on civil process, issued by a state court of competent jurisdiction, upon a debt or claim from which the discharge in bankruptcy would not be a release, excepting when in attendance upon a court of bankruptcy, or engaged in the performance of a duty imposed by the Bankruptcy Act. *In re Baker*, (D. C. Kan. 1899) 96 Fed. 954, 3 Am. Bankr. Rep. 101; *In re Marcus*, (C. C. A. 1st Cir. 1901) 105 Fed. 907, 5 Am. Bankr. Rep. 365; *In re Fritz*, (E. D. N. Y. 1907) 152 Fed. 562, 18 Am. Bankr. Rep. 244; *U. S. v. McAleese*, (C. C. A. 3d Cir. 1899) 1 Am. Bankr. Rep. 650; *In re Smith*, (N. D. N. Y. 1899) 3 Am. Bankr. Rep. 67.

Even though a federal question has been raised, except in peculiar and urgent cases, the courts of the United States will not discharge a prisoner by habeas corpus in advance of a final determination of his case in the courts of the state, and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error. *U. S. v. McAleese*, (C. C. A. 3d Cir. 1899) 1 Am. Bankr. Rep. 650.

**Attendance upon court of bankruptcy.**—The bankrupt is exempt from arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by the Bankruptcy Act, and this is so, even though the process upon which the arrest has been made, is one which has been issued upon a debt or claim from which the bankrupt would not be released by his discharge in the bankruptcy proceedings. The exception is not limited to the particular occasions when the bankrupt is actually in attendance in court or actually performing a required duty, but is enlarged by General Order No. 12 (see *infra*, section 30, note), which provides that "from that day [that is, the day of attendance before the referee] the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court." *In re Lewensohn*, (1900) 99 Fed. 73, affirmed (C. C. A. 1900) 104 Fed. 1006; *In re Dresser*, (S. D. N. Y. 1903) 124 Fed. 915, 10 Am. Bankr. Rep. 270; *In re Adler*, (C. C. A. 2d Cir. 1906) 144 Fed. 659, 16 Am. Bankr. Rep. 416.

Where a bankrupt, who resided in another state, on being required to appear to testify before a referee, was given an

order of protection prohibiting any person from arresting him on civil process while in the state in attendance on the hearing and for a stated time thereafter, it was held that an arrest on such a process before the expiration of the time was a violation of such order, and that he would be discharged by the court of bankruptcy on a writ of habeas corpus, regardless of whether or not the claim on which he was arrested was dischargeable in bankruptcy. *U. S. v. Flynn*, (S. D. N. Y. 1909) 179 Fed. 316, 23 Am. Bankr. Rep. 294.

**Arrest for contempt of state court.**—An order of a court of bankruptcy restraining a sheriff from arresting a bankrupt on civil process, following the language of section 9a, does not prevent the commitment of the bankrupt by a state court for a contempt, where such commitment is intended as a punishment, and not for the collection of a debt. *In re Fritz*, (E. D. N. Y. 1907) 152 Fed. 562, 18 Am. Bankr. Rep. 244.

But where the contempt for which a bankrupt has been arrested is the failure to pay a debt which would be released by his discharge in bankruptcy, it is the duty of the Bankruptcy Court to discharge the debtor from custody. *In re Grist*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 89. See also *Wagner v. U. S.*, (C. C. A. 6th Cir. 1900) 104 Fed. 133, 4 Am. Bankr. Rep. 596, affirming *In re Houston*, (D. C. Ky. 1899) 94 Fed. 119, 2 Am. Bankr. Rep. 107. In that case, however, it appears that the prisoner was arrested for failure to pay alimony, and such debt was held to be a dischargeable one from which the defendant was entitled to be released from custody. This, however, is no longer true with respect to debts of that character. See section 17a (2) and note.

**Protection from arrest under execution for costs.**—A voluntary bankrupt is not protected by a writ of protection from arrest under an execution upon a judgment for costs rendered after the adjudication in bankruptcy, as such costs were not provable against his estate, and therefore they are within the letter of the express exceptions in section 9a. *In re Marcus*, (C. C. A. 1901) 105 Fed. 907, affirming *In re Marcus*, (1900) 104 Fed. 331, and distinguishing *Wagner v. U. S.*, (C. C. A. 1900) 104 Fed. 133. See section 63a (2).

**Effect of General Order No. 30.**—This subsection differs somewhat from General Order No. 30 (see *infra*, section 30, note) in that the former permits of the bankrupt's arrest if it is based upon a debt or claim from which his discharge in

bankruptcy would not be a release; while the latter provides for the bankrupt's release upon habeas corpus if the arrest or imprisonment complained of is upon

a claim provable in bankruptcy. The order must, therefore, yield to the more restricted subsection. *In re Baker*, (1899) 98 Fed. 954.

**b [Detention for examination.]** The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto. [(1898) 30 Stat. L. 549.]

**Strict construction.**—"The drastic remedy provided by section 9 is one directed against the liberty of a citizen, and therefore should be strictly construed and carefully applied." *In re Schenkein*, (1902) 113 Fed. 428.

**Warrant as including writ of ne exeat.** The court may issue a writ, in the nature of a writ of ne exeat, to restrain a bankrupt within the district, where a proper showing of its necessity has been made. *In re Cohen*, (S. D. Ill. 1905) 136 Fed. 999, 14 Am. Bankr. Rep. 355. And see to the same effect, *In re Lipke*, (S. D. N. Y. 1900) 98 Fed. 970, 3 Am. Bankr. Rep. 569; *In re Berkowitz*, (D. C. N. J. 1908) 173 Fed. 1012, 22 Am. Bankr. Rep. 231; *Hoffschlaeger Co. v. Young Nap*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 510.

**A petition for a writ of ne exeat is sufficiently supported by a sworn affidavit by one holding the positions of secretary, treasurer, and manager of the plaintiff corporation, containing the allegations of respondent's indebtedness in a fixed amount for goods sold and delivered, and respondent's action in securing passage for himself and family on a steamer about to depart for a foreign land, and that such departure will prejudice plaintiff's interest in such indebtedness.** *Hoffschlaeger Co. v. Young Nap*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 510.

**Scope of writ of ne exeat.**—The power of a court of bankruptcy to order the detention of a bankrupt, who is about to abscond from the jurisdiction with his

assets, is not limited to the particular circumstances and specific purposes covered by section 9b. *In re Lipke*, (S. D. N. Y. 1900) 98 Fed. 970, 3 Am. Bankr. Rep. 569.

**Bond—Breach of condition.**—A bond given to secure the release of a bankrupt when arrested under a writ of ne exeat, and conditioned that he shall not depart from the district, is to be construed in accordance with its terms; and the departure of the bankrupt from the district without leave of the court is a breach thereof, although he is present to abide the judgment of the court when rendered. *In re Appel*, (C. C. A. 1st Cir. 1908) 163 Fed. 1002, 20 Am. Bankr. Rep. 890.

**Adjustment on breach.**—A court of bankruptcy, acting either upon the analogy of a court of equity or of the power possessed by courts of the United States in actions at law, has power to adjust the bond, given for the release of a bankrupt when arrested under a writ of ne exeat, according to the equities. *In re Appel*, (C. C. A. 1st Cir. 1908) 163 Fed. 1002, 20 Am. Bankr. Rep. 890.

**Arrest of nonresident bankrupt.**—Section 9b confers no authority upon a court of bankruptcy to issue a warrant for the arrest of a bankrupt who is not within the district, but who removed from it six months previously and before the proceedings in bankruptcy were instituted. *In re Hassenbusch*, (C. C. A. 6th Cir. 1901) 108 Fed. 35, *sub nom. In re Ketchum*, 5 Am. Bankr. Rep. 532.

**SEC. 10. EXTRADITION OF BANKRUPTS.**—*a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the

warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another. [(1898) 30 Stat. L. 549.]

**Manner of extradition.**—Section 10 clearly does not deal with or concern the jurisdiction or power of the court in which the bankruptcy case is pending to issue a warrant for the apprehension of the bankrupt, but only confers power on a court, other than the one issuing the warrant, to extradite the bankrupt, just as a person under indictment in one district may be extradited from another district in which he is found, under the statute upon that subject. *In re Hassenbusch*, (C. C. A. 6th Cir. 1901) 108 Fed. 35, *sub nom. In re Ketchum*, 5 Am. Bankr. Rep. 532. See also section 2 (14).

**Relation to sections 2 and 9b.**—"It

is quite evident that the jurisdiction 'to extradite bankrupts from their respective districts to other districts,' as declared in the fourteenth specification of jurisdiction in section 2, is exactly the same power, stated in more general terms, as that found in section 10 of the same Act, wherein the power is more specifically defined and limited, and can in no just view be held to enlarge by implication the power in the court of another jurisdiction to issue the warrant of arrest provided for in clause b, section 9." *In re Hassenbusch*, (C. C. A. 1901) 108 Fed. 35.

**SEC. 11. SUITS BY AND AGAINST BANKRUPTS.—a [Stay of suits.]** A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined. [(1898) 30 Stat. L. 549.]

- I. In general, 630.
- II. Discretion as to granting stays, 631.
- III. Stay as dependent on dischargeability of debt, 632.
- IV. Stay of proceedings on valid liens, 635.
- V. Where state court has complete jurisdiction, 636.
- VI. Stay for protection of assets, 637.
- VII. Stay in other cases, 639.
- VIII. Vacating stay, 640.

#### I. IN GENERAL.

**The word "suits" covers all legal or equitable proceedings to enforce a claim, whether before or after judgment.** *Bailey v. Glover*, (1874) 21 Wall. 342, 22 U. S. (L. ed.) 636; *In re Rosenberg*, (1868) 3 Ben. 14, 20 Fed. Cas. No. 12,054; *In re Ketchka*, (1899) 92 Fed. 901. See also *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122.

**Who may grant stays.**—It has been held that, under General Order in bankruptcy No. 12 (3), a referee has no power to grant an injunction staying a proceeding in a state court. *In re Siebert*, (D. C. N. J. 1904) 133 Fed. 781, 13 Am. Bankr. Rep. 348; *In re Berkowitz*, (E. D. Pa. 1906) 143 Fed. 598, 16 Am. Bankr. Rep. 251. See also *In re Steuer*, (D. C. Mass. 1900) 104 Fed. 976, 5 Am. Bankr. Rep. 209.

**Voluntary and involuntary bankruptcy included.**—Section 11 applies not only to involuntary cases, but also to voluntary proceedings. *In re Geister*, (N. D. Ia. 1899) 97 Fed. 322, 3 Am. Bankr. Rep. 228; *In re Richards*, (C. C. A. 1899) 96 Fed. 935.

**Refusal of state court to stay proceeding not res adjudicata.**—The fact that a creditor of a bankrupt applied to a state court for a stay of proceedings in a pending suit against the bankrupt, and that his application was denied, does not affect the jurisdiction of the court of bankruptcy to stay such proceedings on the application of the same creditor. *New River Coal Land Co. v. Ruffner*, (C. C. A. 4th Cir. 1908) 165 Fed. 881, 21 Am. Bankr. Rep. 474.

**Limitation on right to proceed in state court.**—"The court in bankruptcy has exclusive jurisdiction to take and administer the assets of the bankrupt—pay his debts in so far as the assets will pay them, and discharge him, if he is entitled to a discharge, from further payment. The state court cannot do this. . . . The state court has no right to proceed further in an action there pending until the petition in bankruptcy has been adjudicated. When that has been done, the case may be further stayed in the state court, at its discretion. But, whether it

is stayed or not, the plaintiff in the state court cannot obtain judgment against the defendant for any costs made after the petition in bankruptcy is filed, nor can he obtain judgment in the state court for any interest upon his claim accruing thereafter." *Carpenter v. O'Connor*, (1898) 9 Ohio Cir. Dec. 201.

**Suit brought after petition filed.**—"The stay of suits against the bankrupt pending the bankruptcy proceedings is absolutely necessary to give effect to the Bankruptcy Act. Section 11 expressly extends the power to stay proceedings to suits even that were commenced before the petition was filed; and this in connection with section 2 (15) necessarily includes suits on provable debts commenced after the petition was filed and while the bankruptcy proceedings are pending, as the greater power includes the less." *In re Basch*, (S. D. N. Y. 1899) 97 Fed. 761.

**Application to state court for stay.**—In one case it was held that the application for a stay should be made to the court wherein the action sought to be stayed is pending, and that the bankrupt defendant should file in that court a proper pleading setting forth the pendency of the proceedings in bankruptcy. *In re Geister*, (1899) 97 Fed. 322.

The state court cannot know or take judicial notice of the proceedings in bankruptcy unless they are brought before it in some appropriate manner. *Boynton v. Ball*, (1887) 121 U. S. 457, 7 S. Ct. 981, 30 U. S. (L. ed.) 985. See also cases cited in the last part of the first note to section 17a.

Where a defendant in a state court sets up the pendency of bankruptcy proceedings, the court should decide the question whether bankruptcy proceedings are pending, and then on determining that such proceedings have been commenced, should stay further action, so far as a personal claim against the bankrupt is concerned, until the determination of the bankruptcy proceedings. *Sioux City First Nat. Bank v. Flynn*, (1902) 117 Ia. 493, 91 N. W. 784.

The Bankruptcy Act of 1867, which provided that suits upon provable debts "shall, upon the application of the bankrupt, be stayed," was expounded as follows by Mr. Justice Gray: "This provision, like all laws of the United States made in pursuance of the Constitution, binds the courts of each state, as well as those of the nation. Upon the application of the bankrupt to the court, state or national, in which the suit is pending, it is the duty of that court to stay the proceedings 'to await the determination of the court in bankruptcy on the question of the discharge,' unless there is unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, or unless, the amount of the debt being in dispute, the United States court sitting

in bankruptcy gives leave to proceed to judgment for the purpose of ascertaining that amount. If neither the bankrupt nor his assignee in bankruptcy applies for a stay of proceedings, the court may of course proceed to judgment." *Hill v. Harding*, (1682) 107 U. S. 631, 2 S. Ct. 404, 27 U. S. (L. ed.) 493 (citing *Doe v. Childress*, (1874) 21 Wall. 642, 22 U. S. (L. ed.) 549; *Eyster v. Gaff*, (1875) 91 U. S. 521, 23 U. S. (L. ed.) 403; *Norton v. Switzer*, (1876) 93 U. S. 355, 23 U. S. (L. ed.) 903). See further, as to the court to which application for a stay might be made, *In re Jacoby*, (1867) 1 Nat. Bankr. Reg. 118, 13 Fed. Cas. No. 7,165; *Matter of Rosenberg*, (1868) 3 Ben. 14, 20 Fed. Cas. No. 12,054; *Samson v. Burton*, (1870) 5 Ben. 325, 21 Fed. Cas. No. 12,285; *Matter of Metcalf*, (1867) 2 Ben. 78, 17 Fed. Cas. No. 9,494; *Johnson v. Bishop*, (1868) Woolw. 324, 13 Fed. Cas. No. 7,373; *Cutter v. Evans*, 11 Nat. Bankr. Reg. 448; *In re Richardson*, (1868) 2 Nat. Bankr. Reg. 202; *In re Meyers*, (1868) 2 Ben. 424, 1 Nat. Bankr. Reg. 581, 17 Fed. Cas. No. 9,518; *In re Reed*, (1867) 1 Nat. Bankr. Reg. 1, 20 Fed. Cas. No. 11,637; *Givens v. Robbins*, (1843) 5 Ala. 676; *National Bank v. Taylor*, (1876) 120 Mass. 124.

As to the kind of suits or proceedings which were subject to a stay order, see *Matter of Metcalf*, (1867) 2 Ben. 78, 17 Fed. Cas. No. 9,494; *Matter of Rosenberg*, (1868) 3 Ben. 14, 20 Fed. Cas. No. 12,054; *Mason v. Warthen*, (1874) 14 Nat. Bankr. Reg. 347; *In re Hirsch*, (1868) 2 Ben. 493, 2 Nat. Bankr. Reg. 3, 12 Fed. Cas. No. 6,529; *In re Whipple*, (1876) 6 Biss. 516, 13 Nat. Bankr. Reg. 373, 29 Fed. Cas. No. 17,512; *Minon v. Van Nostrand*, (1870) 1 Lowell 458, 4 Nat. Bankr. Reg. 108, 17 Fed. Cas. No. 9,642; *Merritt v. Glidden*, (1870) 39 Cal. 559; *McKay v. Funk*, (1873) 37 Ia. 661; *Zimmer v. Schleeauff*, (1874) 115 Mass. 52.

## II. DISCRETION AS TO GRANTING STAYS.

**Stay discretionary.**—Whether or not a stay shall be granted, under section 11a, is to a large extent within the sound judicial discretion of the court, to be exercised according as the best interests of the estate shall require. *Southern L. & T. Co. v. Benbow*, (W. D. N. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; *In re Globe Cycle Works*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 447; *In re Lesser*, (C. C. A. 2d Cir. 1900) 99 Fed. 913, 3 Am. Bankr. Rep. 758; *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; *In re Sullivan*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 30; *In re United Wireless Telegraph Co.*, (S. D. N. Y. 1912) 196 Fed. 153; *In re Penn Development Co.*, (S. D. Cal. 1915) 220 Fed. 222. See also *infra*, this note, VI. *Stay for Protection of Assets*.

A District Court, as a court of bankruptcy, has exclusive power to determine whether a suit pending in a state court should be stayed or not, and the exercise of this power rests in the discretion of the judge, which will not be reviewed by an appellate court unless it appears to have been abused. *New River Coal Land Co. v. Ruffner*, (C. C. A. 4th Cir. 1908) 165 Fed. 881, 21 Am. Bankr. Rep. 474; *In re Lesser*, (1900) 99 Fed. 913, 40 C. C. A. 177.

The injunction, after adjudication, is always discretionary and providing the cause of action is one dischargeable in bankruptcy, should usually be granted, (1) if the bankrupt is threatened with arrest or will be needlessly harassed, (2) if the suit is not yet in judgment, and (3) even after judgment if (a) the rights of the general creditors not parties to the suit will be jeopardized by further proceedings in the state court, or (b) the judgment is founded on a transaction which is an act of bankruptcy or a fraud on creditors or the law; but in the absence of either or both of the latter elements (a or b) it should never be granted after the judgment has ripened into an execution sale, provided the state court has, or can be given, jurisdiction of all parties interested in the distribution, including the general creditors represented by the trustee in bankruptcy. *Southern L. & T. Co. v. Benbow*, (W. D. N. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; *In re Globe Cycle Works*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 447.

In *Rosenthal v. Nove*, (1900) 175 Mass. 559, 56 N. E. 884, 78 A. S. R. 512, the court said: "We hold that the court in which a suit against a bankrupt is pending is not, after the adjudication of bankruptcy, bound to stay proceedings further therein, while it may do so if, and to such an extent as, justice may require."

But the discretion as to the granting of a stay cannot be exercised unless the suit to be stayed is founded on a claim from which a discharge would be a release. *In re Sullivan*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 30.

**Interest of majority considered.**—A court of bankruptcy, on the filing of a petition against a corporation by a small minority of its creditors, who are hostile to the plans of the majority, will not enjoin a sale of the corporation's property by order of a court of equity, which acquired prior jurisdiction by the appointment of receivers, where a large majority of the creditors desire such a sale, and it does not appear that it will be to the detriment of the minority or jeopardize their rights. *In re Edward Ellsworth Co.*, (W. D. N. Y. 1909) 173 Fed. 699, 23 Am. Bankr. Rep. 284.

**Consideration of comity.**—Where a suit to establish a lien under a state statute, against property of a corporation, was pending before the Supreme Court of the

state at the time of an adjudication in bankruptcy against the corporation, reasonable considerations of comity require, or at least authorize, the Bankruptcy Court to leave the question of the validity of the asserted lien to the determination of the state court, which is the appropriate tribunal to construe its statutes, and to direct the trustee to go there and present his case; the manner of carrying into effect the judgment of the state court, in case it upholds the lien, being a matter which may be determined after such judgment is rendered. *In re New England Breeders' Club*, (D. C. N. H. 1910) 175 Fed. 501. See also *In re E. A. Kinsey Co.*, (C. C. A. 6th Cir. 1911) 184 Fed. 694.

### III. STAY AS DEPENDENT ON DISCHARGEABILITY OF DEBT.

**Determination of whether debt will be released.**—The Bankruptcy Court has exclusive jurisdiction to determine, for the purpose of an application for an order staying proceedings in a state court, whether or not the claim upon which such proceedings are founded is one provable in bankruptcy, and which will be released by a discharge, and its determination is conclusive until reversed. *Wagner v. U. S.*, (C. C. A. 6th Cir. 1900) 104 Fed. 133, 4 Am. Bankr. Rep. 596, *affirming In re Houston*, (1899) 94 Fed. 119; *Knott v. Putnam*, (D. C. Vt. 1901) 107 Fed. 907, 6 Am. Bankr. Rep. 80; *New River Coal Land Co. v. Ruffner*, (C. C. A. 4th Cir. 1908) 165 Fed. 881, 21 Am. Bankr. Rep. 474.

A determination by a state court in an action against a bankrupt that the debt sued on was created by the fraud of the defendant while acting in a fiduciary capacity, and the awarding of an execution against his body under the state statute, are not conclusive upon the court of bankruptcy, on a petition for an injunction to restrain the enforcement of such execution, that the debt is one from which the bankrupt will not be released by a discharge; but that question is to be determined by the court of bankruptcy for itself under the federal laws and decisions. *Knott v. Putnam*, (D. C. Vt. 1901) 107 Fed. 907, 6 Am. Bankr. Rep. 80.

**Stay of actions on dischargeable debts.**—Upon proper application being made therefor, under section 11a, the court may stay any suit which is founded upon a claim from which a discharge would release the bankrupt, and which was pending at the time the petition in bankruptcy was filed. *In re Kletchka*, (S. D. N. Y. 1899) 92 Fed. 901; *Southern L. & T. Co. v. Benbow*, (W. D. N. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; *In re Geister*, (N. D. Ia. 1899) 97 Fed. 322, 3 Am. Bankr. Rep. 228; *In re Basch*, (S. D. N. Y. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235; *In*

*re* Lesser, (C. C. A. 2d Cir. 1900) 99 Fed. 913, 3 Am. Bankr. Rep. 758; *In re McCauley*, (E. D. N. Y. 1900) 101 Fed. 223, 4 Am. Bankr. Rep. 122; *Wagner v. U. S.*, (C. C. A. 6th Cir. 1900) 104 Fed. 133, 4 Am. Bankr. Rep. 596; *In re Hilton*, (S. D. N. Y. 1900) 104 Fed. 981, 4 Am. Bankr. Rep. 774; *In re Cole*, (W. D. N. Y. 1901) 106 Fed. 837, 5 Am. Bankr. Rep. 780; *Knott v. Putnam*, (D. C. Vt. 1901) 107 Fed. 907, 6 Am. Bankr. Rep. 80; *In re Claiborne*, (S. D. N. Y. 1901) 109 Fed. 74; *In re Beerman*, (N. D. Ga. 1901) 112 Fed. 663, 7 Am. Bankr. Rep. 434; *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *White v. Thompson*, (C. C. A. 5th Cir. 1903) 119 Fed. 868, 9 Am. Bankr. Rep. 653; *In re Butts*, (N. D. N. Y. 1903) 120 Fed. 966, 10 Am. Bankr. Rep. 16; *In re Hymes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477; *In re Hicks*, (N. D. N. Y. 1905) 133 Fed. 739, 13 Am. Bankr. Rep. 654; *Mackel v. Rochester*, (D. C. Mont. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 429; *In re Adler*, (C. C. A. 2d Cir. 1906) 144 Fed. 659, 16 Am. Bankr. Rep. 414; *In re Burke*, (E. D. N. Y. 1907) 155 Fed. 703, 19 Am. Bankr. Rep. 51; *In re Van Buren*, (S. D. N. Y. 1908) 164 Fed. 883, 20 Am. Bankr. Rep. 896; *New River Coal Land Co. v. Ruffner*, (C. C. A. 4th Cir. 1908) 165 Fed. 881, 21 Am. Bankr. Rep. 474; *Gleason v. O'Mara*, (C. C. A. 3d Cir. 1909) 180 Fed. 417; *In re Thaw*, (W. D. Pa. 1910) 180 Fed. 419; *Carpenter v. O'Connor*, (2d Cir. Ohio 1898) 1 Am. Bankr. Rep. 381; *In re Sullivan*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 30; *In re Globe Cycle Works*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 447; *In re Chambers*, (D. C. R. I. 1900) 3 Am. Bankr. Rep. 537; *In re Vastbinder*, (M. D. Pa. 1904) 13 Am. Bankr. Rep. 148; *In re Baughman*, (M. D. Pa. 1905) 15 Am. Bankr. Rep. 23; *Matter of Floyd*, (S. D. N. Y. 1905) 15 Am. Bankr. Rep. 277; *Matter of Pollman*, (S. D. N. Y. 1906) 16 Am. Bankr. Rep. 144; *Maas v. Kuhn*, (N. Y. 1909) 22 Am. Bankr. Rep. 91.

The word "suit," in section 11, means all steps or proceedings born of or following the judgments therein. *In re Grist*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 89.

No matter what the character of the suit, if the claim asserted be such as a discharge in bankruptcy would operate as a release therefrom, the Bankruptcy Court is empowered to stay its prosecution, in furtherance of the policy of the Act authorizing the Bankruptcy Court to administer and distribute the insolvent estate. *In re Hymes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477.

*Suit on unliquidated claim.*—A bankrupt is entitled to an order staying a suit brought after the adjudication in bankruptcy in a state court on an un-

liquidated claim which might have been liquidated, but was voluntarily withheld until after the time for proving claims had passed, as such claim should be considered a provable debt from which the discharge would release the bankrupt. *In re Hilton*, (1900) 104 Fed. 981.

Where proceedings supplementary to execution against the bankrupt, in a state court, begun within four months before the commencement of proceedings in bankruptcy, are pending at the time of the adjudication therein, the court of bankruptcy, by injunction, will stay all further proceedings in the action in the state court. *In re Kleitchka*, (S. D. N. Y. 1899) 92 Fed. 901.

*Action for breach of promise to marry.*—A plaintiff may be enjoined from proceeding in the state courts for the enforcement of a judgment in an action for breach of promise to marry. *In re McCauley*, (E. D. N. Y. 1900) 101 Fed. 223, 4 Am. Bankr. Rep. 122. See also note to section 17a (2).

*Contempt proceedings.*—It is the duty of a court of bankruptcy to stay contempt proceedings against a bankrupt, in a civil suit against him in a state court on a debt or claim from which his discharge would be a release, for twelve months, or until his right to a discharge has been determined. *In re Adler*, (C. C. A. 2d Cir. 1906) 144 Fed. 659, 16 Am. Bankr. Rep. 414.

*A proceeding under a municipal ordinance* for the removal of a fireman who has been adjudged a bankrupt, for the nonpayment of a dischargeable debt, will be enjoined until the expiration of twelve months from the date of the adjudication, or until the question of the bankrupt's discharge shall be determined. *In re Hicks*, (N. D. N. Y. 1905) 133 Fed. 739, 13 Am. Bankr. Rep. 654.

*Action begun after institution of bankruptcy proceedings.*—A court of bankruptcy has jurisdiction to stay the prosecution of an action against the bankrupt in a state court, on a debt from which his discharge would be a release, pending the determination of the question of his discharge, though the action was begun after the filing of the petition in bankruptcy. *In re Basch*, (S. D. N. Y. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235.

*Stay of actions on nondischargeable debts.*—The court, under section 11a, has no authority to stay an action pending against the bankrupt, which is founded upon a claim from which a discharge in bankruptcy would not be a release. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36; *Pickens v. Roy*, (1902) 187 U. S. 177, 23 S. Ct. 78, 47 U. S. (L. ed.) 128, 9 Am. Bankr. Rep. 47; *Jaquith v. Rowley*, (1903) 188 U. S. 620, 23 S. Ct. 369, 47 U. S. (L. ed.) 620, 9 Am. Bankr. Rep. 525; *In re Nowell*, (D.

C. Mass. 1900) 99 Fed. 931, 3 Am. Bankr. Rep. 837; *In re Cole*, (W. D. N. Y. 1901) 106 Fed. 837, 5 Am. Bankr. Rep. 780; National Bank of Republic v. Hobbs, (S. D. Ga. 1901) 118 Fed. 626, 9 Am. Bankr. Rep. 190; *In re Wollock*, (N. D. Ill. 1903) 120 Fed. 516, 9 Am. Bankr. Rep. 685; *In re Eastern Commission, etc., Co.*, (D. C. Mass. 1904) 129 Fed. 847, 12 Am. Bankr. Rep. 305; *B. F. Roden Grocery Co. v. Bacon*, (C. C. A. 5th Cir. 1904) 133 Fed. 515, 13 Am. Bankr. Rep. 251; *Mackel v. Rochester*, (D. C. Mont. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 429; *Lindstroth Wagon Co. v. Ballew*, (1907) 149 Fed. 960, 79 C. C. A. 470, 8 L. R. A. (N. S.) 1204; *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25; *In re Lawrence*, (N. D. Ala. 1908) 163 Fed. 131, 20 Am. Bankr. Rep. 698; *In re Mercedes Import Co.*, (C. C. A. 2d Cir. 1908) 166 Fed. 427, 21 Am. Bankr. Rep. 591; *In re Koronsky*, (C. C. A. 2d Cir. 1909) 170 Fed. 719, 21 Am. Bankr. Rep. 851; *In re Sims*, (S. D. N. Y. 1910) 176 Fed. 645, 23 Am. Bankr. Rep. 899; *In re Clipper Mfg. Co.*, (C. C. A. 2d Cir. 1910) 179 Fed. 843; *In re Smith*, (N. D. N. Y. 1899) 3 Am. Bankr. Rep. 67; *Sayre First Nat. Bank v. Bartlett*, (Pa. 1908) 21 Am. Bankr. Rep. 88; *In re Nuttall*, (S. D. N. Y. 1912) 201 Fed. 557; *Imbriani v. Anderson*, (1912) 76 N. H. 491, 84 Atl. 974.

As to what debts are not released by a discharge in bankruptcy, see the annotation under the several subdivisions of section 17a.

**Action on nonprovable claims.**—Section 11 only authorizes the restraining of suits founded on claims from which a discharge will be a release, and therefore the Bankruptcy Court has no control over a suit on a nonprovable claim. *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25. And see to the same effect *In re Nowell*, (D. C. Mass. 1900) 99 Fed. 931, 3 Am. Bankr. Rep. 837; *In re Smith*, (N. D. N. Y. 1899) 3 Am. Bankr. Rep. 67.

As to what are provable claims, see the several subdivisions of section 63.

**Judgment for costs in action for slander.**—*In re Dowie*, (S. D. N. Y. 1912) 202 Fed. 816, a stay enjoining the enforcement of judgment for costs recovered against the bankrupt by a defendant whom the bankrupt sued for slander was vacated, the court saying: "A judgment on a debt which is not dischargeable should be stayed pending bankruptcy proceedings. It has been held that a judgment to recover damages for slander is not dischargeable, and, in my opinion, a judgment for costs in such an action, recovered by a defendant against the plaintiff, partakes of the same character. A judgment in such an action, or in any action for a pure tort, either in favor of the plaintiff

or the defendant, can be enforced by an execution against the person."

**Action based on bankrupt's fraud.**—A court of bankruptcy is without jurisdiction to enjoin proceedings in a state court in an action based on the fraud of the bankrupt, as such action can in no manner affect the proceedings in bankruptcy, nor can the bankrupt's discharge constitute a defense thereto. *In re Wollock*, (N. D. Ill. 1903) 120 Fed. 516, 9 Am. Bankr. Rep. 685; *Mackel v. Rochester*, (D. C. Mont. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 429; *In re Lawrence*, (N. D. Ala. 1908) 163 Fed. 131, 20 Am. Bankr. Rep. 698.

**Action on false representations.**—An action against the bankrupt for defrauding the plaintiff out of real estate by false representations will not be stayed where the judgment, if obtained, would not, under section 17a (2) of the Act, be dischargeable. *In re Cole*, (1901) 106 Fed. 837.

**Overdue alimony.**—*In re Shepard*, (1899) 97 Fed. 187, a stay of proceedings was denied where the divorced wife of the bankrupt was pursuing her remedies for overdue alimony awarded her by a state court having jurisdiction in the premises, as such debt would not be released by the discharge. See also *In re Houston*, (1899) 94 Fed. 119, affirmed in *Wagner v. U. S.*, (C. C. A. 1900) 104 Fed. 133; *In re Lesser*, (C. C. A. 1900) 99 Fed. 913.

**Action against surety for bankrupt.**—A court of bankruptcy is without jurisdiction to enjoin the plaintiffs, in suits against the bankrupt in the state courts, from collecting their judgments from the surety on the bankrupt's bail bond. *Jaquith v. Rowley*, (1903) 188 U. S. 620, 23 S. Ct. 369, 47 U. S. (L. ed.) 620, 9 Am. Bankr. Rep. 525; *In re Eastern Commission, etc., Co.*, (D. C. Mass. 1904) 129 Fed. 847, 12 Am. Bankr. Rep. 305; *In re Mercedes Import Co.*, (C. C. A. 2d Cir. 1908) 166 Fed. 427, 21 Am. Bankr. Rep. 591.

Thus it has been held that a pending action against bankrupts on a dischargeable debt, in which they were arrested and had given bail more than four months prior to their bankruptcy, may be permitted by the court of bankruptcy to proceed to judgment for the purpose of enabling the plaintiff therein to enforce his demand against the surety in the undertaking. *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679.

**Diminution of estate immaterial.**—That a suit brought against the bankrupt in a state court may result in the diminution of the estate applicable in bankruptcy to the payment of his debts, is not a conclusive reason for restraining the prosecution of that suit, when the personal liberty of the bankrupt is not threatened, and when the judgment sought for is not to be enforced against him, but against some one



else. *In re Franklin*, (D. C. Mass. 1901) 108 Fed. 666, 6 Am. Bankr. Rep. 285. See also *In re Horton*, (8th Cir. 1900) 102 Fed. 986, 43 C. C. A. 87.

*Action to recover fine for contempt.*—A court of bankruptcy will not stay proceedings against the bankrupt for the enforcement of a fine for contempt imposed by a state court. *In re Hall*, (S. D. N. Y. 1909) 22 Am. Bankr. Rep. 498, following *In re Koronsky*, (C. C. A. 2d Cir. 1909) 170 Fed. 719, 21 Am. Bankr. Rep. 851.

#### IV. STAY OF PROCEEDINGS ON VALID LIENS.

*Stay allowed.*—It has been held that a District Court of the United States, in which proceedings in bankruptcy are pending, and which is in the actual possession of property conceded to belong to the bankrupt, has jurisdiction to determine the amount and order of priority of liens thereon and to liquidate such liens, to the end that the property may be sold free of incumbrances, and in aid thereof to enjoin the lienholders from prosecuting the foreclosure of their liens in a suit brought in a state court before the commencement of the bankruptcy proceedings, but within four months thereof; and this though the lienholders object, and it is not contended that their liens are preferential or fraudulent or invalid. *In re Pittelkow*, (E. D. Wis. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 472; *In re Vastbinder*, (M. D. Pa. 1904) 132 Fed. 718, 13 Am. Bankr. Rep. 148; *In re Baughman*, (M. D. Pa. 1905) 138 Fed. 742, 15 Am. Bankr. Rep. 23; *In re Dana*, (C. C. A. 8th Cir. 1909) 167 Fed. 529, 21 Am. Bankr. Rep. 633.

*Stay denied.*—As a general rule, however, proceedings for the enforcement of a valid lien will not be stayed; and where no good reason is shown to warrant the interference of the court of bankruptcy, an application for such a stay will be denied. *In re Holloway*, (D. C. Ky. 1899) 93 Fed. 638, 1 Am. Bankr. Rep. 659; *Heath v. Shaffer*, (N. D. Ia. 1899) 93 Fed. 647, 2 Am. Bankr. Rep. 98; *In re Kimball*, (W. D. Pa. 1899) 97 Fed. 29, 3 Am. Bankr. Rep. 161; *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746; *In re Kenney*, (C. C. A. 2d Cir. 1900) 105 Fed. 897, 5 Am. Bankr. Rep. 355; *In re Seebold*, (C. C. A. 5th Cir. 1901) 105 Fed. 910, 5 Am. Bankr. Rep. 358; *In re Lesser*, (S. D. N. Y. 1901) 108 Fed. 201, 5 Am. Bankr. Rep. 320; *In re Porter*, (D. C. Ky. 1901) 109 Fed. 111, 6 Am. Bankr. Rep. 259; *In re Shoemaker*, (W. D. Va. 1902) 112 Fed. 648, 7 Am. Bankr. Rep. 437, following *Pickens v. Dent*, (4th Cir. 1901) 106 Fed. 653, 45 C. C. A. 522; *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *White v. Thompson*, (5th Cir. 1903) 119 Fed. 868,

56 C. C. A. 398, 9 Am. Bankr. Rep. 653; *Tennessee Producer Marble Co. v. Grant*, (C. C. A. 3d Cir. 1905) 135 Fed. 322, 14 Am. Bankr. Rep. 288; *In re McKane*, (E. D. N. Y. 1907) 152 Fed. 733, 18 Am. Bankr. Rep. 594; *Sample v. Beasley*, (C. C. A. 5th Cir. 1908) 158 Fed. 607, 20 Am. Bankr. Rep. 164; *In re McKane*, (E. D. N. Y. 1907) 158 Fed. 647, 18 Am. Bankr. Rep. 594; *Orr v. Tribble*, (S. D. Ga. 1907) 158 Fed. 897, 19 Am. Bankr. Rep. 849; *In re Rohrer*, (C. C. A. 6th Cir. 1910) 177 Fed. 381, 24 Am. Bankr. Rep. 52; *Reed v. Equitable Trust Co.*, (1902) 8 Am. Bankr. Rep. 242, 115 Ga. 780, 42 S. E. 102. And see the cases cited *infra*, this note, under subdivision V. *Where State Court Has Complete Jurisdiction.*

A suit to enforce a specific lien on property cannot be determined in a summary way such as is usual in the administration of a bankrupt estate. Such a suit is plenary in its character, and possessory in its nature, even though it may eventuate in a money decree, and is not one contemplated by section 11 of the Bankruptcy Act, which deals with suits *in personam* and not *in rem*. *In re United Wireless Tel. Co.*, (D. C. N. J. 1911) 192 Fed. 238.

*Thus where a mortgagee has obtained a judgment for foreclosure and sale in a state court* before the institution of proceedings in bankruptcy against the mortgagor, and the court of bankruptcy is satisfied that the mortgaged property will not sell for enough to pay the mortgage debt, whether sold under authority of the state court or by the trustee in bankruptcy, and that the mortgagee has no intention to delay the sale unreasonably or prevent the property bringing a fair price, proceedings in the state court will not be stayed, nor will the Bankruptcy Court take control of the property for the purpose of a sale by the trustee. *In re Holloway*, (D. C. Ky. 1899) 93 Fed. 638, 1 Am. Bankr. Rep. 659. See also *Heath v. Shaffer*, (N. D. Ia. 1899) 93 Fed. 647, 2 Am. Bankr. Rep. 98; *In re McKane*, (E. D. N. Y. 1907) 152 Fed. 733, 18 Am. Bankr. Rep. 594. As to the propriety of staying or refusing to stay foreclosure suits, see also *In re Iron Mountain Co.*, (1872) 9 Blatchf. 320, 13 Fed. Cas. No. 7,065; *In re Sacchi*, (1872) 10 Blatchf. 29, 21 Fed. Cas. No. 12,200; *Matter of Moller*, (1877) 14 Blatchf. 207, 17 Fed. Cas. No. 9,700.

So, also, it has been held that a court of bankruptcy has no jurisdiction to enjoin the sale of property on a judgment rendered in a state court, enforcing mortgage liens of a date long prior to four months preceding the filing of the petition or adjudication of the mortgagor as a bankrupt. *Sample v. Beasley*, (C. C. A. 5th Cir. 1908) 158 Fed. 607, 20 Am. Bankr. Rep. 164; *In re McKane*, (E. D.

N. Y. 1907) 158 Fed. 647, 18 Am. Bankr. Rep. 594; *In re Lattimer*, (E. D. Pa. 1909) 174 Fed. 824, 23 Am. Bankr. Rep. 388; *In re Wagner's Estate*, (E. D. Pa. 1913) 206 Fed. 364. See also *In re Easley*, (W. D. Va. 1898) 93 Fed. 419, 1 Am. Bankr. Rep. 715.

But, where the facts warrant it, the trustee will be permitted, or directed, to intervene in a foreclosure suit in the state court. *Heath v. Shaffer*, (N. D. Ia. 1899) 93 Fed. 647, 2 Am. Bankr. Rep. 98; *In re Porter*, (D. C. Ky. 1901) 109 Fed. 111, 6 Am. Bankr. Rep. 259.

#### V. WHERE STATE COURT HAS COMPLETE JURISDICTION.

The court of bankruptcy will not stay proceedings, instituted in a state court, where it appears that the state court has acquired complete jurisdiction over the subject matter of the action and the parties thereto. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36; *Pickens v. Roy*, (1902) 187 U. S. 177, 23 S. Ct. 78, 47 U. S. (L. ed.) 128, 9 Am. Bankr. Rep. 47; *Carter v. Hobbs*, (D. C. Ind. 1899) 92 Fed. 594, 1 Am. Bankr. Rep. 215; *In re Price*, (S. D. N. Y. 1899) 92 Fed. 987, 1 Am. Bankr. Rep. 606; *Keegan v. King*, (D. C. Ind. 1899) 96 Fed. 758, 3 Am. Bankr. Rep. 79; *In re Russell*, (C. C. A. 2d Cir. 1900) 101 Fed. 248, 3 Am. Bankr. Rep. 658; *In re Gerdes*, (S. D. Ohio 1900) 102 Fed. 318, 4 Am. Bankr. Rep. 346; *In re Horton*, (C. C. A. 8th Cir. 1900) 102 Fed. 986, 4 Am. Bankr. Rep. 486; *In re Seebold*, (C. C. A. 5th Cir. 1901) 105 Fed. 910, 5 Am. Bankr. Rep. 358; *Pickens v. Dent*, (C. C. A. 4th Cir. 1901) 106 Fed. 653, 5 Am. Bankr. Rep. 644; *In re Franklin*, (D. C. Mass. 1901) 106 Fed. 666, 6 Am. Bankr. Rep. 285; *In re Neely*, (S. D. N. Y. 1901) 108 Fed. 371, 5 Am. Bankr. Rep. 836, (C. C. A. 2d Cir. 1902) 113 Fed. 210, 7 Am. Bankr. Rep. 312; *In re Shoemaker*, (W. D. Va. 1902) 112 Fed. 648, 7 Am. Bankr. Rep. 437; *In re Wells*, (W. D. Mo. 1902) 114 Fed. 222, 8 Am. Bankr. Rep. 75; *National Bank of Republic v. Hobbs*, (S. D. Ga. 1901) 118 Fed. 626, 9 Am. Bankr. Rep. 190; *White v. Thompson*, (5th Cir. 1903) 119 Fed. 868, 56 C. C. A. 398, 9 Am. Bankr. Rep. 653; *In re Kanter*, (C. C. A. 2d Cir. 1903) 121 Fed. 984, 9 Am. Bankr. Rep. 372; *In re Spitzer*, (C. C. A. 2d Cir. 1904) 130 Fed. 879, 12 Am. Bankr. Rep. 346; *Tennessee Producer Marble Co. v. Grant*, (C. C. A. 3d Cir. 1905) 135 Fed. 322, 14 Am. Bankr. Rep. 288; *Linstroth Wagon Co. v. Ballew*, (C. C. A. 5th Cir. 1907) 149 Fed. 960, 18 Am. Bankr. Rep. 23; *Sample v. Beasley*, (C. C. A. 5th Cir. 1908) 158 Fed. 607, 20 Am. Bankr. Rep. 164; *In re McKane*, (E. D. N. Y. 1907) 158 Fed. 647, 18 Am. Bankr. Rep. 594; *Orr v. Tribble*, (S. D. Ga. 1907)

158 Fed. 897, 19 Am. Bankr. Rep. 849; *In re Bluestone*, (N. D. W. Va. 1909) 174 Fed. 53, 23 Am. Bankr. Rep. 264; *In re New England Breeders' Club*, (D. C. N. H. 1910) 175 Fed. 501; *McLoughlin v. Knop*, (E. D. La. 1913) 214 Fed. 260; *In re Rohrer*, (C. C. A. 6th Cir. 1910) 24 Am. Bankr. Rep. 52. And see the cases cited, *supra*, under subdivision IV. *Stay of Proceedings on Valid Liens*.

*The reason why the Bankruptcy Court will refrain from interfering with proceedings in a state court, and anticipate its judgment, is the obligation of the comity necessary to be observed to avoid conflict between the state and federal courts; but this reason would be wanting if the other court waived its priority of right to possession.* *In re E. A. Kinsey Co.*, (C. C. A. 6th Cir. 1911) 184 Fed. 694.

Considering the peculiar character of our government, and keeping in view the forbearance which courts of co-ordinate jurisdiction exercise towards each other, it follows that the court which first obtains rightful jurisdiction over the subject matter of a controversy must be permitted to proceed therein to final judgment. The federal courts will not interfere with the administration of affairs lawfully in the custody and jurisdiction of a state court, nor will they permit the courts of the states to interfere concerning litigation rightfully submitted to the decision of the courts of the United States. The Bankruptcy Act does not in the least modify this rule, but with unusual carefulness guards it in all of its detail, provided the suit pending in the state court was instituted more than four months before the District Court of the United States had adjudicated the bankruptcy of the party entitled to, or interested in, the subject matter of such controversy. *Pickens v. Dent*, (C. C. A. 4th Cir. 1901) 106 Fed. 653, 5 Am. Bankr. Rep. 644; *In re Rohrer*, (C. C. A. 6th Cir. 1910) 177 Fed. 381, 24 Am. Bankr. Rep. 52.

*More interest of trustee does not oust jurisdiction of state court.*—The mere fact that a trustee in bankruptcy may be interested in the result of litigation which is pending between third parties in a state court does not entitle him to have the proceedings in such action stayed, as between such third parties, and to have the controversy transferred for adjudication to the Bankruptcy Court. *In re Horton*, (C. C. A. 8th Cir. 1900) 102 Fed. 986, 4 Am. Bankr. Rep. 486.

*Suit to set aside fraudulent deed.*—A suit to enjoin the further prosecution in a state court of a long pending suit by a judgment creditor to have a deed set aside as fraudulent, and the property described therein sold and the proceeds applied to the payment of the judgment and the satisfaction of the liens existing against

the property, is not within the jurisdiction of a court of bankruptcy, especially where instituted by the bankrupt himself. *Pickens v. Roy*, (1902) 187 U. S. 177, 23 S. Ct. 78, 47 U. S. (L. ed.) 128, 9 Am. Bankr. Rep. 47. See also *National Bank of Republic v. Hobbs*, (S. D. Ga. 1901) 118 Fed. 626, 9 Am. Bankr. Rep. 190.

**Proceeding commenced prior to enactment of Bankruptcy Law.**—A court of bankruptcy is without jurisdiction to enjoin further proceedings, under the judgment of a state court, in a judgment creditor's action commenced before the passage of the Bankruptcy Act. *Metcalfe v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36.

**Suit to determine ownership of property not claimed by bankrupt's estate.**—A court of bankruptcy is without authority to enjoin a suit in a state court to recover property from one claiming to have purchased the same from a bankrupt's trustee, where such property was not claimed nor scheduled by the bankrupt, nor in fact sold by the trustee, and the Bankruptcy Court, therefore, never had any jurisdiction over it or to determine its ownership. *In re Bluestone*, (N. D. W. Va. 1909) 174 Fed. 53, 23 Am. Bankr. Rep. 264.

#### VI. STAY FOR PROTECTION OF ASSETS.

As a general rule a court of bankruptcy will grant an injunction to restrain the disposition of, or interference with, the assets of the bankrupt estate; and, for a like purpose, proceedings pending in other courts may be stayed. *Leidigh Carriage Co. v. Stengel*, (C. C. A. 6th Cir. 1899) 95 Fed. 637, 2 Am. Bankr. Rep. 385; *In re Klein*, (N. D. Ill. 1899) 97 Fed. 31, 3 Am. Bankr. Rep. 174; *In re Schloerb*, (E. D. Wis. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 224; *In re Chambers*, (D. C. R. I. 1900) 98 Fed. 865, 3 Am. Bankr. Rep. 537; *In re Russell*, (C. C. A. 2d Cir. 1900) 101 Fed. 248, 3 Am. Bankr. Rep. 658; *In re Emslie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126; *In re Riker*, (S. D. N. Y. 1901) 107 Fed. 96, 5 Am. Bankr. Rep. 720; *In re Kleinhans*, (W. D. N. Y. 1902) 113 Fed. 107, 7 Am. Bankr. Rep. 604; *Beach v. Macon Grocery Co.*, (C. C. A. 5th Cir. 1902) 116 Fed. 143, 8 Am. Bankr. Rep. 751; *National Bank of Republic v. Hobbs*, (S. D. Ga. 1901) 118 Fed. 626, 9 Am. Bankr. Rep. 190; *In re Eastern Commission, etc., Co.*, (D. C. Mass. 1904) 129 Fed. 847, 12 Am. Bankr. Rep. 305; *In re Vastbinder*, (M. D. Pa. 1904) 132 Fed. 718, 13 Am. Bankr. Rep. 148; *In re Lines*, (M. D. Pa. 1903) 133 Fed. 803, 13 Am. Bankr. Rep. 318; *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 689; *In re Baughman*, (M. D. Pa. 1905) 138 Fed. 742, 15 Am. Bankr. Rep. 23;

*In re Van Buren*, (S. D. N. Y. 1908) 164 Fed. 883, 20 Am. Bankr. Rep. 896; *New River Coal Land Co. v. Ruffner*, (C. C. A. 4th Cir. 1908) 165 Fed. 881; *In re Schwartzman*, (D. C. S. C. 1909) 167 Fed. 399, 21 Am. Bankr. Rep. 885; *In re Berkowitz*, (D. C. N. J. 1908) 173 Fed. 1013, 22 Am. Bankr. Rep. 233; *In re Kimmel*, (E. D. Pa. 1910) 183 Fed. 665; *Matter of Pollman*, (S. D. N. Y. 1906) 16 Am. Bankr. Rep. 144.

**Stay discretionary.**—In the case of *In re Penn Development Co.*, (S. D. Cal. 1915) 220 Fed. 222, the court said: "Should this court, upon the filing of an involuntary petition in bankruptcy, *as of course*, and without any allegation or proof of a threatened invasion of the rights of any creditor, issue its injunction enjoining the further prosecution of a suit in a state court for a provable debt against the bankrupt, because of the *mere possibility* of action being taken which will be injurious to the rights of creditors, and in the absence of an application to such state court for the proper relief therein? I cannot believe that such question should be answered in the affirmative. Though it is true that the writ of injunction is proper to be used in order to effect and secure the stay provided for in said section 11a, *supra*, nevertheless I can find nothing in the Bankruptcy Act, or otherwise, which seems to justify the issuance of a writ of injunction by the court under any circumstances less strong than would be required in any other instance wherein this prerogative writ of the court was sought to be made use of. In other words, there is nothing in the Bankruptcy Act, *per se*, which either requires or justifies the issuance of a writ of injunction under any circumstances less formidable than would be required to justify its issuance in any other equitable proceeding. It will be issued, and its use is intended, to prevent the infliction of threatened or imminent, and not mere *possible*, injury. . . . In a proper case, where a court, or a party litigant therein, is about to take some unlawful or unwarranted step with respect to property which is properly subject to the jurisdiction of this court of bankruptcy, both propriety and duty would demand that this court issue its injunction staying or preventing such unlawful or unwarranted act. It is my judgment, however, that in a case like the present, where the proceeding is pending in a state court, because of considerations of comity and with a view of avoiding needless friction between state and federal sovereignties, it were better, in the first instance, for a petitioning creditor to make a motion in the state court for the withholding of a writ of execution, or for such other remedy as may be appropriate. Thereafter, upon a denial of such motion, or, in any event, upon a threatened or

probable step by the judgment creditor, or some officer of the court, looking to a sequestration of the property involved, or a use of it unwarranted under the bankruptcy law, application should be made to this court for the issuance of its injunctive relief, and the same would be granted at once, as of right."

**Power given for benefit of bankrupt estate.**—"The bankruptcy act authorizes the District Court as a court of bankruptcy to stay suits against the bankrupt founded upon provable claims pending in state courts at the time of the bankruptcy. It also authorizes such stays in attachment actions instituted within four months of the bankruptcy, the lien of the attachment being invalidated thereby. But the power is given in both cases only for the benefit of the bankrupt estate. If the estate have no interest in the suit or action it cannot properly be stayed. As this court said in *In re Mercedes Import Co.*, (C. C. A. 2d Cir. 1908) 166 Fed. 427: 'As the trustee in bankruptcy has no interest whatever in the claim against the surety, we think the creditor's rights and equities are questions to be disposed of by the state court.' In the Mercedes case the facts were somewhat similar to those appearing here. An attachment suit had been brought in a state court against a corporation which subsequently became bankrupt. A bond was substituted for the attachment. The District Court stayed the action, but this court reversed the order upon the ground indicated in the extract quoted, viz: that the bankrupt estate had no interest in preventing proceedings in the state court which looked only to enforcing the obligation of the surety company upon the attachment bond. But in the Mercedes case the attachment was made more than four months before the bankruptcy and, what is particularly important, no property of the bankrupt estate was held directly or indirectly to indemnify the surety. In the present case, on the other hand, the attachment was made within four months of bankruptcy and if Anger has a right to the property transferred for his benefit the trustee has a substantial interest in the attachment action. If the surety company is held it can look to Anger for indemnity and he may avail himself of the property of the estate. Thus if a stay be not granted a suit against a bankrupt on a provable claim brought within four months of bankruptcy may result in a depletion of the assets of the estate—a result clearly in contravention of the purpose of the bankruptcy act." *In re Federal Biscuit Co.*, (C. C. A. 2d Cir. 1913) 203 Fed. 37.

An assignee for the benefit of creditors may be enjoined from disposing of the assets of the bankrupt in his hands, and required to hold the same subject to the orders of the court in bankruptcy. *In re*

*Gutwillig*, (C. C. A. 2d Cir. 1899) 92 Fed. 337, 1 Am. Bankr. Rep. 388; *Leidigh Carriage Co. v. Stengel*, (C. C. A. 6th Cir. 1899) 95 Fed. 637, 2 Am. Bankr. Rep. 385.

**Disposal of property conveyed in fraud of creditors may be stayed.**—Where an insolvent debtor, who has conveyed all his property to a trustee, with directions to sell the same and distribute the proceeds to the creditors of the grantor, is adjudged bankrupt in involuntary proceedings, on the ground that such conveyance was intended to delay and defraud creditors, the court of bankruptcy, pending the appointment of a trustee, may enjoin the trustee under the deed from disposing of the property, or exercising any of the powers given him by the deed except to hold possession of the property and preserve it. *Rumsey, etc., Co. v. Novelty, etc., Mfg. Co.*, (E. D. Mo. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704.

**Suits to establish claim against assets.**—The court of bankruptcy, on petition of the trustee, will enjoin the prosecution of an action brought by a claimant against the trustee, in a state court, to establish a claim to the assets of the estate. *Keegan v. King*, (D. C. Ind. 1899) 96 Fed. 758, 3 Am. Bankr. Rep. 79; *In re Gutman*, (S. D. N. Y. 1902) 114 Fed. 1009, 8 Am. Bankr. Rep. 252.

**Stay of proceedings to impose lien on assets.**—Proceedings in a state court, instituted to impose a lien on certain of the bankrupt's property, may be stayed. *New River Coal Land Co. v. Ruffner*, (4th Cir. 1908) 165 Fed. 881, 91 C. C. A. 559, 21 Am. Bankr. Rep. 474.

**Foreclosure stayed.**—Where a creditor, claiming a mechanic's lien on property of the bankrupt over which the court of bankruptcy has acquired jurisdiction, brings an action in a state court for the foreclosure of such lien without leave of the Bankruptcy Court, it is an unwarrantable interference with the assets of the estate in the custody of the latter court, and the further prosecution of such action will be stayed. *In re Emslie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126.

**A preferential mortgagee may be enjoined from selling or otherwise disposing of the property pending the adjudication in bankruptcy;** and it is immaterial that the mortgage was given to secure a debt contracted in good faith before the passage of the Bankruptcy Act. *In re Nathan*, (D. C. Nev. 1899) 92 Fed. 590.

**Bankrupt's landlord restrained from interfering with leased premises.**—A court of bankruptcy has power to restrain a landlord from interfering with the possession, by a trustee, of a store occupied by the bankrupt under an unexpired lease, and which contains a valuable stock of goods, until the trustee has had a reasonable time to dispose of the same, where

they cannot be removed without serious loss to the estate, on the giving of a bond to protect the landlord from loss. *In re Schwartzman*, (D. C. S. C. 1909) 167 Fed. 399, 21 Am. Bankr. Rep. 885. See also *In re Lines*, (M. D. Pa. 1903) 133 Fed. 803, 13 Am. Bankr. Rep. 318.

In *In re Kimmel*, (E. D. Pa. 1910) 183 Fed. 665, it appeared that the bankrupt was a lessee for a term of five years, and that his trustee received an offer for the unexpired term, and the good will of the business, together with certain personal property, and that the referee ordered the acceptance of such offer; and it was held that, pending the offer and its acceptance, dispossession proceedings, instituted by the landlord in a state court, might be restrained.

And where a receiver was appointed to take charge of the assets, and prior to his qualification the bankrupt's lessors instituted summary proceedings in the state court to recover the leased premises which contained such assets, but no possession had been obtained prior to the qualification of the receiver, it was held that the receiver was entitled to an injunction restraining the summary proceedings. *In re Kleinhans*, (W. D. N. Y. 1902) 113 Fed. 107, 7 Am. Bankr. Rep. 604.

**Garnishment and attachment.**—In *In re Beerman*, (1901) 112 Fed. 662, an injunction was granted restraining a creditor from collecting money under garnishee process until the bankrupt's right to a discharge was determined. See also as to restraining attaching creditors *Bear v. Chase*, (C. C. A. 1900) 99 Fed. 920.

**When judgment is not enforceable against bankrupt.**—That a suit brought against a bankrupt in a state court may result in the diminution of his estate applicable in bankruptcy to the payment of his debts, is not a conclusive reason for restraining the prosecution of the suit, when the personal liberty of the bankrupt is not threatened, and when the judgment sought is not to be enforced against him, but against some one else. *In re Franklin*, (1901) 106 Fed. 666.

#### VII. STAY IN OTHER CASES.

**Stay in aid of jurisdiction.**—In many instances the granting of a stay of proceedings, instituted in another court, has been deemed to be necessary for the protection of the bankruptcy proceedings and in order to give effect to the statute; and where this element appears a stay will be allowed. *Lea v. George M. West Co.*, (E. D. Va. 1899) 91 Fed. 237, 1 Am. Bankr. Rep. 261; *In re Basch*, (S. D. N. Y. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235; *In re Emslie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126; *In re Kleinhans*, (W. D. N. Y. 1902) 113 Fed. 107, 7 Am. Bankr. Rep. 604; *In re Gutman*, (S. D. N. Y. 1902) 114 Fed. 1009, 8 Am. Bankr. Rep. 252; *In re*

*Wollock*, (N. D. Ill. 1903) 120 Fed. 516, 9 Am. Bankr. Rep. 685; *In re Mustin*, (N. D. Ala. 1908) 165 Fed. 506, 21 Am. Bankr. Rep. 147.

And see also *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183, 4 Am. Bankr. Rep. 178, wherein it was held that after an adjudication in bankruptcy, an action in replevin cannot be commenced and maintained against the bankrupt to recover property in the possession of, and claimed by, the bankrupt, at the time of the adjudication, which property was in the possession of a referee in bankruptcy when the action of replevin was begun.

**Stay of proceedings annulled by adjudication.**—A court of bankruptcy will stay, on request, all further action in the state courts on such proceedings as are annulled under the provisions of subdivisions c or f of section 67. *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746; *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 758; *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *In re Walsh*, (N. D. Ia. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472. See also *In re Nathan*, (D. C. Nev. 1899) 92 Fed. 590; *Rumsey, etc., Co. v. Novelty, etc., Mfg. Co.*, (E. D. Mo. 1899) 99 Fed. 699, 3 Am. Bankr. Rep. 704. And see the annotation under section 67f.

**Stay of action directed against exempt property.**—Where a creditor of a bankrupt holds a written waiver of exemptions, which is permitted by the law of the state, the court of bankruptcy should not, on application of the bankrupt, enjoin him from prosecuting an attachment suit in a state court against property claimed by the bankrupt as exempt, at least not longer than until the property shall have been set aside as exempt by the trustee, the validity of the waiver being a matter immaterial to the court of bankruptcy, and one for the state court to determine. *B. F. Roden Grocery Co. v. Bacon*, (C. C. A. 5th Cir. 1904) 133 Fed. 515, 13 Am. Bankr. Rep. 251. See also *Sayre First Nat. Bank v. Bartlett*, (Pa. 1908) 21 Am. Bankr. Rep. 88.

**Stay of suits brought against officers.**—Where a receiver in bankruptcy acts as an officer of the court in the administration of the estate, the Bankruptcy Court has jurisdiction to determine the validity of his acts, even to the extent of preventing an action at law by one who is raising no question and relying on no right which is not within the jurisdiction of the Bankruptcy Court in the bankruptcy proceeding, the parties being the same; but such court has no jurisdiction to prevent the maintenance of an action against the receiver to enforce a liability *in personam* against him for acts done beyond the scope of his authority. *In re Spechler*, (E. D. N. Y. 1911) 185 Fed. 311. And

see to the same effect *In re Kanter*, (C. C. A. 2d Cir. 1903) 121 Fed. 984, 9 Am. Bankr. Rep. 372. See also *In re Russell*, (C. C. A. 2d Cir. 1900) 101 Fed. 251, 3 Am. Bankr. Rep. 658; *In re Spitzer*, (C. C. A. 2d Cir. 1904) 130 Fed. 879, 12 Am. Bankr. Rep. 346; *In re Kalb, etc.*, Mfg. Co., (C. C. A. 2d Cir. 1908) 165 Fed. 895, 21 Am. Bankr. Rep. 393.

**Stay to prevent bankrupt's arrest.**—It is the duty of the judge or referee, charged with the administration of the Bankruptcy Law, to stay proceedings in a state court which will, or may, result in the arrest and imprisonment of the bankrupt during the pendency of proceedings in which he is the bankrupt; and this is true even though such arrest and imprisonment might be a contempt of court, and the bankrupt still have the right to a discharge from custody through habeas corpus. *In re Grist*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 89. And see the annotation under section 9a.

#### VIII. VACATING STAY.

**When stay will be vacated.**—A stay order restraining the prosecution of an action against a bankrupt, entered under section 11a, is in its nature temporary only, and should ordinarily be vacated as a matter of course, on application of the creditor, after the bankrupt has been discharged. *In re Rosenthal*, (S. D. N. Y. 1901) 108 Fed. 368, 5 Am. Bankr. Rep. 799. See also *Wakeman v. Throckmorton*, (1902) 74 Conn. 616, 51 Atl. 554.

By the terms of the statute the stay is granted only for the time during which the question of discharge may be open and pending. If a discharge is denied, or the time for asking one is allowed to expire without making the application therefor, there is no occasion for a stay. If the discharge is granted, the right of

action is brought under its effect and the bankrupt is entitled to its protection by proper legal remedies. The vacation of the stay, however, should be made without prejudice to the rights of the bankrupt under the discharge. *In re Flanders*, (D. C. Vt. 1903) 121 Fed. 936, 10 Am. Bankr. Rep. 379.

**Vacation as to persons not within jurisdiction.**—A motion to vacate a stay will be granted in so far as the stay applies to persons outside of the territorial jurisdiction of the court, and not personally subject to its orders within the jurisdiction. *In re Isaac Harris Co.*, (E. D. N. Y. 1909) 173 Fed. 735, 23 Am. Bankr. Rep. 237.

**Vacation to permit sale of property.**—Where a bankrupt owned a remainder interest in certain real property in the hands of trustees subject to a valid judgment lien on the bankrupt's interest, and it did not appear that the trustee could obtain a sufficient amount for the bankrupt's rights in the estate in the remainder to justify a direction that the trustee attempt to sell such rights and pay off the undisputed lien of the judgment creditor, a stay precluding the creditor from proceeding to enforce the judgment against such remainder will be vacated, subject to the right of the trustee to join in any proceeding taken by the creditor, or to protect any equity which might arise. *In re Arden*, (E. D. N. Y. 1911) 188 Fed. 475.

**Vacation to permit proceedings for contempt.**—A stay of proceedings against the bankrupt in the state court will be vacated so as to permit creditors to move the state court to punish the bankrupt for contempt committed prior to the filing of the bankruptcy petition. *In re Sims*, (S. D. N. Y. 1910) 176 Fed. 645, 23 Am. Bankr. Rep. 899.

**b [Appearance of trustee.]** The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt. [(1898) 30 Stat. L. 549.]

**Intervention by trustee may be allowed.**—Under the express terms of section 11b the court may order the trustee to enter his appearance and defend any suit pending against the bankrupt. *Heath v. Shaffer*, (N. D. Ia. 1899) 93 Fed. 647, 2 Am. Bankr. Rep. 98; *In re Klein*, (N. D. Ill. 1899) 97 Fed. 31, 3 Am. Bankr. Rep. 174; *In re Porter*, (D. C. Ky. 1901) 109 Fed. 111, 6 Am. Bankr. Rep. 259; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 12 Am. Bankr. Rep. 781, 123 Ia. 432, 99 N. W. 121; *Conti v. Sunseri*, (Pa. 1907) 18 Am. Bankr. Rep. 891.

**Order discretionary.**—Suits begun against a bankrupt before the latter's bankruptcy may be defended or stayed, in the discretion of the Bankruptcy Court, according

as the interests of the bankrupt's creditors shall require. *In re St. Albans Foundry Co.*, (D. C. Vt. 1900) 4 Am. Bankr. Rep. 594. See also *Victor Talking Mach. Co. v. Hawthorne, etc.*, Mfg. Co., (E. D. Pa. 1909) 173 Fed. 617, 23 Am. Bankr. Rep. 234; *In re Porter*, (1901) 109 Fed. 111.

**Intervention in attachment suits.**—Where creditors of an insolvent debtor sue out attachments on his property in a state court, and cause the same to be sold thereunder and the proceeds paid into court, and within four months thereafter he is adjudged bankrupt on a petition alleging such attachments to be preferential and to constitute acts of bankruptcy, an intervening petition filed by the trustee

in bankruptcy in the state court should be limited to a demand for the proceeds of sale remaining in court. *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746.

The fact that a warrant of attachment has been levied upon the property of the bankrupt does not authorize the trustee in bankruptcy to intervene, in an action in which attachment issued, for the purpose of obtaining possession of the attached property. *Jewett v. Huffman*, (1905) 13 Am. Bankr. Rep. 738, 14 N. D. 110, 103 N. W. 408.

An order of the Bankruptcy Court, permitting intervention, but leaving the question of the effect and validity of the attachments to be determined in the state court, is erroneous. *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746.

**Intervention to protect assets.**—Where, at the time of an adjudication in bankruptcy, property of the bankrupt is in the hands of a receiver appointed by a state court in a suit brought against the bankrupt by a judgment creditor, the trustee in bankruptcy, when appointed, should intervene in such suit in the state court, by petition, for the protection of the interests of the general creditors of the estate. *In re Klein*, (N. D. Ill. 1899) 97 Fed. 31, 3 Am. Bankr. Rep. 174.

**Intervention does not oust jurisdiction of state court.**—A trustee in bankruptcy by intervening in an action to enforce a specific lien upon an insolvent, pending in a state court, cannot thereby oust the jurisdiction of the court. *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 12 Am. Bankr. Rep. 781, 123 Ia. 432, 99 N. W. 121.

**Effect of state statutes and rules of practice on intervention.**—The Bankruptcy Law, however mandatory it may be, does not control the practice in state courts, and was not intended to do so. If an order be made, under section 11b, commanding the trustee to intervene in a

state court in an action to which the bankrupt is a party, the trustee performs his full duty when he makes a proper application to such state court to be let into the action therein pending. In disposing of such an application the state statutes and rules of practice must necessarily govern the same as when any other party invokes the court's jurisdiction. *Bank of Commerce v. Elliott*, (Wis. 1901) 6 Am. Bankr. Rep. 409, following *National Distilling Co. v. Seidel*, (1899) 103 Wis. 489, 79 N. W. 744.

**The judgment of the state court is conclusive on the trustee**, where he has intervened in a suit pending therein by permission of the court of bankruptcy, even though he was not a necessary party to the suit. *Linstroth Wagon Co. v. Ballew*, (C. C. A. 5th Cir. 1907) 149 Fed. 960, 18 Am. Bankr. Rep. 23. See also *In re Skinner*, (N. D. Ia. 1899) 97 Fed. 190, 3 Am. Bankr. Rep. 163; *In re Van Alstyne*, (N. D. N. Y. 1900) 100 Fed. 929, 4 Am. Bankr. Rep. 42; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 12 Am. Bankr. Rep. 781, 123 Ia. 432, 99 N. W. 121.

**Plaintiff may make trustee party defendant.**—Where, pending a suit in equity for infringement of a patent against a corporation, the defendant is adjudged a bankrupt, the complainant is entitled to file a supplemental bill, making its trustee a party defendant, that he may be bound by a decree, so far as that result may properly follow, whether or not he will make a defense being a matter to be determined by him and the Bankruptcy Court. *Victor Talking Mach. Co. v. Hawthorne, etc., Mfg. Co.*, (E. D. Pa. 1909) 173 Fed. 617, 23 Am. Bankr. Rep. 234.

**As to the discretion of the trustee**, under the Bankruptcy Act of 1867, see *Reade v. Waterhouse*, (1873) 52 N. Y. 587; *Traders' Nat. Bank v. Campbell*, (1871) 14 Wall. 87, 20 U. S. (L. ed.) 832.

**c [Prosecution of suit by trustee.]** A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him. [(1898) 30 Stat. L. 549.]

**Prosecution of suit by bankrupt.**—In *Johnson v. Collier*, (1912) 222 U. S. 538, 32 S. Ct. 104, 56 U. S. (L. ed.) 306, the question arose whether prior to the election of a trustee the bankrupt might prosecute. The answer was in the affirmative, the court saying: "The trustee, with the approval of the court, may prosecute any suit commenced by the bankrupt prior to the adjudication. But the statute is otherwise silent as to the right of the bankrupt himself to begin a suit in the time which intervenes between

the filing of the petition and the election of the trustee. There is a conflict in the conclusions reached in the few cases dealing with this question. *Rand v. Sage*, (1905) 94 Minn. 344, 102 N. W. 864; *Rand v. Iowa Cent. R. Co.*, (1906) 186 N. Y. 58, 78 N. E. 574, 116 A. S. R. 530, 9 Ann. Cas. 542; *Gordon v. Mechanics' & Traders' Insurance Co.*, (1907) 120 La. 441, 45 So. 384, 124 A. S. R. 434, 14 Ann. Cas. 886, 15 L. R. A. (N. S.) 827. While for many purposes the filing of the petition operates in the nature of an

attachment upon choses in action and other property of the bankrupt, yet his title is not thereby divested. He is still the owner, though holding in trust until the appointment and qualification of the trustee, who thereupon becomes 'vested by operation of law with the title of the bankrupt' as of the date of adjudication. (§ 70.) Until such election the bankrupt has title—defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so. There must always some time elapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court in his own name, the one previously brought can be abated. If, however, he is of opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt and avail himself of rights and priorities thereby acquired. *Thatcher v. Rockwell*, (1881) 105 U. S. 467, 26 U. S. (L. ed.) 949. If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some states the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the Bankrupt Court, be amply protected against any danger of being made to pay twice."

**Prosecution of suit by trustee.**—A trustee in bankruptcy may, with the approval of the court, be permitted to prosecute any suit commenced by the bankrupt prior to the adjudication, with the same force and effect as though such action had been instituted by the trustee. *In re Price*, (S. D. N. Y. 1899) 92 Fed. 987. 1 Am. Bankr. Rep. 606; *Griffin v. Mutual L. Ins. Co.*, (1904) 11 Am. Bankr. Rep. 622, 119 Ga. 663, 46 S. E. 870; *Hahlo v. Cole*, (1906) 15 Am. Bankr. Rep. 591, 112 App. Div. 636, 98 N. Y. S.

1049; *Kessler v. Herklotz*, (N. Y. 1909) 22 Am. Bankr. Rep. 257.

**Approval of bankruptcy court essential.**

—It is improper for the state court to permit the substitution of the trustee in bankruptcy as plaintiff in an action begun by the bankrupt therein, prior to adjudication, unless the consent of the federal court thereto is first obtained and affirmatively shown. *Hahlo v. Cole*, (1906) 15 Am. Bankr. Rep. 591, 112 App. Div. 636, 98 N. Y. S. 1049; *Kessler v. Herklotz*, (N. Y. 1909) 22 Am. Bankr. Rep. 257. See also *Traders' Ins. Co. v. Mann*, (Ga. 1903) 11 Am. Bankr. Rep. 269; *Callahan v. Israel*, (1904) 186 Mass. 383, 71 N. E. 812.

The court whose approval this section requires is the court who appointed the trustee. *The Alert*, (D. C. Mass. 1912) 199 Fed. 542.

**Actions for personal torts are not intended**, but only actions in which the estate is concerned; and therefore the bankrupt has a right to determine for himself whether an action by him for malicious imprisonment and arrest upon a criminal charge shall be further prosecuted or not. *In re Haensell*, (1899) 91 Fed. 355, wherein the bankrupt's application for leave to prosecute such suit was denied, because leave was unnecessary.

**Substitution of trustee as plaintiff.**—

In *In re Price*, (1899) 92 Fed. 987, the court entered an order authorizing the trustee to apply to the state court for leave to be substituted as a plaintiff in certain proceedings, to the end that funds in a receiver's hands might be turned over to him for distribution among creditors.

**Failure of trustee to intervene does not abate action against bankrupt.**—If no trustee is appointed, or if the Bankruptcy Court does not consider it to the interest of the estate to permit the trustee to prosecute a suit previously brought by the bankrupt, the action does not thereby abate, nor is the bankrupt's debtor discharged from liability in the pending action. *Griffin v. Mutual L. Ins. Co.*, (1904) 11 Am. Bankr. Rep. 622, 119 Ga. 664, 46 S. E. 870; *Hahlo v. Cole*, (N. Y. 1906) 15 Am. Bankr. Rep. 591.

**Costs.**—The trustee will not be held liable for costs in an action wherein he has not intervened, and in the prosecution of which he has taken no part. *Kessler v. Herklotz*, (N. Y. 1909) 22 Am. Bankr. Rep. 257.

**As to the practice under prior bankruptcy acts in respect of prosecution by the trustee of suits commenced by the bankrupt**, see *Thatcher v. Rockwell*, (1881) 105 U. S. 467, 26 U. S. (L. ed.) 949; *In re Boyd*, (1871) 2 Hughes 349, 3 Fed. Cas. No. 1,745; *Serra & Hijo v. Hoffman*, (1877) 29 La. Ann. 17; *Ramsey v. Fel lows*, (1879) 58 N. H. 607; *Dessan v. Johnson*, (Supm. Ct. Spec. T. 1883) 66 How. Pr. (N. Y.) 4.



**d [Time for bringing suit against trustee.]** Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed. [(1898) 30 Stat. L. 549.]

**Time within which trustee may sue.**—A trustee in bankruptcy may maintain an action to set aside a conveyance made by the bankrupt at any time within two years after the estate is closed, provided the action was not barred by the state law at the time the petition in bankruptcy was filed. *Sheldon v. Parker*, (1902) 11 Am. Bankr. Rep. 152, 66 Neb. 610, 92 N. W. 923.

This provision is separate from and independent of a state statute of limitations, and it may extend or may contract the time provided in the state statute. "Thus, if at the time of the appointment of the assignee but a few days remained of the time necessary to complete the bar, the time would be extended; or, if the statute had just commenced running, and under the state law would have ten years to run . . . it would be complete within two years." *Freelander v. Holloman*, (1873) 9 Nat. Bankr. Reg. 331, 9 Fed. Cas. No. 5,081; *Sheldon v. Parker*, (1902) 66 Neb. 610, 92 N. W. 923, 930; *Rock v. Dennett*, (1892) 155 Mass. 500, 30 N. E. 171.

"Closed" means properly and finally closed, hence a suit is not barred by the lapse of the two-year period from the time an estate is declared closed when it is subsequently reopened under section 2 (8). *Bilafsky v. Abraham*, (1903) 183 Mass. 401, 67 N. E. 318.

**Leave to sue trustee unnecessary.**—A trustee in bankruptcy may be sued without first obtaining leave from the Bankruptcy Court. *In re Smith*, (S. D. N. Y. 1903) 121 Fed. 1014, 9 Am. Bankr. Rep. 603.

**Continuance of suit, brought by trustee, after closing estate.**—A suit brought by a trustee in bankruptcy may, after the estate has been closed, be maintained by the bankrupt for his own benefit, in the name and with the consent of the trustee. *Stone v. Jenkins*, (Mass. 1900) 4 Am. Bankr. Rep. 568.

**Suits against bankrupt and receiver unauthorized.**—Section 11 clearly indicates

that suits against a bankrupt and the receivers are not to be authorized by the court in any event, and not against any one prior to the appointment of a trustee who is to represent the creditors. *In re Heim Milk Product Co.*, (N. D. N. Y. 1910) 183 Fed. 787.

**Costs.**—A court of bankruptcy cannot, by a summary order, require a trustee to pay a judgment for costs rendered against him in another jurisdiction, where there are no funds of the estate in his hands. *In re Howard*, (N. D. Cal. 1904) 130 Fed. 1004, 12 Am. Bankr. Rep. 462.

The Bankruptcy Act of 1867 contained a provision barring suits brought "within two years from the time the cause of action accrued for or against" the assignee. For cases construing that provision see *Bailey v. Glover*, (1874) 21 Wall. 342, 22 U. S. (L. ed.) 636; *Jenkins v. International Bank*, (1882) 106 U. S. 571, 2 S. Ct. 1, 27 U. S. (L. ed.) 304; *Phelps v. McDonald*, (1878) 99 U. S. 298, 25 U. S. (L. ed.) 473; *Freelander v. Holloman*, (1873) 9 Nat. Bankr. Reg. 331; *Steele v. Moody*, (1878) 16 Nat. Bankr. Reg. 558; *Wilt v. Stickney*, (1876) 15 Nat. Bankr. Reg. 23, 30 Fed. Cas. No. 17,854; *Gildersleeve v. Gaynor*, (1882) 4 Woods (U. S.) 541; *Walker v. Townner*, (1877) 4 Dill. (U. S.) 165; *Scovill v. Shaw*, (1878) 4 Cliff. (U. S.) 549; *Payson v. Coffin*, (1877) 4 Dill. (U. S.) 386; *In re Conant*, (1862) 5 Blatchf. (U. S.) 54; *Peiper v. Harmer*, 5 Nat. Bankr. Reg. 252; *Chicago, etc., R. Co. v. Jenkins*, (1882) 103 Ill. 588; *International Bank v. Jenkins*, (1883) 107 Ill. 291; *Pike v. Lowell*, (1850) 32 Me. 245; *Minot v. Tappan*, (1879) 127 Mass. 333; *Ross v. Wilcox*, (1883) 134 Mass. 21; *Rock v. Dennett*, (1891) 155 Mass. 500, 30 N. E. 171; *Ames v. Gilman*, (1845) 10 Met. (Mass.) 239; *Esmond v. Apgar*, (1879) 76 N. Y. 359; *Cleveland v. Boerum*, (1862) 24 N. Y. 613; *Chemung Canal Bank v. Judson*, (1853) 8 N. Y. 254; *Cogdell v. Exum*, (1873) 69 N. C. 464; *Union Canal Co. v. Woodside*, (1849) 11 Pa. St. 176.

**SEC. 12. COMPOSITIONS, WHEN CONFIRMED.—a [When offer may be made.]** A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed

until it shall be determined whether such composition shall be confirmed. [(Amended 1910, which excepted pending cases) 36 Stat. L. 839.]

As originally enacted, section 12a read as follows:

"SEC. 12. COMPOSITIONS, WHEN CONFIRMED.—a. A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts." [30 Stat. L. 594.]

In 1910 it was amended "so as to read as" in the text.

**Constitutionality.**—An analogous section in the Act of June 22, 1874, supplementing the Bankruptcy Act of 1867, was pronounced constitutional in *Matter of Reiman*, (1874) 7 Ben. 455, (1875) 12 Blatchf. 562, 20 Fed. Cas. No. 11,673, 11,675.

**Construction.**—The provisions of the statute prescribing the requisites of a composition with creditors are in derogation of the common law and are to be strictly construed as against those who seek by this means to deprive nonassenting creditors of their right to have the debtor's property administered upon and distributed in the ordinary course of bankruptcy proceedings. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178; *In re Frear*, (N. D. N. Y. 1903) 120 Fed. 978, 10 Am. Bankr. Rep. 199; *In re Kinnane Co.*, (S. D. Ohio 1915) 221 Fed. 762. See also *In re Shields*, (1877) 4 Dill. 588, 15 Nat. Bankr. Reg. 532, 21 Fed. Cas. No. 12,784.

**Nature of composition proceedings.**—The case of composition is in some respects exceptional. It is a proceeding voluntary on both sides, by which the debtor of his own motion offers to pay his creditors a certain percentage of their claims in exchange for a release from his liabilities. The amount offered may be less or more than would be realized through distribution in bankruptcy by the trustee. The creditors may accept this offer or they may refuse it. For the purposes of the composition all the creditors are treated as a class, and the will of the majority is enforced upon the minority, provided the decision of the majority is approved by the court. Except for this coercion of the minority, the intervention of the court of bankruptcy would hardly be necessary.

The effect of the composition proceeding is to substitute composition for bankruptcy proceedings in a certain sense, and in a measure to supersede the latter proceeding, and to reinvest the bankrupt with all his property free from the claims of his creditors. *In re Lane*, (D. C. Mass. 1902) 125 Fed. 772, 11 Am. Bankr. Rep. 137; *Cumberland Glass Mfg. Co. v. De Witt*, (1915) 237 U. S. 447, 35 S. Ct. 636, 59 U. S. (L. ed.) 1042. See also *In re Frischknecht*, (C. C. A. 2d Cir. 1915) 223 Fed. 417.

**Offer of composition.**—Prior to the amendment of 1910 it was held that a composition could not be offered before the adjudication; but that amendment provides for the offer of a composition either before or after adjudication. The offer must be made after, and not before, the bankrupt has been examined in open court or at a meeting of his creditors, and after he has filed in court the schedule of his property and a list of creditors required to be filed by bankrupts. *In re Fox*, (E. D. N. Y. 1915) 222 Fed. 135; *Cumberland Glass Mfg. Co. v. De Witt*, (1915) 237 U. S. 447, 35 S. Ct. 636, 59 U. S. (L. ed.) 1024. And see the following cases which were decided prior to the enactment of the 1910 amendment. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178; *In re Hilborn*, (S. D. N. Y. 1900) 104 Fed. 866, 4 Am. Bankr. Rep. 741; *In re Frear*, (N. D. N. Y. 1903) 120 Fed. 978, 10 Am. Bankr. Rep. 199.

**The purpose of the amendment of 1910**, providing that a bankrupt can offer a composition before adjudication but after he has been examined in open court, and that upon filing schedules and suggesting a composition the court shall call a meeting for such examination, was to enable the bankrupt to advance the time of examination so that he might thereafter at once present the offer of composition. The intent clearly was to shorten the time necessary in cases of honest composition and to do away with the necessity of waiting for adjudication, first meeting and subsequent notice of meeting to prove claims and of the offer of composition. *In re Fox*, (E. D. N. Y. 1915) 222 Fed. 135.

**To whom composition must be offered.**—A composition, to be valid, must have been offered by the bankrupt to all of his general creditors, whether or not they have proved their debts at the time of the offer; and all must have a reasonable opportunity to consider it. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178.

**But secured creditors are not necessary or proper parties to a composition proceeding.** *In re Kahn*, (S. D. N. Y. 1902) 121 Fed. 412, 9 Am. Bankr. Rep. 107.

**Amendment of original offer of composition.**—There is no provision in the Bankruptcy Act providing for amended or

substituted offers of composition, but in proper circumstances, as where it appears that the bankrupt has at all times acted in good faith and where the only change in the offer is an increase in the cash offered, the court will permit an amendment of the original offer of composition. *In re Cockshaw*, (S. D. N. Y. 1915) 220 Fed. 239.

But where a proposed composition, clear in its provisions, has been submitted by the bankrupt and accepted by a majority of the creditors in number and amount and an amended or substituted offer is made, the new proposition must be submitted to the several creditors, as upon the first offer of composition, in the orderly manner prescribed by law. *In re Kinnane Co.*, (S. D. Ohio 1914) 217 Fed. 488.

See also *Re Reiman*, (1874) 7 Ben. 455, 20 Fed. Cas. No. 11,673, affording an illustration in which the court, on account of a defect in the composition proceedings, permitted a resubmission of the offer to the creditors for their action, and *In re Whipple*, (1875) 11 Nat. Bankr. Reg. 524, 29 Fed. Cas. No. 17,513, wherein the composition was refused because the proposal was insufficient; but subsequently the debtor was permitted to make a better offer which was accepted, although the practice was against the second offer unless good cause was shown therefor.

The term "in open court" refers to proceedings before the referee. *In re*

*Bloodworth-Stembridge Co.*, (S. D. Ga. 1910) 178 Fed. 372, 24 Am. Bankr. Rep. 156.

The schedule provided for in section 12a is the schedule required by section 7a (8) to be filed within ten days after adjudication, and not schedules filed prior to adjudication. *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835, reversing 19 Am. Bankr. Rep. 33.

The examination of the bankrupt referred to in section 12a is not an examination of the bankrupt as a witness on the issues of insolvency and the commission of acts of bankruptcy charged, but the examination to which the bankrupt is required to submit by section 7a (9). *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835, reversing 19 Am. Bankr. Rep. 33.

Meeting of creditors.—The calling of a special meeting of creditors to receive an offer of composition is not required; and a submission of an offer of composition to the creditors at their first meeting, after an examination of the bankrupt, is competent and sufficient. *In re Hilhorn*, (S. D. N. Y. 1900) 104 Fed. 866, 4 Am. Bankr. Rep. 741.

But where composition is offered before adjudication, it will be observed that the statute provides for the calling of a special meeting.

Form No. 60 is a petition for meeting to consider composition.

**b [Application for confirming.]** An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge. [(1898) 30 Stat. L. 549.]

Form No. 61 is an application for confirmation of composition.

**Presenting application for confirmation.**—The provision that an application for the confirmation of a composition may be filed in the court of bankruptcy, after the consideration and the cost of the proceedings have been deposited in a place designated by, and subject to the order of, the judge, requires those matters to be presented to the judge rather than the referee. *In re Bloodworth-Stembridge Co.*, (S. D. Ga. 1910) 178 Fed. 372.

**Acceptance by majority—In general.**—Before an application for the confirmation of a composition may be filed, it is necessary that the terms of such composition shall have been accepted in writing

by a majority in number of all creditors whose claims have been allowed; and such majority must represent, also, a majority in amount of such claims. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178; *Matter of Fox*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 525; *In re Messingill*, (E. D. N. C. 1902) 113 Fed. 366, 7 Am. Bankr. Rep. 669; *In re Harvey*, (E. D. Pa. 1906) 144 Fed. 901, 16 Am. Bankr. Rep. 345; *In re Ullman*, (S. D. N. Y. 1910) 180 Fed. 944; *In re Ennis*, (S. D. N. Y. 1910) 183 Fed. 859; *In re Goldstein*, (D. C. Conn. 1914) 213 Fed. 115; *Cumberland Glass Co. v. De Witt*, (1915) 237 U. S. 447, 35 S. Ct. 636, 59 U. S. (L. ed.) 1042.

The procedure in compositions requires

the bankrupt to make an offer of specific terms upon which he shall have back his estate. He must get the consent of one-half of his creditors who have filed claims, and deposit enough money to pay all of them who have been scheduled or filed claims up to that time. Then he may file a petition and compel the remainder to accept the terms if he can induce the court so to order. *In re Ennis*, (S. D. N. Y. 1910) 183 Fed. 859.

**Assignee of several claims counted as one creditor.**—In determining whether a majority have accepted an offer of composition an assignee of a large number of claims should be counted as one creditor only, and not as the number of creditors who have assigned claims to him. *In re Messengill*, (E. D. N. C. 1902) 113 Fed. 366, 7 Am. Bankr. Rep. 669.

**A composition of a bankrupt partner of a bankrupt firm, individually, without the consent of a majority in number and amount of his individual creditors, cannot be effected by the consent of the firm creditors, though the consenting majority be more than a majority of the number and amount of all creditors.** *In re Ullman*, (S. D. N. Y. 1910) 180 Fed. 944.

**Withdrawing acceptance.**—Creditors of a bankrupt, who have signed an acceptance of an offer of composition and invoked the action of the court thereon, will not be permitted to withdraw their signatures, where it is not alleged that they were procured by fraud or misrepresentation. *In re Levy*, (W. D. Pa. 1901) 110 Fed. 744, 6 Am. Bankr. Rep. 299.

**Deposit — Generally.**—The consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority under section 64, and the costs of the proceeding, must be deposited in such place as shall have been designated by, and is subject to, the order of the judge, before the application for the confirmation of a composition is filed. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178; *Matter of Fox*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 525; *In re Harris*, (W. D. Tenn. 1902) 117 Fed. 575, 9 Am. Bankr. Rep. 20; *In re Frear*, (N. D. N. Y. 1903) 120 Fed. 978, 10 Am. Bankr. Rep. 199; *In re Flynn*, (D. C. Mass. 1905) 134 Fed. 145, 13 Am. Bankr. Rep. 720; *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366; *In re Harvey*, (E. D. Pa. 1906) 144 Fed. 901, 16 Am. Bankr. Rep. 345; *In re Bloodworth-Stembridge Co.*, (S. D. Ga. 1910) 178 Fed. 372; *In re Wiener*, (E. D. N. Y. 1914) 215 Fed. 278, (1914) 217 Fed. 173; *Cumberland Glass Co. v. De Witt*, (1915) 237 U. S. 447, 35 S. Ct. 636, 59 U. S. (L. ed.) 1042.

**The judge must require the money to be deposited, and designate what sum shall be deposited, and it must be deposited subject to his orders.** *In re Blood-*

*worth-Stembridge Co.*, (S. D. Ga. 1910) 178 Fed. 372, 24 Am. Bankr. Rep. 156.

**The court will not confirm a composition offered by a bankrupt to his creditors, where the money deposited by him to cover the cost of the proceedings is not sufficient in amount.** *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178.

**Taxes must be provided for.**—The deposit required on the making of a composition must provide for the payment of taxes, which by section 64a are made a preferred claim against the bankrupt's assets. *In re Flynn*, (D. C. Mass. 1905) 134 Fed. 145, 13 Am. Bankr. Rep. 720.

**Secured claims.**—The bankrupt is not required to deposit sufficient to secure a percentage on secured claims, nor for any supposed deficiency, if it has not yet been ascertained and filed. *In re Harvey*, (E. D. Pa. 1906) 144 Fed. 901, 16 Am. Bankr. Rep. 345.

**The intention in the enactment of section 12b was to authorize a majority in numbers and amounts of all creditors, whose claims have been allowed, to pass upon the question of the acceptance of a composition; but after that has been determined, then this section requires the bankrupt to deposit a sufficient sum to cover the percentage offered in the compromise of all the scheduled claims of creditors, and any unscheduled claims which have been presented and allowed before confirmation, because these scheduled claims are undoubtedly provable claims and discharged by a confirmation of a composition by section 14c (Glover Grocery Co. v. Dorne, (1902) 8 Am. Bankr. Rep. 702, 116 Ga. 216, 42 S. E. 347), and unless there is a deposit sufficient to cover them the claimant is without a remedy. As to all unsecured and unscheduled claims provision is made for these by section 17a (3) in that they are not discharged by the confirmation of a composition if they have not been duly scheduled in time for proof and allowance, and the creditor has had no notice or actual knowledge of the proceeding in bankruptcy. So that as to these claims the creditor is protected, and after a composition has been effected and the bankrupt discharged, such a creditor could recover on his claim against such property as the bankrupt might own when suit is brought, at least so much as he paid his other creditors who participated in the composition. But as to a creditor whose claim has been duly scheduled in time for proof and allowance, it seems that he must be protected by a deposit of a sufficient percentage to cover his claim, whether it has been proven or not. There is no hardship in this on the bankrupt, because he knows what debts he owes, and it is presumed he will not schedule more debts, or debts for larger amounts, than he actually owes, and when they**

are so scheduled by him, and he offers a compromise, he should deposit sufficient to cover all scheduled debts without regard to whether they have been proven or not. *Per* Holland, D. J., in *In re Harvey*, (E. D. Pa. 1906) 144 Fed. 901, 16 Am. Bankr. Rep. 345.

**Costs.**—“Composition is wholly a matter of arrangement by the bankrupt and his creditors, and the negotiations always should comprehend a disposition of all the costs, with a definite understanding of amounts and the method of their payment. If there be an attorney’s fee not waived the attorney should agree with the parties on the amount, or, if disagreed, application should be made to the court to fix the fee, and so of the receiver or the trustee; and with every item not distinctly fixed by the statutes or rules of practice, this should be done, as a preliminary of the composition agreement, and as a part of it. When the amounts are ascertained, the parties should agree whether the costs come out of the deposit for creditors, or whether the bankrupt provides an additional sum to meet costs. If he is to do this, he should bring the cost money with the other, to be deposited in court. It is all, however, purely a matter of agreement by negotiation, and the court will take no part in it by compelling either to do anything about it. It is a mistake to suppose that the statute requires the bankrupt, as a matter of law, to pay the costs in addition to what he agrees to pay the creditors. He is not obliged to pay the creditors anything whatever, nor the costs, and unless all the elements of the composition are mutually settled by the agreement they make, the technical and logical result is that the composition fails, or rather the attempt at composition fails, and the ordinary administration of the assets goes on as if there had been no attempt to compound the debts. The costs then come out of the assets, and practically out of the creditors, always being paid out of whatever fund is in court, unless otherwise agreed upon

and provided for by the parties. Hence, the payment of the costs by the bankrupt under composition is in a proper sense voluntary.” *Per* Hammond, J., in *In re Harris*, (W. D. Tenn. 1902) 117 Fed. 575, 9 Am. Bankr. Rep. 20. See also *In re Wiener*, (E. D. N. Y. 1914) 217 Fed. 173, wherein the court distinguished between the payment of costs and the expenses incident to an offer of composition.

**Attorney fees.**—Where a composition offered by a bankrupt, which includes the payment of all costs, is confirmed after opposition, the bankrupt’s attorney will not be allowed fees from the estate for his services in securing the confirmation. *In re Martin*, (E. D. N. Y. 1907) 152 Fed. 582, 18 Am. Bankr. Rep. 250. And see annotation under section 62.

**Composition in money by use of credit.**—Section 12, in prescribing the time and mode of offering terms of composition, plainly contemplates that a composition in money may be offered, and expressly prescribes that an application for the confirmation of a composition may be made after, but not before, “the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.” The Act, of course, contemplates that the bankrupt may acquire the money required for the purposes of the composition by the use of his credit. *Zavelo v. Reeves*, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676.

Under the Acts of 1867 and 1874 the word “money” was likewise held to include notes or other evidences of indebtedness. *Matter of Reiman*, (1874) 7 Ben. 455, (1875) 12 Blatchf. 562, 20 Fed. Cas. Nos. 11,673, 11,675; *In re Langdon*, (1875) 2 Lowell 387, 14 Fed. Cas. No. 8,053; *In re Hurst*, (1876) 1 Flip. 462, 13 Nat. Bankr. Reg. 455, 12 Fed. Cas. No. 6,925; *Matter of Wronkow*, (1878) 15 Blatchf. 38, 30 Fed. Cas. No. 18,105.

**c [Date and place of hearing.]** A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation. [(1898) 30 Stat. L. 550.]

**Specifications — Generally.**—The specifications in opposition to the confirmation of a bankrupt’s composition with his creditors must be similar to specifications in opposition to a discharge; they must be sufficient in law and the burden of sustaining them rests upon the objecting creditors, who must present proof which meets the requirements of the rules of law and of evidence. *City Nat. Bank v. Doolittle*, (C. C. A. 5th Cir. 1901) 107

Fed. 236, 5 Am. Bankr. Rep. 736; *Adler v. Jones*, (C. C. A. 6th Cir. 1901) 109 Fed. 967, 6 Am. Bankr. Rep. 245; *In re Rivkin*, (D. C. Conn. 1914) 216 Fed. 218. And see the annotations under section 14b, as to specifications of objections to a discharge.

**Necessity of entering appearance and filing objections.**—Where the requisite proportion of the creditors of a bankrupt have executed the composition agreement,

opposing creditors should be required to enter their appearance and file specifications in writing of the grounds of opposition. *Adler v. Jones*, (C. C. A. 6th Cir. 1901) 109 Fed. 967, 6 Am. Bankr. Rep. 245.

**Hearing.**—*The judge must fix a date for the hearing; that is, a hearing before him. In re Bloodworth-Stembridge Co.*, (S. D. Ga. 1910) 178 Fed. 372, 24 Am. Bankr. Rep. 156. See also *Adler v. Jones*, (C. C. A. 6th Cir. 1901) 109 Fed. 967, 6 Am. Bankr. Rep. 245.

*But proposed composition may be referred to ascertain whether there are grounds for believing that the objections are well founded, and what grounds there are for believing that the composition offered will be for the best interests of the creditors. In re Levy*, (D. C. Mass. 1908) 172 Fed. 780, 22 Am. Bankr. Rep. 769. See also *Adler v. Jones*, (C. C. A. 6th Cir. 1901) 109 Fed. 967, 6 Am. Bankr. Rep. 245.

**General Order No. 12, par. 3** requires the application to be heard and decided by the judge who may, however, "refer such an application, or any specific issue thereon, to the referee to ascertain and report the facts."

*The proper practice is for a referee, when requested in accordance with a rule of court, to appoint a day for bringing the composition before the court, and to issue the required notices to creditors, suggesting in his report any legal questions arising upon the composition papers. In re Hilborn*, (S. D. N. Y. 1900) 104 Fed. 866, 4 Am. Bankr. Rep. 741.

**Notice of hearing.**—Creditors are entitled to at least ten days' notice by mail to their respective addresses of all hearings of applications for the confirmation of a composition. See section 58a (2).

*All the creditors must have notice of the proposed composition, whether they have proved their claims at the time of*

*the offer or not; the composition must be offered and sufficiently explained to all alike and they must have reasonable opportunity to consider it. They must be fully and honestly advised of the true condition of the debtor's affairs so they can act intelligently and understandingly, in view of the facts and with a knowledge of their rights in the premises. In re Kinnane Co.*, (S. D. Ohio 1914) 217 Fed. 488. See also *In re Fox*, (E. D. N. Y. 1915) 222 Fed. 135.

**Where an unscheduled creditor acquires notice or actual knowledge of the bankruptcy proceedings, after the bankrupt's application for the confirmation of the composition, but before the final order of confirmation, such creditor is not bound by the composition. Broadway Trust Co. v. Mannheim, (1905) 14 Am. Bankr. Rep. 122, 47 Misc. 415, 95 N. Y. S. 93.**

*A trustee who concludes a composition without notifying a petitioning creditor of whose claim he, as trustee, has notice, is liable personally for the amount of the claim. Thus, where, after the appointment of a trustee for a bankrupt firm, an assignee of the firm's assets was ordered to deliver such assets to the trustee, the latter to hold the assignee harmless from any claims against the assignee with reference to any money or property transferred to the trustee, and he, with notice of the petitioner's claim, before the confirmation of a composition, proceeded therewith without notice to the petitioner and distributed the proceeds, it was held that the trustee was either guilty of negligence, or of a conscious effort to cut the petitioner off from any recourse to the fund; and, the petitioner having recovered judgment in a state court in an action in which the trustee was a party, the trustee was bound thereby, and was liable for the amount of the judgment. In re Cadenas*, (S. D. N. Y. 1910) 178 Fed. 158.

**d [When judge shall confirm.]** The judge shall confirm a composition if satisfied that

(1) **[Best interests of creditors.]** it is for the best interests of the creditors; [(1898) 30 Stat. L. 550.]

**Creditors' interests prevail.**—The court will not confirm a composition unless it is satisfied that it is for the best interests of the creditors. *In re Wilson*, (1901) 107 Fed. 83; *City Nat. Bank v. Doolittle*, (C. C. A. 1901) 107 Fed. 236; *In re Heyman*, (1901) 108 Fed. 207; *Adler v. Jones*, (C. C. A. 6th Cir. 1901) 109 Fed. 967, 6 Am. Bankr. Rep. 245; *In re New Chattanooga Hardware Co.*, (E. D. Tenn. 1911) 190 Fed. 241; *In re McLellan*, (N. D. N. Y. 1913) 204 Fed. 482; *In re B. Jacobson & Son Co.*, (C. C. A. 3d Cir. 1912) 196 Fed. 949; *In re Kinnane Co.*,

(S. D. Ohio 1914) 217 Fed. 488, (1915) 221 Fed. 762; *In re Criterion Watch Case Mfg. Co.*, (S. D. N. Y. 1902) 8 Am. Bankr. Rep. 206; *In re H. J. Arrington Co.*, (E. D. Va. 1902) 113 Fed. 498, 8 Am. Bankr. Rep. 64; *In re Waynesboro Drug Co.*, (S. D. Ga. 1907) 157 Fed. 101, 19 Am. Bankr. Rep. 487; *In re Hoxie*, (D. C. Me. 1910) 180 Fed. 508; *Riley v. Pope*, (S. D. Ga. 1911) 186 Fed. 857; *In re J. B. & J. M. Cornell Co.*, (S. D. N. Y. 1911) 186 Fed. 859.

*It is for the court to determine whether*

nonassenting creditors have met the burden of showing that the offer of composition is inadequate, and that a substantially larger sum may reasonably be expected to result from the administration of the assets under the regular course of bankruptcy proceedings. *In re Hoxie*, (D. C. Me. 1910) 180 Fed. 508.

The determination of the question whether a proposed composition is for the best interest of creditors depends on whether they would receive more or less under the composition than might reasonably be expected by the administration of the assets of the bankrupt in due course. *Adler v. Jones*, (C. C. A. 6th Cir. 1901) 109 Fed. 967, 6 Am. Bankr. Rep. 245.

The court will doubtless be influenced by the consideration that a man can ordinarily do better with his own property, and realize more therefrom, than can be obtained in course of judicial proceedings, with compulsory sales and expenses of administration. *In re H. J. Arrington Co.*, (E. D. Va. 1902) 113 Fed. 498, 8 Am. Bankr. Rep. 64.

A composition should be confirmed upon the recommendation of the referee showing that there is no probability of the estates paying over ten per cent. more than has been offered as being for the best interests of the creditors. *In re H. J. Arrington Co.*, (E. D. Va. 1902) 113 Fed. 498, 8 Am. Bankr. Rep. 64.

Under the Act of 1874 it was said that "in the absence of fraud and concealment the question for the court seems to be, not whether the debtor might have offered more, but whether his estate would pay more in bankruptcy." *Ex p. Jewett*, (1875) 11 Nat. Bankr. Reg. 443. To the same effect see *Re Whipple*, (1875) 2 Lowell 404, 29 Fed. Cas. No. 17,513; *Matter of Reiman*, (1874) 7 Ben. 455, 20 Fed. Cas. No. 11,673; *In re Weber Furniture Co.*, (1876) 13 Nat. Bankr. Reg. 529, 29 Fed. Cas. No. 17,330, wherein the court said: "Where a composition deed has been signed by a large majority of the creditors upon a full consideration of the condition of the debtor, I should be very reluctant to overrule their judgment simply because I thought the estate would yield a larger dividend in bankruptcy." See also *In re Scott*, (1876) 15 Nat. Bankr. Reg. 73; *In re Haskell*, (1874) 11 Nat. Bankr. Reg. 164.

Reference.—The court may send the matter to a referee for a report on the facts. *Adler v. Jones*, (C. C. A. 1901) 109 Fed. 967. And see General Order No. 12, par. 3.

The decision of the creditors is *prima facie* evidence that the composition is for their best interest; and the burden rests upon objecting creditors to show such gross discrepancy between the offer and the amount to be reasonably expected from a sale of the assets as to justify

a refusal to confirm. *In re Waynesboro Drug Co.*, (S. D. Ga. 1907) 157 Fed. 101, 19 Am. Bankr. Rep. 487; *In re Hoxie*, (D. C. Me. 1910) 180 Fed. 508; *In re Goldstein*, (D. C. Conn. 1914) 213 Fed. 115; *In re Kinnane Co.*, (S. D. Ohio 1915) 221 Fed. 762.

But the assent of creditors does not relieve the court from passing on the question whether the composition is for the best interests of all the creditors. This question is addressed to the judicial discretion of the court, and from its conclusion either party may appeal. *In re Hoxie*, (D. C. Me. 1910) 180 Fed. 508.

When composition will not be confirmed.—If the court is satisfied upon the hearing that the composition offered would be considerably less than the creditors might reasonably expect to realize in the administration of the assets in due course, then the composition is not for the best interest of the creditors, and will not be confirmed. *In re H. J. Arrington Co.*, (E. D. Va. 1902) 113 Fed. 498, 8 Am. Bankr. Rep. 64, following *Adler v. Jones*, (6th Cir. 1901) 109 Fed. 967, 48 C. C. A. 761, 6 Am. Bankr. Rep. 245.

The court cannot arbitrarily order that any creditor who objects shall receive twenty-five per cent. of his claim, when it is not apparent that upon a formal liquidation he will not receive a larger amount. Nor can any bankruptcy court compel a creditor to consent to have all the bankrupt estate transferred to a corporation, and accept in settlement of his claim the obligations of the new corporation, payable at a future date. *In re J. B. & J. M. Cornell Co.*, (S. D. N. Y. 1911) 186 Fed. 859.

The court will disapprove of a compromise which is not in consonance with principles of public policy and mercantile integrity. *Riley v. Pope*, (S. D. Ga. 1911) 186 Fed. 857.

Confirmation as effecting general discharge.—The confirmation of a composition effects a general discharge by virtue of section 14c. *Friend v. Talcott*, (1913) 228 U. S. 27, 33 S. Ct. 505, 57 U. S. (L. ed.) 718. See also *Wilmot v. Mudge*, (1874) 103 U. S. 217, 26 U. S. (L. ed.) 536; *Liebke v. Thomas*, (1886) 116 U. S. 605, 6 S. Ct. 496, 29 U. S. (L. ed.) 744.

Order of confirmation stayed.—When an order has been made and entered, upon the consent of all the creditors that were known, settling the estate and distributing the proceeds, but not following the provisions of the Act, it will be stayed by the court to await the action of any unknown creditors who may present their claims within the time allowed them. *In re Lockwood*, (1900) 104 Fed. 794.

Appeal.—As to the right of appeal from a judgment confirming or refusing confirmation of a composition, see the annotations to section 25a (2).

(2) **[Acts which would bar discharge.]** the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and [(1898) 30 Stat. L. 550.]

**Where discharge is barred.**—In accordance with the requirements of section 12d (2), the court will not confirm a composition where it has been made to appear that the bankrupt has been guilty of any of the acts, or failed to perform any of the duties, which will bar his discharge. *In re Wilson*, (E. D. Pa. 1901) 107 Fed. 83, 5 Am. Bankr. Rep. 849; *In re Godwin*, (E. D. Pa. 1903) 122 Fed. 111, 10 Am. Bankr. Rep. 252; *In re Olman*, (S. D. Ohio 1902) 134 Fed. 681, 13 Am. Bankr. Rep. 398; *In re Comstock*, (D. C. R. I. 1907) 154 Fed. 747, 19 Am. Bankr. Rep. 65; *In re Seligman*, (E. D. N. Y. 1908) 163 Fed. 549, 20 Am. Bankr. Rep. 774; *In re Griffin*, (N. D. Ga. 1910) 180 Fed. 792; *In re Ullman*, (S. D. N. Y. 1910) 180 Fed. 944; *In re B. Jacobson & Son Co.*, (C. C. A. 3d Cir. 1912) 196 Fed. 949; *In re Barde*, (D. C. Ore. 1913) 207 Fed. 654; *In re Burman*, (D. C. Mass. 1913) 210 Fed. 512; *Bolles v. Kelley*, (C. C. A. 1st Cir. 1915) 222 Fed. 63; *In re Levinson*, (D. C. Mass. 1914) 223 Fed. 874.

*As to what will bar a discharge*, see the several subdivisions of section 14b and section 29b.

Thus it has been held that if the bankrupt has been guilty of any of the acts which would be a bar to a discharge, the court is without power to confirm a com-

position, even if satisfied that it would be for the best interests of the creditors to do so. *In re Comstock*, (D. C. R. I. 1907) 154 Fed. 747, 19 Am. Bankr. Rep. 65. See also *In re Godwin*, (D. C. Pa. 1903) 122 Fed. 111, 10 Am. Bankr. Rep. 252; *In re Griffin*, (N. D. Ga. 1910) 180 Fed. 792.

And in such case the fact that only one creditor is actively objecting, while a large majority is in favor of taking what the bankrupt offers, is of no importance. *In re Griffin*, (N. D. Ga. 1910) 180 Fed. 792.

*The fact that an objecting creditor purchased his claim for the purpose of forcing a settlement in a suit brought by the trustee, by the threats of opposition to the confirmation of a composition, is immaterial, where it is shown that the bankrupt has committed any of the acts which would bar his discharge.* *In re Comstock*, (D. C. R. I. 1907) 154 Fed. 747, 19 Am. Bankr. Rep. 65.

**Burden of proof.**—The burden of proof that a bankrupt has been guilty of acts that will bar his discharge, is upon the objecting creditor and he must establish the fact by a clear preponderance of the evidence. *In re Barde*, (D. C. Ore. 1913) 207 Fed. 654; *Bolles v. Kelly*, (C. C. A. 1st Cir. 1915) 222 Fed. 63. See also note to section 14b, preceding clause (1).

(3) **[Good faith.]** the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. [(1898) 30 Stat. L. 550.]

**Good faith.**—In offering a composition there must be the utmost good faith on the part of the bankrupt and the court will refuse to confirm a composition where the offer and its acceptance are not so made, or where they have been procured by means or promises forbidden by the statute or in any manner contrary to the spirit of the statute. *In re Lockwood*, (S. D. N. Y. 1900) 104 Fed. 794, 4 Am. Bankr. Rep. 731; *In re Frear*, (N. D. N. Y. 1903) 120 Fed. 978, 10 Am. Bankr. Rep. 199; *In re Comstock*, (D. C. R. I. 1907) 154 Fed. 747, 19 Am. Bankr. Rep. 65; *In re Linderman*, (E. D. Pa. 1909) 166 Fed. 593, 22 Am. Bankr. Rep. 131; *In re Cockshaw*, (S. D. N. Y. 1915) 220 Fed. 239.

**Irregular settlements, and compromises, and so-called compositions**, are not cognizable by the court or the judge, except when they are brought in question in a proper manner, or interfere with the due administration of the bankrupt estate according to law. In such cases the court

or judge would be called upon to declare their illegality. *In re Frear*, (N. D. N. Y. 1903) 120 Fed. 978, 10 Am. Bankr. Rep. 199. See also *In re Linderman*, (E. D. Pa. 1909) 166 Fed. 593, 22 Am. Bankr. Rep. 131.

**Irregular composition subject to rights of nonparticipating creditors.**—An order entered by consent of all known creditors in proceedings against an insolvent corporation for the settlement of the estate and distribution of the proceeds as therein provided, but not in accordance with any express provision of the Bankruptcy Act, must be held subject to the rights of any unknown creditors who may appear and present their claims within the time given by law. *In re Lockwood*, (S. D. N. Y. 1900) 104 Fed. 794, 4 Am. Bankr. Rep. 731.

**An agreement for a provisional order of adjudication**, as a part of a composition agreement, will not be approved. *In re Linderman*, (E. D. Pa. 1909) 166 Fed. 593, 22 Am. Bankr. Rep. 131.



**e [Distribution of consideration—administration when no confirmation.]** Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided. [(1898) 30 Stat. L. 550.]

**Effect of confirmation.**—The confirmation of a composition has precisely the same effect as the granting of a discharge in bankruptcy. And, as a discharge, it may be pleaded in bar in a subsequent suit against the bankrupt, wherein it is sought to recover debts which were released thereby. *Cumberland Glass Mfg. Co. v. De Witt*, (1915) 237 U. S. 447, 35 S. Ct. 636, 59 U. S. (L. ed.) 1042; *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178; *Ross v. Saunders*, (C. C. A. 1st Cir. 1901) 105 Fed. 913; 5 Am. Bankr. Rep. 350; *In re J. C. Winship Co.*, (7th Cir. 1903) 120 Fed. 93, 56 C. C. A. 45; *In re Lane*, (D. C. Mass. 1902) 125 Fed. 772, 11 Am. Bankr. Rep. 137; *In re Eisenberg*, (S. D. N. Y. 1906) 148 Fed. 325, 16 Am. Bankr. Rep. 776; *In re Jersey Island Packing Co.*, (N. D. Cal. 1907) 152 Fed. 839, 18 Am. Bankr. Rep. 417; *In re Ullman*, (S. D. N. Y. 1910) 180 Fed. 944; *Glover Grocery Co. v. Dorne*, (1902) 8 Am. Bankr. Rep. 702, 116 Ga. 216, 42 S. E. 347; *Gordon v. Mechanics*, etc., *Ins. Co.*, (1907) 22 Am. Bankr. Rep. 649, 120 La. 441, 45 So. 384; *Herschman v. Justices of Boston*, (1915) 220 Mass. 137, 107 N. E. 543; *Stone v. Jenkins*, (1900) 4 Am. Bankr. Rep. 568, 176 Mass. 544, 57 N. E. 1002; *Broadway Trust Co. v. Manheim*, (1905) 14 Am. Bankr. Rep. 122, 47 Misc. 415, 95 N. Y. S. 93; *Mandell v. Levy*, (N. Y. 1905) 14 Am. Bankr. Rep. 540; *Consolidated Rubber Tire Co. v. Vehicle Equipment Co.*, (1907) 19 Am. Bankr. Rep. 862, 121 App. Div. 764, 106 N. Y. S. 599; *Matter of Cooper*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 634.

As to the effect of a discharge, with respect to the release of debts, see the annotation under the several subdivisions of section 17.

**When the composition is paid** the creditors have no further claim upon the debtor or his property. *In re Lane*, (D. C. Mass. 1902) 125 Fed. 772, 11 Am. Bankr. Rep. 137.

**Dismissal on confirmation.**—Section 12e does not mean that after confirming a composition the court has lost all further power over the case except to distribute the consideration. The case is to be dismissed; but "dismissed" in this connection can mean no more than that the court is not to proceed further with its administration of the estate under the Bankruptcy Act. It does not mean that there is to be no longer any case before the court, as if the petition of the proceedings had been dismissed under sec-

tions 3c, 18d, 18e, 58a (8), 59d, or 59g. Since the consideration must in every case remain to be distributed, and since compositions are not infrequently confirmed within the year allowed for proving claims, the court must retain jurisdiction for these purposes at least. Immediate dismissal is neither directed nor intended. *U. S. v. Sondheim*, (D. C. Mass. 1910) 188 Fed. 378.

**Distribution—Creditors only entitled to percentage agreed upon.**—In a composition the creditor gets, not his share of the bankrupt's estate, but what he bargained for, and he has no right to claim more. If he does not enforce his bargain, his failure should inure to the bankrupt's benefit, not to the benefit of another creditor. *In re Lane*, (D. C. Mass. 1902) 125 Fed. 772, 11 Am. Bankr. Rep. 137.

**Scheduled creditors are entitled to share** in a composition, even if they did not file their claims before the confirmation. *Matter of Fox*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 525.

**A creditor whose claim is barred by his failure to prove it** is not entitled to recognition for the purpose of distribution in composition proceedings. *In re French*, (D. C. Mass. 1909) 181 Fed. 583; *In re Blond*, (D. C. Mass. 1910) 188 Fed. 452. See also *Matter of Fox*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 525.

**Claims not scheduled or filed.**—The court has no power to require the bankrupt to pay the composition to a creditor whose claim was not scheduled or filed; his only remedy being to procure the setting aside of the composition for fraud. *In re Abrams*, (S. D. N. Y. 1909) 173 Fed. 430, 23 Am. Bankr. Rep. 25. See also *In re Rudnick*, (D. C. Mass. 1899) 93 Fed. 787, 2 Am. Bankr. Rep. 114.

And where a composition offered by a bankrupt has been accepted, and some of the creditors have failed to claim their dividends, the bankrupt is entitled to object to the payment of a preferred claim of a creditor, omitted from the schedule in good faith, whose claim was not proved within a year after the adjudication. *In re Lane*, (D. C. Mass. 1902) 125 Fed. 772, 11 Am. Bankr. Rep. 137.

**Form No. 63** is an order of distribution on composition.

**Consideration for composition not paid.**—Upon confirmation of the composition, the title of the bankrupt to all its property reverts in it, and if the consideration for the composition has not for any reason been paid by it, the remedy of the

creditor for the recovery thereof is against it as upon a new cause of action, which is not affected by the discharge. *In re*

*Maytag-Mason Motor Co.*, (N. D. Ia. 1915) 223 Fed. 684.

**SEC. 13. COMPOSITIONS, WHEN SET ASIDE.—a [When fraud practiced.]** The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition. [(1898) 30 Stat. L. 550.]

Section 13 defines exclusively the ground upon which a composition may be vacated, and operates as a limitation upon the general grant of authority in section 2 (9), which gives to the courts of bankruptcy jurisdiction to set aside compositions and reinstate the cases. *In re Rudnick*, (D. C. Mass. 1899) 93 Fed. 787, 2 Am. Bankr. Rep. 114; *In re Sacharoff*, (E. D. N. Y. 1908) 163 Fed. 664, 20 Am. Bankr. Rep. 814; *In re Abrams*, (S. D. N. Y. 1909) 173 Fed. 430, 23 Am. Bankr. Rep. 25; *In re French*, (D. C. Mass. 1909) 181 Fed. 583; *Matter of Cooper*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 634.

**Composition set aside for fraud.**—The judge may, on a proper application and showing, set aside a composition because of fraud practiced in the procurement thereof. *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 122 Fed. 355, 10 Am. Bankr. Rep. 641; *In re Roukous*, (D. C. R. I. 1904) 128 Fed. 645, 12 Am. Bankr. Rep. 128; *In re Allen B. Wrisley Co.*, (C. C. A. 7th Cir. 1904) 133 Fed. 388, 13 Am. Bankr. Rep. 193; *In re Sacharoff*, (E. D. N. Y. 1908) 163 Fed. 664, 20 Am. Bankr. Rep. 814; *In re Balance*, (E. D. N. Y. 1913) 206 Fed. 505, reversed on other grounds, (C. C. A. 2d Cir. 1914) 219 Fed. 537. See also *In re Wilkens*, (E. D. N. Y. 1911) 191 Fed. Rep. 94.

**The general equitable principle** is that a composition agreement is invalid if based upon or procured by a secret arrangement with one or more favored creditors, in violation of the equality and reciprocity upon which such an agreement is avowedly based. *Zavelo v. Reeves*, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676.

Where it appears that at the time of a composition with creditors the true state of the affairs of the bankrupt must have been known not only to the counsel for the creditors but also to many people having an interest in the matter, and notwithstanding all this, every creditor either expressly accepted the composition, or failed to make any objection to the same although having notice of the offering and of the hearing, the composition will

not be set aside for fraud. *Union Furniture Co. v. Walker-Cooley Furniture Co.*, (N. D. Ga. 1913) 206 Fed. 217.

**The burden is upon the petitioner** to show fraud in procuring the composition. *City Nat. Bank v. Doolittle*, (C. C. A. 1901) 107 Fed. 236; *In re Roukous*, (D. C. R. I. 1904) 128 Fed. 645, 12 Am. Bankr. Rep. 128. As to the general rule that fraud when relied upon as a ground for relief must be alleged with particularity, and as to the sufficiency of the allegations in that behalf, see 12 R. C. L. 417 *et seq.*

**Opening order of confirmation.**—The question whether the Bankruptcy Court may vacate its order confirming a composition, just as courts in general may open their judgments, and upon grounds other than fraud, was suggested but left undecided in *City Nat. Bank v. Doolittle*, (C. C. A. 1901) 107 Fed. 236.

**Under the Act of 1874** the court was authorized to set aside a composition if it was shown that the agreement could not be carried out without injustice or delay to the creditors. For cases where compositions were attacked for alleged fraud committed by the bankrupt, or in his interest, see *In re Whitney*, (1875) 14 Nat. Bankr. Reg. 1; *In re Sawyer*, (1876) 14 Nat. Bankr. Reg. 241; *Bean v. Amsinck*, (1873) 10 Blatchf. (U. S.) 361; *Bean v. Brookmire*, (1873) 7 Nat. Bankr. Reg. 568; *Ex p. Morris*, (1875) 12 Nat. Bankr. Reg. 170.

**The joining of the trustee with the bankrupt** to effect a composition to the detriment of creditors by means of false representations as to the assets is ground for setting aside the composition. *In re Allen B. Wrisley Co.*, (C. C. A. 7th Cir. 1904) 133 Fed. 388, 13 Am. Bankr. Rep. 193.

**Secret agreement for more than pro rata share.**—A secret arrangement, by which a creditor who joins with others in a composition receives the note of a third person from the debtor for a substantial amount to apply on his claim, and the same percentage as other creditors on the remainder, is fraudulent in law, whether the note was given to induce

him to become a party to the composition, or, under the circumstances, in consideration of his advancing money to enable the debtor to make the payments. *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 122 Fed. 355, 10 Am. Bankr. Rep. 641.

But a motion to set aside a composition should be denied, notwithstanding the fact that it was shown that some creditors fraudulently obtained notes for more than the *pro rata* share of their debts, where the applicant for the order also obtained a preference, and, because of the fact that the bankrupt was unable to pay the composition notes, new proceedings in bankruptcy have been instituted against him, in which the innocent creditors can be best protected by the disallowance of the fraudulent claims. *In re Sacharoff*, (E. D. N. Y. 1908) 163 Fed. 664, 20 Am. Bankr. Rep. 814.

**Making false schedule.**—That a bankrupt made a false schedule, or a false oath to his schedule, constitutes ground for setting aside a composition for fraud, if not known to the petitioning creditor until after the confirmation, notwithstanding the fact that the order confirming the composition recites that it appears that the bankrupt has not been guilty of any acts which would be a bar to his discharge, and that the offer and its acceptance are in good faith, and have not been made or procured by means contrary to the Acts of Congress relating to bankruptcy. *In re Roukous*, (D. C. R. I. 1904) 128 Fed. 645, 12 Am. Bankr. Rep. 128.

**Mistake in creditor's scheduled address.**—A composition will not be set aside on the ground that a creditor has failed to get notice of the proceedings because his address was misstated in the bankrupt's schedule by mistake. *In re Rudnick*, (D. C. Mass. 1899) 93 Fed. 787, 2 Am. Bankr. Rep. 114.

The fact that a bankrupt has failed to fulfil a composition agreement affords no ground for setting aside the composition, whatever its effect may be on the operation of the composition as a discharge. *In re Eisenberg*, (S. D. N. Y. 1906) 148 Fed. 325, 16 Am. Bankr. Rep. 776.

**Petition to set aside composition.**—*Allegation as to petitioner's knowledge.*—A

petition to set aside a composition filed within the six months allowed therefor, and which alleges that the fraud charged was not known to the petitioner until after the confirmation, is sufficient, and need not allege the time or manner in which the petitioner's knowledge was acquired. *In re Roukous*, (D. C. R. I. 1904) 128 Fed. 645, 12 Am. Bankr. Rep. 128.

**Leave to file a petition** to set aside the confirmation of a composition in bankruptcy should be refused only when the petition on its face shows that the petitioner cannot under any circumstances be entitled to relief. *In re Allen B. Wrisley Co.*, (C. C. A. 7th Cir. 1904) 133 Fed. 388, 13 Am. Bankr. Rep. 193.

**A creditor of a bankrupt, who has assigned his claim**, receiving a consideration therefor, is no longer a "party in interest" who can maintain a petition to set aside the confirmation of a composition subsequently entered, although the assignment was obtained through the fraud and misrepresentation of the trustee and the bankrupt. *In re Allen B. Wrisley Co.*, (C. C. A. 7th Cir. 1904) 133 Fed. 388, 13 Am. Bankr. Rep. 193.

**A verification** in the usual form of a bill in equity is sufficient on a petition for the revocation of a composition. *In re Roukous*, (D. C. R. I. 1904) 128 Fed. 645, 12 Am. Bankr. Rep. 128.

**Time of making application.**—A court has no power to set aside a composition after the lapse of six months from the date of its confirmation. *In re Eisenberg*, (S. D. N. Y. 1906) 148 Fed. 325, 16 Am. Bankr. Rep. 776; *In re Ennis*, (S. D. N. Y. 1910) 183 Fed. 859; *In re Jersey Island Packing Co.*, (N. D. Cal. 1907) 18 Am. Bankr. Rep. 417.

**The application should be made to the judge who made the order of confirmation.** *In re Ennis*, (S. D. N. Y. 1910) 183 Fed. 859.

**Effect of setting aside composition.**—For the effect of setting aside a composition on title to property of the bankrupt, see section 64c.

Setting aside a composition probably has no effect on payments made under it. *In re Hamlin*, (N. D. Ill. 1877) 16 Nat. Bankr. Reg. 522, 11 Fed. Cas. No. 5,994.

**SEC. 14. DISCHARGES, WHEN GRANTED.**—a [Application for discharge.] Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months. [(1898) 30 Stat. L. 550.]

**Who entitled to a discharge.**—A corporation is entitled to a discharge. *In re Marshall Paper Co.*, (C. C. A. 1900) 102 Fed. 872, disposing of the *quære* made in the same case, (1899) 95 Fed. 419.

**One who has been refused discharge.**—A bankrupt may apply for a discharge notwithstanding the fact that he was refused a discharge under the Act of 1867, in respect of the same debt and upon grounds that would bar a discharge under the present Act. *In re Herrman*, (1900) 102 Fed. 753.

**Applicant for discharge must comply with statutory conditions.**—A discharge in bankruptcy is an act of grace, and the person who applies for it must comply with the conditions required, as essential to its granting, at the time he applies for it. *In re U. S. Restaurant, etc., Co.*, (C. C. A. 2d Cir. 1911) 187 Fed. 118.

A discharge is not an absolute right existing at the time of filing the petition in bankruptcy. The right or privilege arises subsequently, and is granted upon the conditions of the statute, and is dependent in part upon the conduct of the bankrupt after the filing of his petition in bankruptcy; and those conditions cannot be applied until application has been made for a discharge. *In re Little*, (C. C. A. 7th Cir. 1905) 137 Fed. 521, 13 Am. Bankr. Rep. 640.

**To whom application must be made.**—All matters relating to the discharge of the bankrupt are, under section 38a (4), expressly excepted from the jurisdiction of the referee; and, therefore, the application for the bankrupt's discharge should be made to the judge of the District Court. *In re Johnson*, (W. D. Ark. 1908) 158 Fed. 342, 19 Am. Bankr. Rep. 814. See also General Order 12, par. 3; *In re Elby*, (N. D. Ia. 1907) 157 Fed. 935, 19 Am. Bankr. Rep. 734; *In re Randall*, (E. D. Pa. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305.

An application for a bankrupt's discharge is in the nature of a separate proceeding from the original cause, so that the reference of the original cause confers no jurisdiction on the referee over the application for discharge. *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479.

But the application may be referred to a special master to ascertain and report the facts. *In re McDuff*, (C. C. A. 5th Cir. 1900) 101 Fed. 241, 4 Am. Bankr. Rep. 110.

**When application must be made.**—Excepting where the time has been extended by the judge for good cause, the bankrupt must apply for his discharge within the twelve months subsequent to the adjudication; and his failure to make such application within that time will prevent his discharge. *In re Marshall Paper Co.*, (D. C. Mass. 1899) 95 Fed. 419, 2 Am. Bankr. Rep. 653, affirmed (C. C. A. 1st Cir. 1900) 102 Fed. 872, 4 Am. Bankr.

Rep. 468; *In re Wolff*, (N. D. Cal. 1900) 100 Fed. 430, 4 Am. Bankr. Rep. 74; *In re Royal*, (E. D. N. C. 1902) 113 Fed. 140, 7 Am. Bankr. Rep. 636; *In re Fahy*, (N. D. Ia. 1902) 116 Fed. 239, 8 Am. Bankr. Rep. 354; *In re Crist*, (S. D. Ala. 1902) 116 Fed. 1007, 9 Am. Bankr. Rep. 1; *In re Fiegenbaum*, (2d Cir. 1903) 121 Fed. 69, 57 C. C. A. 409, 9 Am. Bankr. Rep. 595; *In re Haynes*, (M. D. Pa. 1903) 122 Fed. 560, 10 Am. Bankr. Rep. 13; *Kuntz v. Young*, (8th Cir. 1904) 131 Fed. 719, 65 C. C. A. 477; *In re Knauer*, (N. D. Ia. 1904) 133 Fed. 805, 13 Am. Bankr. Rep. 503; *In re Weintraub*, (D. C. N. J. 1905) 133 Fed. 1000; *In re Little*, (C. C. A. 7th Cir. 1905) 137 Fed. 521, 13 Am. Bankr. Rep. 640; *In re Wagner*, (D. C. Nev. 1905) 139 Fed. 87, 15 Am. Bankr. Rep. 100; *In re Kuffer*, (C. C. A. 2d Cir. 1907) 151 Fed. 12, reversing (E. D. N. Y. 1906) 144 Fed. 445, 16 Am. Bankr. Rep. 305; *In re Silverman*, (C. C. A. 2d Cir. 1907) 157 Fed. 675; *The Pokanoket*, (E. D. Va. 1908) 161 Fed. 383; *In re Bramlett*, (N. D. Ga. 1908) 161 Fed. 588, 20 Am. Bankr. Rep. 402; *In re Glickman*, (E. D. Pa. 1908) 164 Fed. 209, 21 Am. Bankr. Rep. 171; *In re Holmes*, (D. C. Vt. 1908) 165 Fed. 225, 21 Am. Bankr. Rep. 339; *In re Schnabel*, (E. D. N. Y. 1909) 166 Fed. 383; *In re Pullian*, (E. D. Tenn. 1909) 171 Fed. 595, 22 Am. Bankr. Rep. 513; *In re Stone*, (D. C. Ore. 1909) 172 Fed. 947, 23 Am. Bankr. Rep. 24; *In re Levenstein*, (D. C. Conn. 1910) 180 Fed. 957; *In re Westbrook*, (N. D. Ala. 1911) 186 Fed. 414; *In re U. S. Restaurant, etc., Co.*, (C. C. A. 2d Cir. 1911) 187 Fed. 118; *In re Loughran*, (C. C. A. 3d Cir. 1914) 218 Fed. 619; *In re Harris*, (E. D. Pa. 1908) 15 Am. Bankr. Rep. 705.

*In Lindeke v. Converse*, (C. C. A. 8th Cir. 1912) 198 Fed. 618, affirming an order dismissing an application for discharge for want of prosecution, the court said: "The provisions of section 14 of the Bankruptcy Law that the application for a discharge shall be filed within one year after the adjudication, that if the bankrupt is unavoidably prevented from doing so it may be filed within the next six months, and that the judge shall hear the petition and the proofs in opposition to it at such time and place as will give parties in interest a reasonable opportunity to be heard, plainly indicate the purpose of Congress to secure an early hearing and disposition of the issues springing from such petitions. It is obvious that a wise and just administration of this law requires that such issues shall be framed and tried before the memory of the witnesses familiar with the transactions of the bankrupt at and shortly before the time of his adjudication has been dimmed by long delay and before they and the documentary evidence surrounding these transactions have been

scattered or lost. The record in this case is so clear and compelling that the court is unable to resist the conclusion that the bankrupt failed to exercise that reasonable diligence in the prosecution of her claim for a discharge which is requisite to call a court of equity into action in her behalf."

*"The next twelve months."*—A bankrupt has twelve months within which to file his application for discharge as of right and course, commencing after the expiration of one month subsequent to adjudication. *In re Walters*, (D. C. Mont. 1913) 209 Fed. 133, wherein the court said: "It would seem the legislative intent was to measure 'the next twelve months,' not from adjudication, but from the point of time 'after the expiration of one month' subsequent to adjudication. Otherwise the words 'the next' are superfluous, and serve only to create ambiguity. The section should be read either with a comma after 'the next twelve months,' or as though it were arranged, 'any person may after the expiration of one month subsequent to being adjudged a bankrupt and within the next twelve months file an application for discharge.' The section creates three limitations of time, all subsequent to adjudication; the first one month thereafter, the second the next twelve months after the first, and the third the next six months after the second. The time for filing such application is first made unlimited after the expiration of one month subsequent to adjudication. Then Congress proceeded to attach a limitation, to qualify the unlimited time by the phrase 'and within the next twelve months.' The time so qualified is not that commencing to run from adjudication, but that commencing to run after the expiration of one month subsequent to adjudication. The latter and not the former is the antecedent of the qualifying words 'within the next twelve months.' If the intent was that the twelve months are to be measured from adjudication, even as the one month is, there was no more necessity to add the words 'the next' to the former than there was to add them to the latter. Absent from the latter, their addition to the former indicates a different intent, meaning, and point of departure in computation of time."

*After a year and a day from the date of the adjudication* has elapsed, the court has no jurisdiction to grant a discharge, unless it shall have extended the time for six months by reason of unavoidable delay. *In re Holmes*, (D. C. Vt. 1908) 165 Fed. 225, 21 Am. Bankr. Rep. 339.

If, after adjudication, the bankrupt shall fail to file a petition for discharge, within the time fixed by the statute, his right to such discharge is lost to him forever. *In re Levenstein*, (D. C. Conn. 1910) 180 Fed. 957.

*Bankrupt need not be notified of expira-*

*tion of time.*—It is no part of the duty of a referee in bankruptcy to notify the bankrupt or his attorney of the date of the expiration of the time for filing a petition for a discharge; both the bankrupt and his attorney are required to take notice thereof. *In re Knauer*, (N. D. Ia. 1904) 133 Fed. 805, 13 Am. Bankr. Rep. 503.

*Application after discharge of trustee.*—In *In re Forsyth*, (1880) 4 Fed. 629, it was held that a discharge of the assignee did not divest the court of jurisdiction to discharge the bankrupt on his subsequent application.

*Laches.*—A bankrupt, almost sixteen months after his adjudication, having, without leave of the court, and without explaining his delay, filed a petition for discharge, presented a second and verified petition therefor, in which he prayed that the second petition be filed *nunc pro tunc* as of the date of the filing of the first. The court refused the prayer, on the ground of laches. *In re Wolff*, (1909) 100 Fed. 430.

*Extension allowed because of unavoidable delay.*—The court may extend the time for the filing of an application for the discharge of a bankrupt, for six months; but such extension can only be granted where it is made clearly to appear that the bankrupt was unavoidably prevented from filing his application for discharge within the twelve months period specified in the statute. *In re Wolff*, (N. D. Cal. 1900) 100 Fed. 430, 4 Am. Bankr. Rep. 74; *In re Fahy*, (N. D. Ia. 1902) 116 Fed. 239, 8 Am. Bankr. Rep. 354; *In re Haynes*, (M. D. Pa. 1903) 122 Fed. 560, 10 Am. Bankr. Rep. 13; *In re Knauer*, (N. D. Ia. 1904) 133 Fed. 805, 13 Am. Bankr. Rep. 503; *In re Anderson*, (D. C. Mont. 1905) 134 Fed. 319, 14 Am. Bankr. Rep. 221; *In re Lewin*, (W. D. Tex. 1905) 135 Fed. 252, 14 Am. Bankr. Rep. 358; *In re Wagner*, (D. C. Nev. 1905) 139 Fed. 87, 15 Am. Bankr. Rep. 101; *In re Glickman*, (E. D. Pa. 1908) 164 Fed. 209, 21 Am. Bankr. Rep. 171; *In re Fritz*, (E. D. N. Y. 1909) 173 Fed. 560, 23 Am. Bankr. Rep. 84; *In re Chase*, (D. C. Mass. 1910) 186 Fed. 408; *Lindeke v. Converse*, (C. C. A. 8th Cir. 1912) 193 Fed. 618; *In re Harris*, (E. D. Pa. 1906) 15 Am. Bankr. Rep. 705.

*Extension must be applied for within the six months period.*—In express terms the discretion of the judge is limited to the six months following the expiration of the year beginning with the date of the adjudication; and this is a limitation on the jurisdiction of the judge over the matter of discharge. The power and right to grant a discharge effectual to bar the enforcement of debts is conferred by the statute, and is governed by the limitations found in the statute; and therefore, unless it is petitioned for within the time limit fixed by section 14 of the Act, the court

of bankruptcy is without the power and jurisdiction to grant a discharge. If the court, yielding to equitable considerations, should grant a discharge in form to the bankrupt, its validity could be impeached before any court wherein it might be pleaded as a bar to a claim, on the ground of want of jurisdiction to entertain the petition for discharge; the record showing on its face that the petition was not filed within eighteen months of the date of the adjudication. *In re Fahy*, (N. D. Ia. 1902) 116 Fed. 239, 8 Am. Bankr. Rep. 354.

*Extension nunc pro tunc.*—A court of bankruptcy cannot, by a *nunc pro tunc* order, extend the statutory period within which to file an application for a discharge. *In re Taunton*, (E. D. N. Y. 1914) 216 Fed. 987, where eighteen months had expired.

*Inquiry whether a bankrupt was unavoidably prevented* from applying for a discharge within the year should be had within the additional six months period during which filing may be allowed on such showing. *In re Chase*, (D. C. Mass. 1910) 186 Fed. 408.

*Application for extension must be sustained by proof.*—A petition filed by a bankrupt asking an extension of time for filing an application for discharge on the ground that he was unavoidably prevented from filing it within the year allowed therefor is not evidence of the facts therein alleged; and, on a reference of such petition, they must be sustained by proof, although no formal answers may be filed thereto. *In re Glickman*, (E. D. Pa. 1908) 164 Fed. 209, 21 Am. Bankr. Rep. 171. See also *In re Lewin*, (W. D. Tex. 1905) 135 Fed. 252, 14 Am. Bankr. Rep. 358.

*In re Daly*, (W. D. Wash. 1913) 205 Fed. 1002, an extension of time for filing an application for discharge was refused on the ground that ordinary diligence or attention on the part of applicant would have enabled him to present application within twelve months.

*Mistake.*—In the case of *In re Churchill*, (E. D. Wis. 1912) 197 Fed. 111, the reason given for failure to apply for a discharge within a year was that the bankrupt "understood and believed that his . . . attorneys had filed his petition for discharge within the statutory period of twelve months and in compliance with the law relating thereto; that his said attorneys understood and honestly believed that they were not to file said petition until further specific instructions from the bankrupt; that, owing to such misunderstanding, and with no intention to mislead or delay, and without bad faith on the part of any one connected with the case, failure to file said petition occurred." In holding that an unavoidable delay was shown the court said: "It will be conceded that there is no fixed rule or standard whereby it can readily

be determined whether a person was 'unavoidably prevented' from doing a certain act. If a narrow view respecting the meaning of these words be entertained, then nothing short of physical obstacles, or other facts or circumstances which literally deprived the bankrupt of his will or power to exercise his right, must be shown to have existed before the demands of the statute are satisfied. However, I think that the terms should be given a broader construction. The fact that the bankrupt is given nearly a year within which to file his application, and that such time can be enlarged six months, indicates that Congress was disposed to be rather liberal. If the terms are narrowly construed as above suggested, a situation would rarely arise in which the bankrupt could satisfy that construction. In other words, it would not happen very frequently, if ever, that a bankrupt would be 'unavoidably prevented' for a period of a full year from preparing and filing the petition for discharge. It seems to me that the Act was intended to provide a remedy for situations which were likely to occur—and which would occur, not through the intervention of overruling obstacles as above indicated, but rather through excusable neglect, reasonable grounds for delay, mistake, possibly inadvertence, and the like. That is, it was contemplated that a bankrupt might default, as parties to litigation frequently default, in the performance of an act within a limited time, and that a further time in the discretion of the court be allowed to relieve from the consequences of such default. This seems a more reasonable construction to be given the words in question. While it may be claimed that a delay occasioned through a misunderstanding as is alleged fails not only to show that the bankrupt was 'unavoidably prevented,' but also fails to show a reasonable excuse, it is equally true that a different view is possible; that if a bankrupt in good faith represents to the court his reliance upon counsel, and counsel appear to have misunderstood their client's instructions, the default is explained in an entirely reasonable manner, and if, upon such explanation, the judge is satisfied, it seems to me he has exercised a discretion which ought not to be disturbed."

*Sickness and poverty.*—In the case of *In re Casey*, (N. D. N. Y. 1912) 195 Fed. 322, the reason given why the application for a discharge had not been made within the twelvemonth period was that the petitioner was "a common laborer, and had no other means of support except that derived from his daily toil, and through sickness and the necessity of providing for the support of his family did not have sufficient means to pay for the expense of said proceeding, and, further, your petitioner was not informed of the necessity of filing said petition within said twelve months by his said attorney, and that he

failed and neglected to notify him of said fact." In holding that the showing was sufficient, Ray, District Judge, said: "It is true that this petition does not set forth with particularity the sickness of the bankrupt and the amount of his earnings and the amount required for the support of his family. It may be said that the allegations of the petition are a conclusion, and that the judge might have required the bankrupt to show that he was constantly sick during the twelve months' period, and that all his money was required to support his wife and children, and that he was unable to see his attorney, or that his attorney refused to act without pay, and did not inform him of the necessity of filing the petition within twelve months. If the bankrupt was sick or if his family was sick, and he was under the necessity of providing for their support, and did not have means to pay an attorney for making the papers on his application for a discharge, I think it may fairly be said that he was inevitably prevented from filing his application within the twelve months. Poverty is no excuse for the commission of a crime, but poverty and sickness may be an absolute bar to the institution of a legal proceeding."

**Failure to apply because of previous discharge.**—In *In re Vaine*, (N. D. N. Y. 1911) 186 Fed. 535, it appears that a bankrupt was adjudicated within six years of his former voluntary bankruptcy proceedings, and that he requested an extension of six months' time within which to file his application for discharge in the second proceeding, on the ground that he was unavoidably prevented from making such application within the twelve months period because, if the application were made within that period, it would be within six years of his former discharge. In disposing of this contention the court said: "Section 14b (5) was intended to prevent the filing of voluntary petitions in bankruptcy by the same person oftener than once in six years, and not merely to space discharges to the same person six years apart." And see the annotation under section 14b (5).

**Notice of application for extension.**—An application by a bankrupt for an extension of time within which to file an application for discharge being addressed wholly to the discretion of the judge, it is not necessary that notice thereof be given to all creditors; the notice of hearing required to be given by section 58a being sufficient. *In re Fritz*, (E. D. N. Y. 1909) 173 Fed. 560, 23 Am. Bankr. Rep. 84; *In re Chase*, (D. C. Mass. 1910) 186 Fed. 408.

"The contentions that the order is erroneous because made without notice, and because the petition or statement filed was not verified, are without merit. The Bankruptcy Act, section 14a, authorizes an application for a discharge within the first

twelve months. Such application may be filed as a matter of course. It may also be filed within the next six months 'if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it' within the first twelve months. The Act being silent upon the procedure to be followed, it is fair to presume that the judge has a right to entertain the application of the bankrupt for leave to file, not only *ex parte*, but in such summary or informal manner as may be proper or convenient at the time. The proceeding to permit filing within the enlarged time would seem to be one addressed to the discretion of the judge, and its purpose, after all, is simply to reinstate the bankrupt for a limited period to an absolute right which he possessed during the twelve months succeeding the adjudication. The further fact that parties in interest, who may desire to oppose a discharge, are protected in their rights whether the petition be filed within the original or enlarged time, and are therefore not prejudiced by the enlargement of the time, tends to negative the requirement of notice, verification, formalities of practice, or procedure, except such as the judge may, at the time of the application, direct." *In re Churchill*, (E. D. Wis. 1912) 197 Fed. 111.

**Waiver of objection to extension.**—A creditor, with knowledge that an application for an order extending the time to file an application for a discharge has been made, waives such objection by appearing and obtaining time to file specifications of objection to the discharge, and then filing objections. *In re Casey*, (N. D. N. Y. 1912) 195 Fed. 323. To the same effect, see *In re Churchill*, (E. D. Wis. 1912) 197 Fed. 111.

**Effect of extending time.**—Where bankrupts have been allowed to file a petition for a discharge, notwithstanding more than a year has passed since the adjudication, the only question open thereafter is whether they are entitled to a discharge; and creditors seeking to oppose the discharge are confined to the statutory objections. *In re Haynes*, (M. D. Pa. 1903) 122 Fed. 560, 10 Am. Bankr. Rep. 13.

Though the court entertains a petition for a bankrupt's discharge more than a year after the adjudication, on an insufficient showing, the remedy is by motion to vacate; and it is too late to contest the matter on the hearing of the petition. *In re Haynes*, (M. D. Pa. 1903) 122 Fed. 560, 10 Am. Bankr. Rep. 13.

**General requisites of petition for discharge.**—"The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the Act and the orders of the court, the proceedings in the case and the acts of the bankrupt."

General Order No. 31. For the frame of a petition see Form No. 57.

"All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference." General Order No. 5. See also *Mahoney v. Ward*, (1900) 100 Fed. 282, where the court made a rule for the Eastern District of North Carolina that "petitions in bankruptcy will not be filed or considered unless they are on the prescribed printed forms; written or typewritten petitions and schedules will be returned to parties without action."

In case one member of a firm seeks to apply separately for his discharge in bankruptcy, the adjudication of the firm and of the petitioner as a member thereof should be recited in his petition, and he should ask to be released from both firm and personal debts, and the notice to creditors should advise them of these facts. *In re Meyers*, (1899) 97 Fed. 757.

**Verification.**—An application for a bankrupt's discharge should be considered a pleading within section 18c; and, therefore, should be verified. *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479. And see to the same effect, *In re Holman*, (S. D. Ia. 1899) 92 Fed. 514; *In re Brown*, (C. C. A. 5th Cir. 1901) 112 Fed. 49, 7 Am. Bankr. Rep. 252; *In re Glass*, (W. D. Tenn. 1902) 119 Fed. 509, 9 Am. Bankr. Rep. 394.

**Filing.**—An application for a bankrupt's discharge must be filed with the clerk of court, and not with the referee. *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479.

It is improper to mail the application for a discharge to the judge, instead of filing it with the clerk. *In re Sykes*, (W. D. Tenn. 1901) 106 Fed. 669.

But where an application for a bankrupt's discharge, though erroneously filed with the referee instead of the clerk, was, with the other proceedings thereon before the referee, filed with the clerk within a year after adjudication, and no objection had been taken by the objecting creditor to the improper original filing, it was held that the petition would be regarded as properly filed. *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479.

**Under District Court rule 11 in bankruptcy, in the southern district of New York**, which makes the office of the referee the office of the court, the filing of a petition for discharge with the referee is sufficient. *In re Pincus*, (S. D. N. Y. 1906) 147 Fed. 621, 17 Am. Bankr. Rep. 331.

**An application for discharge may be withdrawn** by leave of court where no order has been made upon it, and the bankrupt may be permitted to file a new one at a later day. *In re Svenson*, (1879) 9 Biss. (U. S.) 69; *In re Brockway*, (1882) 12 Fed. 69.

**Notice of application for discharge.**—The amendment of 1910 provides that the creditors shall have thirty days' notice of all applications for the discharge of the bankrupt. See section 58a (9).

**A petition by a bankrupt asking a special reference** to the referee, requiring him to take proof and report whether or not he is entitled to be discharged, will not be considered until the trustee and the creditors have notice of the petition. *In re Sykes*, (W. D. Tenn. 1901) 106 Fed. 669, 6 Am. Bankr. Rep. 264.

**Service of notice.**—Creditors of a bankrupt are not deprived of their property without due process of law, because the Bankruptcy Act does not require personal service of the notice of the application for a discharge. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1.

**Second application after denial of first.**—"A bankrupt is not entitled to file a second petition for discharge when his first petition is denied after investigation of its merits. *In re Brockway*, (1882) 23 Fed. 583. . . . Upon newly discovered testimony, excusable neglect or oversight, the court might grant a rehearing. It is discretionary, even if the court is justified in exercising such discretion, of which no opinion is now expressed." *In re Royal*, (1902) 113 Fed. 140, dismissing a second petition, the first having been dismissed on the merits in *In re Royal*, (1901) 112 Fed. 135.

**Effect of failure to apply for discharge on subsequent bankruptcy proceedings.**—The failure of a bankrupt to apply for his discharge within the statutory period has been held to bar his right to a discharge in subsequent bankruptcy proceedings from debts scheduled and provable in the prior proceedings, such failure being held equivalent to a denial of a discharge. *Kuntz v. Young*, (1904) 131 Fed. 719, 65 C. C. A. 477; *In re Weintraub*, (D. C. N. J. 1905) 133 Fed. 1000; *In re Kuffler*, (1907) 151 Fed. 12, 80 C. C. A. 508, reversing on other grounds (1906) 144 Fed. 445; *In re Silverman*, (2d Cir. 1907) 157 Fed. 675, 85 C. C. A. 224; *In re Eby*, (1907) 157 Fed. 935; *In re Bramlett*, (N. D. Ga. 1908) 161 Fed. 588; *In re Schnabel*, (1909) 166 Fed. 383; *In re Von Borries*, (1909) 168 Fed. 718; *In re Kuffler*, (1909) 168 Fed. 1021, 93 C. C. A. 671, mem., affirming (1909) 155 Fed. 1018, certiorari denied without opinion (1909) 214 U. S. 520, 29 S. Ct. 701, 53 U. S. (L. ed.) 1066; *In re Pullian*, (E. D. Tenn. 1909) 171 Fed. 595; *In re Stone*, (D. C. Ore. 1909) 172 Fed. 947; *Pollet v. Cosel*, (1910) 179 Fed. 488, 103 C. C. A. 68, 30 L. R. A. (N. S.) 1164 and note; *In re Westbrook*, (N. D. Ala. 1911) 186 Fed. 414; *In re Bacon*, (5th Cir. 1912) 193 Fed. 34, 113 C. C. A. 358, certiorari



denied without opinion 225 U. S. 701, 32 S. Ct. 836, 56 U. S. (L. ed.) 1264; *In re Springer*, (E. D. N. C. 1912) 199 Fed. 294. See also *In re Brockway*, (1882) 23 Fed. 583; *In re Kuffler*, (1903) 127 Fed. 125, 61 C. C. A. 259; *In re Kuffler*, (1907) 153 Fed. 667; *In re Elkins*, (1909) 175 Fed. 64, 99 C. C. A. 86; *In re Levenstein*, (1910) 180 Fed. 957; *In re Richter*, (1911) 190 Fed. 905. Compare *In re White*, (1878) 18 Nat. Bankr. Reg. 106, 29 Fed. Cas. No. 17,533; *In re Wolff*, (1904) 132 Fed. 396, 13 Am. Bankr. Rep. 95.

And the fact that the second bankruptcy proceeding has been instituted in a different district does not render the failure to apply for a discharge in the first proceeding any the less *res judicata*. *In re Weintraub*, (D. C. N. J. 1905) 133 Fed. 1000.

**Effect of denial of discharge on subsequent bankruptcy proceedings.**—"Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based." *Bluthenthal v. Jones*, (1908) 208 U. S. 64, 28 S. Ct. 192, 52 U. S. (L. ed.) 390, *affirming* (1900) 51 Fla. 396, 41 So. 533, 120 A. S. R. 181, 13 L. R. A. (N. S.) 629.

And it is held that the refusal of a discharge in bankruptcy is *res judicata* in subsequent bankruptcy proceedings as to debts provable in the former proceedings. *Youngman v. Salvage*, (1911) 21 N. D. 317, 130 N. W. 930, Ann. Cas. 1913C 1181 and note; *In re Fiegenbaum*, (1903) 121 Fed. 69, 57 C. C. A. 409; *Pollet v. Cosel*, (1910) 179 Fed. 488, 103 C. C. A. 68, 30 L. R. A. (N. S.) 1164. See also *In re Herrman*, (1900) 102 Fed. 753, (1900) 134 Fed. 566, *affirmed* (1901) 106 Fed. 987, mem., 46 C. C. A. 77; *In re Royal*, (1902) 113 Fed. 140; *In re Semons*, (1906) 140 Fed. 989, 72 C. C. A. 683; *In re Barton*, (1906) 144 Fed. 540; *In re Krall*, (1912) 196 Fed. 402. Compare *In re Drisko*, (1875) 2 Lowell 430, 7 Fed. Cas. No. 4,090; *In re Farrell*, (1871) 5 Nat. Bankr. Reg. 125, 8 Fed. Cas. No. 4,680; *In re Black*, (1899) 97 Fed. 493; *In re Marshall Paper Co.*, (1900) 102 Fed. 872, 43 C. C. A. 38; *In re Claff*, (1901) 111 Fed. 506.

In the case of *In re Claff*, (1901) 111 Fed. 506, 7 Am. Bankr. Rep. 128, however, it was said: "Claff was adjudicated bankrupt in 1899 upon a voluntary petition. His discharge was refused for fraudulent concealment of assets. In 1900 he filed a second petition, and seeks a discharge thereunder. That his discharge under the second petition, if obtained, will be no bar to a suit upon a debt scheduled under the first commission, and not proved

under the second, seems clear." Citing *In re Drisko*, (1875) 2 Lowell 430, 7 Fed. Cas. No. 4,090; *Gilbert v. Hebard*, (1844) 8 Metc. (Mass.) 129; *Dean v. Justices*, (1899) 173 Mass. 453, 53 N. E. 893. The court then continued: "But this fact does not prevent the bankrupt from filing a second petition, or from getting a discharge thereunder, for whatever the discharge may be worth. *In re Drisko*, above cited. The discharge is granted, and no exception will be made therein of debts scheduled under the earlier commission. It is more convenient to make the discharge a general one, and to leave its effect to be determined by subsequent proceedings." The court cited *In re Marshall Paper Co.*, (1900) 102 Fed. 872, 43 C. C. A. 38, and cases cited; *In re Black*, (1899) 97 Fed. 493. But it should be noted that in the case of *In re Pullian*, (1909) 171 Fed. 595, the case of *In re Claff* and the cases therein cited are stated to have been overruled "in some respects" in later federal decisions. See also *In re Kuffler*, (1907) 155 Fed. 1018, *affirmed* (1909) 168 Fed. 1021, 93 C. C. A. 671.

**Reason of rule of res judicata.**—"A proceeding in bankruptcy is in the nature of a bill in equity in which the bankrupt is complainant and the creditors are defendants. Where a discharge is refused on the merits the judgment inures to the benefit of all the creditors. Both parties are bound by it and neither party should be permitted to try the same question again; it is *res judicata*." *Per Lacombe, J.*, in *In re Fiegenbaum*, (1903) 121 Fed. 69, 57 C. C. A. 409. For other statement of the reason of the rule see *In re Bacon*, (1912) 193 Fed. 34, 113 C. C. A. 358; *In re Kuffler*, (1907) 151 Fed. 12, 80 C. C. A. 508.

A refusal of a discharge under the Act of 1867 has been held not to be *res judicata* in proceedings brought under the Act of 1898 as to the same debts kept alive by subsequent judgment. *In re Herrman*, (1900) 102 Fed. 753, (1900) 134 Fed. 566, *affirmed* (1901) 106 Fed. 987, mem., 46 C. C. A. 77.

**Necessity of pleading res judicata.**—But where the subsequent proceeding is in a different district, a creditor who claims immunity therefrom because of a former proceeding must plead such former proceeding. *Bluthenthal v. Jones*, (1907) 208 U. S. 64, 28 S. Ct. 192, 52 U. S. (L. ed.) 390, 19 Am. Bankr. Rep. 288; *Youngman v. Salvage*, (1911) 21 N. D. 317, 130 N. W. 930, Ann. Cas. 1913C 1181.

**Applications of rule of res judicata** stated in the last two preceding black-lettered paragraphs.

In the leading case of *Kuntz v. Young*, (1904) 131 Fed. 719, 65 C. C. A. 477, 12 Am. Bankr. Rep. 505, it appeared that there was an involuntary proceeding in

bankruptcy pending, in which the bankrupt had disobeyed the order of the referee, and had failed to apply for a discharge within twelve months after his adjudication, and that he had instituted a voluntary proceeding, and had therein applied for a discharge from the same debts scheduled and provable in the involuntary proceeding. The court, in applying the general rule, said: "The failure of the bankrupt to apply for a discharge from his debts in the involuntary proceeding within twelve months after the adjudication foreclosed his right to such a discharge. It is only within that time that he may, under the Bankruptcy Law, make a lawful application to be relieved from his debts. The record of his failure to make the application in that proceeding was in effect a judgment by default in favor of his creditors to the effect that he was not entitled to a discharge from their claims. A judgment by default renders the issue as conclusively *res adjudicata* as a judgment upon a trial. The result is that the question whether or not the bankrupt was entitled to be discharged from the claims of the creditors scheduled and provable in the involuntary proceeding was conclusively determined in an action between them and the bankrupt by the record of his failure to apply for a discharge in that proceeding. But the parties to the voluntary were the same as to the involuntary proceeding, for Kuntz scheduled the same claims and creditors, and the trustee who objected to his discharge was the legal representative of the latter. The bankrupt's application for a discharge in the voluntary proceeding presented the same issue which had been conclusively determined against him in the involuntary proceeding, and there was no error in the refusal of the court below to reverse the former judgment and grant the application. The denial of an application for a discharge from debts provable in proceedings under one petition in bankruptcy under the Act of 1898 renders the issue of a right to a discharge from those debts in a proceeding under a subsequent petition *res adjudicata*. A failure to apply for a discharge within twelve months after the adjudication in the earlier proceeding has the same effect. . . . It is said, however, that the dismissal of the voluntary proceeding was, in any event, erroneous, and unauthorized. Why was it so? The record does not disclose that the bankrupt brought any property to the court to be distributed among his creditors when he presented his petition for a second adjudication in bankruptcy. The sole purpose of that proceeding, so far as we may learn it from the record presented here, was to enable the bankrupt to raise the very issue which the record in the invol-

untary proceeding had conclusively determined—the issue whether or not he was entitled to a discharge from the debts there scheduled and provable. The voluntary proceeding was in fact nothing but a suit in equity to obtain a discharge. The second adjudication in bankruptcy, the appointment of the trustee, his report, and every other act in that proceeding were nothing but steps in the progress of the suit for the discharge. For any other purpose they were both farcical and futile. As there was no equity in the suit for the discharge, and the bankrupt was entitled to no relief in it, it was properly dismissed. A voluntary proceeding in bankruptcy for the sole purpose of obtaining discharge which a prior involuntary proceeding has conclusively determined that the bankrupt is not lawfully entitled to presents no ground for relief, is vexatious and futile, and should be dismissed. *In re Fiegenbaum*, (1903) 121 Fed. 69, 57 C. C. A. 409." That case was followed in the subsequent case of *In re Elby*, (1907) 157 Fed. 935, wherein the court, *per* Reed, J., said: "The failure of the bankrupt to apply for a discharge in the first bankruptcy proceedings, and the approval of the record of such proceedings by the court without granting a discharge, are in effect a judgment by default in favor of his then existing creditors that the bankrupt was not entitled to a discharge from their claims, and that judgment is conclusive in favor of such creditors. *Kuntz v. Young*, (1904) 131 Fed. 719, 65 C. C. A. 477. This decision is by the court of appeals of this circuit, and is controlling upon this court. When, therefore, it is made to appear to the court that a bankrupt under the Act of 1898, who has failed to apply for a discharge within the time prescribed by that Act, or has been denied a discharge by the court, files a subsequent petition, and schedules no assets, the proceeding should be dismissed, because by the prior proceedings it is conclusively determined that he is not entitled to a discharge from those debts." In the case of *In re Stone*, (1909) 172 Fed. 947, 23 Am. Bankr. Rep. 24, the rule was likewise applied where the failure to apply for a discharge in the time allowed was due to the neglect of the bankrupt's attorney. To the same effect is *In re Springer*, (1912) 199 Fed. 294. In *Pollet v. Cosel*, (1910) 179 Fed. 488, 103 C. C. A. 68, 30 L. R. A. (N. S.) 1164, the rule was applied where the prior proceedings had been dismissed for want of prosecution. Also in the case of *In re Springer*, (1912) 199 Fed. 294, the rule was applied where the adjudication in the former proceedings was against a partnership and its individual members.

The fact that the creditor in the prior proceedings appears and proves his claim

in the subsequent proceedings does not estop him from disputing the application of the discharge to his claim where there are no assets scheduled except those exempt. *In re Elby*, (1907) 157 Fed. 935; *In re Bacon*, (1912) 193 Fed. 34, 113 C. C. A. 358, certiorari denied without opinion (1912) 225 U. S. 701, 32 S. Ct. 836, 56 U. S. (L. ed.) 1264, mem.

So it is held that the court may properly except in its order of discharge in the subsequent proceedings those debts provable in the prior proceedings. *In re Kuffler*, (1907) 151 Fed. 12, 80 C. C. A. 508, reversing (1906) 144 Fed. 445; *Pollet v. Cosel*, (1910) 179 Fed. 488, 103 C. C. A. 68, 30 L. R. A. (N. S.) 1164; *In re Westbrook*, (1911) 186 Fed. 414; *In re Bacon*, (1912) 193 Fed. 34, 113 C. C. A. 358, certiorari denied without opinion (1912) 225 U. S. 701, 32 S. Ct. 856, 56 U. S. (L. ed.) 1264, mem., or the court may enjoin the bankrupt from applying in the subsequent proceedings for a discharge from the debts provable in the prior proceedings. *In re Pullian*, (1909) 171 Fed. 595.

An order dismissing the subsequent proceedings was held to have been improper where new debts were scheduled although of trifling value as compared to the old debts also scheduled. *In re Kuffler*, (1907) 151 Fed. 12, 80 C. C. A. 508. See also *In re Kuffler*, (1907) 155 Fed. 1018.

The fact that debts provable in the prior proceedings were carried to judgment between those proceedings and the subsequent proceedings has been held not to make them new and different debts so as to take them out of the application of the rule and enable new proceedings to be founded thereon. *In re Schnabel*, (1909) 166 Fed. 383; *In re Kuffler*, (1909) 168 Fed. 1021, 93 C. C. A. 671, affirming (1907) 155 Fed. 1018, certiorari denied without opinion (1909) 214 U. S. 520, 29 S. Ct. 701, 53 U. S. (L. ed.) 1066.

Where the debts in the prior and in the subsequent proceedings are identical the general rule applies, and it is held that the subsequent proceedings are vexatious and should be dismissed. *Kuntz v. Young*, (1904) 131 Fed. 719, 65 C. C. A. 477; *In re Bramlett*, (1908) 161 Fed. 588; *In re Stone*, (1909) 172 Fed. 947; *In re Springer*, (1912) 199 Fed. 294. See also *In re Brockway*, (1882) 23 Fed.

583; *In re Silverman*, (1907) 157 Fed. 675, 85 C. C. A. 224; *In re Pullian*, (1909) 171 Fed. 595; *In re Bacon*, (1912) 193 Fed. 34, 113 C. C. A. 358, certiorari denied without opinion (1912) 225 U. S. 701, 32 S. Ct. 836, 56 U. S. (L. ed.) 1264, mem.

Where the debts in the subsequent proceeding are partly new and partly the same as those provable in the prior proceeding it appears that the bankrupt is entitled to a discharge from the new debts, while the general rule applies to the old. *In re Kuffler*, (1912) 151 Fed. 12, 80 C. C. A. 508, reversing on other grounds (1906) 144 Fed. 445; *In re Von Borries*, (1906) 168 Fed. 718; *In re Pullian*, (1909) 171 Fed. 595; *In re Bacon*, (1912) 193 Fed. 34, 113 C. C. A. 358, certiorari denied without opinion (1912) 225 U. S. 701, 32 S. Ct. 836, 56 U. S. (L. ed.) 1264, mem.

It has been held, however, that where the creditor who resisted the prior proceedings fails to appear and take part in the subsequent proceedings, the general rule does not apply, and hence that a general discharge in the latter proceedings discharges the creditors' debts. *Bluthenthal v. Jones*, (1908) 208 U. S. 64, 28 S. Ct. 192, 52 U. S. (L. ed.) 390, affirming (1906) 51 Fla. 396, 41 So. 533, 120 A. S. R. 181, 13 L. R. A. (N. S.) 629; *Youngman v. Salvage*, (1911) 21 N. D. 317, 130 N. W. 930, Ann. Cas. 1913O 1181.

Where an examination of the record in the earlier proceeding shows that no order was ever entered on the memorandum of the district judge denying the bankrupt's discharge the question is not *res adjudicata*. *In re Elkind*, (1909) 175 Fed. 64, 99 C. C. A. 86.

Analogous to the foregoing are cases in which state insolvency laws were involved, and in which the same general rules were applied. Illustrations may be found in the following cases, among others: *In re Smith*, (1885) 68 Cal. 203, 8 Pac. 881; *Fisher v. Currier*, (1844) 7 Metc. (Mass.) 424; *Gilbert v. Hebard*, (1844) 8 Metc. (Mass.) 129; *Gardner v. Way*, (1857) 8 Gray (Mass.) 189; *Whitney v. Willard*, (1859) 13 Gray (Mass.) 203. See also *Van Ingen v. Justices*, etc., (1896) 166 Mass. 128, 44 N. E. 121; *Dean v. Justices*, etc., (1899) 173 Mass. 453, 53 N. E. 893.

**b [Hearing application and granting discharge.]** The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has [(Amended 1910, which excepted pending cases) 36 Stat. L. 839.]

This part of section 14b as originally enacted read as follows: "b. The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has" (30 Stat. L. 550). It was re-enacted without change in 1903. (32 Stat. L. 797).

In connection with the amendment of 1910, which constitutes the text, see the proviso appearing herein immediately after section 14b (6).

- I. Generally, 662.
- II. Objections to bankrupt's discharge, 664.
- III. Hearing and proof, 670.
- IV. Determination, 673.

#### I. GENERALLY.

Congress may prescribe any regulations concerning discharges in bankruptcy that are not so grossly unreasonable as to be incompatible with the fundamental law. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1; *In re Dresser*, (C. C. A. 2d Cir. 1906) 146 Fed. 383, 16 Am. Bankr. Rep. 561.

**Construction — Statute to be liberally construed.**—"The adjudged cases . . . favor a liberal construction of section 14 . . . in the matter of the discharge of honest bankrupts." *Hardie v. Swafford Bros. Dry Goods Co.*, (C. C. A. 5th Cir. 1908) 165 Fed. 588, 21 Am. Bankr. Rep. 457.

Relief of honest debtors one of the main purposes of the Act, see note preceding section 1.

Statutory provisions regulating the conditions on which bankrupts may be discharged are remedial in their nature with respect to the bankrupts or to their creditors, or to both, and the strict rules of construction or interpretation appropriate to retroactive or retrospective laws are inapplicable to them. *In re Scott*, (D. C. Del. 1904) 126 Fed. 981, 11 Am. Bankr. Rep. 327.

**Construction with regard to purpose.**—The well-settled and uniformly recognized purpose of the Bankruptcy Law is to secure to the creditors of an insolvent person, coming within the terms of the Act, a full and honest disclosure and an equitable distribution of his property, and, this being accomplished, to give to the honest debtor a full discharge. This two-fold purpose should be kept in view in construing and enforcing the provisions of the statute. *In re James*, (E. D. N. C. 1910) 175 Fed. 894, 23 Am. Bankr. Rep. 703. See also note preceding section 1.

**Relation between sections 14 and 17.**—Each bears upon a different subject; the one relating to the discharge, the other to the debts from which such discharge will relieve the debtor. The matters and things which will prevent a discharge in bankruptcy are different from those set out in the section which will not relieve from liability in case there is a discharge of the bankrupt. The bankrupt may be discharged and still be

held liable for the classes of debts mentioned in section 17 of the Act; and in seeking to hold a party liable, who has been discharged in bankruptcy, the ground for such liability must be found in section 17, and not in section 14, which enumerates the grounds upon which a discharge shall be refused. *Katzenstein v. Reid*, (Tex. 1905) 16 Am. Bankr. Rep. 740.

The only obstacles to a discharge are described in this section, and they do not include the creation of a debt by the bankrupt's fraud or other misconduct while acting in a fiduciary capacity. Section 17, however, protects such a debt from discharge. *In re Gara*, (E. D. Pa. 1911) 190 Fed. 112, wherein the court said: "It may be that the debt due to the objecting creditor was created by the misconduct of the bankrupt while acting in a fiduciary capacity. Assuming this to be true, section 17 protects the debt from discharge, but the mere existence of such a debt does not prevent the bankrupt from receiving a discharge from his other provable obligations. The only obstacles to a discharge are described in section 14, and I do not find among them the creation of a debt by the bankrupt's fraud or other misconduct while acting in a fiduciary capacity. At the best, the pending specification charges such creation and nothing more, and this is plainly insufficient. The motion to dismiss is granted."

#### No discharge from disputed claims.—

The discharge authorized by the Bankrupt Act is a discharge from debts, not from disputed claims. A Bankruptcy Court has no jurisdiction to grant a discharge unless there are dischargeable debts to discharge. *In re Gulick*, (S. D. N. Y. 1911) 190 Fed. 52, wherein the court said: "This is a motion to confirm a referee's report recommending a discharge. The bankruptcy is voluntary. Three claims only are listed in the schedules, each of which is stated in the schedules to be disputed. In fact, three actions were pending on them when the bankruptcy petition was filed, in which the bankrupt had interposed answers denying liability. These answers have not been withdrawn. The referee has reported in favor of a discharge, to which the creditors object on the ground that, as the bankrupt denies that any debts exist, the court has no jurisdiction. The point is novel; but, in my opinion, the objection is valid. The discharge authorized by the Bankrupt Act is a discharge from

debts, not from disputed claims. I think that a Bankruptcy Court has no jurisdiction to grant a discharge, unless there are dischargeable debts to discharge. Thus it has been held that the court has no jurisdiction to grant a discharge when the only claim listed is not provable (*In re Yates*, [D. C.] 114 Fed. 365; *In re Schwaninger*, [D. C.] 144 Fed. 555), or, though provable, is not dischargeable (*In re Maples*, [D. C.] 105 Fed. 919; *In re Yates*, [D. C.] 114 Fed. 365). Two of the claims filed in this case appear to be dischargeable; but the point is that the bankrupt does not admit that they are debts. He may prefer to get a discharge, instead of litigating the claims on the merits; but, until he admits that they are debts, I do not see what power a Bankruptcy Court has to discharge such contested claims because they may be established as debts. The referee's report is not confirmed, and the discharge is denied."

**Discharge as a matter of right.**—The bankrupt is entitled to a discharge as a matter of right, provided he has not brought himself within any of the following clauses of the section. *In re Marshall Paper Co.*, (C. C. A. 1900) 102 Fed. 872.

The right to a discharge is determined by the good faith of the bankrupt; and the effect of a discharge is to be determined in accordance with a proper recognition of his civil liability for the acts of partners and other agents. *Frank v. Michigan Paper Co.*, (1910) 179 Fed. 776, 103 C. C. A. 268, 30 L. R. A. (N. S.) 623.

**Governed by law at time of filing petition.**—A bankrupt's right to a discharge is governed by the law as it stood at the time he filed his petition. *Matter of Petersen*, (D. C. Minn. 1903) 10 Am. Bankr. Rep. 355.

**Moral turpitude involved.**—It is noticeable that, of the six reasons for refusing a discharge, recited in section 14b, all except the last two (which stand by themselves on a ground that affects the administration of the law) imply moral turpitude on the part of the bankrupt. *Klein v. Powell*, (C. C. A. 3d Cir. 1909) 174 Fed. 640, 23 Am. Bankr. Rep. 494.

The only issue tendered by the petition for a discharge is the right to the discharge, and the only facts pleadable in opposition thereto are those which show that the bankrupt is entitled to no discharge whatever; and the court will not, upon application of creditors, order the discharge to except the bankrupt's alleged fraudulent debts or claims proved in insolvency proceedings which are pending, the scope of the discharge being preferably left for future determination. *In re Mussey*, (1900) 99 Fed. 71. See also to the point that no issue upon the effect of the discharge can properly arise in this pro-

ceeding *In re Marshall Paper Co.*, (C. C. A. 1900) 102 Fed. 874; *In re Tinker*, (1900) 99 Fed. 79; *In re Black*, (1899) 97 Fed. 493; *In re Rhutassel*, (1899) 96 Fed. 597; *In re Blumberg*, (1899) 94 Fed. 476, in which last case the court expressed a doubt whether such an issue could be rightfully determined even by consent.

**Grounds for refusing discharge in general.**—There are no grounds other than those set out in section 14b for a refusal to grant a discharge; and "the court will not seek for grounds upon which to refuse or even delay a discharge, but hear and consider them when properly presented; the court must, however, in every case see that the law and rules have been complied with." *Strause v. Hooper*, (1901) 105 Fed. 590. See also *U. S. v. Hammond*, (C. C. A. 1900) 104 Fed. 864; *In re Rhutassel*, (1899) 96 Fed. 597; *In re Thomas*, (1899) 92 Fed. 912. But compare *In re Marshall Paper Co.*, (1899) 95 Fed. 419, where it was held that under the existing Bankruptcy Act the duties of the judge regarding discharges are more onerous than those imposed by the Act of 1867, he being directed to "investigate the merits of the application," and therefore not being confined to the creditors' objections.

**Absence of jurisdiction of the court over the bankruptcy proceedings is an objection which may be made against an application for discharge.** *Matter of Little*, (1868) 3 Ben. (U. S.) 25, and *Matter of Penn*, (1870) 4 Ben. (U. S.) 99, decided under the Bankruptcy Act of 1867. But under the present Act it has been held that such objection is not tenable at this stage of the proceedings if jurisdiction appears on the face of the prior proceedings. *In re Clisdell*, (1900) 101 Fed. 246; *In re Mason*, (1900) 99 Fed. 256. See also *Allen v. Thompson*, (1882) 10 Fed. 116.

**Opposition to a discharge on the ground that the bankrupt was not domiciled within the district the requisite time before filing his petition in bankruptcy, such petition being sufficient on its face, and the jurisdiction of the court not having been challenged before adjudication, will not avail to prevent a discharge.** *In re Clisdell*, (1900) 101 Fed. 246.

**Laches.**—Delay in bringing on the hearing is not a ground for refusing a discharge. Thus, where a bankrupt had filed his petition for discharge within the time limited by the Bankruptcy Act, and thereafter was in contempt, it was held that his failure to bring on his petition for hearing within eight days after the contempt was discharged was not ground for refusing a discharge in bankruptcy. *In re Glasberg*, (C. C. A. 2d Cir. 1912) 197 Fed. 896, where the court said: "Delay in bringing on the hearing is not a ground for refusing a discharge found

in the act. It specifically enumerates what the grounds are and this is not one of them. Assuming that the District Court may make rules requiring a speedy hearing, we are unable to find that it has done so. At least, there is no rule which applies to the present case. Rule 20 (Bankruptcy Forms, Hagar & Alexander, 612) relates to the first meeting of creditors, the examination of the bankrupt, and the completion thereof before the application for discharge is filed. There is no pretense that this rule was not fully complied with. Rule 21 provides for the hearing of specifications filed in opposition to the discharge. As no specifications were filed, this rule is inapplicable."

*The fact that the bankrupt was not a frank witness, and "if discharges were granted only as rewards to bankrupts who freely furnish information to their creditors, this bankrupt would be pre-eminently not entitled to one," is not alone sufficient ground for refusing a discharge. In re McCrea, (1908) 161 Fed. 246, 88 C. C. A. 282, 20 L. R. A. (N. S.) 246.*

Nonresidence is no bar to a discharge. *In re Goodale, (1901) 109 Fed. 783.*

The insanity of a bankrupt which has prevented his examination by the creditors, and still continues, is no bar to his discharge. *In re Miller, (1904) 133 Fed. 1017.*

## II. OBJECTIONS TO BANKRUPT'S DISCHARGE.

"Opposition to discharge or composition" is briefly regulated by General Order 32.

Who may object—Parties in interest.—The phrase "parties in interest" also appears in section 15a.

Creditors are "parties in interest" who may oppose the application for discharge. *In re Frice, (S. D. Ia. 1899) 96 Fed. 611, 2 Am. Bankr. Rep. 674; In re Maples, (D. C. Mont. 1901) 105 Fed. 919, 5 Am. Bankr. Rep. 426; In re Brown, (C. C. A. 5th Cir. 1901) 112 Fed. 49, 7 Am. Bankr. Rep. 252; In re Levey, (N. D. N. Y. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 312; In re Conroy, (E. D. Pa. 1905) 134 Fed. 764, 14 Am. Bankr. Rep. 249; In re Chandler, (C. C. A. 7th Cir. 1905) 138 Fed. 637, 14 Am. Bankr. Rep. 512; In re Servis, (N. D. Ia. 1905) 140 Fed. 222, 15 Am. Bankr. Rep. 271; In re Harr, (E. D. Mo. 1906) 143 Fed. 421, 16 Am. Bankr. Rep. 213; In re Hendrick, (D. C. Conn. 1906) 143 Fed. 647, 16 Am. Bankr. Rep. 218; In re Carton, (S. D. N. Y. 1906) 148 Fed. 63, 17 Am. Bankr. Rep. 313; In re Nathanson, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56; Talcott v. Friend, (C. C. A. 7th Cir. 1909) 179 Fed. 676; In re Westbrook, (N. D.*

*Ala. 1911) 186 Fed. 414; In re Hagy, (C. C. A. 6th Cir. 1915) 220 Fed. 665.*

*But only such creditors as have provable debts, which will be affected by the discharge, are parties in interest. In re Chandler, (1905) 138 Fed. 637, 71 C. C. A. 87. See quotation from this case in note to section 15.*

If a creditor of a bankrupt, opposing his discharge, has a debt not provable, or which the discharge would not affect, the bankrupt's remedy is by a motion to expunge the claim or strike out the specifications. *In re Nathanson, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56.*

*The assignee of a judgment which was listed by the debtor in his schedules of liabilities is a "party in interest" within the meaning of this section. Haley v. Pope, (C. C. A. 9th Cir. 1913) 206 Fed. 266.*

*Need not prove claim in order to object to discharge.*—The right to object to the discharge is not restricted to creditors who have proved their claims, persons who claim to be creditors and who are so scheduled being "parties in interest." *In re Frice, (1899) 96 Fed. 611; In re Nathanson, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56. See also In re Conroy, (E. D. Pa. 1905) 134 Fed. 764, 14 Am. Bankr. Rep. 249; Re Murdock, (1869) 1 Lowell (U. S.) 362; In re Balmer, (1878) 3 Hughes (U. S.) 637; Hester v. Baldwin, (1875) 2 Woods (U. S.) 433.*

*One who has a suit pending against a bankrupt for the recovery of a debt, which is contested, is a party in interest, and entitled to contest the bankrupt's right to a discharge. In re Conroy, (E. D. Pa. 1905) 134 Fed. 764, 14 Am. Bankr. Rep. 249.*

*Creditor barred by limitation.*—The fact that a creditor's claim is barred by limitation at the time he files objections to the bankrupt's discharge does not deprive him of a subsisting cause of action so as to bar his right to object. *In re Westbrook, (N. D. Ala. 1911) 186 Fed. 414.*

*Objection in behalf of dissolved partnership.*—Where a partnership, which had proved a claim against a bankrupt estate, was dissolved pending the proceedings, without any disposition of the claim being made as between the partners, it was held that in order to maintain objections to the bankrupt's discharge it was necessary to show affirmatively that all of the partners assented. *In re Hendrick, (D. C. Conn. 1906) 143 Fed. 647, 16 Am. Bankr. Rep. 218.*

*Trustees.*—Although trustees were not mentioned in this part of section 14b prior to its amendment in 1910, it was nevertheless held that a trustee who was prosecuting proceedings against the bankrupt to recover or compel the payment or

delivery to him of property or money alleged to have been wrongfully and fraudulently concealed or withheld from him by the bankrupt, was a "party in interest" and could make and file specifications of objection to the discharge. *In re Levey*, (1904) 133 Fed. 572.

Trustee's opposition must be authorized by creditors, see the proviso appearing herein immediately after section 14b (6).

**Effect of failure to object to allowance of claim.**—The bankrupt has an equitable right to insist that objection shall be made to illegal claims, and his failure to exercise such right by requesting the trustee to make such objection estops him to deny the standing of a creditor, whose claim is allowed without objection, to file objections to his discharge. *In re Carton*, (S. D. N. Y. 1906) 148 Fed. 63, 17 Am. Bankr. Rep. 343.

Objections not specified will not be considered. *In re Adams*, (1900) 104 Fed. 72, in which case the court cited *In re Pierce*, (1900) 103 Fed. 64. See also *In re Kaiser*, (1899) 99 Fed. 689; *Matter of Schuyler*, (1869) 3 Ben. (U. S.) 200; *In re Rosenfeld*, (1868) 2 Nat. Bankr. Reg. 117.

**Specification of objections—General requisites.**—The specification of objections to a discharge is in the nature of a pleading, and the allegations thereof must be distinct, specific, and definite, and set forth with almost the exactness of an indictment, particularly where the offense charged is one included in section 29, so that the bankrupt may be advised of the acts charged, which bring him within the inhibition of the statute, so far as it relates to his discharge. *In re Holman*, (S. D. Ia. 1899) 92 Fed. 512, 1 Am. Bankr. Rep. 600; *In re Thomas*, (S. D. Ia. 1899) 92 Fed. 912, 1 Am. Bankr. Rep. 515; *In re Hixon*, (S. D. Ia. 1899) 93 Fed. 440, 1 Am. Bankr. Rep. 610; *In re Idzall*, (S. D. Ia. 1899) 96 Fed. 314, 2 Am. Bankr. Rep. 741; *In re Hirsch*, (W. D. Tenn. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715; *In re Rhutassel*, (N. D. Ia. 1899) 96 Fed. 597, 2 Am. Bankr. Rep. 697; *In re Frice*, (1899) 96 Fed. 611; *In re Kaiser*, (D. C. Minn. 1899) 99 Fed. 689, 3 Am. Bankr. Rep. 767; *In re Wetmore*, (E. D. Pa. 1900) 99 Fed. 703, 3 Am. Bankr. Rep. 704; *In re Peacock*, (E. D. N. C. 1900) 101 Fed. 560, 4 Am. Bankr. Rep. 136; *In re Quackenbush*, (N. D. N. Y. 1900) 102 Fed. 282, 4 Am. Bankr. Rep. 274; *In re McGurn*, (D. C. Nev. 1900) 102 Fed. 743, 4 Am. Bankr. Rep. 459; *In re Pierce*, (D. C. Wash. 1900) 102 Fed. 977, 4 Am. Bankr. Rep. 489; *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64; *In re Adams*, (1900) 104 Fed. 72; *In re Mudd*, (W. D. Mo. 1900) 105 Fed. 348, 5 Am. Bankr. Rep. 242; *Bragassa v. St. Louis Cycle*, (C. C.

A. 5th Cir. 1901) 107 Fed. 77, 5 Am. Bankr. Rep. 700; *In re Steed*, (E. D. N. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73; *In re Brown*, (C. C. A. 5th Cir. 1901) 112 Fed. 49, 7 Am. Bankr. Rep. 252; *In re Beebe*, (E. D. Pa. 1902) 116 Fed. 48, 8 Am. Bankr. Rep. 597; *In re Crist*, (S. D. Ala. 1902) 116 Fed. 1007, 9 Am. Bankr. Rep. 1; *In re Blalock*, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266; *In re Peck*, (D. C. Conn. 1903) 120 Fed. 972, 9 Am. Bankr. Rep. 747; *In re Patterson*, (N. D. N. Y. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371; *In re Parish*, (N. D. Ia. 1903) 122 Fed. 553, 10 Am. Bankr. Rep. 548; *In re Milgraum*, (E. D. Pa. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306; *In re Ginsburg*, (E. D. Pa. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; *In re Levey*, (N. D. N. Y. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 317; *In re Taplin*, (N. D. Ia. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360; *In re Servis*, (N. D. Ia. 1905) 140 Fed. 222, 15 Am. Bankr. Rep. 271; *Troeder v. Lorsch*, (C. C. A. 1st Cir. 1906) 150 Fed. 710, 17 Am. Bankr. Rep. 723; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re McCarthy*, (S. D. N. Y. 1909) 170 Fed. 859, 22 Am. Bankr. Rep. 499; *In re Bradin*, (E. D. Pa. 1910) 179 Fed. 768; *In re McNamara*, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 566; *In re Wolfensohn*, (S. D. N. Y. 1900) 5 Am. Bankr. Rep. 60; *Matter of Wetmore*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 703. See also *Matter of Hill*, (1868) 2 Ben. (U. S.) 136; *Matter of Waggoner*, (1867) 1 Ben. (U. S.) 532; *In re Butterfield*, (1870) 5 Biss. (U. S.) 120; *In re Burk*, (1868) 3 Nat. Bankr. Reg. 296; *Matter of Freeman*, (1870) 4 Ben. (U. S.) 245; *In re Bellis*, (1870) 3 Nat. Bankr. Reg. 496; *In re Tyrrel*, (1868) 2 Nat. Bankr. Reg. 200.

"Specification of grounds of opposition to bankrupt's discharge" is official Form No. 58.

**Facts stated upon mere information and belief** are insufficient upon which to ground specifications in opposition to a discharge. *In re Thomas*, (D. C.) 92 Fed. 912; *In re White*, (D. C. Ore. 1915) 222 Fed. 688, wherein the court said: "It was not intended, by fixing the statutory grounds for opposing a discharge, to afford the objectors opportunity to go upon a voyage of discovery for ascertaining whether, perchance, they might find something that would defeat the bankrupt's purpose. But, if the bankrupt be guilty of things that render him not entitled to a discharge, they ought to be directly and unequivocally alleged, so that he will be readily apprised of the direct issue as to them, and enabled to concert his defense, and the proof must be clear and convincing, although not beyond a reasonable doubt."

*Must show objector to be party in interest.*—"The specification must also allege, and the proofs must show, that the objector is a party in interest, and, if a creditor, has a debt provable in bankruptcy which will be affected by the discharge. *In re Chandler*, (1905) 138 Fed. 637, 71 C. C. A. 87; *In re Servis*, (N. D. Ia. 1905) 140 Fed. 222." *In re Main*, (N. D. Ia. 1913) 205 Fed. 421.

Where the specification fails to show that the party making the same is a party in interest who will be affected by the discharge, but affirmatively shows that he will not be, the court itself may take notice of this, although the specification is not excepted to; for opposition to a discharge will not be heard or determined at the instance of one who does not show in his specification that he is a party in interest, and therefore entitled to oppose the same. *In re Servis*, (N. D. Ia. 1905) 140 Fed. 222, 15 Am. Bankr. Rep. 271.

But it has been held that an objection to a bankrupt's discharge, reciting that the objector "being interested as a creditor in the estate of [the bankrupt], does hereby oppose," etc., sufficiently shows that petitioner is "a party interested" in the bankrupt's estate, especially in view of the allegation in Form No. 58. *In re Nathanson*, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56, where Chatfield, J., said: "The word 'party' may mean 'person' or 'party to the proceeding.' The record of the bankruptcy proceeding shows whether [the objecting creditor] is a party to the proceeding, and the record can be used upon this motion for that or any material purpose. If he is a creditor having a debt which is not provable, or which the discharge in bankruptcy would not affect, that would seem to be matter for an affirmative motion to expunge the claim, or to strike out the specifications, rather than to object to their form."

*Statutory language insufficient.*—So-called specifications of objection to the discharge of a bankrupt which merely state the grounds for refusing a discharge, in the language of the statute, without any attempt to specify any particular act of the bankrupt, are, as a general rule, wholly insufficient, and no evidence can be received thereunder, nor do they afford any basis for amendment. *In re Peck*, (D. C. Conn. 1903) 120 Fed. 972, 9 Am. Bankr. Rep. 747; *In re Main*, (N. D. Ia. 1913) 205 Fed. 421. See also *In re Hirsch*, (W. D. Tenn. 1899) 96 Fed. 468, 2 Am. Bankr. Rep. 715; *In re Wetmore*, (E. D. Pa. 1900) 99 Fed. 703, 3 Am. Bankr. Rep. 704; *In re Hixon*, (1899) 93 Fed. 440; *In re Holman*, (1899) 92 Fed. 512; *In re Levey*, (N. D. N. Y. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 317; *Remmers v. Merchants' Laclede Nat. Bank*, (C. C. A. 8th Cir. 1909) 173 Fed. 484, 23 Am. Bankr. Rep. 78. And see

generally the annotation of each statutory objection under subdivisions (1), (2), (3), (4), (5), and (6) of this (14b) subsection.

*Duplicity.*—A charge that the bankrupt made a false oath in the proceeding, and that he has concealed assets from the trustee, is objectionable as including two grounds in one specification. *Matter of Wetmore*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 703.

*Several creditors may join in same specification.*—Where several creditors of a bankrupt desire to urge the same objections to the bankrupt's discharge, they are not required to sign separate specifications of objection, but are entitled to join in the same specification. *In re Milgraum*, (E. D. Pa. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306.

*Proceeding on specification abandoned by another creditor.*—One creditor of a bankrupt may adopt and prosecute the objections filed by another to the bankrupt's discharge, when the latter has declared his intention to abandon the same. *In re Guilbert*, (E. D. Pa. 1907) 154 Fed. 676, 18 Am. Bankr. Rep. 830; *Matter of Wetmore*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 703.

A claim by a creditor, whose objections to a discharge are held to be insufficient, of the right to proceed under objections filed on behalf of another creditor, who did not appear on the hearing, should be passed upon by the district judge, and not the referee. *Matter of Wetmore*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 703.

*Must allege statutory objection.*—It is incumbent on a creditor, opposing a bankrupt's discharge, to allege in his specification of objections at least one of the statutory grounds for withholding the discharge; objections not specified in the act being unavailable. *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479; *Matter of Wetmore*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 703.

The grounds of refusing a discharge in bankruptcy are statutory and limited, and do not cover general dishonesty or unfair and sharp dealing with creditors, or oral misrepresentations made in obtaining property on credit, or even false oaths, unless they relate to matters material to the bankruptcy proceedings. *In re Chamberlain*, (N. D. N. Y. 1910) 180 Fed. 304.

That a bankruptcy petition was filed to defeat the claims of a judgment of an objecting creditor against the bankrupt is no ground for denying a discharge. *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479.

*The omission of creditors from the schedule of a bankrupt is not ground for refusing his discharge.* *In re Blalock*, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266.

*Larceny.*—A creditor cannot procure



the denial of the bankrupt's discharge because of the alleged offense of larceny, or larceny as bailee, committed by the bankrupt against the objecting creditor more than a year before the petition was filed. *In re Wolf*, (E. D. Pa. 1908) 159 Fed. 299, 20 Am. Bankr. Rep. 304.

**Owing nondischargeable debts.**—It is no ground for refusing a bankrupt's application for discharge that the creditor objecting thereto holds a judgment against him for wilful and malicious injury to property, or a claim founded upon the fraud of the bankrupt for his misfeasance as a fiduciary. Such debts will not be affected by the discharge when granted, but they do not defeat the bankrupt's right to be discharged. *In re Carmichael*, (N. D. Ia. 1899) 96 Fed. 594, 2 Am. Bankr. Rep. 815.

**Verification.**—The authorities are practically unanimous to the effect that specifications of objection to the discharge of a bankrupt are pleadings, and should be verified as required by section 18c of the Bankruptcy Act; but the failure so to verify them is amendable. *In re Brown*, (5th Cir. 1901) 112 Fed. 49, 50 C. C. A. 118; *In re Baerncopf*, (E. D. Pa. 1902) 117 Fed. 975, 9 Am. Bankr. Rep. 133; *In re Glass*, (W. D. Tenn. 1902) 119 Fed. 520; *In re Pack*, (D. C. Conn. 1903) 120 Fed. 972, 9 Am. Bankr. Rep. 747; *In re Robinson*, (D. C. R. I. 1903) 123 Fed. 844, 10 Am. Bankr. Rep. 477; *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302; *In re Milgraum*, (E. D. Pa. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306; *In re Gift*, (M. D. Pa. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244; *In re Meurer*, (E. D. Pa. 1906) 144 Fed. 445, 15 Am. Bankr. Rep. 823; *In re Nathanson*, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56; *In re Randall*, (E. D. Pa. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305.

But it has been held that a specification of objections to the discharge of a bankrupt is not a pleading within the meaning of section 18c, and that such specification need not be verified, as a verification is not provided for in Form No. 58. *In re Jamieson*, (N. D. Ill. 1903) 120 Fed. 697, 9 Am. Bankr. Rep. 681.

Verification of the specifications is required in some districts by a rule of court; *e. g.*, Bankruptcy Rule No. 11 in the Northern District of New York.

Verification "should be positive and certain, not vague and argumentative." *In re Brown*, (C. C. A. 1901) 112 Fed. 49.

**Who should verify.**—Specifications of objection to a bankrupt's discharge should be verified by the objecting creditor and not by his counsel, unless some reason is given why the oath is not taken by the creditor. *In re Randall*, (E. D. Pa. 1908) 159 Fed. 298, 20 Am. Bankr.

Rep. 305. See also *In re Baerncopf*, (E. D. Pa. 1902) 117 Fed. 975, 9 Am. Bankr. Rep. 133; *In re Milgraum*, (E. D. Pa. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306.

**Sufficient verification.**—Affidavits to specifications of objection to a bankrupt's discharge sworn to "to the best of affiant's knowledge, information, and belief," are sufficiently verified. *In re Milgraum*, (E. D. Pa. 1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306.

**Special master may allow amendment.**—A special master, to whom was referred a bankrupt's application for discharge, has power to permit the amendment of specifications of objection filed in behalf of a number of creditors, but signed and verified only by an agent of one, by allowing the same to be signed and verified by one of the other creditors. *In re Hanna*, (C. C. A. 2d Cir. 1909) 168 Fed. 238, 21 Am. Bankr. Rep. 843.

**Waiver of objection to verification.**—Where no objection to the want of verification of a petition for a bankrupt's discharge was made until after the evidence on the application was heard before the referee, it was held that it was too late. *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479.

**Time to file specifications.**—The time for filing objections to a bankrupt's discharge is governed by General Order 32 which provides that "a creditor opposing the application of a bankrupt for his discharge . . . shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge." *In re Frice*, (S. D. Ia. 1899) 96 Fed. 611, 2 Am. Bankr. Rep. 674; *In re Albrecht*, (E. D. Pa. 1900) 104 Fed. 974, 5 Am. Bankr. Rep. 223; *In re Clotier*, (E. D. Pa. 1901) 108 Fed. 199, 6 Am. Bankr. Rep. 203; *In re Ginsburg*, (E. D. Pa. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; *In re Grant*, (E. D. Pa. 1905) 135 Fed. 889, 14 Am. Bankr. Rep. 398; *In re Nathanson*, (E. D. N. Y. 1907) 152 Fed. 585, 18 Am. Bankr. Rep. 252. And see to the same effect under a former statute *In re Grefe*, (S. D. N. Y. 1868) 2 Nat. Bankr. Reg. 329, 10 Fed. Cas. No. 5,794; *In re Levin*, (C. C. A. 1st Cir. 1910) 176 Fed. 177, 23 Am. Bankr. Rep. 845.

General Order 32 should be strictly complied with, and failure therein will be excused only upon excellent reasons. *In re Clotier*, (1901) 108 Fed. 199.

**Setting aside specifications.**—An application to set aside specifications in opposition filed, without leave of the court, several days after the time fixed by General Order No. 32 (see *infra*, sec. 30,

note) no satisfactory explanation of the delay being given, was granted. *In re Albrecht*, (1900) 104 Fed. 974.

**Extension of time.**—The judge may, in his discretion, extend the time for entering an appearance as well as for filing the specification; and may do so after the time has expired, as well as before. *In re Levin*, (C. C. A. 1st Cir. 1910) 176 Fed. 177, 23 Am. Bankr. Rep. 845.

But a creditor has no right to enter an appearance after return day, and should not be allowed to do so, except for good cause shown in excuse of the delay. *In re Ginsburg*, (E. D. Pa. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; *In re Grant*, (E. D. Pa. 1905) 135 Fed. 889, 14 Am. Bankr. Rep. 398.

**Additional specifications.**—The court in its discretion may allow to be filed additional specifications which are merely enlargements of those already filed and purely amendatory thereof, after the ten days allowed have expired. *In re Osborne*, (C. C. A. 1902) 115 Fed. 1.

**Order nunc pro tunc.**—No appearance having been entered by any creditors who have proven their claims, but certain persons claiming to be creditors having appeared and filed written announcement of their intention to oppose, not filing, however, their specifications until two days after the time fixed by General Order No. 32, the court has discretion to allow the same and to make an order *nunc pro tunc*. *In re Frice*, (1899) 96 Fed. 611.

**Specifications filed before judge or referee.**—The specifications of objections are to be filed before the judge, Mahoney v. Ward, (1900) 100 Fed. 281; or, if so provided by a court rule, before the referee, *In re Holman*, (1899) 92 Fed. 514; *In re Hixon*, (1899) 93 Fed. 441.

**Amendment.**—The specification of objections to the granting of a discharge may be amended with the same liberality as is allowed in the case of other pleadings in bankruptcy proceedings. *In re Hixon*, (S. D. Ia. 1899) 93 Fed. 440, 1 Am. Bankr. Rep. 610; *In re Morgan*, (W. D. Ark. 1900) 101 Fed. 982, 4 Am. Bankr. Rep. 402; *In re Quackenbush*, (N. D. N. Y. 1900) 102 Fed. 282, 4 Am. Bankr. Rep. 274; *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64, 4 Am. Bankr. Rep. 554; *In re Mudd*, (W. D. Mo. 1900) 105 Fed. 348, 5 Am. Bankr. Rep. 242; *In re Eaton*, (N. D. N. Y. 1901) 110 Fed. 731, 6 Am. Bankr. Rep. 531; *In re Osborne*, (C. C. A. 1st Cir. 1902) 115 Fed. 1, 8 Am. Bankr. Rep. 165; *In re Carley*, (C. C. A. 3d Cir. 1902) 117 Fed. 130, 8 Am. Bankr. Rep. 720; *In re Glass*, (W. D. Tenn. 1902) 119 Fed. 509, 9 Am. Bankr. Rep. 391; *In re Peck*, (D. C. Conn. 1903) 120 Fed. 972, 9 Am. Bankr. Rep. 747; Kentucky Nat. Bank v. Carley, (C. C. A. 3d Cir. 1903) 121 Fed. 822, 10 Am. Bankr. Rep. 375; *In re Gift*, (M. D. Pa. 1904)

130 Fed. 230, 12 Am. Bankr. Rep. 244; *In re Hendrick*, (D. C. Conn. 1905) 138 Fed. 473, 14 Am. Bankr. Rep. 795; *In re Knaszak*, (W. D. N. Y. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187; *In re Nathanson*, (E. D. N. Y. 1907) 152 Fed. 585, 19 Am. Bankr. Rep. 56; *In re Wittenberg*, (E. D. Pa. 1908) 160 Fed. 991, 20 Am. Bankr. Rep. 398; *In re Gross*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 271.

Thus it has been held that where specifications of objection to a bankrupt's discharge, alleging perjury by the bankrupt in his examination before the referee, are not sufficiently definite, they will not be wholly disregarded, but the creditor may be given an opportunity to cure the defect by amendment. *In re Nathanson*, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56; *In re Wittenberg*, (E. D. Pa. 1908) 160 Fed. 991, 20 Am. Bankr. Rep. 398.

So also it has been held that an opposing creditor may amend his specifications of objection to a bankrupt's discharge, by supplying allegations that the acts relied upon were knowingly and fraudulently committed by the bankrupt, at any time before the evidence is closed. *In re Knaszak*, (W. D. N. Y. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187.

It has also been held that, under certain circumstances, the specifications may be amended to conform to the proofs. *In re Lesser*, (S. D. N. Y. 1901) 108 Fed. 205; *In re Knaszak*, (W. D. N. Y. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187. See also *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64.

And that specifications opposing a bankrupt's discharge, though entirely defective, may be amended at the discretion of the court. *In re Glass*, (W. D. Tenn. 1902) 119 Fed. 509, 9 Am. Bankr. Rep. 391.

**Amendments in matters of detail.**—Where good faith in the attempt to specify is manifest, but the objecting creditor has failed in the matter of detail, the court would probably grant leave to amend the specifications. *In re Hixon*, (1899) 93 Fed. 440.

**Amendment not sufficiently specific.**—Specifications of objections which are not sufficiently specific may be ordered to be amended; whereupon, if such amendments do not cure the defect, they may, at the instance of the bankrupt, be struck out, thus leaving the application for discharge unopposed. *In re Holman*, (1899) 92 Fed. 512.

**Amendment in discretion of court.**—The Bankruptcy Act contemplates a speedy discharge of the bankrupt; and objecting creditors ought, in simple justice, to advise themselves of the requirements of the statute, and to bring themselves strictly within its terms. When they have long delayed the hearing of the application for discharge, by reason

of their insufficient objections, it rests largely in the sound discretion of the court whether or not amended specifications shall be permitted. *In re Mudd*, (1900) 105 Fed. 348.

An objector having been once allowed to amend after demurrer sustained was not allowed to amend again after a second demurrer sustained where the proposed amendment would help him to keep alive a usurious contract. *In re Walker*, (N. D. Cal. 1913) 209 Fed. 144.

**Discretion to allow amendment not to be loosely exercised.**—Although the court may allow the filing of amended specifications of objection after the time set by General Order No. 32, for the filing of such specifications, yet the allowance of an amendment "should not be exercised loosely, but only to meet the ends of justice." *In re Morgan*, (1900) 101 Fed. 982.

**Amendments presenting new issues.**—The specifications of objections may be amended by alleging that the concealment of property was "knowingly and fraudulently" made, the evidence having been taken and considered upon the theory that the specifications were sufficient; but amendments will not be allowed which present an entirely new issue. *In re Pierce*, (1900) 103 Fed. 64. See also as to the point last above stated *In re Graves*, (1885) 24 Fed. 550.

**Must be something to amend.**—It has been held that specifications of objection to the discharge of a bankrupt which are in the language of the statute without more, and contain no statement of facts, are not amendable. *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64; *In re Mudd*, (W. D. Mo. 1900) 105 Fed. 348; *In re Peck*, (D. C. Conn. 1903) 120 Fed. 972; *In re Bromley*, (E. D. Pa. 1907) 152 Fed. 493, 18 Am. Bankr. Rep. 227.

**To whom application for amendment made.**—It is to the court and not to the referee that an application to amend specifications is to be made. *In re Kaiser*, (1899) 99 Fed. 689; *In re Peck*, (D. C. Conn. 1903) 120 Fed. 972, 9 Am. Bankr. Rep. 747. See also *In re Lesser*, (1901) 108 Fed. 205, where the court allowed the specifications to be amended to conform to the proof.

**Time of allowance.**—The court undoubtedly has the right to amend the specifications at any stage of the case. *In re Knaszak*, (W. D. N. Y. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187.

Rule 32 in bankruptcy does not operate as a statute of limitations to prevent the court, in its discretion, from permitting creditors to file amended specifications of objection to a bankrupt's discharge after the expiration of ten days. *In re Nathanson*, (E. D. N. Y. 1907) 152 Fed. 585, 19 Am. Bankr. Rep. 56.

But it has been held that an amendment of objections to the discharge of a bank-

rupt in matters of substance is only allowable, after the time within which objections are required to be filed, where the amendment is no more than an amplification, by the supplying of details, of charges which are substantially stated in the original. *In re Gift*, (M. D. Pa. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244.

**Waiver of defects in specification.**—It has been held in several cases that the right to take advantage of a defective specification of objections may be waived by the failure to take prompt exception thereto. *In re Osborne*, (C. C. A. 1st Cir. 1902) 115 Fed. 1, 8 Am. Bankr. Rep. 165; *In re Baerncopf*, (E. D. Pa. 1902) 117 Fed. 875, 9 Am. Bankr. Rep. 133; *In re Baldwin*, (N. D. N. Y. 1903) 119 Fed. 796, 9 Am. Bankr. Rep. 591; *In re Robinson*, (D. C. R. I. 1903) 123 Fed. 844, 10 Am. Bankr. Rep. 477; *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302.

**Total failure to state ground of objection not cured by waiver.**—But where specifications of objection to the discharge of a bankrupt wholly fail to state any statutory ground for the refusal of a discharge, their insufficiency is not waived by the bankrupt by failing to except thereto, and they may be disregarded. *In re McCarthy*, (S. D. N. Y. 1909) 170 Fed. 859, 22 Am. Bankr. Rep. 499.

**Answering specifications of objection.**—The bankrupt may answer, or plead otherwise in resistance of the specification of objections; but he is not obliged to do so. *In re Logan*, (D. C. Ky. 1900) 102 Fed. 876, 4 Am. Bankr. Rep. 525; *In re Crist*, (S. D. Ala. 1902) 116 Fed. 1007, 9 Am. Bankr. Rep. 1; *In re Hendrick*, (D. C. Conn. 1905) 138 Fed. 473, 14 Am. Bankr. Rep. 795. See *In re Holman*, (1899) 92 Fed. 512, where an objection to the specifications on the ground of indefiniteness was filed and sustained; *In re Morgan*, (1900) 101 Fed. 982, where a demurrer was interposed to the specifications, and was conceded by the objectors; and *In re Howell*, (1900) 105 Fed. 594, where a demurrer to the specifications of objections was allowed.

A bankrupt is not estopped from controverting the specifications of objections to his discharge because he has not demurred to them. *In re Crist*, (1902) 116 Fed. 1007, holding that if the allegations in specifications of objections to the bankrupt's discharge are insufficient in law, the bankrupt may file exceptions or he may demur, or do neither, and leave it to the court to hear the application for discharge and such pleas and proofs as may be made in opposition thereto by parties interested.

**Prosecution of objection in forma pauperis.**—A creditor who objects to the discharge of a bankrupt may prosecute his objections *in forma pauperis* by virtue of the Act of July 20, 1892, ch. 209, 27 Stat.

L. 252 (its title Costs herein) which gives any citizen entitled to commence "any suit or action in any court of the United States" such right on making the required showing. *In re Guilbert*, (E. D. Pa. 1907) 154 Fed. 676, 18 Am. Bankr. Rep. 830.

A creditor cannot withdraw his objections, thereby prejudicing another creditor, although the latter has not formally joined therein, if the latter has virtually adopted them as his own. *In re Dietz*, (1899) 97 Fed. 563.

### III. HEARING AND PROOF.

**Necessity of hearing.**—A motion for a bankrupt's discharge cannot be granted until specifications of objection have been disposed of. *In re Randall*, (E. D. Pa. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305.

**Nature of hearing.**—"The hearing upon an application for a discharge in bankruptcy is in effect a trial in equity. Objections to a bankrupt's discharge are the beginning of a distinct and separate dispute and fall within any accepted definition of a suit or action." *In re Malachick*, (E. D. Pa. 1914) 217 Fed. 492.

**Hearing deferred until fees paid.**—Where the filing fees are not paid, and the case is not within the exception of section 51a (2), the hearing of a petition for discharge will be deferred until such fees are paid. *In re Barden*, (1900) 101 Fed. 553.

A voluntary bankrupt having filed his affidavit of poverty, under section 51a (2), a discharge will not be granted him as a matter of course, without payment of expenses of the proceedings necessary to secure that discharge. *In re Fees Payable by Voluntary Bankrupts*, (1899) 95 Fed. 120.

**Hearing to be had before judge.**—Section 14b provides that "the judge shall hear," etc. Section 1a (16) provides that "judge" shall not include the referee. Section 38a (4) excludes from the referee the power to hear applications for discharge. General Order 12, subd. 3, provides that applications for discharge shall be heard by the judge. See also the order for hearing in Form No. 57.

An application for a discharge in bankruptcy, with such briefs and pleas as may be made in opposition thereto, must be heard and determined by the judge of the court of bankruptcy. The decision of the question whether or not a discharge shall be granted cannot be delegated to a referee. *In re McDuff*, (C. C. A. 5th Cir. 1900) 101 Fed. 241, 4 Am. Bankr. Rep. 110; *Mahoney v. Ward*, (1900) 100 Fed. 278; *Fellows v. Freudenthal*, (1900) 102 Fed. 731, 42 C. C. A. 607; *In re Baldwin*, (N. D. N. Y. 1903) 119 Fed. 796, 9 Am. Bankr. Rep. 591; *In re Goodhile*, (N. D. Ia. 1904) 130 Fed. 782, 12 Am. Bankr.

Rep. 380; *In re Randall*, (E. D. Pa. 1908) 159 Fed. 298, 20 Am. Bankr. Rep. 305; *International Harvester Co. v. Carlson*, (C. C. A. 8th Cir. 1914) 217 Fed. 736.

As the Act has excluded from the referee the power to hear applications for discharge, the notice to creditors of the hearing and the fixing of the date should be upon the order of the judge, in accordance with Supreme Court Form 57. *In re Hockman*, (E. D. Pa. 1912) 205 Fed. 330.

It is an irregularity for a referee to take testimony on an application for discharge against which an objection has been filed, before returning the same to the court; but where both parties appear, so that no prejudice can result, testimony so taken will not be stricken out. *In re Goodhile*, (N. D. Ia. 1904) 130 Fed. 782, 12 Am. Bankr. Rep. 380. See also *In re Polakoff*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 358.

*In the northern district of New York*, it is settled practice to require all objections to the sufficiency of specifications of objection to the discharge of a bankrupt, to be raised before the judge on motion, within a specified time. *In re Baldwin*, (N. D. N. Y. 1903) 119 Fed. 796, 9 Am. Bankr. Rep. 591.

**Reference to referee.**—General Order 12, subd. 3, provides that an application for discharge, or any specified issue arising thereon, may be referred to the referee to ascertain and report the facts. In a case where the petition for discharge and specification of objections were referred to the referee to take the evidence and make findings of fact and recommendations to the court, it was said: "Such a reference, however, is not by consent, and the report of the referee can be treated as advisory only. *Kimberly v. Arms*, (1889) 129 U. S. 512, 9 S. Ct. 355, 32 U. S. (L. ed.) 764; *Davis v. Schwartz*, (1895) 155 U. S. 631, 15 S. Ct. 237, 39 U. S. (L. ed.) 289; *In re Holden*, (1913) 203 Fed. 229, 121 C. C. A. 435; *In re Swift*, (D. C. Mass. 1902) 118 Fed. 348. The duty of the court to pass upon the issue cannot be shifted by such a reference, nor can the duty of the court be dependent upon the filing of exceptions. Orderly practice would require that such exceptions be filed, but the omission to do so is not jurisdictional. When the question of the discharge is brought before the District Court the issue is made up of the specifications of objection to the discharge, and the bankrupt's answer thereto, and not by the report of the referee and exceptions thereto. We are of the opinion, therefore, that it was the duty of the district judge to hear the cause and exercise an independent judgment thereon. When the referee's report was brought to his notice, he was then, for the first time, called upon to perform his duty of deciding whether the petition for discharge

should be granted or denied. If the filing of exceptions to the master's report would aid him in the performance of his duty, he had ample authority to require such exceptions to be filed, or to consider such exceptions though they were filed late. Counsel for the objecting creditor insists that rule 37 of the bankruptcy rules makes the general equity rules prescribed by the Supreme Court applicable to proceedings in bankruptcy, and that by equity rule 66 (198 Fed. xxxvii, 115 C. C. A. xxxvii) the time for filing exceptions to the report of masters is fixed at twenty days. We do not think that the general equity rules can be applied as rules of court in the performance of the administrative work of courts of bankruptcy. They may be looked to for analogies, but not as rules. The Supreme Court itself has fixed the rules to govern courts of bankruptcy. To hold that the District Court was bound by the report of the referee, because exceptions were not filed within twenty days, would deprive that court of its duty both under the Bankruptcy Law and the rules of the Supreme Court to pass upon the question of the bankrupt's right to his discharge." *International Harvester Co. v. Carlson*, (8th Cir. 1914) 217 Fed. 736, 133 C. C. A. 430. See *In re Royal*, (1902) 113 Fed. 140, holding that exceptions to findings of fact by the referee should be filed in accordance with Equity Rule 83 (now 66), as construed by the Supreme Court.

The referee has the power to rule upon the sufficiency of the specifications of objection, and should not take evidence on such as are clearly insufficient. *In re Kaiser*, (1899) 99 Fed. 689. He is to report on the facts, and give his conclusions of law. *In re Steed*, (1901) 107 Fed. 682.

The report may be approved or not; or it may be sent back to the referee for further consideration. *In re Logan*, (1900) 102 Fed. 876; *In re Hyman*, (1899) 97 Fed. 195; *In re Steed*, (1901) 107 Fed. 682; *In re Phillips*, (1900) 98 Fed. 844; *Mahoney v. Ward*, (1900) 100 Fed. 278.

In a proceeding in involuntary bankruptcy, where the referee had not followed the correct practice, and where there were many irregularities and omissions in the procedure, the application for discharge was referred back to him with instructions to follow the statute. *Mahoney v. Ward*, (1900) 100 Fed. 278.

*When referee's finding set aside.*—Except upon clear and convincing proof of error, the finding of the referee, in a petition for discharge, especially on matters of fact, will not be set aside. *In re Covington*, (1901) 110 Fed. 143.

*Reference to special master.*—As the District Court is invested with jurisdiction, under section 2, both at law and in equity, to enable it to exercise original

jurisdiction in bankruptcy proceedings, such court has power to order a reference of an issue made by creditors by filing objections to a bankrupt's petition for discharge; and, in such cases, the court may avail itself of preliminary assistance by the appointment of a special master to hear and report on the facts, as in other proceedings in equity; and this course is usually pursued. *In re Kaiser*, (D. C. Minn. 1899) 99 Fed. 689, 3 Am. Bankr. Rep. 767; *In re McDuff*, (C. C. A. 5th Cir. 1900) 101 Fed. 241, 4 Am. Bankr. Rep. 110; *Fellows v. Freudenthal*, (C. C. A. 7th Cir. 1900) 102 Fed. 731, 4 Am. Bankr. Rep. 490; *In re Steed*, (E. D. N. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73; *In re Knaszak*, (W. D. N. Y. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187; *In re Eldred*, (E. D. N. Y. 1907) 152 Fed. 491, 18 Am. Bankr. Rep. 243; *In re McKane*, (E. D. N. Y. 1907) 155 Fed. 674, 19 Am. Bankr. Rep. 103; *In re Murray*, (D. C. Conn. 1908) 162 Fed. 983, 20 Am. Bankr. Rep. 700; *In re Gillardon*, (E. D. Pa. 1911) 187 Fed. 289; *In re Rauchenplat*, (D. C. Porto Rico 1903) 9 Am. Bankr. Rep. 763.

*Under rule 41 in the eastern district of New York*, it is the duty of objecting creditors to see that the objections to a bankrupt's application for discharge are referred to a special master, and to arrange for the hearing thereon. *In re Eldred*, (E. D. N. Y. 1907) 152 Fed. 491, 18 Am. Bankr. Rep. 243.

*It is the duty of a special master* to whom have been referred a bankrupt's petition for discharge and specifications of objection thereto, to take and report all the testimony offered, with his rulings as to its admissibility. *In re Knaszak*, (W. D. N. Y. 1907) 151 Fed. 503, 18 Am. Bankr. Rep. 187.

*A finding by a special commissioner*, to whom were referred a bankrupt's application for discharge, and objections thereto, should be followed, unless there is no evidence to support it. *In re McKane*, (E. D. N. Y. 1907) 155 Fed. 674, 19 Am. Bankr. Rep. 103.

*Bankrupt must attend hearing.*—The bankrupt's attendance on the hearing of objections to his application for a discharge, if demanded by the creditors, cannot be dispensed with by the referee, under the requirements of section 7a (1). *In re Shanker*, (M. D. Pa. 1905) 138 Fed. 862, 15 Am. Bankr. Rep. 109.

*Specifications of objection must be proved.*—*In general.*—The opposition to a discharge is in the nature of a new suit, and requires proof in support of the allegations presented. The burden of proof is on the opposing creditors, and they must satisfy the conscience of the court that the grounds of objection urged are true, and that the bankrupt is not entitled to a discharge, because of having

committed some one of the offenses specified in the several subdivisions of section 14b. *Bluthenthal v. Jones*, (1908) 208 U. S. 64, 28 S. Ct. 192, 52 U. S. (L. ed.) 390, 19 Am. Bankr. Rep. 288; *In re Idzall*, (S. D. Ia. 1899) 96 Fed. 314, 2 Am. Bankr. Rep. 741; *In re Phillips*, (S. D. N. Y. 1900) 98 Fed. 844, 3 Am. Bankr. Rep. 542; *In re Finkelstein*, (S. D. N. Y. 1900) 101 Fed. 418, 3 Am. Bankr. Rep. 800; *In re Brice*, (S. D. Ia. 1900) 102 Fed. 114, 4 Am. Bankr. Rep. 355; *Fellows v. Freudenthal*, (C. C. A. 7th Cir. 1900) 102 Fed. 731, 4 Am. Bankr. Rep. 490; *In re Cashman*, (S. D. N. Y. 1900) 103 Fed. 67, 4 Am. Bankr. Rep. 326; *In re Fitchard*, (N. D. N. Y. 1900) 103 Fed. 742, 4 Am. Bankr. Rep. 609; *In re Ferris*, (N. D. Ia. 1900) 105 Fed. 356, 5 Am. Bankr. Rep. 246; *In re Howden*, (N. D. N. Y. 1901) 111 Fed. 723, 7 Am. Bankr. Rep. 191; *In re Gaylord*, (C. C. A. 2d Cir. 1901) 112 Fed. 668, 7 Am. Bankr. Rep. 1; *In re Salisbury*, (N. D. N. Y. 1902) 113 Fed. 833, 7 Am. Bankr. Rep. 771; *In re Greenberg*, (D. C. Conn. 1902) 114 Fed. 773, 8 Am. Bankr. Rep. 94; *In re Leslie*, (N. D. N. Y. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561; *In re Dauchy*, (N. D. N. Y. 1903) 122 Fed. 688, 10 Am. Bankr. Rep. 527; *In re Chamberlain*, (W. D. N. Y. 1903) 125 Fed. 629, 11 Am. Bankr. Rep. 95; *In re Hamilton*, (W. D. N. Y. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333; *In re Prager*, (N. D. W. Va. 1905) 134 Fed. 1006, 13 Am. Bankr. Rep. 527; *In re Keefer*, (W. D. N. Y. 1905) 135 Fed. 885, 14 Am. Bankr. Rep. 290; *In re Hendrick*, (D. C. Conn. 1905) 138 Fed. 473, 14 Am. Bankr. Rep. 795; *In re Eades*, (C. C. A. 7th Cir. 1905) 143 Fed. 293, 16 Am. Bankr. Rep. 30; *In re Kolster*, (D. C. Nev. 1906) 146 Fed. 138, 17 Am. Bankr. Rep. 52; *In re Garrison*, (C. C. A. 2d Cir. 1906) 149 Fed. 178, 17 Am. Bankr. Rep. 832; *Troeder v. Lorsch*, (1st Cir. 1906) 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723; *In re Weinreb*, (C. C. A. 2d Cir. 1907) 153 Fed. 363, 18 Am. Bankr. Rep. 387; *Hardie v. Swafford Bros. Dry Goods Co.*, (C. C. A. 5th Cir. 1908) 165 Fed. 588, 21 Am. Bankr. Rep. 457; *In re Wermuth*, (N. D. N. Y. 1910) 179 Fed. 1009; *In re Chamberlain*, (N. D. N. Y. 1910) 180 Fed. 304; *In re Cotton*, (S. D. Ga. 1910) 183 Fed. 181; *Garry v. Jefferson Bank*, (C. C. A. 5th Cir. 1911) 186 Fed. 461; *In re Polakoff*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 358; *In re Miller*, (1914) 212 Fed. 920, 129 C. C. A. 440; *In re Berner*, (S. D. Ohio) 4 Am. Bankr. Rep. 383; *In re Wolfensohn*, (S. D. N. Y. 1900) 5 Am. Bankr. Rep. 60; *In re Gross*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 271; *Matter of Wetmore*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 703; *Matter of Brockman*, (W. D. Ky. 1908) 21 Am. Bankr. Rep. 251.

The opposing creditor having failed to sustain his specifications of objections by

sufficient evidence, the same must be overruled, and a discharge granted; this notwithstanding that the bankrupt's examination tends indirectly to support the objections. *In re Ferris*, (1900) 105 Fed. 356.

*Clear, positive, and direct proof required.*—The burden of proof is upon an opposing creditor to establish the ground for refusing a discharge by clear, positive, and direct evidence. *In re Chamberlain*, (W. D. N. Y. 1903) 125 Fed. 629, 11 Am. Bankr. Rep. 95; *In re McGurn*, (1900) 102 Fed. 743.

*Evidence must be clear and convincing.*—On an application for a bankrupt's discharge, the burden of proof is on the opposing creditors to establish the truth of the objections set out in the specification, by clear and convincing evidence. *In re Hamilton*, (W. D. N. Y. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333; *Garry v. Jefferson Bank*, (C. C. A. 5th Cir. 1911) 186 Fed. 461.

*Evidence to satisfy conscience of court sufficient.*—The strict rules applicable to the trial of the bankrupt under an indictment should not be applied in the case of discharge proceedings. It is sufficient ground for refusing a discharge, if the conscience of the court is satisfied by proper and sufficient evidence that the bankrupt is not entitled to receive it. *In re Gross*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 271.

*Proof need not preclude reasonable doubt.*—A creditor objecting to the discharge of a bankrupt is not bound to prove his specifications beyond a reasonable doubt. *In re Greenberg*, (D. C. Conn. 1902) 114 Fed. 773, 8 Am. Bankr. Rep. 94.

*Suspicion of fraud insufficient.*—The burden of proof rests upon the creditor, and while the acts charged may be established by inference from the facts proved, it is not sufficient that such facts justify a suspicion of fraud, but they must be inconsistent with honesty and good faith. *In re Kolster*, (D. C. Nev. 1906) 146 Fed. 138, 17 Am. Bankr. Rep. 52; *In re Miller*, (C. C. A. 2d Cir. 1914) 212 Fed. 920.

*Where question of law is presented.*—Though generally the burden is on the creditor to sustain his opposition to the bankrupt's discharge, that rule does not apply where the question presented is one of law, *e. g.*, the construction of a statute, and not one of fact. *In re Gilpin*, (E. D. Pa. 1908) 160 Fed. 171, 20 Am. Bankr. Rep. 374.

*Evidence.*—The ordinary rules of evidence are applicable in a contest of the bankrupt's right to be discharged. *Garry v. Jefferson Bank*, (C. C. A. 5th Cir. 1911) 186 Fed. 461.

*Admission and representations of a partner* are receivable in evidence against

his copartners when made in the ordinary course of the firm's business concerning its affairs. *In re Malschick*, (E. D. Pa. 1914) 217 Fed. 492.

*Testimony given by the bankrupt*, under section 7a (9), may be used to defeat his application for discharge. *In re Leslie*, (N. D. N. Y. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561; *In re Goodhile*, (N. D. Ia. 1904) 130 Fed. 782, 12 Am. Bankr. Rep. 380. See also *In re Bard*, (S. D. N. Y. 1901) 108 Fed. 208; *In re Wilcox*, (2d Cir. 1900) 109 Fed. 628, 48 C. C. A. 567; *Shaffer v. Koblegard Co.*, (C. C. A. 4th Cir. 1910) 183 Fed. 71; *In re Malschick*, (E. D. Pa. 1914) 217 Fed. 492.

*But the testimony of third persons*, given under section 21a before the referee, is not directed to a defined issue, and is inadmissible on a subsequent hearing of specifications against the bankrupt's application for discharge. *In re Wilcox*, (C. C. A. 2d Cir. 1900) 109 Fed. 628, 6 Am. Bankr. Rep. 362; *In re Goodhile*, (N. D. Ia. 1904) 130 Fed. 782, 12 Am. Bankr. Rep. 380. But see *In re Cooke*, (1901) 109 Fed. 631, holding that relevant testimony of third parties taken during the course of the bankruptcy proceedings, the bankrupt either personally or by counsel being present and taking part in the examination, is admissible in opposition to discharge.

*Testimony given at other hearings must be duly proved*.—It has been held that a referee, acting as a special master on a hearing in proceedings for a discharge, must confine himself to the evidence produced before him as such special master; and that he cannot, in the determination of such hearing, base his findings upon testimony given before him as a referee. *In re Hendrick*, (D. C. Conn. 1905) 138 Fed. 473, 14 Am. Bankr. Rep. 795; *In re Walder*, (D. C. Conn. 1907) 152 Fed. 489, 18 Am. Bankr. Rep. 419; *In re Murray*, (D. C. Conn. 1908) 162 Fed. 983, 20 Am. Bankr. Rep. 700.

#### IV. DETERMINATION.

*When discharge should be granted*.—It has been held that it is the duty of the court to grant a bankrupt his discharge, unless the commission of one of the acts specified in the several subdivisions of section 14b has been committed by him, and such commission has been duly proved. *Bluthenthal v. Jones*, (1908) 208 U. S. 64, 28 S. Ct. 192, 52 U. S. (L. ed.) 390, 19 Am. Bankr. Rep. 288; *In re Marshall Paper Co.*, (C. C. A. 1st Cir. 1900) 102 Fed. 872, 4 Am. Bankr. Rep. 468; *In re Eades*, (C. C. A. 7th Cir. 1905) 143 Fed. 293, 16 Am. Bankr. Rep. 30; *In re Wolf*, (E. D. Pa. 1908) 159 Fed. 299, 20 Am. Bankr. Rep. 304; *In re James*, (E. D. N. C. 1910) 175 Fed. 894, 23 Am. Bankr. Rep. 703.

*Discharge not discretionary*.—The refusal to grant a discharge does not rest

in the discretion of the judge, but the applicant is entitled to a discharge as a matter of right, unless he is found guilty of some one of the prescribed offenses. *In re Marshall Paper Co.*, (C. C. A. 1st Cir. 1900) 102 Fed. 872, 4 Am. Bankr. Rep. 468; *In re James*, (E. D. N. C. 1910) 175 Fed. 894, 23 Am. Bankr. Rep. 703.

*The fact that a bankrupt is a nonresident of the district* does not affect his right to a discharge. *In re Goodale*, (N. D. N. Y. 1901) 109 Fed. 783, 6 Am. Bankr. Rep. 493. See also *In re Clisdell*, (N. D. N. Y. 1900) 101 Fed. 246, 4 Am. Bankr. Rep. 95.

*Only such grounds as are specified* by the objecting creditors will be considered in opposition to the discharge of a bankrupt. *In re Adams*, (N. D. N. Y. 1900) 104 Fed. 72, 4 Am. Bankr. Rep. 696.

But it has been held that the judge is not confined to the consideration of those objections which are set forth by the creditors, and that he should investigate the merits of the application. *In re Marshall Paper Co.*, (D. C. Mass. 1899) 95 Fed. 419, 2 Am. Bankr. Rep. 653.

*The court is not required to grant a discharge* to a bankrupt, knowing at the time that facts exist which would render such discharge revocable for fraud had they first come to light after it was granted, although no cause for refusing it is shown under section 14b. *In re Luffig*, (D. C. Mass. 1905) 162 Fed. 322, 15 Am. Bankr. Rep. 773.

The Bankruptcy Act is liberal in its provisions for a discharge of the bankrupt from his debts, and that spirit must be observed and carried out in the consideration of objections thereto. If it plainly appears, however, that the applicant has intentionally and substantially violated the Act, in either of the particulars stated in section 14b, the duty of the court is equally clear to deny the benefits of a discharge. *In re McBachron*, (E. D. Wis. 1902) 116 Fed. 783, 8 Am. Bankr. Rep. 732.

*Dismissal of petition for discharge because of failure to prosecute*.—Where a bankrupt filed a petition for discharge, but took no further steps in the matter for a year thereafter, it was held that he was chargeable with an abuse of the proceedings for the purpose of delaying creditors; and that, on proper application by a creditor, his petition for discharge should be dismissed. *In re Lederer*, (S. D. N. Y. 1903) 125 Fed. 96, 10 Am. Bankr. Rep. 492.

*The specification of objections may be disregarded* where the objector does not appear on the hearing of the application for a discharge. *In re Chase*, (D. C. Mass. 1910) 186 Fed. 408.

So, also, it has been held that it is the duty of objecting creditors to bring the matter on for hearing; otherwise the

court is warranted in dismissing the specifications. *In re Fritz*, (E. D. N. Y. 1909) 173 Fed. 560, 23 Am. Bankr. Rep. 84.

But see *In re Wolff*, (N. D. Cal. 1904) 132 Fed. 396, 13 Am. Bankr. Rep. 95, wherein it was held that a court of bankruptcy is not authorized to dismiss a bankrupt's petition for discharge, filed in due time, because of delay in bringing the matter to a hearing after specifications of objection have been filed.

**Withholding decision.**—A claimant holding a lien against garnishees indebted to a bankrupt is entitled to a stay of the bankrupt's discharge for a reasonable time to enable such claimant to enforce his rights against the garnishees, and the sureties on a bond to dissolve the garnishment. *In re Maher*, (N. D. Ga. 1909) 169 Fed. 997, 22 Am. Bankr. Rep. 290.

**Stay to determine rights.**—Where creditors of a bankrupt hold obligations containing a waiver of the right of exemption, the bankruptcy proceedings may be stayed until the rights of such creditors have been determined in a state court. *In re Allen*, (W. D. Va. 1904) 134 Fed. 320, 13 Am. Bankr. Rep. 518. And see to the same effect *In re Castleberry*, (N. D. Ga. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159; *In re Olansky*, (E. D. N. Y. 1908) 163 Fed. 428, 20 Am. Bankr. Rep. 780.

"Certainly, there would exist in favor of a creditor holding a waiver note, like that possessed by the petitioning creditor in the case at bar, an equity entitling him to a reasonable postponement of the discharge of the bankrupt in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights possessed by the creditor." *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061. To the same effect, see *B. F. Roden Grocery Co. v. Bacon*, (1904) 133 Fed. 515, 66 C. C. A. 497; *Meinhard v. Pincus*, (1912) 200 Fed. 736.

And where it was contended that a bankrupt was not entitled to retain property claimed as against a judgment for breach of a marriage promise, and the only way in which the judgment creditor could test the question was by proceedings in the state courts, it was held that the bankrupt's discharge should be withheld until the judgment creditor was afforded a reasonable opportunity to test her rights. *In re Brumbaugh*, (D. C. Pa. 1904) 128 Fed. 971, 12 Am. Bankr. Rep. 204.

So, also, it has been held that where there seems to be probable cause for opposition to the petitioner's discharge in bankruptcy, on the ground that his petition did not contain a full, true, and correct statement of assets or financial condition, a discharge will be refused until

the charge can be regularly investigated, and the record submitted to a proper tribunal, where he may be tried and punished if guilty as the Act prescribes. *In re Steed*, (E. D. N. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73.

**To await valuation.**—*In re McBryde*, (1899) 99 Fed. 686, action upon the bankrupt's application for discharge was suspended to await a proper valuation and allotment of property claimed as a homestead.

**To test question of fraud.**—"If the court here could have seen that the creditors of this bankrupt were diligent, and earnestly pursuing their remedies at law, . . . it would undoubtedly at least suspend the further hearing of the application for a discharge until the creditors had had an opportunity of testing in a court of competent jurisdiction the question of fraud in the most direct and beneficial way." *In re Hirsch*, (1899) 96 Fed. 474.

**To await settlement of question of creditors' rights.**—Proceedings on an application for discharge may be stayed to await the definite settlement of the question of the rights of certain creditors as to exemptions. *In re Woodruff*, (1899) 96 Fed. 317.

A sacrifice sale, which would be void as a preference, made nine days before the filing of the petition in bankruptcy, along with great haste in paying certain favored creditors, is not a ground for refusing a discharge; but the court will postpone the consideration thereof until the bankrupt satisfies creditors having claims by a surrender of property. *In re Steed*, (1901) 107 Fed. 682.

A court of bankruptcy will not stay its decision upon a bankrupt's application for discharge, to await the result of a pending action in a state court, where the issues are not identical, and the decree of the state court would not determine the right of the bankrupt to be discharged. *In re Cornell*, (S. D. N. Y. 1899) 97 Fed. 29.

A motion to withhold the bankrupt's discharge, in order that a creditor may pursue a remedy for the collection of a judgment lien in the state court, will be denied where it appears that the discharge cannot, under the law of the state, affect the rights of such judgment creditor with respect to the collection of his lien. *In re Hartsell*, (N. D. Ala. 1905) 140 Fed. 30, 15 Am. Bankr. Rep. 177; *In re Weaver*, (N. D. Ga. 1904) 144 Fed. 229, 16 Am. Bankr. Rep. 265.

The purpose of the penalties of the bankruptcy statute is to prevent bankrupts from concealing their property and defrauding their creditors. Ordinary questions of contumacy or contempt of court can be disposed of directly, and of themselves are not to be corrected by the



withholding of a discharge. *In re Fanning*, (E. D. N. Y. 1907) 155 Fed. 701, 19 Am. Bankr. Rep. 55.

"The right to a discharge, and the effect of a discharge, are wholly distinct propositions. The proper time and place for the determination of the effect of a discharge is when the same is pleaded or relied upon by the debtor as a defense to the enforcement of a particular claim. The issue upon the effect of a discharge cannot properly arise or be considered in determining the right to a discharge." *In re Marshall Paper Co.*, (C. C. A. 1900) 102 Fed. 872. See also *In re Rhutassel*, (1899) 96 Fed. 597, and *In re McCarty*, (1901) 111 Fed. 151.

The omission in the notice of discharge to set up facts necessary to give the Bankruptcy Court jurisdiction does not render the pleading of the discharge insufficient as a bar to an action. *Bryant v. Kinyon*, (1901) 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801.

In *Liesum v. Kraus*, (N. Y. City Ct. Gen. T. 1901) 35 Misc. 376, 71 N. Y. S. 1022, a clerical error, whereby a judgment creditor named George Liesum was described in the schedule as George Liesman, prevented the discharge from releasing the debt as against Liesum; and, therefore, the order which discharged the judgment on the ground of the judgment debtor's discharge in bankruptcy was reversed with costs.

**Contract to pay discharged debt.**—See end of note to section 17a preceding section 17a (1).

"Discharge of bankrupt" is official Form No. 59.

**Discharge affecting firm debts.**—A firm, as a firm, not being bankrupt, and there being grounds for believing that there are firm assets not brought into court or that such have been concealed, a discharge will not be granted to partners in voluntary bankruptcy so as to affect the firm debts. *In re Meyers*, (1899) 96 Fed. 408.

**Rehearing of application.**—It was intimated that, upon newly discovered testimony, or excusable neglect or oversight, the court might grant a rehearing after refusal of a discharge. *In re Royal*, (1902) 113 Fed. 141, holding, however, that when a referee has heard an application for discharge, and found the facts adverse to the petitioner, and no exceptions are filed to his finding, the court will not, after refusing a discharge, grant a rehearing upon allegations controverting the facts found by the referee. See also *In re Holman*, (1899) 92 Fed. 512, and *In re Plimpton*, (1900) 103 Fed. 775, where it is laid down that, unless there is some defect or informality which must be corrected, the court will grant the discharge as of course.

**Amendment of discharge.**—A court of bankruptcy has power, after the term at

which a discharge has been granted, to amend the same; and also to permit the amendment of the application for discharge, when necessary, to set out correctly and more specifically the character of the debts scheduled and provable, and upon which the discharge operated. *In re Kaufman*, (E. D. N. Y. 1905) 136 Fed. 262, 14 Am. Bankr. Rep. 393.

**Costs.**—In matters of discharge and revocation costs are in the discretion of the court. Section 2 (18) provides that the court may "tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy." Here, as elsewhere, costs usually abide the event, and are given against the unsuccessful party. See *In re Idzall*, (1899) 96 Fed. 314; *In re Black*, (1899) 97 Fed. 493, and *Fellows v. Freudenthal*, (C. C. A. 1900) 102 Fed. 731, where discharges were granted with costs against opposing creditors; *In re Marshall Paper Co.*, (C. C. A. 1900) 102 Fed. 872, where discharge was granted with costs to successful appellant; *Smith v. Keegan*, (C. C. A. 1901) 111 Fed. 157, where an order of discharge was affirmed, with costs of appeal to the appellee; *In re Gaylord*, (C. C. A. 1901) 112 Fed. 668, where an order of discharge was affirmed, with costs; *In re Wilcox*, (C. C. A. 1900) 109 Fed. 628, where the order refusing a discharge, affirmed with costs, was reversed on rehearing, the cause being remanded to referee, without costs; *In re Todd*, (1901) 112 Fed. 315, where costs were given against objectors; and *In re Welch*, (1899) 100 Fed. 65, where a discharge was refused on the merits, with costs against the applicant.

The power to award costs against a creditor who files specifications of objection in opposition to a bankrupt's discharge is inherent in a District Court as a court of equity, and may be exercised in proper cases, although such power is not specifically conferred by the Bankruptcy Act. See *Bragassa v. St. Louis Cycle*, (C. C. A. 5th Cir. 1901) 107 Fed. 77, 5 Am. Bankr. Rep. 700; *In re Guilbert*, (E. D. Pa. 1907) 154 Fed. 676, 18 Am. Bankr. Rep. 830; *In re Wolpert*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 436; *In re Gaylord*, (N. D. N. Y. 1901) 5 Am. Bankr. Rep. 805.

Costs will not be awarded against an objecting creditor who fails to substantiate his specifications of objection in opposition to a bankrupt's discharge where the opposition to the discharge was not frivolous or vexatious but was made in good faith. *In re Miers*, (D. C. S. D. 1912) 193 Fed. 288, wherein the court said: "The further question arises here, Should the costs and disbursements above set forth be awarded the bankrupt

here? So far as I am able to ascertain from this record, there is no pretense that this creditor who objected to this bankrupt's discharge was not acting in good faith at the time his specifications of objection were filed, nor does it appear that said objections were either frivolous or vexatious. There is no finding in the record that the creditor's objections were intended merely to vex or delay the bankrupt. It is true he failed to prove the truth of his objections, but, in so far as I can see, there are none of the elements which go to make up a frivolous or vexatious attack upon this bankrupt by this creditor. I agree with the referee in *In re Wolpert, supra*, wherein he states that 'It would be unfair to hold that costs should be awarded against the creditor from whom they can be collected, when, had the decision been the other way, the creditor would have been unable to collect costs from the bankrupt.' The bankrupt in this case received his discharge. The creditor had a perfect right to in good faith oppose such discharge so long as his opposition was not frivolous or vexatious, and this court will not impose upon the creditor the taxation of these costs so long as he acts in good faith. I hold that the discretion is always in the court, and that it should be exercised under the rules above stated. The foregoing is, I think, in conformity with the practice that has heretofore obtained in this district."

**Issue of certificate.**—Where specifications have been filed in opposition to a discharge and the latter has been granted, the certificate shall not issue until ten days after the order granting the discharge has been entered, or until the expiration of any extension of time allowed to creditors to appeal from such order. *In re Hirsch*, (1899) 96 Fed. 468.

**Res judicata.**—Conclusiveness of order denying discharge and its effect as a bar to an application for discharge in a subsequent bankruptcy proceeding, see the several paragraphs at the end of note to section 14a.

**Collateral attack on order of discharge.**—

*Mere irregularities in the bankruptcy proceedings*, where the court has acquired jurisdiction, are not ground for collaterally attacking the discharge. *Custard v. Wigderson*, (1907) 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740; *Morrison v. Woolson*, (1854) 29 N. H. 510; *Price v. Bray*, (1847) 21 N. J. L. 13; *Sinclair v. Smyth*, (1804) 1 Brev. (S. C.) 402. The order of discharge cannot be questioned or attacked collaterally in any court, either state or federal, except for cause fatal to any other judgment of a federal court. *In re Shaffer*, (1900) 104 Fed. 982, citing *Commercial Bank v. Buckner*, (1857) 20 How. 108, 15 U. S. (L. ed.) 862.

**On ground of fraud.**—The Bankruptcy Act of 1841 declared that a discharge in

bankruptcy should not be effectual if the bankrupt was guilty of fraud, but provided no tribunal for ascertaining the question of fraud. Under that statute it was held that a discharge could be attacked collaterally in a state court on the specified ground of fraud. *In re Bel-lows*, 3 Story 428, 3 Fed. Cas. No. 1,278; *Mabry v. Herndon*, (1846) 8 Ala. 848; *Fox v. Paine*, (1846) 10 Ala. 523; *Gilbert v. Bradford*, (1849) 15 Ala. 769; *Rugely v. Robinson*, (1851) 19 Ala. 404; *Pearsall v. McCartney*, (1856) 23 Ala. 110; *Ashley v. Robinson*, (1856) 29 Ala. 112, 65 Am. Dec. 387; *Randall v. Sutton*, (1842) 2 Houst. (Del.) 510; *Bond v. Baldwin*, (1850) 9 Ga. 9; *Dupuy v. Harris*, (1846) 6 B. Mon. (Ky.) 534; *Selby v. Gibson*, (1841) 3 La. Ann. 209; *Drake v. Jones*, (1848) 3 La. Ann. 638; *Crooker v. Trevett*, (1848) 28 Me. 271; *Humphreys v. Swett*, (1850) 31 Me. 192; *Burnside v. Brigham*, (1844) 8 Metc. (Mass.) 75; *Beekman v. Wilson*, (1845) 9 Metc. (Mass.) 434; *Coates v. Blush*, (1848) 1 Cush. (Mass.) 564; *Swan v. Littlefield*, (1849) 4 Cush. (Mass.) 574; *Abbey v. Commercial Bank*, (1857) 34 Miss. 571, 69 Am. Dec. 401; *Edwards v. Gibbs*, (1860) 39 Miss. 166; *Shelton v. Pease*, (1847) 10 Mo. 473; *Brereton v. Hull*, (1845) 1 Denio (N. Y.) 75; *Chamberlin v. Griggs*, (1846) 3 Denio (N. Y.) 9; *Dresser v. Brooks*, (1848) 3 Barb. (N. Y.) 429; *Lyon v. Marshall*, (1851) 11 Barb. (N. Y.) 241; *Penniman v. Norton*, (1845) 1 Barb. Ch. (N. Y.) 246; *Alcott v. Avery*, (1846) 1 Barb. Ch. (N. Y.) 347; *Hubbell v. Cramp*, (1844) 11 Paige (N. Y.) 310; *Caryl v. Russell*, (1855) 13 N. Y. 194, *reversing* (1854) 18 Barb. 429; *Saunders v. Smallwood*, (1847) 30 N. C. 125; *State v. Bethune*, (1847) 30 N. C. 139; *Suydam v. Walker*, (1847), 16 Ohio 122; *Richards v. Nixon*, (1852) 20 Pa. St. 19; *Peterson v. Speer*, (1857) 29 Pa. St. 478; *Brown v. Rebb*, (1844) 1 Rich. L. (S. C.) 374; *Conner v. Gupton*, (1849) 10 Humph. (Tenn.) 320; *Gupton v. Conner*, (1850) 11 Humph. (Tenn.) 287; *Tichenor v. Allen*, (1855) 13 Grat. (Va.) 15. But where the creditor in the bankruptcy court unsuccessfully opposed the granting of the discharge, on the ground of fraudulent acts of the bankrupt in view of bankruptcy he could not afterward attack the discharge for such fraud. *Wales v. Lyon*, (1851) 2 Mich. 276; *Gove v. Lawrence*, (1853) 26 N. H. 484; *Downer v. Rowell*, (1853) 25 Vt. 336. It is probable that the experience of contesting the validity of discharges before the state courts taught Congress the wisdom of conferring such jurisdiction on the federal courts. *Corey v. Ripley*, (1869) 57 Me. 69, 2 Am. Rep. 19.

The Bankruptcy Act of 1867 contained a provision for the setting aside or annulment of a discharge by application to the Bankruptcy Court. This remedy was held

to be exclusive, and the discharge was not open to collateral attack. *Wiley v. Pavey*, (1878) 61 Ind. 457, 28 Am. Rep. 677; *Payne v. Able*, (1870) 7 Bush (Ky.) 344, 3 Am. Rep. 316; *Corey v. Ripley*, (1869) 57 Me. 69, 2 Am. Rep. 19; *Symonds v. Barnes*, (1879) 59 Me. 191, 8 Am. Rep. 418; *Way v. Howe*, (1871) 108 Mass. 502, 11 Am. Rep. 386; *Marshall v. Sumner*, (1867) 59 N. H. 218, 47 Am. Rep. 194. *Contra* *Beardsley v. Hall*, (1869) 36 Conn. 270, 4 Am. Rep. 74. The fact that the bankrupt in listing his creditors omitted the name of such a creditor, though intentionally, and that such creditor was prevented from receiving the written notice provided for by the statute, and, having no actual knowledge of the proceedings, was unable to be heard therein, was held by the weight of authority, to afford him no ground for impeaching collaterally the effect of the discharge as a bar to his claim. *Sawyer v. Rector*, (1888) 5 Dak. 110, 37 N. W. 741; *Symonds v. Barnes*, (1871) 59 Me. 191, 8 Am. Rep. 418; *Bailey v. Carruthers*, (1880) 71 Me. 172; *Black v. Blazo*, (1875) 117 Mass. 17; *Benedict v. Smith*, (1882) 48 Mich. 593, 12 N. W. 866; *Marshall v. Sumner*, (1879) 59 N. H. 218, 47 Am. Rep. 194; *Platt v. Parker*, (1875)

4 Hun (N. Y.) 135; *Rayl v. Lapham*, (1875) 27 Ohio St. 452; *Howland v. Carson*, (1876) 28 Ohio St. 625; *Brown v. Kroh*, (1877) 31 Ohio St. 492; *Pattison v. Wilbur*, (1873) 10 R. I. 448; *Brown v. Causey*, (1882) 56 Tex. 340.

Section 15 of the present Bankruptcy Act provides for the revocation of a discharge on the ground of fraud, upon application to the Bankruptcy Court, and it cannot be set aside or annulled on that ground by a state court. *Turner v. Hudson*, (1909) 105 Me. 476, 75 Atl. 45, 18 Ann. Cas. 600 and note. And where the schedule filed by the bankrupt is on its face in proper form, the effect of the discharge cannot be attacked in a state court on the ground that the bankrupt fraudulently stated a creditor's residence as unknown. *Lutz v. Kalmus*, (1909) 115 N. Y. S. 230.

*For want of jurisdiction.*—If the Bankruptcy Court does not acquire jurisdiction in the bankruptcy proceedings, the discharge is of no effect when pleaded in bar of an action in a state court, and for this purpose the question of jurisdiction may be inquired into by the state court. *Stiles v. Lay*, (1846) 9 Ala. 795. See also *Poillon v. Lawrence*, (1879) 77 N. Y. 207.

(1) [Commission of offense.] committed an offense punishable by imprisonment as herein provided; or [(1898) 30 Stat. L. 550.]

This clause (1) was re-enacted without change in 1903 (32 Stat. L. 797), and again in 1910 (36 Stat. L. 839).

**"Offense punishable by imprisonment."**

—Under section 14b (1) the bankrupt must be denied a discharge where it has been proven that he has committed an offense punishable by imprisonment as provided by the bankruptcy statute. The offenses to which the Act refers are those specified in the several subdivisions of section 29 and have been considered generally thereunder.

The fact that a bankrupt, after the filing of the petition against him, procured the buying up of a creditor's claim, and furnished the money therefor, with intent to defeat the Bankruptcy Act, is not ground for refusing his discharge, where it is not shown that the creditor knew that the bankrupt furnished the money, so as to render him guilty of an offense under section 29b (4), and the bankrupt a participant therein by virtue of section 1a (19). *In re Luftig*, (D. C. Mass. 1905) 162 Fed. 322, 15 Am. Bankr. Rep. 773.

*Conviction of offense.*—To deprive a bankrupt of a discharge, it is not necessary that he shall have been convicted of one of the offenses enumerated. It is enough if it be shown by clear and convincing evidence that he has been guilty of such an offense. *In re Shear*, (W. D. N. Y. 1913) 201 Fed. 460.

False reports to commercial agencies or creditors will not necessitate refusing a discharge. *In re Steed*, (1901) 107 Fed. 682, decided prior to the enactment in 1903 of clause (3) of section 14b.

That the debt was created by the fraud of the bankrupt is no ground for refusal to discharge under the statute. *In re Thomas*, (1899) 92 Fed. 912; *In re Black*, (1899) 97 Fed. 493; *In re Peacock*, (1900) 101 Fed. 560, also pointing out that section 17a (2) does not apply to a petition for a final discharge.

*Prior fraudulent but not criminal conduct.*—The Act limiting the grounds of objection, under section 14b (1), to the commission of a criminal offense within section 29b, prior conduct merely fraudulent as to creditors, and not made criminal, is not in question. *Fellows v. Freudenthal*, (C. C. A. 1900) 102 Fed. 731.

*Act done before statute passed.*—Even though it be conceded that a transfer of property by a bankrupt, if made after the passing of the present Act, would have been fraudulent, it certainly could not be maintained that by his conduct in 1896 he committed an offense under a law passed two years afterwards. "One cannot be convicted of a statutory crime for acts done before the statute creating

the crime was passed." *In re Webb*, (1899) 98 Fed. 404.

**Concealment under section 29b (1).—**In order to warrant the refusal of a discharge, under sections 14b (1) and 29b, there must be established: "First. That the bankrupt has concealed property from his trustee in bankruptcy. Second. That the property so concealed belongs to the bankrupt's estate. Third. That the concealment occurred while he was a bankrupt or after his discharge. Fourth. That the concealment was made knowingly and fraudulently." *In re Quackenbush*, (1900) 102 Fed. 282.

In *In re Miner*, (1902) 114 Fed. 998, a discharge in bankruptcy was not refused although it appeared that the bankrupt had made certain false statements, they relating to matters of slight consequence.

It is immaterial that a bankrupt falsely swears that he did not say to certain parties that he had an interest in a certain firm, which firm had never engaged in business, and possibly was never fully formed. *Bauman v. Feist*, (C. C. A. 1901) 107 Fed. 83.

A merchant was refused his discharge who, finding himself insolvent, retained the proceeds of cash sales and collections until his business was shortly afterwards closed up by an attachment levy, and he was thereafter adjudged bankrupt, the money so retained by him being a considerable amount, and being unaccounted for, and not in his hands at the time of the filing of the petition, and there being nothing to show what had become of it, and where evidence was produced of attempts to prefer certain creditors and to transfer his property to other creditors. *In re O'Gara*, (1899) 97 Fed. 932.

"Failure to schedule or surrender property to the trustee is not *per se* or *ipso facto* to 'knowingly and fraudulently' conceal it." *In re Hirsch*, (1899) 96 Fed. 471.

The omission by a voluntary bankrupt to schedule as an asset money borrowed just before the filing of his petition in bankruptcy, in order to pay his fees and attorney's costs, does not constitute a ground of opposition to a discharge. *Sellers v. Bell*, (C. C. A. 1899) 94 Fed. 809.

Omission to schedule a lease is not a concealment barring a discharge, there being no evidence that the premises were worth more than the rent, and the lease in question being only for a year. *In re Hirsch*, (1899) 97 Fed. 571.

Omission to schedule the products of the lands of his wife, such lands not being limited to her separate use, and being occupied by them and their children, and, although in the open possession of the bankrupt, claimed by him to belong to

her, does not constitute such a concealment of property as to preclude a discharge even though the property may be adjudged by the court to belong to the bankrupt. *In re Marsh*, (1901) 109 Fed. 602.

In *In re Holstein*, (1902) 114 Fed. 794, a discharge was refused on the ground of concealment of assets and the failure to keep proper books of account.

In *In re Otto*, (1902) 115 Fed. 860, the discharge of the bankrupt was refused on the ground that he had fraudulently concealed money deposited in a bank.

In *Fields v. Karter*, (C. C. A. 1902) 115 Fed. 950, the court under the circumstances and upon the proof was unable to discover any such fraudulent conduct on the part of the bankrupt as would justify the refusal of his discharge.

In *In re Schenck*, (1902) 116 Fed. 554, a discharge was refused on account of certain crooked transactions and fraudulent conveyances by the bankrupt which the creditors were not to be precluded from attacking.

The wife's right of discharge is not barred by the fraudulent concealment, without her knowledge or consent, of her assets, by her husband who manages her business; nor, as it would seem, by his failure to keep proper books of account of the business. *In re Meyers*, (1900) 105 Fed. 353; *In re Hyman*, (1899) 97 Fed. 195.

It is the duty of a bankrupt who, prior to her bankruptcy, had administered the estate of her deceased husband, to present an intelligent and true account of her affairs, to show clearly what goods her husband left, what she had added and commingled with the same, with the disposition made of each class of property, and thereupon to account for the property that should inure to the benefit of her creditors. Her discharge should be withheld until this is done. *In re Walther*, (1899) 95 Fed. 941.

In *In re Hoffmann*, (1900) 102 Fed. 979, a discharge was refused because the bankrupt had made a transfer to an employee which was a mere subterfuge and sham.

The premiums paid by the bankrupt not being unduly large, his wife is entitled to the surrender value of insurance policies, of which she is a beneficiary, upon his life; and he is not guilty of fraudulent concealment under the Act in failing to disclose the fund realized therefrom. *In re Dews*, (1899) 96 Fed. 181. But see also *In re Becker*, (1901) 106 Fed. 54, where discharge was refused.

It seems that a bankrupt cannot be guilty of the offense of concealment in respect of property to which, if discovered, a receiver appointed by a state court, prior to the bankruptcy proceedings, will have a valid title. *In re Lesser*, (C. C. A. 1902) 114 Fed. 83. But see *In re Lesser*, (1901) 108 Fed. 205.

The absolute conveyance of property long before the commencement of the bankruptcy proceedings, without a consideration, where there is no agreement for any beneficial interest therein or a reconveyance to the grantor, is not a concealment within the meaning of the Bankruptcy Law. *In re Dauchy*, (1903) 122 Fed. 688.

**Burden of proof or burden of evidence.**—The onus is on the bankrupt applying for a discharge to explain the disappearance of a very large amount of assets shown by the opposing creditors to have been in his possession a year before his bankruptcy, and which he had not entered on the schedules; and, if he does not satisfactorily explain the matter, concealment barring a discharge will be inferred. *In re Finkelstein*, (1900) 101 Fed. 418; *In re Meyers*, (1899) 96 Fed. 408. See also *In re Wood*, (1900) 98 Fed. 972.

The burden is upon the objecting creditor to establish by convincing proof a charge that the bankrupt, since the adjudication, has concealed from his trustee property belonging to his estate, and that the concealment was knowingly and fraudulently made. *In re Fitchard*, (1900) 103 Fed. 742; *In re Idzall*, (1899) 96 Fed. 314; *In re Corn*, (1901) 106 Fed. 143. See also *In re Salsbury*, (1902) 113 Fed. 833; *Smith v. Keegan*, (C. C. A. 1901) 111 Fed. 157; *In re Conn*, (1901) 108 Fed. 525; *In re Gaylord*, (C. C. A. 1901) 112 Fed. 668; *In re Steed*, (1901) 107 Fed. 682, holding that proof beyond a reasonable doubt is not required; *In re Howden*, (1901) 111 Fed. 723, where a mere preponderance of evidence is held not sufficient; and *In re Bryant*, (1900) 104 Fed. 789, where it was held that the proof must be somewhat cogent, although a fair preponderance will suffice. See further, as to the burden of proof being upon the creditor, *In re Phillips*, (1900) 98 Fed. 844; *In re Wetmore*, (1900) 99 Fed. 703; *In re Locks*, (1900) 104 Fed. 783; *In re Bryant*, (1900) 104 Fed. 789; *Matter of Herdic*, (1880) 1 Fed. 242; *In re O'Kell*, (1868) 2 Nat. Bankr. Reg. 105; *In re Nooman*, (1869) 3 Nat. Bankr. Reg. 267; *Matter of Hill*, (1868) 2 Ben. (U. S.) 136.

**Opponents of discharge must show existence of property.**—Where specifications were filed opposing a bankrupt's application for discharge on the ground of concealment of property, evidence must be produced showing the existence of property in the bankrupt personally or in him as a trustee when the petition in bankruptcy was filed. *In re Cornell*, (1899) 97 Fed. 29; *In re Lesser*, (C. C. A. 1902) 114 Fed. 83, reversing (1901) 108 Fed. 205; *In re Fitchard*, (1900) 103 Fed. 742, holding that where property of the bankrupt is actually in existence and is concealed, or "where the title is concealed

by a colorable conveyance, the discharge should be refused."

**There is a presumption of fraudulent concealment of assets** such as to bar the right to discharge, where, every possible credit being allowed the bankrupt, there appears by his schedule an unexplained shrinkage in his property of from \$10,000 to \$13,000 in nine months. *In re Cashman*, (1900) 103 Fed. 67, where there was also a fraudulent failure to keep books.

**Lack of action by creditors.**—The right of the creditors to specify an alleged fraudulent transaction in opposition to a discharge does not depend upon their having taken any legal proceedings to recover the property itself; but, when the case is doubtful or inconclusive, their lack of action is a factor of importance in reaching a decision. *In re Hirsch*, (1899) 96 Fed. 468.

**Amended schedule as evidence.**—An amended schedule giving a full statement of the property and offering to deliver to the trustee property omitted from the first schedule is evidence, but not conclusive evidence, tending to show the absence of unlawful intent in such omission. *In re Eaton*, (1901) 110 Fed. 731.

**Making false oath.**—A bankrupt who has made a false oath or account in, or in relation to, any bankruptcy proceedings will be denied a discharge; the making of such oath being an offense set out in section 29b (2). *In re Becker*, (N. D. N. Y. 1901) 106 Fed. 54, 5 Am. Bankr. Rep. 438; *In re Steed*, (E. D. N. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73; *In re Royal*, (E. D. N. C. 1901) 112 Fed. 135, 7 Am. Bankr. Rep. 106; *In re Gaylord*, (C. C. A. 2d Cir. 1901) 112 Fed. 668, 7 Am. Bankr. Rep. 1; *In re Semmel*, (M. D. Pa. 1902) 118 Fed. 487, 9 Am. Bankr. Rep. 351; *In re Gailey*, (C. C. A. 7th Cir. 1904) 127 Fed. 538, 11 Am. Bankr. Rep. 539; *In re Breiner*, (N. D. Ia. 1904) 129 Fed. 155, 11 Am. Bankr. Rep. 684; *In re Hennebry*, (N. D. Ia. 1913) 207 Fed. 882.

**False oath at creditors' meeting.**—The wilful and fraudulent making of a false oath as to a material fact, at a meeting of the creditors, precludes the debtor from obtaining his discharge, notwithstanding section 7a (9), which provides that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." *In re Gaylord*, (C. C. A. 1901) 112 Fed. 668; *In re Dow*, (1900) 105 Fed. 889. *Contra*, *In re Marx*, (1900) 102 Fed. 676.

**False oath in another proceeding.**—The making of a false oath by a bankrupt in a proceeding in bankruptcy, not against him, but against the corporation of which he was an officer and stockholder, is not ground for refusing his discharge. *In re*

Blalock, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266.

*Oath as to inability to pay fees.*—The fact that friends would have loaned the bankrupt the money for the filing fees does not render him guilty of making a false oath in swearing that he could not obtain such amount; nor does the Act require him to use, sell, or pledge his exempt property therefor. *Sellers v. Bell*, (C. C. A. 1899) 94 Fed. 817.

In *In re Roy*, (1899) 96 Fed. 400, it was held upon the proof that a bankrupt who when he signed his petition and schedule was possessed of money from an accident insurance policy, but who stated in the petition that he had no cash on hand and who also filed an affidavit of poverty, should be denied his discharge on the ground of a false oath.

*Offense must be knowingly and fraudulently committed.*—*In general.*—In order to render the commission of an offense, as provided by section 29, available as an objection to the granting of a discharge, under section 14b (1), it must be alleged and proved that such offense was committed knowingly and fraudulently. *Fellows v. Freudenthal*, (C. C. A. 7th Cir. 1900) 102 Fed. 731, 4 Am. Bankr. Rep. 490; *In re Bryant*, (E. D. Tenn. 1900) 104 Fed. 789, 5 Am. Bankr. Rep. 114; *In re Eaton*, (N. D. N. Y. 1901) 110 Fed. 731, 6 Am. Bankr. Rep. 531; *Smith v. Keegan*, (C. C. A. 1st Cir. 1901) 111 Fed. 157, 7 Am. Bankr. Rep. 4; *In re Salisbury*, (N. D. N. Y. 1902) 113 Fed. 833, 7 Am. Bankr. Rep. 771; *In re Beebe*, (E. D. Pa. 1902) 116 Fed. 48, 8 Am. Bankr. Rep. 597; *In re Blalock*, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266; *In re Patterson*, (N. D. N. Y. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371; *Kentucky Nat. Bank v. Carley*, (C. C. A. 3d Cir. 1904) 127 Fed. 686, 12 Am. Bankr. Rep. 119; *In re Levey*, (N. D. N. Y. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 312; *In re Hamilton*, (W. D. N. Y. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333; *In re Cohen*, (W. D. N. Y. 1907) 149 Fed. 908, 18 Am. Bankr. Rep. 84; *Troeder v. Lorsch*, (C. C. A. 1st Cir. 1906) 150 Fed. 710; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re McCrea*, (C. C. A. 2d Cir. 1908) 161 Fed. 246, 20 Am. Bankr. Rep. 412; *In re Luftig*, (D. C. Mass. 1905) 162 Fed. 322, 15 Am. Bankr. Rep. 773; *In re Mayer*, (S. D. N. Y. 1912) 195 Fed. 571; *In re Buchanan*, (1914) 219 Fed. 492, 135 C. C. A. 204.

In *In re Doyle*, (W. D. N. Y. 1912) 199 Fed. 247, the court said: "The special master found as established specification 2 which relates to a false oath made by the bankrupt, in that he testified that he did not in the year 1908 transfer any property to his wife. I think, however, that in view of the bankrupt's explanation before the completion

of his examination that he had testified inadvertently and mistakenly regarding such transfers of securities, and that it was not his intention to falsely testify, negatives any intention on his part to make a false oath in this proceeding."

A purpose "knowingly and fraudulently" to swear falsely will not be attributed to a bankrupt who testifies as to the time of the knowledge of insolvency, because he entertained the hope and expectation of being able to continue his business longer than it afterward appears the real facts justified. *In re Slingluff*, (1900) 105 Fed. 502.

Omissions and inaccuracies in the schedule, when not knowingly and fraudulently made, will not bar a discharge. *In re Slingluff*, (1900) 105 Fed. 502; *In re Crenshaw*, (1899) 95 Fed. 632; *In re Pierce*, (1900) 103 Fed. 64; *In re Eaton*, (1901) 110 Fed. 731, where discharges were granted; *In re Dewa*, (1900) 101 Fed. 549, where discharge was refused.

"The omission to include property in the schedule of assets filed by a bankrupt, when such omission was due to a mistake either of law or fact, is not an offense under subdivision b of section 29 of the Bankruptcy Act, and is not ground for withholding a discharge." *In re Morrow*, (1899) 97 Fed. 574.

It has been held that while certain interests in the estate of the bankrupt's father should have been included in the schedule of assets, it does not necessarily follow that the bankrupt knowingly and fraudulently made a false oath when he verified the schedule and did not mention them. *In re McCrea*, (C. C. A. 2d Cir. 1908) 161 Fed. 246, 20 Am. Bankr. Rep. 412.

Where a bankrupt firm did not anticipate any reversion in certain lumber which it transferred to a creditor, and one of the partners testified that the firm was morally certain that the creditor would not realize near the amount of the firm's debt, it was held that such partner's oath to the schedules, omitting such reversionary interest, was insufficient to bar his discharge. *In re Hamilton*, (W. D. N. Y. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333.

And where a proposed voluntary bankrupt, who had no property except such as was exempt, borrowed fifty dollars wherewith to pay the fees and costs of his attorney, just before filing his petition, it was held that he was not required to list the amount so borrowed in his schedule of assets, and his omission to do so was not a sufficient ground of opposition to his discharge. *Sellers v. Bell*, (C. C. A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 529.

Where a judgment against the bankrupt has been assigned and the schedule following the court records describes the debt as one due to the original judgment

creditor, the schedule is not thereby vitiated, although it appears that the bankrupt had constructive notice of the assignment. *Sellers v. Bell*, (C. C. A. 1899) 94 Fed. 801.

The fact that the bankrupt has a doubtful interest in land, and that, if existent, such land may be exempt as a homestead, is a factor in the determination of the question of fraudulent intent in the omission to schedule such interest. *In re Todd*, (1901) 112 Fed. 315.

Shares of stock should be scheduled, even though they are pledged for their full value; but the omission to schedule them, without fraudulent intent, the bankrupt believing that, being pledged, they were valueless, does not disentitle him to a discharge. *In re Hirsch*, (1899) 96 Fed. 468. See also *In re Bullwinkle*, (1901) 111 Fed. 364.

Omission to schedule household furniture conveyed by the bankrupt twenty-six years before to his wife is not a fraudulent concealment constituting a criminal offense and barring a discharge. *In re Freund*, (1899) 98 Fed. 81.

The omission by the bankrupt from his schedule of certain property which, two years prior to the filing of his petition in bankruptcy, he had transferred to a creditor, to whom it was pledged as security for a debt of equal or greater amount, is not an offense within section 14b (1). *In re Webb*, (1899) 98 Fed. 404.

The fact that the bankrupt, several years before his bankruptcy, gave his wife certain moneys, such gift being fraudulent as to only one creditor, who might have sued to set the gift aside, but who did not do so, and that the bankrupt did not refer to this in his schedule, is not ground for refusing a discharge. *In re House*, (1900) 103 Fed. 616. See also *In re Howell*, (1900) 105 Fed. 594; *In re Goodale*, (1901) 109 Fed. 783; *In re DeLeeuw*, (1899) 98 Fed. 408. But compare *In re Bemis*, (1900) 104 Fed. 672, where discharge was refused, there having been both a fraudulent conveyance to the wife and a fraudulent failure to keep books; *In re Welch*, (1899) 100 Fed. 65, where discharge was refused; *In re Skinner*, (1899) 97 Fed. 190.

An attorney-at-law who, at the time his petition was filed, had a number of outstanding written contracts, by which he was to share in the fruits of certain claims which he was prosecuting for his client, is not guilty of fraudulent concealment of assets or of knowingly making a false oath in not entering such claims upon his schedule. *In re McAdam*, (1899) 98 Fed. 409.

A bankrupt who enters in his schedules the value of his property as the same was fixed by state court appraisers several years before will not, although it may be subsequently much more valuable, be denied a discharge for having concealed

his assets or made a false oath. *In re McBryde*, (1899) 99 Fed. 686.

In *In re Buchanan*, (C. C. A. 2d Cir. 1914) 219 Fed. 492, the specification set forth as a ground of objection the making of a false oath and rendering a false account, in that the bankrupt failed to set forth in his sworn schedules the income during his life derived from certain trust funds. The court said as to this objection: "There is nothing as yet to show what the amount of the alleged surplus is, or indeed that there is any surplus. Moreover, as stated above, it is still an open question whether or not such surplus, if there be one, passed to the trustee. Presumably the bankrupt was advised by his counsel that it did not so pass, and a majority of the creditors in number and amount, also presumably advised by counsel, have reached the conclusion that the chance of an affirmative answer to the question was too uncertain to risk spending the funds of the estate in securing a judicial answer to it. Under these circumstances, it would be a very harsh construction of the Bankruptcy Act to refuse discharge because the bankrupt did not include this trust income in his schedules."

On the other hand, it has been held that the fact that the assets are so small that they probably would produce no dividend has nothing to do with the question of incorrect schedules and a false oath. *In re Lowenstein*, (1899) 106 Fed. 51.

The bankrupt having falsely stated in a schedule his inability to discover his business books of account, when, as the case was, these books were to his knowledge in the possession of a creditor and he had access to them, has made a false oath under section 29b, and has no right to a discharge. *In re Kamsler*, (1899) 97 Fed. 194.

The omission from his schedule of certain lands which he, some years before, had, with the object of defrauding his creditors, caused to be transferred to a certain party, to be held in secret trust for himself, is a fraudulent concealment on the part of the bankrupt, the verification of the schedules constituting a false oath. *In re Wilcox*, (C. C. A. 1900) 109 Fed. 628.

A fictitious mortgage will vitiate the schedule and require a refusal of the discharge. *In re Heyman*, (1900) 104 Fed. 677.

The bankrupt is not entitled to a discharge when he falsely states in his schedule that he has no cash on hand. *In re Royal*, (1901) 112 Fed. 135.

In *In re Stoddart*, (1902) 114 Fed. 486, the bankrupt was refused a discharge on account of his neglect to return a true schedule of his property. It was held that even if the bankrupt in such case acted upon the advice of his counsel he was not freed from the legal consequences

of making an untrue representation with respect to his property.

Fraudulent intent to conceal is shown by a bankrupt who, although, upon his own statement, he was advised not to omit property of value, did omit it, while scheduling various alleged properties of no value. *Osborne v. Perkins*, (C. C. A. 1901) 112 Fed. 127.

A voluntary bankrupt, who, just prior to a judgment against him, turned over all his property to his wife, the value of such property being greater than any possible claim of hers against him, is guilty of a false oath in failing to schedule his equitable interest in such property, and in certifying that he has no property; and he is not entitled to a discharge. *In re Gammon*, (1901) 109 Fed. 312.

**Omission of assets on advice of counsel.**

—The Act requires the fullest disclosure, the utmost good faith, and the surrender by the bankrupt of all his estate not exempt by the Act. The discharge will be denied, where assets, though of a small amount, are knowingly and designedly omitted by the bankrupt. The omission of an item by advice of counsel is no excuse for a violation of the Act, unless such advice was taken and given in good faith on a full statement of facts made in good faith, and the omission made in the belief that correct advice had been given. *In re Breitling*, (C. C. A. 1904) 133 Fed. 146.

**Subsequent correction ineffective.**

—Where a bankrupt knowingly omitted certain assets from his schedules, the fact that he listed the property and amended his schedules after his attempt to conceal such assets, and after the fact that he had made a false oath, had been discovered, is insufficient to relieve him of the consequences of his acts and entitle him to a discharge. *In re Breiner*, (N. D. Ia. 1904) 129 Fed. 155, 11 Am. Bankr. Rep. 684.

**Specifications of objection to the discharge of a bankrupt, where they attempt to charge the commission of a crime, must state the facts constituting such crime with substantially the same particularity and exactness required in an indictment, and the acts set out must be charged as having been knowingly and fraudulently done.** *In re Hirsch*, (W. D. Tenn. 1899) 96 Fed. 468; *In re Mudd*, (W. D. Mo. 1900) 105 Fed. 348; *In re Beebe*, (E. D. Pa. 1902) 116 Fed. 48, 8 Am. Bankr. Rep. 597; *In re Blalock*, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266; *In re Patterson*, (N. D. N. Y. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371; *In re Levey*, (N. D. N. Y. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 312; *In re Taplin*, (N. D. Ia. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360. And see division II. **Objections to Bankrupt's Discharge in the first note to section 14b.**

Allegations, substantially in the words of the statute, that the bankrupt has "concealed a part of his effects from the court," that he has, "in contemplation of becoming a bankrupt, made payments, transfers, and assignments of his property for the purpose of preferring a creditor having a claim against him, and to prevent the same coming into the hands of the trustee," are not sufficiently specific. *In re Hixon*, (1899) 93 Fed. 440.

"Specifications for defeating a discharge, especially where attempting to set forth some act that the bankruptcy statute has made criminal, should be pleaded with greater particularity than where it is sought to allege matter pertaining to civil actions, although the strict rules pertaining to statements in indictments may not apply. The averments should at least be so specific and of such a character that their sufficiency may be met and tested by demurrer or by exceptions, in analogy to such as are employed in equity practice." *In re White*, (D. C. Ore. 1915) 222 Fed. 688.

**Scienter must be charged.**—Specifications of objections to a discharge on the ground that the bankrupt has committed an offense as set forth in section 14b (1) must charge the scienter, and must state all essential facts necessary to establish the commission of the offense; not necessarily, however, with the technical certainty required in an indictment. *In re Kaiser*, (1899) 99 Fed. 689.

**Averment of belief.**—Specifications in opposition alleging merely that the creditor believes the bankrupt to have property which he is concealing and has not scheduled do not suffice, full opportunity being given to creditors by the Act to examine the bankrupt and discover the facts. *In re Thomas*, (1899) 92 Fed. 912.

**Alleging false oath.**—Where it is specified, as an objection to the discharge of a bankrupt, that he has committed the crime of perjury in his testimony before the referee, the objection must set out the testimony alleged to be false, together with the facts relied on to prove its falsity, so as to present a specific issue. *In re Goodale*, (N. D. N. Y. 1901) 109 Fed. 783, 6 Am. Bankr. Rep. 493; *Troeder v. Lorsch*, (C. C. A. 1st Cir. 1906) 150 Fed. 710, 17 Am. Bankr. Rep. 723.

An objection to the discharge of a bankrupt on the ground that he made a false oath must show wherein the bankrupt made a false oath, and that crucial fact cannot be disposed of speculatively by the assertion that he swore falsely on one occasion or another, and therefore is not sustained by a finding of a special master that it was clear, in his opinion, that in (1) verifying the answer and in (2) giving his testimony the bankrupt made a false oath "either in one or the other." *In re Mayer*, (S. D. N. Y. 1912) 195 Fed. 571.



A specification that the bankrupt, knowingly and fraudulently, made a false oath in relation to a proceeding in bankruptcy, is sufficient, where it is shown that the oath was made for the purpose of deceiving the trustee and concealing the assets of the bankrupt and preventing a discovery thereof. *In re White*, (D. C. Ore. 1915) 222 Fed. 688.

The objection to a discharge being that the bankrupt has committed the crime of perjury in his testimony before the referee, the testimony alleged to be false should be specifically pointed out, together with the facts which are relied upon to prove its falsity, so that the bankrupt may be informed of the accusation against him. *In re Goodale*, (1901) 109 Fed. 783.

In *In re Beebe*, (1902) 116 Fed. 48, specifications of objection to the discharge of a bankrupt were held to be fatally defective because they did not aver that the bankrupt "knowingly and fraudulently" made the false oath in question. Such an averment is not a matter of form but of substance.

*Allegations as to concealment.*—It is essential, under sections 14b (1) and 29b, that the concealment shall be alleged to have been "knowingly and fraudulently" made; an allegation that the bankrupt "with a fraudulent intent has failed to include," etc., is not sufficient, although mere formal objections may be waived by the bankrupt's counsel. *In re Adams*, (1900) 104 Fed. 72. See also *In re Pierce*, (1900) 103 Fed. 64.

*Specifications in the form of a petition*, not being objected to, may be treated as if in the ordinary technical form. *In re Howell*, (1900) 105 Fed. 594.

*Evidence.*—To justify the denial of a bankrupt's discharge on the ground that

he made a false oath to his schedules, the evidence must be of a sufficiently clear and convincing character in order to overcome the presumption of his honesty; but it is not required to be of the high degree necessary to sustain a conviction for perjury. *Remmers v. Merchants' Laclede Nat. Bank*, (C. C. A. 8th Cir. 1909) 173 Fed. 484, 23 Am. Bankr. Rep. 78; *In re Berner*, (S. D. Ohio) 4 Am. Bankr. Rep. 383. And see the division III. *Hearing and Proof*, in the first note to section 14b.

A prior adjudication that the bankrupt had made a false oath, on the certificate of the referee, and his summary punishment for contempt, are to be considered as showing *prima facie* that this specification was established. *In re Shear*, (W. D. N. Y. 1913) 201 Fed. 460.

*The burden is upon the creditors* to prove the crime charged by clear and positive proof. *In re Cohen*, (W. D. N. Y. 1907) 149 Fed. 908, 18 Am. Bankr. Rep. 84.

On the hearing of an objection to a bankrupt's discharge on the ground that he has committed an offense punishable by imprisonment, while the opposing creditor is not required to establish such offense beyond a reasonable doubt, the evidence must be sufficient to overcome the opposing presumptions as well as the opposing evidence. *Troeder v. Lorsch*, (C. C. A. 1st Cir. 1906) 150 Fed. 710, 17 Am. Bankr. Rep. 723.

To sustain the objection of a false oath as to property omitted from the schedules, there must be proof of ownership by the bankrupt and clear knowledge of such ownership on his part, either directly shown or necessarily implied. *Fellows v. Freudenthal*, (C. C. A. 1900) 102 Fed. 731.

(2) [Concealment of financial condition.] with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or [(Amended 1903, which excepted pending cases) 32 Stat. L. 797.]

This clause (2) was re-enacted without change in 1910 (36 Stat. L. 839). As originally enacted the clause read as follows: "(2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained." [30 Stat. L. 550.]

"In contemplation of bankruptcy," the phrase formerly used in this clause, as well as in earlier Bankruptcy Acts, was construed in *In re Carmichael*, (1899) 96 Fed. 594; *In re Morgan*, (1900) 101 Fed. 982; *Buckingham v. McLean*, (1851) 13 How. 151, 14 U. S. (L. ed.) 91; *Matter of Goldschmidt*, (1869) 3 Ben. (U. S.) 379; *Matter of Freeman*, (1870) 4 Ben. (U. S.) 245; *In re Craft*, (1868) 6 Blatchf. (U. S.) 177.

*Concealment of financial condition.*—A bankrupt who has destroyed, concealed, or failed to keep books of account or records, from which his financial condition may be ascertained, with the intent to conceal such financial condition, will not be granted a discharge in bankruptcy proceedings. *In re Feldstein*, (C. C. A. 2d Cir. 1902) 115 Fed. 259, 8 Am. Bankr. Rep. 160; *In re Conley*, (N. D. Ga. 1902) 120 Fed. 42, 9 Am. Bankr. Rep. 496; *In*

*re Patterson*, (N. D. N. Y. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371; *In re Studebaker*, (C. C. A. 2d Cir. 1904) 127 Fed. 951, 11 Am. Bankr. Rep. 384, *reversing* (S. D. N. Y. 1903) 124 Fed. 945, 10 Am. Bankr. Rep. 205; *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302; *In re Ginsburg*, (E. D. Pa. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; *In re Alvord*, (E. D. Conn. 1905) 135 Fed. 236, 14 Am. Bankr. Rep. 264; *In re Lewin*, (S. D. N. Y. 1907) 155 Fed. 501, 18 Am. Bankr. Rep. 72; *In re Nathanson*, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56; *In re Murray*, (D. C. Conn. 1908) 162 Fed. 983, 20 Am. Bankr. Rep. 700; *In re Lewis*, (E. D. N. Y. 1908) 163 Fed. 137, 20 Am. Bankr. Rep. 711; *In re Goldich*, (E. D. Pa. 1908) 164 Fed. 882, 21 Am. Bankr. Rep. 249; *In re Brod*, (N. D. Ga. 1909) 166 Fed. 1011, 21 Am. Bankr. Rep. 426; *In re Hanna*, (C. C. A. 2d Cir. 1909) 168 Fed. 238, 21 Am. Bankr. Rep. 843; *In re Pomerantz*, (E. D. Pa. 1909) 168 Fed. 444, 21 Am. Bankr. Rep. 857; *In re Schachter*, (S. D. N. Y. 1909) 170 Fed. 683, 22 Am. Bankr. Rep. 389; *In re Koelle*, (E. D. Pa. 1909) 171 Fed. 257, 22 Am. Bankr. Rep. 515; *In re Wiedmann*, (W. D. N. Y. 1911) 188 Fed. 684; *Matter of Brockman*, (W. D. Ky. 1908) 21 Am. Bankr. Rep. 251; *Baylor v. Rawlings*, (C. C. A. 8th Cir. 1912) 200 Fed. 131; *In re A. O. Brown & Co.*, (C. C. A. 2d Cir. 1913) 204 Fed. 63; *In re Weston*, (C. C. A. 2d Cir. 1913) 206 Fed. 281; *In re Janavitz*, (C. C. A. 3d Cir. 1915) 219 Fed. 876.

It must appear that the bankrupts, at or about the time of the petition of bankruptcy, knew or might have ascertained where the books were, and that they were therefore privy to the nonproduction of them, the burden of the proof falling upon the creditors. *In re Phillips*, (1900) 98 Fed. 844. See also *In re Ablowich*, (1900) 99 Fed. 81.

In *In re McBachron*, (1902) 116 Fed. 783, a discharge was refused for concealment of books and intentional failure to disclose certain transactions.

**Mutilation of books.**—The cutting out, without fraudulent intent, of leaves in an old set of books of a business, which set was afterwards used by a corporation having nothing to do with such business, the bankrupt being the bookkeeper of the corporation but having no interest therein, is not such a mutilation of books of account as will bar the right to a discharge. *Bauman v. Feist*, (C. C. A. 1901) 107 Fed. 83.

Prior to the amendment of 1903 it was held that when the greater part of the bookkeeping to which exception was taken was done before the passing of the Act, and is not proved to have been done in contemplation of bankruptcy, a discharge would not be refused, section 14b (2)

not applying. *In re Marx*, (1900) 102 Fed. 676. See also *In re Holman*, (1899) 92 Fed. 512; *In re Dewes*, (1899) 96 Fed. 181; *In re Shorer*, (1899) 96 Fed. 90; *In re Carmichael*, (1899) 96 Fed. 594; *In re Hirsch*, (1899) 96 Fed. 468, where it was held that the destruction or concealment, since the passage of the Act, of books of a business carried on before, would, if there were fraudulent intent, be a bar.

**Intention to conceal.**—In order that the destruction or concealment of books or records, or the failure to keep them, may constitute a valid objection to the granting of a discharge in bankruptcy, it is necessary that such destruction or concealment of books of accounts or records, or failure to keep them, be done with the intent to conceal the bankrupt's financial condition. *In re Brice*, (S. D. Ia. 1900) 102 Fed. 114, 4 Am. Bankr. Rep. 355; *In re Spear*, (D. C. Vt. 1900) 103 Fed. 779; *In re Schultz*, (S. D. N. Y. 1901) 109 Fed. 264, 6 Am. Bankr. Rep. 91; *In re Feldstein*, (C. C. A. 2d Cir. 1902) 115 Fed. 259, 8 Am. Bankr. Rep. 160; *In re Blalock*, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266; *In re Studebaker*, (C. C. A. 2d Cir. 1904) 127 Fed. 951, 11 Am. Bankr. Rep. 384, *reversing* (S. D. N. Y. 1903) 124 Fed. 945, 10 Am. Bankr. Rep. 205; *Van Ingen v. Schophofen*, (C. C. A. 8th Cir. 1904) 129 Fed. 352, 12 Am. Bankr. Rep. 24; *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302; *In re Allendorf*, (N. D. Ia. 1904) 129 Fed. 981, 12 Am. Bankr. Rep. 320; *In re Ginsburg*, (E. D. Pa. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; *In re Mackenzie*, (D. C. Conn. 1904) 132 Fed. 114, 13 Am. Bankr. Rep. 605; *In re Halsell*, (N. D. Tex. 1904) 132 Fed. 562, 13 Am. Bankr. Rep. 107; *In re Hamilton*, (W. D. N. Y. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333; *In re Prager*, (N. D. W. Va. 1905) 134 Fed. 1006, 13 Am. Bankr. Rep. 527; *In re Keefer*, (W. D. N. Y. 1905) 135 Fed. 885, 14 Am. Bankr. Rep. 290; *In re Garrison*, (C. C. A. 2d Cir. 1906) 149 Fed. 178, 17 Am. Bankr. Rep. 831; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re Burstein*, (D. C. Conn. 1908) 160 Fed. 765, 20 Am. Bankr. Rep. 399; *In re McCrea*, (C. C. A. 2d Cir. 1908) 161 Fed. 246, 20 Am. Bankr. Rep. 412; *In re Murray*, (D. C. Conn. 1908) 162 Fed. 983, 20 Am. Bankr. Rep. 700; *In re Haskell*, (S. D. N. Y. 1908) 164 Fed. 301, 20 Am. Bankr. Rep. 914; *In re Bradin*, (E. D. Pa. 1910) 179 Fed. 768; *In re Barthier*, (D. C. Mass. 1910) 188 Fed. 394; *In re Tanner*, (E. D. Wash. 1911) 192 Fed. 572; *In re Marcus*, (S. D. N. Y. 1911) 192 Fed. 743; *In re Sabsevit*, (S. D. N. Y. 1912) 197 Fed. 109. See also paragraphs under the next black-letter caption, *Failed to keep books of account*. *In re Idzall*, (S. D.

Ia. 1899) 2 Am. Bankr. Rep. 741; *In re Rauchenplat*, (D. C. Porto Rico 1903) 9 Am. Bankr. Rep. 764; *In re Brockman*, (W. D. Ky. 1908) 21 Am. Bankr. Rep. 251.

**"Failed to keep books of account."**—

A mere failure to keep books or records or the mere destruction of those kept is not sufficient to justify the court in refusing a discharge. There must be circumstances and conditions from which the inference ought to be drawn and necessarily should be drawn that such failure or destruction was "with intent to conceal his financial condition." *In re Hodge*, (N. D. N. Y. 1913) 205 Fed. 824. See also cases cited under the preceding black-letter caption in this note, "*Intention to conceal*," and the following cases: *In re Weston*, (C. C. A. 2d Cir. 1913) 206 Fed. 281; *In re Garrison*, (C. C. A. 2d Cir. 1906) 149 Fed. 178, 17 Am. Bankr. Rep. 831; *In re Halsell*, (N. D. Tex. 1904) 132 Fed. 562, 13 Am. Bankr. Rep. 107; *In re Idzall*, (1899) 96 Fed. 314; *In re Corn*, (1901) 106 Fed. 143; *In re Shertzer*, (1900) 99 Fed. 706; *In re Lafieche*, (1901) 109 Fed. 307; *In re Stark*, (1899) 96 Fed. 88; *In re Carmichael*, (1899) 96 Fed. 594. See also *Bragassa v. St. Louis Cycle*, (C. C. A. 1901) 107 Fed. 77. But compare *Ablowich v. Stursberg*, (C. C. A. 1901) 105 Fed. 751, where discharge was denied.

Thus it has been held that where a book entry was made for the purpose of deceiving the general creditors into a belief that an ordinary sale had been made to an unsecured creditor, whereas in fact the transaction was an unlawful preference, while such conduct is reprehensible, it is not sufficient to bar a discharge, where there was no intention to conceal the bankrupt's financial condition. *In re Hamilton*, (W. D. N. Y. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333.

Where the bankrupts made a general assignment two years before the Bankruptcy Act was passed, and did not thereafter engage in business, they will not be denied a discharge on the ground that they kept no books and concealed their property at the time of the assignment, where there is no proof that at the time of filing their petition they had any other property than that which they surrendered in their schedule. *In re Prager*, (1905) 134 Fed. 1006.

In *In re Brown*, (N. D. N. Y. 1912) 199 Fed. 356, the court said: "A mere failure to keep books is not enough to justify the refusal of a discharge. A person is presumed to intend the natural and known consequences of his voluntary acts, but it cannot be said that the natural and known consequences of a failure to keep books of account are to conceal the financial condition of the one omitting to keep books. The Bankruptcy Act of 1867 (Act March 2, 1867, ch. 176, 14 Stat. L. 517),

as does the English law, made the mere failure to keep books a ground for refusing a discharge, but the Bankruptcy Act of 1898 explicitly states that the omission must have been accompanied by the specific intent to conceal the true financial condition, and hence the burden of proving this intent is on the objecting creditors. So, when from certain acts or omissions two inferences may be drawn, the one pointing to a guilty or bad intent and the other perfectly consistent with honesty and absence of a bad purpose, it is the duty of the court to find in favor of honesty of purpose and intent."

Compare *McKibbin v. Haskell*, (C. C. A. 8th Cir. 1912) 198 Fed. 639, wherein it was held that every one is presumed, in the absence of countervailing proof, to intend the natural and inevitable consequences of his acts, and that where a merchant, who had conducted his business in a small town for many years, and had kept books of account of some kind, moved with a stock of merchandise, worth about \$2,000, and a debt of about the same amount, to a city, kept no books of account after his removal, but within four months bought more than \$8,000 worth of new merchandise, sold more than \$1,300 worth thereof in bulk at 25 per cent. less than cost, and more than \$462 worth thereof in bulk at 10 per cent. less than cost, and paid with the proceeds thereof relatives and friends, from whom he had borrowed more than \$1,700, and went into bankruptcy with a stock scheduled at \$2,415.13 and debts to the amount of more than \$8,000, the legal presumption that the bankrupt intended, by failing to keep books, the natural effect thereof, the concealment of his financial condition, was so strongly supported by these facts as to overcome the persuasive presumption of the contrary finding of the chancellor below, and his discharge must be denied.

In the case of *In re Weston*, (C. C. A. 2d Cir. 1913) 206 Fed. 281, it appeared that the bankrupt was a commission broker and had been in business since 1899. He had the usual blackboard telegraph operator and marker, but no other clerks. His customers gave verbal orders, which he transmitted by telegraph to a firm in Cincinnati to be executed, making a memorandum on a piece of paper which he put on a spindle, and afterwards made up from the memorandums a list of the day's transactions on a sheet of paper. These sheets he kept "until all trades were closed out," and they were thrown into the waste paper basket about once a month. He had a bank account and bank book, but kept most of his money in his safe, disbursing it as cash. His customers deposited a small margin on their orders, and actual deliveries were not contemplated. His profits were in the shape of a commission of one-fourth of one per cent, paid him by the firm to which he

transmitted his customers' orders. Transactions with this firm were settled every day; the daily sheet showing whether he owed it or it owed him, and how much. It was held that the special master was justified in finding that the facts showed an intent to conceal the bankrupt's financial condition.

In the case of *In re Hirshowitz*, (M. D. Pa. 1912) 194 Fed. 562, it appeared that the bankrupt within a month or two prior to the adjudication, established at least two branch stores or stations in neighboring towns, where he moved large quantities of goods and merchandise, and instructed his agents to sell the same at any price, even below cost, if necessary. He never kept any account of this merchandise or the proceeds thereof. That he might be able to check the sales, his agents were required to return to him slips indicating the amount of the sales and the goods sold. These slips, although they practically contained a correct record of the goods and the amount of sales, were destroyed by the bankrupt before his adjudication, so that the only available account of these transactions was thus wholly extirpated, and the bankrupt was unable to account for the proceeds received from these sales as well as for the proceeds of the store. The court said: "Even if these slips were destroyed with an honesty of purpose, the bankrupt could not have selected a more opportune moment for self-preservation, nor a more unfortunate moment for the interest of his creditors, because they were deprived of the last vestige of written evidence that might lead to the recovery of assets that rightfully belonged to them. It even precluded a proper examination of the bankrupt. It is conceded that the bankrupt is a good business man, and to within a short period prior to the filing of the petition was successful, yet he kept no books that would tend to explain the disposition of merchandise aggregating many thousands of dollars which he disposed of in some manner, within the last two or three months prior to his adjudication. The greater portion of this merchandise was purchased on credit within four or five months immediately preceding his adjudication and not paid for, and the bankrupt could not have been ignorant of the fact that he was hopelessly insolvent at the time he made these purchases. I cannot determine that the slips were destroyed without any ulterior or improper motive."

In *In re Greenberg*, (1902) 114 Fed. 773, a discharge was refused on the ground of concealment of property and failure to keep books of accounts or records from which the true condition of the bankrupt could be ascertained.

*Mere negligence immaterial.*—A refusal of a discharge to a bankrupt on the ground

that he failed to keep books is not warranted, unless there is evidence from which, at least, it can fairly be inferred that there was an actual intent to conceal his condition. Mere negligence in the keeping of books is not sufficient. *In re Haskell*, (S. D. N. Y. 1908) 164 Fed. 301, 20 Am. Bankr. Rep. 914.

*Inaccurate books.*—The Act does not refuse discharge because the books have been so kept as to make it difficult, if not impossible, to get an exact financial condition without further examination. The failure to keep sufficient books of account must have been with intent on the part of the bankrupt to conceal his financial condition. Such books may be inaccurate on account of misunderstanding, inadvertence, mistakes, and other reasons consistent with a desire that they should truthfully show the real conditions. *In re Marcus*, (C. C. A. 2d Cir. 1913) 203 Fed. 29.

*Effect of concealment immaterial.*—Any failure by a bankrupt to keep books "with intent to conceal his financial condition" defeats his right to a discharge, whatever its actual effect on creditors may have been. *In re Schlachter*, (S. D. N. Y. 1909) 170 Fed. 683, 22 Am. Bankr. Rep. 389.

Proof that the books are in fact false will of itself defeat a right to a discharge. It is not necessary to show that the creditors have actually been deceived. *In re Newbury*, (C. C. A. 2d Cir. 1913) 209 Fed. 195.

*Books intelligible to expert accountant.*—The fact that an expert of many years' standing, having possession of private memorandum books, was able, by questioning or investigation, to make a substantially true statement when "he had the key," is not sufficient to disprove the charge that the bankrupt, with fraudulent intent, failed to keep proper books of account. *In re Feldstein*, (1901) 108 Fed. 794.

*Books failing to show particulars.*—The fact that the books of the debtor, who, being in a hopelessly insolvent condition, has opened a new business, fail to show the sums due him on credit sales, the cash receipts from sales, the disposition made of cash received, his indebtedness for money borrowed, or his previous indebtedness, coupled with the fact that he is an able business man, disentitles him to a discharge. *In re Kenyon*, (1902) 112 Fed. 658.

*Failure to make inventory.*—In the case of *In re Marcus*, (C. C. A. 2d Cir. 1913) 203 Fed. 29, it appeared that when the bankrupt firm was organized one of the partners contributed a stock of goods which he brought over from his former business. The items of this stock, valued at cost, were all set down in the books, but these entries were made in pencil,

because there was some dispute between the partners as to what discount there should be made from the cost price. From the beginning a merchandise account was kept, and the evidence indicated that from the original pencil entries and the merchandise account it was possible at any time to prepare an inventory which would show with substantial accuracy what goods the firm had on hand. The court said: "We do not understand that the Bankrupt Act requires a new inventory to be taken every time there is some fluctuation in the actual selling value of the stock on hand, so that the revised estimates of value may be from time to time recorded on the face of the books. It seems to us that the books of this firm were so kept as to show what goods they had on hand, stated at their cost value, and that a person familiar with the particular trade could estimate with reasonable accuracy what discount there should be made from cost, in order to ascertain the financial condition."

*Where books are unnecessary.*—The bankrupt's omission to keep books of account cannot be made a ground of opposition to his discharge, when it appears that, since a time more than three years prior to the passage of the Bankruptcy Act, he has not been engaged in any business to which the keeping of books would be necessary or appropriate. *Sellers v. Bell*, (C. C. A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 529.

So when a bankrupt is merely an employee, and not engaged in any business of his own, his failure to keep books showing his financial condition does not indicate a fraudulent intent which justifies the refusal of his discharge. *In re McCrea*, (C. C. A. 2d Cir. 1908) 161 Fed. 246, 20 Am. Bankr. Rep. 412.

*Entry of loans made prior to enactment of Bankruptcy Law.*—The fact that loans made to a bankrupt and not entered by him in his regular account books were made before the Bankruptcy Act was passed does not excuse his failure to enter them as required by the Act. *In re Feldstein*, (C. C. A. 2d Cir. 1902) 115 Fed. 259, 8 Am. Bankr. Rep. 160.

*Intention presumed.*—*Prima facie* a man must be held to intend the natural and probable consequence of his acts; and where the inevitable consequence of an omission to keep books of account is the concealment of such financial condition, the intent to conceal must be presumed; though such presumption may be rebutted. *In re Pomerantz*, (E. D. Pa. 1909) 168 Fed. 444; *In re Koelle*, (E. D. Pa. 1909) 171 Fed. 257, 22 Am. Bankr. Rep. 515. To the same effect as the original note, see *In re Sims*, (N. D. Ga. 1914) 213 Fed. 992; *In re Linker*, (S. D. N. Y. 1914) 222 Fed. 173.

Thus, where a bankrupt, who was a man of business experience, failed to keep any books whatever from which his financial condition might be ascertained, it was held that it must be presumed that he intended to conceal such condition, and that he was not entitled to a discharge. *In re Alvord*, (D. C. Conn. 1905) 135 Fed. 236, 14 Am. Bankr. Rep. 264.

Such intention will be presumed if at least a year prior to his failure the bankrupt's condition was one of such hopeless insolvency that he must have known it. *In re Feldstein*, (C. C. A. 1902) 115 Fed. 259, where a discharge was refused.

Where one doing a large business fails to keep books or record from which his financial condition can be ascertained the law, in the absence of any reasonable explanation, will presume an intent to conceal. Thus, where the bankrupts were doing a business of considerable magnitude and the evidence showed that nothing was left by the bankrupts which enabled the trustee to ascertain the most necessary details of the business, except a few check books which gave a false statement of the condition of the bank account, an intent to conceal was presumed and a discharge refused. *In re Newbury*, (C. C. A. 2d Cir. 1913) 209 Fed. 195.

*Compare* with the above authorities *In re Hindin*, (S. D. Cal. 1914) 219 Fed. 605, wherein the court said: "The intent referred to in the statute is ordinarily an inferable one and not a presumptive one. It is closely analogous, indeed comparable, to the specific intent often met in criminal statutes, such as the intent to commit a felony, which must have been specifically in the mind of a party entering a building in order that the crime of burglary might be made out. Such specific intent is as substantially a part of the crime as the entering of the building itself, and in the absence of the proof of such specific intent the crime could not be made out. Of course it is obvious that the existence of such intent can hardly ever be proven by direct evidence, but it is none the less the fact that such existence can only be inferred or presumed from the proof of facts which clearly and almost irresistibly lead to such conclusion. Though the intent now under consideration is not the fraudulent intent which was required under the Bankruptcy Act previous to the amendment of 1903, yet even after that amendment, in my judgment, it is an intent sounding in fraud, because it would be of the essence of fraud for a debtor to destroy or conceal, or fail to keep, proper books of account, with the intent to conceal his financial condition. It would seem as if the purpose of the amendment was merely to relieve those objecting to the granting of a discharge from being required to prove that the intent with which a bankrupt

was concealing his true financial condition was a fraudulent one, that is, accompanied by, or in pursuance of, a design actually to defraud; now, it is sufficient if he has the intent to conceal his financial condition from his creditors, because it would be presumed that the existence of such intent was with the design of perpetrating a fraud."

*Need not be a fraudulent intent.*—The Act as it stands now has omitted the word "fraudulent" which was originally in this section so that it is no longer necessary to prove that the bankrupt's intent was fraudulent, or that his acts were done in contemplation of bankruptcy. It is enough to prevent his discharge if he has, with intent to conceal his financial condition, failed to keep books of account from which such condition might be ascertained. *In re Linker*, (S. D. N. Y. 1914) 222 Fed. 173. See to the same effect, *In re Newbury*, (C. C. A. 2d Cir. 1913) 209 Fed. 195; *In re Hanna*, (C. C. A. 2d Cir. 1909) 168 Fed. 238, 21 Am. Bankr. Rep. 843.

The Bankruptcy Act of 1867 provided that no discharge should be granted "if being a merchant or tradesman" the bankrupt had not, subsequently to the passage of the Act, "kept proper books of account." The qualification of fraudulent intent or contemplation of bankruptcy was not annexed to that particular provision as in the present Act when the latter was originally enacted, the qualification being omitted in the amendment of 1903. For cases decided under the provision in the former Act, see *Matter of Newman*, (1868) 3 Ben. (U. S.) 20; *Matter of Bellis*, (1870) 4 Ben. (U. S.) 53; *Matter of Jorey*, (1870) 2 Bond (U. S.) 336; *Re Keach*, (1869) 1 Lowell (U. S.) 335; *Re Hammond*, (1869) 1 Lowell (U. S.) 381; *In re Vernia*, (1880) 5 Fed. 723; *In re Williams*, (1882) 13 Fed. 30; *In re Frey*, (1881) 9 Fed. 376; *In re Smith*, (1883) 16 Fed. 465; *In re Brockway*, (1882) 12 Fed. 69; *In re Graves*, (1885) 24 Fed. 550; *In re Townsend*, (1880) 2 Fed. 559; *In re Hunt*, (1886) 26 Fed. 739; *Matter of Jewett*, (1880) 3 Fed. 503; *In re Mackay*, (1870) 4 Nat. Bankr. Reg. 66; *In re Gay*, (1868) Hask. 108, 2 Nat. Bankr. Reg. 358, 10 Fed. Cas. No. 5,279; *In re White*, (1868) 2 Nat. Bankr. Reg. 590, 29 Fed. Cas. No. 17,532; *In re Reed*, (1875) 12 Nat. Bankr. Reg. 390, 20 Fed. Cas. No. 11,639; *In re Solomon*, (1868) 2 Nat. Bankr. Reg. 285.

*Fraud of copartner or agent.*—If, in any case, fraud can be imputed to an innocent partner on account of the fraud of his copartner or other agent as respects the false or improper keeping of books of account, it can only be where the fraudulent entries or omissions have reference to partnership transactions, so as to fall

within the general scope of the partner's or agent's authority. Where one partner so keeps the firm's books of account, he having full charge of the same, as to conceal from his partner, as well as others, the withdrawal of money by himself for purposes entirely foreign to the firm's business, fraud cannot be imputed to the innocent partner, nor can he, on that ground, be deprived of his right to a discharge. *In re Schultz*, (1901) 109 Fed. 264.

But to entitle a member of a partnership to a discharge, notwithstanding the fact that the firm failed to keep proper books with the intent on the part of some member to conceal its financial condition, the burden rests on him to prove that he was innocent of participation therein. *In re Schachter*, (S. D. N. Y. 1909) 170 Fed. 683, 22 Am. Bankr. Rep. 389.

The word "records" may include canceled and paid checks and the stubs thereof. *In re Hodge*, (N. D. N. Y. 1913) 205 Fed. 824, wherein the court said: "If a 'stub book' is not a book of account in the strict sense, it is at least a 'record' which shows checks drawn, their date, amount, and to whom payable. It is a record from which the financial condition of one who keeps the bank account may, to some extent at least, be ascertained. Their intentional destruction, in the absence of regular books showing details, is the destruction of books and records from which the financial condition of the bankrupt might be ascertained. When no other books of account or records of financial transactions are kept, such a stub book with the paid checks become 'a record' and, so far as they go, the equivalent of a book of account. The checks show to whom the money was paid, when drawn, etc., and with proper indorsements become vouchers for the payment of money. Their destruction with intent to conceal financial condition will defeat discharge."

The specification of objections to the discharge of a bankrupt on the ground that he, with fraudulent intent to conceal his true financial condition, failed to keep books of account, is sufficient if made in the language of the Act. *In re Patterson*, (N. D. N. Y. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371; *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302; *In re Ginsburg*, (E. D. Pa. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; *In re Nathanson*, (E. D. N. Y. 1907) 155 Fed. 645, 19 Am. Bankr. Rep. 56; *In re Lewis*, (E. D. N. Y. 1908) 163 Fed. 137, 20 Am. Bankr. Rep. 711; *In re Brod*, (N. D. Ga. 1909) 166 Fed. 1011, 21 Am. Bankr. Rep. 426; *In re Pomerantz*, (E. D. Pa. 1909) 168 Fed. 444, 21 Am. Bankr. Rep. 857.

But see *In re Milgram*, (E. D. Pa. 1904) 129 Fed. 827, 12 Am. Bankr. Rep.

306, wherein it was held that a specification of objection in the statutory language was insufficient.

The purpose of a specification is to fairly apprise the bankrupt of such matters in bar of his discharge as will be insisted upon, in order that he may be able to meet them. Such matters are not to be specified with the exactness and formality required in indictments, but only in such substantial form as will fairly inform one of the charges made against him. But where, as in the case of books of account, the bankrupt in the very nature of things, and he alone, already knows what books he did or did not keep, and the creditor does not know, except as he infers their nonexistence, concealment, or destruction from the fact of their nondelivery to the trustee, it would seem that a specification following the language of the statute and covering non-keeping, concealment, or destruction sufficiently and fairly apprises the bankrupt of the matter insisted upon in that respect. *In re Magen Bros. Co.*, (C. C. A. 3d Cir. 1912) 192 Fed. 883.

In *re Mintzer*, (E. D. N. Y. 1912) 197 Fed. 647, where objections to a discharge on the ground of failure to keep books was alleged in the language of the statute, the court said: "The trustee would have been compelled to amend them or make them more specific if an objection had been taken before the case was called for trial. But after the witnesses had been called, and when it was apparent that the bankrupt would not be affected by surprise or prejudice by proceeding upon the specifications as they stood, the commissioner was correct in his ruling that he would deny the motion until he heard the testimony, and then see if the testimony supplied the deficiency. But, on the other hand, the commissioner was wrong in ultimately refusing to let the specifications be made to conform to the proof, if he intended to rely upon the proofs as supplying the deficiencies of the specifications. This error, however, makes no difference, for no one was affected thereby. The complete record comes up to the court, and an error of law, having no influence upon the proceeding, makes no action necessary, except that this court should correct the ruling, as a basis for its own action."

A specification that the bankrupt's

"books were so kept with intent to conceal his financial condition that there cannot be ascertained therefrom the true condition of his estate," the books being referred to and produced therewith, will not cover a failure to keep any books of account whatever for eighteen months prior to the bankruptcy. *In re Halsell*, (1904) 132 Fed. 562.

*Particularity of description not required.*—A specification of objection to the bankrupts' discharge, alleging that the bankrupts, with intent to conceal their financial condition, did destroy, through the agency of their regularly authorized bookkeeper, canceled checks drawn by the bankrupts, together with stubs of such checks, from which such condition might be ascertained, is not objectionable for the failure to more definitely describe the checks and stubs alleged to have been destroyed. *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302, holding also that the specification of objections to a discharge that the bankrupts "did, with intent to conceal their financial condition, fail to keep books of accounts or records from which such condition might be ascertained," is sufficient. The objecting creditor need not specify what books of account the bankrupts should have kept.

*Allegation of intent necessary.*—An objection to the discharge of a bankrupt because of his failure to keep proper books of account, which does not state that such failure was with intent to conceal his financial condition, is insufficient, but such a defect is amendable. *In re Bradin*, (E. D. Pa. 1910) 179 ed. 768.

*Sufficiency for amendment.*—A specification of objection, which charged that the bankrupt, while conducting a brokerage business in the city of Buffalo in the years 1906, 1907 and 1908, "failed and neglected to keep any books, with full and complete knowledge of the importance and necessity of books and records in the brokerage business, and with intent to defraud and deceive the undersigned and others," was held, although very inapt, to fairly indicate the statutory ground upon which it rested, so that the special master had power to allow an amendment making it conform to the words of the statute. *In re Weston*, (C. C. A. 2d Cir. 1913) 206 Fed. 281.

(3) [Obtained money or property upon false statement.] obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or [(Inserted 1903) 32 Stat. L. 797; (amended 1910) 36 Stat. L. 839; both acts excepting pending cases.]

This clause (3) was first enacted in 1903, and read as follows: "(3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit;" [32 Stat. L. 797.] It was amended in 1910 to read as in the text.

**False statement in writing—*In general.***—Where a bankrupt has obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person, he will not be entitled to a discharge. *In re Goodhile*, (N. D. Ia. 1904) 130 Fed. 782, 12 Am. Bankr. Rep. 380; *In re Harr*, (E. D. Mo. 1906) 143 Fed. 423; *In re Hardie*, (W. D. Tex. 1906) 143 Fed. 607; *In re Pincus*, (S. D. N. Y. 1906) 147 Fed. 621, 17 Am. Bankr. Rep. 331; *In re Carton*, (S. D. N. Y. 1906) 148 Fed. 63, 17 Am. Bankr. Rep. 343; *In re Shaffer*, (N. D. W. Va. 1909) 169 Fed. 724, 22 Am. Bankr. Rep. 147; *In re Darevski*, (E. D. Pa. 1909) 171 Fed. 288, 22 Am. Bankr. Rep. 571; *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414; *In re Russell*, (C. C. A. 2d Cir. 1910) 176 Fed. 253, 23 Am. Bankr. Rep. 850; *In re Augspurger*, (S. D. Ohio 1909) 181 Fed. 174; *Shaffer v. Koblebard Co.*, (C. C. A. 4th Cir. 1910) 183 Fed. 71; *In re Neyland*, (S. D. Miss. 1910) 184 Fed. 144; *In re Ellerbee*, (N. D. Ga. 1912) 198 Fed. 952; *In re Braverman*, (S. D. N. Y. 1912) 199 Fed. 863; *In re McLellan*, (N. D. N. Y. 1913) 204 Fed. 482; *In re Wylly*, (E. D. N. Y. 1913) 210 Fed. 954; *Joseph v. Powell*, (C. C. A. 2d Cir. 1914) 213 Fed. 627; *In re Petersen*, (D. C. Minn. 1903) 10 Am. Bankr. Rep. 355; *Katzenstein v. Reid*, (1905) 16 Am. Bankr. Rep. 740, 41 Tex. Civ. App. 106, 91 S. W. 360; *Matter of Brener*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 644; *Mooney v. Davis*, (1889) 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; *Wilmot v. Lyon*, (1897) 7 Ohio Cir. Dec. 394, 11 Ohio Cir. Ct. 238.

**The statute applies to any false statement** which has to do with the extension of credit affecting the bankruptcy proceeding. *In re Berg*, (D. C. Mass. 1910) 183 Fed. 885.

"Under section 14b (3) of the Bankruptcy Act, it is immaterial whether the credit obtained is large or small, or whether it is given to a new customer or one who had already dealt with the creditor. It includes further credit as well as new or larger credit." *In re Arenson*, (D. C. N. J. 1912) 195 Fed. 609.

The discharge will be refused on objections of creditors where the bankrupt in a written statement to such creditors, a mercantile house, as a basis of credit, listed property valued at \$1,600 which she knowingly never owned, and obtained goods on the credit thereof, which form the basis of their claim. *In re Goodhile*, (1904) 130 Fed. 782.

**Creditor estopped with respect to false statement.**—An agreement by a creditor, based on a valuable consideration, which

recites that one of its purposes is to cancel and surrender certain written statements, made by a debtor on which he obtained credit, the truthfulness of which was in controversy between the parties, and by which the creditor expressly cancels and "agrees to surrender up the same, and concedes that any inaccuracies therein . . . were inadvertent and without wrongful intent," debars the creditor from using such statements as a ground of objection to the debtor's discharge in bankruptcy. *In re Russell*, (C. C. A. 2d Cir. 1910) 176 Fed. 253, 23 Am. Bankr. Rep. 850.

**Extension of credit on faith of statement.**—Where it appears that credit was not extended because of an alleged false statement, but that the creditor refused to act thereon, and required the giving of security, before the credit was extended, the statement is not sufficient to bar the bankrupt's discharge. *In re Kaplan*, (E. D. Pa. 1905) 141 Fed. 463, 15 Am. Bankr. Rep. 534. To the same effect see *In re Mintzer*, (E. D. N. Y. 1912) 197 Fed. 647.

A discharge will not be refused under this section where it is apparent that the objecting creditor did not rely on the statement complained of. *In re Sabsevitz*, (S. D. N. Y. 1912) 197 Fed. 109.

Where a bankrupt presented a written, but unsigned, statement of his condition to a bank which advanced him money against warehouse receipts, it was held that the advance was upon credit although the bank took the warehouse receipts as collateral. The Act does not say that the credit must be obtained solely on the written statement. It is sufficient that the advance would not have been made without the statement. *In re Savarese*, (C. C. A. 2d Cir. 1913) 209 Fed. 830.

"It is further contended that such credit was not due to the making of such statement. But the evidence does not warrant any such conclusion. . . . Under the circumstances it does not lie in the mouth of bankrupt to say that the whole thing was looked upon as a mere matter of form, and that he should not be held accountable for his statement that he owed nothing to friends and relatives for loans, when he knew the fact to be otherwise." *In re Arenson*, (D. C. N. J. 1912) 195 Fed. 609.

**Time of obtaining property on false statements.**—In the case of *In re Simon*, (W. D. N. Y. 1913) 201 Fed. 1004, the court said: "The contention by the bankrupt that to bar his discharge the merchandise obtained by means of the false statements must have been delivered within four months of bankruptcy is untenable. The Bankruptcy Act, as amended in 1910, does not prescribe any limitation of time within which the



credit must have been given or the merchandise delivered, and the authorities cited by counsel for the bankrupt do not uphold him in his contention."

This provision does not contain any limitation of time relative to the commencement of proceedings in bankruptcy within which property must have been obtained on materially false statements to operate as a bar to a discharge. It is not material that the property was obtained prior to the amendment or more than four months prior to filing the petition. *In re Scott*, (1904) 126 Fed. 981.

Where the bankrupt before the amendment obtained property on credit from a firm upon a materially false statement in writing made to such firm for the purpose of obtaining such property on credit, and six months later, and after the amendment, was adjudged a bankrupt in voluntary proceedings, it was held that a discharge would be refused on specifications in opposition, filed by the firm which had proved its claim setting up such obtaining of property. *In re Scott*, (1904) 126 Fed. 981.

A written financial statement made by a business firm to a commercial agency, reciting that it is made as a basis for credit with the associate members of such agency, and which is communicated to members, who extend credit on the faith of it, is equivalent to one made directly to them, and, if materially false, will debar the debtor firm from the right to a discharge. *In re Pincus*, (S. D. N. Y. 1906) 147 Fed. 621, 17 Am. Bankr. Rep. 331; *In re Schwartz & Co.*, (S. D. N. Y. 1912) 201 Fed. 166; *In re Simon*, (W. D. N. Y. 1913) 201 Fed. 1004. See also *In re Augspurger*, (S. D. Ohio 1909) 181 Fed. 174; *In re Kretz*, (W. D. Wash. 1914) 212 Fed. 784, in which the court held that a false statement made to a mercantile agency will not prevent a discharge in the absence of a finding in evidence that the mercantile agency was, in some sense, the representative of a creditor from whom money or property was obtained, or that the representations made to it were in some way communicated to the creditor and relied upon by the creditor.

Where a bankrupt made a false statement to a commercial agency in order to prevent "unfavorable reports" being given out concerning him, and later attempted to correct such statement by another, which was also false, and he referred to the same and was granted credit on the basis thereof, it was held that he was guilty of wilfully making a false statement for credit, which was sufficient to deprive him of the right of discharge. *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414.

But it has been held that it is not a valid objection to a bankrupt's discharge

that he made a false statement concerning his financial condition to a commercial agency, on the faith of which credit was extended, where it does not appear that such statement was made directly to such creditors, and the bankrupt does not make the commercial agency his representative for the purposes of communicating such statement. *In re Foster*, (S. D. Miss. 1910) 186 Fed. 254.

And see *In re Russell*, (C. C. A. 2d Cir. 1910) 176 Fed. 253, 23 Am. Bankr. 850, wherein it was said that if the bankrupt gave to the reporter of a commercial agency a report to be filed with said agency for the purpose of securing a rating, and not for the purpose of obtaining property on credit, such statement was not within the language of section 14b (3) as it read prior to the amendment of 1910. But if the circumstances were such that the bankrupt knew that a certain proposed creditor was making inquiries at the agency concerning him, then the giving of such false statement to the reporter was equivalent to authorizing the commercial agency to repeat such statement to the proposed creditor; and, although the latter never saw the original statement, the copy which was sent to it by the commercial agency would be as effective to bind the bankrupt as if he had signed and delivered it personally. In that event, however, the "materially false statement in writing" would be the one which was delivered to the proposed creditor, and upon which it relied.

*In Novick v. E. P. Reed & Co.*, (C. C. A. 3d Cir. 1911) 192 Fed. 20, it was held that the bankrupt's representations to a commercial agency did not, under the facts of the case, come within the language of section 14b (3) prior to its amendment in 1910.

**Annual financial statement to bank.**—A false statement contained in an annual financial statement made by a firm to banks from which it borrowed money has been held to prevent a discharge in bankruptcy. *In re Waite*, (D. C. Md. 1915) 223 Fed. 853.

**Statement as continuing representation.**—A financial statement made by a bankrupt for credit, to a commercial agency, is a continuing representation for a reasonable time that the facts stated therein are true. *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414.

But in *In re O'Callaghan*, (D. C. Mass. 1912) 199 Fed. 662, the court said: "I must hesitate to hold that section 14b (3) applies, without limit of time, to any obtaining of credit, however long before the bankruptcy, and irrespective of intervening transactions with the creditor."

Where a false statement as to assets and liabilities is made in writing, and it

is stated that the statement is binding for "each purchase now or hereafter made, unless charged by written authority from the undersigned," and it appears that the transactions between the parties are in the nature of a running account, the false statement will bar a discharge of the bankrupt although the particular property obtained at the time the statement was made was paid for before the adjudication in bankruptcy. *Ragan, Malone & Co. v. Cotton*, (C. C. A. 5th Cir. 1912) 200 Fed. 546.

But the omission by a bankrupt to state an item of indebtedness, in a statement made at the request of a wholesale house to which he had previously sent an order for goods, cannot be considered as rendering it a materially false statement, made for the purpose of obtaining other goods which were not ordered until eight months thereafter—the goods ordered at the time having been paid for in the meantime, so as to defeat the right to a discharge. *In re Allendorf*, (N. D. Ia. 1904) 129 Fed. 981, 12 Am. Bankr. Rep. 320.

"Property."—An indemnity bond is not "property" within the meaning of the section. *In re Tanner*, (E. D. Wash. 1911) 192 Fed. 572, wherein the court said: "The term 'property' in its most comprehensive sense includes everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal, choses in action as well as in possession; in fact, everything which has an exchangeable value, or which goes to make up one's wealth or estate. The term, however, is not always used in this comprehensive sense in constitutional and statutory provisions, and it is manifest that it was not so used here. By the insertion of the words 'money or' before the word 'property' in the amendment of 1910, Congress manifestly doubted whether the term 'property' as used in the amendment of 1903 was comprehensive enough to include money; and, if it did not include money, most assuredly it did not include a contract or obligation such as this. In *Firestone v. Harvey*, (C. C. A. 6th Cir. 1909) 174 Fed. 574, Mr. Justice Lurton said: 'This ground for denying a discharge was evidently leveled particularly at the practice of making false statements of one's financial condition by a buyer or borrower for the purpose of obtaining from the person to whom such false statement is made, in writing, the articles or money desired on credit.' There must, therefore, be the obtaining of property by purchase or otherwise by means of the false statement, and the relation of debtor and creditor must exist between the parties obtaining the property and the person from whom it is obtained, after the property is so obtained. In my opinion, therefore, the indemnity

bond in question is not property within the meaning of the statute, and, if it is, it was not obtained 'on credit' because the relation of debtor and creditor did not exist after the bond was obtained any more than before."

*Borrowing money* was held to be obtaining "property" on credit within the meaning of section 14b (3) prior to its amendment in 1910. *In re Gilpin*, (E. D. Pa. 1908) 160 Fed. 171, 20 Am. Bankr. Rep. 374, *disapproving In re Pfaffinger*, (W. D. Ky. 1907) 154 Fed. 528, 18 Am. Bankr. Rep. 807.

*False statement to surety*.—The applicability of this section to money obtained from a third party through false statements made to a surety was considered but not decided in *In re Dunfee*, (N. D. N. Y. 1913) 206 Fed. 745.

*Meaning of "made by him."*—*In re Bleyer*, (S. D. N. Y. 1913) 210 Fed. 391, the court said: "It is contended on behalf of the bankrupt that the objecting creditor alleges corporate acts to bar the bankrupt's individual discharge; in other words, that the money obtained by the bankrupt as president of the corporation on notes of the corporation indorsed by him, did not constitute money obtained by him within the meaning of the act, and that a materially false statement in writing as to the financial condition of a corporation in which the bankrupt is interested, and by means of which statement the bankrupt obtains money or property on credit, is not a statement made 'by him' within the meaning of the act. For the purposes of this decision, it is admitted that the bankrupt was to benefit financially by his representations as to the condition of a corporation in which he was interested. The question then comes down to this: In order to bar the discharge must the materially false statement in writing, made for his own benefit, be so made by the bankrupt only in respect of his own property, and must it be made by him in his capacity as an individual as distinguished from his capacity as an officer of a corporation? The precise question here to be determined has not been passed upon by the courts, although *In re Dresser & Co.*, (D. C.) 144 Fed. 318, is of some service in reaching a conclusion. It seems to me that the act is broad enough to comprehend a case in which the facts are as in the case at bar. Concededly the statement was in writing and materially false, and money on credit was obtained as the direct result of the statement, and that money was obtained by the bankrupt for his own benefit. The materially false statement in writing was 'made by him' for all substantial purposes, and the fact that it was made because he was president of the corporation, and that he signed with that designation or in that capacity, does not relieve him from the

responsibility which he undertook when he signed this statement in order to procure money on credit for his own benefit. The distinction between the bankrupt individual and the bankrupt as president of this corporation is, on the particular facts here conceded, too illusory to justify the close construction urged by the learned counsel for the bankrupt. Such a construction might well open the way to fraudulent transactions; and where it may be argued that the phraseology itself, if literally taken, may be susceptible of one or two meanings, that construction should be adopted which the more likely meets the intent of the act as an instrument in the conduct of business by honest methods."

**A false statement made by the bankrupt's agent** has the same effect as if made by the bankrupt himself, provided it was made while the agent was acting within the scope of his employment. *In re Reed*, (W. D. Okla. 1911) 191 Fed. 920.

**False statement made by partner.**—A materially false statement in writing made by a partner in the ordinary course of business of the partnership in buying merchandise for the purpose of obtaining goods on credit, and by means of which they were so obtained by the firm, is not ground for refusing a discharge in bankruptcy to another partner who did not participate in the wrongful act and had no knowledge of it. *Hardie v. Swafford Bros. Dry Goods Co.*, (C. C. A. 5th Cir. 1908) 165 Fed. 588, 21 Am. Bankr. Rep. 457, *reversing* (W. D. Tex. 1906) 16 Am. Bankr. Rep. 313; *Ragan, Malone & Co. v. Cotton*, (C. C. A. 5th Cir. 1912) 200 Fed. 546.

The bar to a discharge by reason of a false statement in writing is confined to such person or persons as actually made such statement with the intention to deceive, and to the partnership entity of which such person is a member. *Frank v. Michigan Paper Co.*, (C. C. A. 4th Cir. 1910) 179 Fed. 776.

**Intent—Guilty knowledge essential.**—It is clear that the plain language of section 14b (3) requires that the written statement made by the bankrupt, for the purpose of obtaining credit, etc., should be knowingly and intentionally untrue, in order to constitute a bar to the discharge of the bankrupt. In other words, "false statement" denotes a guilty *scienter* on the part of the bankrupt. *In re Taplin*, (N. D. Ia. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360; *In re Dresser*, (S. D. N. Y. 1905) 144 Fed. 318, 13 Am. Bankr. Rep. 637; *In re Collins*, (E. D. Ark. 1907) 157 Fed. 120, 19 Am. Bankr. Rep. 688; *Hardie v. Swafford Bros. Dry Goods Co.*, (C. C. A. 5th Cir. 1908) 165 Fed. 588, 21 Am. Bankr. Rep. 457; *Gilpin v. Merchants' Nat. Bank*, (3d Cir. 1908) 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A.

(N. S.) 1023; *Firestone v. Harvey*, (C. C. A. 6th Cir. 1909) 174 Fed. 574, 23 Am. Bankr. Rep. 468; *Klein v. Powell*, (C. C. A. 3d Cir. 1909) 174 Fed. 640, 23 Am. Bankr. Rep. 494; *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414; *W. S. Peck Co. v. Lowenbein*, (C. C. A. 4th Cir. 1910) 178 Fed. 178; *Frank v. Michigan Paper Co.*, (C. C. A. 4th Cir. 1910) 179 Fed. 776, 24 Am. Bankr. Rep. 261; *In re Cotton*, (S. D. Ga. 1910) 183 Fed. 181; *In re Mintzer*, (E. D. N. Y. 1912) 197 Fed. 647; *In re Arenson*, (D. C. N. J. 1912) 195 Fed. 609; *Franklin v. Manning Dry Goods Co.*, 217 Fed. 929, 133 C. C. A. 601.

The word "false," as used in section 14b (3), means more than merely erroneous or untrue, being used in its primary legal sense as importing an intention to deceive; and such a statement, in order to constitute a bar to a discharge, must have been knowingly and intentionally untrue. *Gilpin v. Merchants' Nat. Bank*, (C. C. A. 3d Cir. 1908) 165 Fed. 607, 21 Am. Bankr. Rep. 429; *Franklin v. Manning Dry Goods Co.*, (1914) 217 Fed. 929, 133 C. C. A. 601; *Frank v. Michigan Paper Co.*, (C. C. A. 4th Cir. 1910) 179 Fed. 776, 24 Am. Bankr. Rep. 261.

The false statement in writing which is enough to deny a discharge implies a statement knowingly false, or made recklessly, without an honest belief in its truth, and with a purpose to mislead or deceive, and thereby obtain from the person to whom it is made property upon credit. *Gilpin v. Merchants' Nat. Bank*, (3d Cir. 1908) 165 Fed. 607, 611, 91 C. C. A. 445, 449, 20 L. R. A. (N. S.) 1023; *Firestone v. Harvey*, (C. C. A. 6th Cir. 1909) 174 Fed. 574, 23 Am. Bankr. Rep. 468.

In *In re Collins*, (E. D. Ark. 1907) 157 Fed. 120, it was held that a discharge can only be refused where the bankrupt has been guilty of such acts as would sustain a civil action for fraud or deceit, and where the statements were either knowingly false or fraudulent, or made so recklessly as to warrant a finding that the bankrupt acted fraudulently.

In order to be "false" so as to bar a discharge, the representations made by a bankrupt to obtain credit must have been wilfully or intentionally misleading. *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414.

**Statement made by mistake.**—A statement of assets and liabilities, made by a merchant from his books and believed by him to be correct, will not warrant a denial of his discharge in bankruptcy, although it was in fact materially erroneous by reason of the failure of his bookkeeper, through illness, to enter on the books certain liabilities which existed

at the time the statement was made, and which were in consequence omitted therefrom. *In re Collins*, (E. D. Ark. 1907) 157 Fed. 120, 19 Am. Bankr. Rep. 688, holding that all presumptions are in favor of honesty, and if the actions of a party are such that the presumption of honesty is as strong as that of wrong, the law requires that the theory of honesty, rather than that of guilt, be adopted.

But see *In re Shaffer*, (N. D. W. Va. 1909) 169 Fed. 724, 22 Am. Bankr. Rep. 147, holding that where a creditor relied on a bankrupt's statement, which was materially false in fact, in selling him goods on credit, the bankrupt was not entitled to a discharge, though the mistake was made in good faith and was not intentional.

**Who may object.**—The right to oppose a discharge on the ground that the bankrupt has obtained property on credit from any person upon a materially false statement in writing, made to such person for the purpose of obtaining such property on credit, is not limited to the creditor defrauded, but may be properly pleaded by any creditor of the bankrupt. *In re Harr*, (E. D. Mo. 1906) 143 Fed. 421, 16 Am. Bankr. Rep. 213; *In re Carton*, (S. D. N. Y. 1906) 148 Fed. 63, 17 Am. Bankr. Rep. 343; *In re Shaffer*, (N. D. W. Va. 1909) 169 Fed. 724, 22 Am. Bankr. Rep. 147.

The objections may be interposed by any party in interest. *In re Miller*, (N. D. Ia. 1912) 192 Fed. 730; *In re Kretz*, (W. D. Wash. 1914) 212 Fed. 784, in which the court held that creditors, who are parties in interest, are entitled to object, under the statute, to a discharge if a false statement was made to "any person," and that it was not necessary that such false statement should have been made to one of the objecting creditors. See also as to parties who may object the introductory paragraph of section 14b, preceding clause (1), and the note thereto.

**Specification of objections.**—The objections must not only set out the false representations, but the name of the person alleged to have been defrauded must be given. *In re Levey*, (N. D. N. Y. 1904) 133 Fed. 572, 13 Am. Bankr. Rep. 312. See also *E. H. Godshalk Co. v. Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580, 12 Am. Bankr. Rep. 302.

**Evidence—burden of proof.**—While the burden of proof is upon the objecting creditor to establish the cause which he claims bars a discharge, yet, when such creditor shows that a material statement was known to be untrue when it was made, the burden of proof shifts to the bankrupt to show that it was not made with intent to deceive. *In re Arenson*, (D. C. N. J. 1912) 195 Fed. 609.

(4) [Concealment, etc., of assets.] at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or [(Inserted 1903, which excepted pending cases) 32 Stat. L. 798.]

This clause was re-enacted without change in 1910 (36 Stat. L. 839).

**Concealment, etc., of assets—In general.**—The bankrupt is not entitled to a discharge, under section 14b (4) if at any time subsequent to the first day of the four months immediately preceding the filing of the petition in bankruptcy he has transferred, removed, destroyed, or concealed, or permitted the removal, destruction, or concealment of, any of his property, with the intent to hinder, delay, or defraud his creditors. *In re Ferguson*, (S. D. N. Y. 1899) 95 Fed. 429, 2 Am. Bankr. Rep. 586; *In re Dews*, (D. C. R. I. 1899) 96 Fed. 181, 3 Am. Bankr. Rep. 691; *In re Skinner*, (N. D. Ia. 1899) 97 Fed. 190, 3 Am. Bankr. Rep. 163; *In re O'Gara*, (D. C. Ore. 1899) 97 Fed. 932, 3 Am. Bankr. Rep. 349; *In re Welch*, (S. D. Ohio 1899) 100 Fed. 65, 3 Am. Bankr. Rep. 93; *In re Finkelstein*, (S. D. N. Y. 1900) 101 Fed. 418, 3 Am. Bankr. Rep. 800; *In re Quackenbush*, (N. D. N. Y. 1900) 102 Fed. 282, 4 Am.

Bankr. Rep. 274; *In re Hoffmann*, (S. D. N. Y. 1900) 102 Fed. 979, 4 Am. Bankr. Rep. 331; *In re Bemis*, (N. D. N. Y. 1900) 104 Fed. 672, 5 Am. Bankr. Rep. 36; *In re Heyman*, (S. D. N. Y. 1900) 104 Fed. 677, 4 Am. Bankr. Rep. 735; *In re Becker*, (N. D. N. Y. 1901) 106 Fed. 54, 5 Am. Bankr. Rep. 438; *Bragassa v. St. Louis Cycle*, (C. C. A. 5th Cir. 1901) 107 Fed. 77, 5 Am. Bankr. Rep. 700; *In re Wilcox*, (C. C. A. 2d Cir. 1900) 109 Fed. 628, 6 Am. Bankr. Rep. 362; *In re Covington*, (E. D. N. C. 1901) 110 Fed. 143, 6 Am. Bankr. Rep. 373; *In re Bullwinkle*, (S. D. N. Y. 1901) 111 Fed. 364, 6 Am. Bankr. Rep. 756; *Osborne v. Perkins*, (C. C. A. 1st Cir. 1901) 112 Fed. 127, 7 Am. Bankr. Rep. 250; *In re Royal*, (E. D. N. C. 1901) 112 Fed. 135, 7 Am. Bankr. Rep. 106; *In re Stoddart*, (D. C. Wash. 1902) 114 Fed. 486, 7 Am. Bankr. Rep. 762; *In re Greenberg*, (D. C. Conn. 1902) 114 Fed. 773, 8 Am. Bankr.

Rep. 94; *In re Holstein*, (D. C. Conn. 1902) 114 Fed. 794, 8 Am. Bankr. Rep. 147; *In re Otto*, (D. C. N. J. 1902) 115 Fed. 860, 8 Am. Bankr. Rep. 305; *Fields v. Karter*, (C. C. A. 5th Cir. 1902) 115 Fed. 950, 8 Am. Bankr. Rep. 351; *In re Schenck*, (D. C. Wash. 1902) 116 Fed. 554, 8 Am. Bankr. Rep. 727; *Hudson v. Mercantile Nat. Bank*, (8th Cir. 1902) 119 Fed. 346, 56 C. C. A. 250, 9 Am. Bankr. Rep. 432; *In re Leslie*, (N. D. N. Y. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561; *In re Fleishman*, (N. D. Ill. 1902) 120 Fed. 960, 9 Am. Bankr. Rep. 557; *In re Dauchy*, (N. D. N. Y. 1903) 122 Fed. 688, 10 Am. Bankr. Rep. 527; *In re Gailey*, (C. C. A. 7th Cir. 1904) 127 Fed. 538, 11 Am. Bankr. Rep. 539; *In re Breiner*, (N. D. Ia. 1904) 129 Fed. 155, 11 Am. Bankr. Rep. 684; *In re Gift*, (M. D. Pa. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244; *In re Breitling*, (C. C. A. 7th Cir. 1904) 133 Fed. 146, 13 Am. Bankr. Rep. 126; *Barton v. Texas Produce Co.*, (C. C. A. 8th Cir. 1905) 136 Fed. 355, 14 Am. Bankr. Rep. 502; *In re Young*, (E. D. N. C. 1905) 140 Fed. 728, 15 Am. Bankr. Rep. 477; *U. S. v. Cohn*, (S. D. N. Y. 1906) 142 Fed. 983, 15 Am. Bankr. Rep. 359; *Vehon v. Ullman*, (C. C. A. 7th Cir. 1906) 147 Fed. 694, 17 Am. Bankr. Rep. 435; *In re Jacobs*, (D. C. Ore. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470; *In re McKane*, (E. D. N. Y. 1907) 152 Fed. 733, 19 Am. Bankr. Rep. 103; *In re Olansky*, (E. D. N. Y. 1908) 163 Fed. 428, 20 Am. Bankr. Rep. 780; *Seigel v. Cartel*, (C. C. A. 8th Cir. 1908) 164 Fed. 691, 21 Am. Bankr. Rep. 140; *In re Goodman*, (E. D. Pa. 1909) 171 Fed. 287, 22 Am. Bankr. Rep. 570; *In re Nelson*, (S. D. N. Y. 1909) 179 Fed. 320; *In re McCann*, (E. D. Pa. 1910) 179 Fed. 575; *In re Borg*, (D. C. Minn. 1910) 184 Fed. 640; *Pirvitz v. Pithan*, (C. C. A. 8th Cir. 1912) 194 Fed. 403; *In re Hirshowitz*, (M. D. Pa. 1912) 194 Fed. 562; *In re Bouck*, (S. D. N. Y. 1912) 199 Fed. 453; *In re Diamond*, (E. D. Wis. 1913) 204 Fed. 137; *In re Schickerling*, (C. C. A. 2d Cir. 1913) 204 Fed. 592; *In re Felts*, (N. D. Ia. 1909) 205 Fed. 983; *In re Cohen*, (C. C. A. 2d Cir. 1913) 206 Fed. 457; *In re Silverman*, (N. D. N. Y. 1913) 206 Fed. 960; *In re McNamara*, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 566; *In re Berner*, (S. D. Ohio) 4 Am. Bankr. Rep. 383; *In re Steindler*, (S. D. N. Y. 1900) 5 Am. Bankr. Rep. 63; *In re Gross*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 271; *Ablowich v. Stursburgh*, (C. C. A. 2d Cir. 1901) 5 Am. Bankr. Rep. 403, affirming *In re Ablowich*, (S. D. N. Y. 1900) 99 Fed. 81, 3 Am. Bankr. Rep. 586; *In re Cabus*, (S. D. N. Y. 1901) 6 Am. Bankr. Rep. 156.

Under this section it is possible that a discharge may be denied, yet that which was conveyed in fraud cannot be recovered. This because section 67e only

pronounces such conveyances "null and void" when not made to "purchasers in good faith and for a present fair consideration." *Lewis v. Julius*, (S. D. N. Y. 1913) 212 Fed. 225.

*The purpose of section 14b (4) is to prevent dishonest and unscrupulous debtors from imposing upon the public in general, and their creditors in particular; and in order to be entitled to a discharge it is essential that a bankrupt should come into court with clean hands, and show that his conduct has been that of an honest, upright man. In re James*, (C. C. A. 4th Cir. 1910) 181 Fed. 476.

*Necessity of transfer being within four months period.*—The statute requires that a fraudulent transfer, in order to prevent a discharge, must be made within four months. *In re Brumbaugh*, (D. C. Pa. 1904) 128 Fed. 971, 12 Am. Bankr. Rep. 204; *Stephenson v. Bird*, (1910) 168 Ala. 363, 53 So. 92, Ann. Cas. 1912B 249; *In re Wakefield*, (N. D. N. Y. 1913) 207 Fed. 180; *In re Hennebry*, (N. D. Ia. 1913) 207 Fed. 882. See also *In re Dauchy*, (C. C. A. 2d Cir. 1904) 130 Fed. 532, 11 Am. Bankr. Rep. 511.

*Continuing concealment.*—The word "concealed" is sufficiently elastic in its meaning to include a continuous concealment; and a bankrupt who concealed property from his creditors while insolvent before the four months period, and kept the same concealed until within the four months, and until it was discovered by another, is not entitled to a discharge. *In re James*, (E. D. N. C. 1910) 175 Fed. 894, 23 Am. Bankr. Rep. 703, affirmed (C. C. A. 4th Cir. 1910) 181 Fed. 476; *In re White*, (D. C. Ore. 1915) 222 Fed. 688. See also *In re Jacobs*, (D. C. Ore. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470.

*Property conveyed in fraud of creditors prior to four months period.*—The failure of a bankrupt to include in his petition and schedules real estate which he caused to be conveyed to another some years before for the purpose of defrauding his then creditors, and which is still held by the grantee on a secret trust for the bankrupt, is a fraudulent concealment of property from his trustee. *In re Wilcox*, (C. C. A. 2d Cir. 1900) 109 Fed. 628, 6 Am. Bankr. Rep. 362. See also *In re Olansky*, (E. D. N. Y. 1908) 163 Fed. 428, 20 Am. Bankr. Rep. 780.

*What constitutes fraudulent transfer.*—Where the bankrupts sold their assets to a corporation made up of their relatives and gave the purchase price to their attorney to distribute, upon condition that each creditor should compromise his debt on getting his dividend, and if he refused he was to be excluded and his share go to the bankrupt's attorney, it constitutes such a fraudulent transfer as will debar the bankrupt from the right to a discharge. *In re Julius*, (S. D. N. Y.

1913) 209 Fed. 371, wherein the court said: "Nor does it in the least matter that the bankrupts might be in any case entitled to a discharge in bankruptcy. Certainly it is one thing to get a discharge after one has submitted oneself to the Bankruptcy Court, and another to get it out of hand upon such statement and examination as one may accord *sua sponte*. No doubt an extortionate creditor has it in his power to abuse an honest bankrupt by insisting upon his getting his release from the Bankruptcy Court. That is a penalty for an unworthy bar, but a court cannot permit the creditors to be coerced into accepting the bankrupt's statement of his resources, even when the statement eventually turns out to have been correct. The transfer was therefore in fraud of the creditors' rights, in that it compelled them to surrender their debts upon pain of getting nothing at all. It deprived them of their rights as much as though the whole of the proceeds had not been distributed."

**Adjudication as to fraudulent transfer.**—The final determination in a bankruptcy proceeding in which the bankrupt is a party that a certain transfer by him was a fraud upon the rights of his creditors will prevent a discharge. *In re Miller*, (1905) 135 Fed. 591.

The judgment of a state court, in a suit brought by a bankrupt's trustee, refusing to set aside a transfer of property made by the bankrupt, as fraudulent, concludes creditors, who cannot, therefore, set up the same ground to defeat the bankrupt's discharge. *In re Tiffany*, (S. D. N. Y. 1906) 147 Fed. 314, 13 Am. Bankr. Rep. 310.

**What constitutes concealment, removal, or destruction of property—Transfer to bankrupt's wife.**—Where a debtor, four months prior to filing his petition in bankruptcy, transfers real and personal property to his wife, without consideration, and with intent to defraud his creditors, and then states in his schedule that he has no property of any kind, he is guilty of knowingly and fraudulently concealing from his trustee property belonging to his estate in bankruptcy, and is not entitled to be discharged. *In re Skinner*, (N. D. Ia. 1899) 97 Fed. 190, 3 Am. Bankr. Rep. 163. To the same effect, see *In re Graves*, (M. D. Pa. 1911) 189 Fed. 847; *In re Hirshowitz*, (M. D. Pa. 1912) 194 Fed. 562.

So, also, where the bankrupt has an interest in real estate which stands in his wife's name, he should include such interest in his schedules; and his failure to do so is ground for refusing his discharge. *In re Borg*, (D. C. Minn. 1910) 184 Fed. 640.

Where it appeared that the bankrupt, shortly before bankruptcy, and in anticipation of the levy of an execution on a

judgment, obtained from his brokers \$2,000 in the form of cash which was kept in the brokers' strong box for a few days, later deposited in the name of the brokers' cashier, and still later returned into an account in the name of the bankrupt's wife and was not scheduled as part of the bankrupt's assets, it was held that there was such concealment of assets as would warrant refusing a discharge. *In re De Mauriac*, (E. D. N. Y. 1913) 206 Fed. 358.

But the fact that a bankrupt did not schedule or turn over to his trustee the produce of lands which he claimed were owned by his wife, where there was no concealment of the property, and the claim was openly made, does not constitute a knowing and fraudulent concealment of property which will defeat his right to a discharge, although the property may have been, as matter of law, a part of his estate. *In re Marsh*, (D. C. Vt. 1901) 109 Fed. 602.

So, also, it has been held that the fact that a bankrupt transferred property to his wife before the passage of the Bankruptcy Law, and that he failed to schedule such property, constitutes no ground for refusing him a discharge, when it does not appear that the wife holds the property in secret trust for his benefit. *In re Goodale*, (N. D. N. Y. 1901) 109 Fed. 783, 6 Am. Bankr. Rep. 493.

Where it appeared that within four months prior to bankruptcy the bankrupt paid \$4,500 to his wife who thereafter gave \$1,250 of the sum to the bankrupt to go to Europe and see friends there, with a view to obtaining further capital to put into his business, and the special master found that the payment to the wife was borrowed money due him, it was held that although the payment might have been preferential, it did not constitute a transfer or concealment with intent to hinder, delay, or defraud creditors so as to prevent the bankrupt's discharge. *In re Marcus*, (C. C. A. 2d Cir. 1913) 203 Fed. 29, wherein the court said: "What she might do with the money after she received it in payment of the debt to her was of course her own affair."

**Transfer to bankrupt's children.**—Where, on an application by a bankrupt for a discharge, it appears that he considered a large portion of his legal liabilities to be unjust, that in view of bankruptcy he contemplated transferring considerable property directly to his daughter, but was deterred from doing so by being warned that such proceeding would probably get him into trouble, and that he then, by a series of questionable trades, so manipulated his property that his children were benefited to the extent of several thousand dollars, at the expense of his estate, it was held that his

discharge should be denied. *In re Schenck*, (D. C. Wash. 1902) 116 Fed. 554, 8 Am. Bankr. Rep. 727.

*Property conveyed to relative.*—If a bankrupt, while insolvent, conveys property to a near relative without consideration, and afterwards fails to disclose the existence of such property in his schedules, he is *prima facie* guilty of concealing assets from his trustee, although the conveyance may have been made more than four months before the petition was filed. But if his innocence is made to appear, the conveyance, and the subsequent omission of the property from the schedules, will interpose no obstacle to the bankrupt's discharge. *In re McCann*, (E. D. Pa. 1910) 179 Fed. 575.

*Transfer to corporation owned by bankrupt.*—In *In re Perger*, (E. D. N. Y. 1912) 200 Fed. 325, a bankrupt was refused a discharge because he concealed property by transferring it to a corporation which did not exist except as merely a form of business activity by the bankrupt himself.

*Property held in trust for bankrupt.*—The intentional omission by a bankrupt to schedule or bring to the attention of his trustee an interest in real estate which a short time prior to his bankruptcy he conveyed in trust, the income to be paid to another during life, and the property then to be held for his own benefit, constitutes ground for refusing him a discharge. *In re Stoddart*, (D. C. Wash. 1902) 114 Fed. 486, 7 Am. Bankr. Rep. 762.

So, also, where a bankrupt's mother bequeathed one-half the residue of her estate to the bankrupt's wife, in trust, to pay the interest and income to the bankrupt free from the claims of the creditors, and to pay from time to time to the bankrupt so much of the principal as the trustee should deem proper, in such manner as to free it from the claims of creditors, it was held that, before he could secure a discharge, the bankrupt must assign his interest in the income to his trustee in bankruptcy, though his right to the principal being conditioned on the option of the trustee, need not be so assigned. *In re Fleishman*, (N. D. Ill. 1902) 120 Fed. 960, 9 Am. Bankr. Rep. 557.

The failure to schedule a resulting trust amounts to a fraudulent concealment of property from the trustee, and justifies the court in refusing a discharge. *Hudson v. Mercantile Nat. Bank*, (8th Cir. 1902) 119 Fed. 346, 56 C. C. A. 250, 9 Am. Bankr. Rep. 432.

*Concealment of valueless property.*—But it is no ground for refusing a bankrupt's application for discharge that he omitted to list in his schedule a leasehold interest in realty, under a yearly lease, where there is no evidence that the use of the property was worth more than

the rent. *In re Hirsch*, (S. D. N. Y. 1899) 97 Fed. 571, 3 Am. Bankr. Rep. 344.

And where a bankrupt failed to schedule a piece of real estate of small and uncertain value it was held not to justify the withholding of his discharge. *In re Neely*, (S. D. N. Y. 1904) 134 Fed. 667, 12 Am. Bankr. Rep. 407. See also *In re Todd*, (D. C. Vt. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 770.

*Transfer by chattel mortgage.*—Where, on the hearing of objections to the discharge of a bankrupt partners on the ground of having fraudulently concealed property from their trustee, it was shown that they aided and assisted in a transfer of the partnership property to a creditor by means of the foreclosure of a chattel mortgage previously given by them more than four months prior to the bankruptcy, the question whether such acts were sufficient in law to bar their discharge depends on the validity of the chattel mortgage and its foreclosure, and a discharge will not be granted until that question has been determined in a proper proceeding therefor. *In re Olansky*, (E. D. N. Y. 1908) 163 Fed. 428, 20 Am. Bankr. Rep. 780.

A payment of lawful debts is not a concealment of assets. *In re Mintzer*, (E. D. N. Y. 1912) 197 Fed. 647, wherein the facts showed that after the bankrupt's credit was stopped by the association controlling those dealers from whom he was purchasing goods, and apparently after he must have known that without credit he could do nothing except wind up his business or proceed on a cash basis, he continued to pay debts. The court said: "Many of these payments may have been preferential, but the creation of a preference without intent to defraud other creditors is not a ground for denying discharge, and a payment of lawful debts is not a concealment of assets."

*Property which does not pass to trustee.*—The fact that a bankrupt does not schedule or turn over to his trustee property which forms no part of the estate in bankruptcy, cannot be said to be a concealment of such property, and does not bar the bankrupt's right to a discharge. *In re Quackenbush*, (N. D. N. Y. 1900) 102 Fed. 282, 4 Am. Bankr. Rep. 295; *In re Mudd*, (W. D. Mo. 1900) 105 Fed. 348, 5 Am. Bankr. Rep. 244; *In re Goodale*, (N. D. N. Y. 1901) 109 Fed. 783, 6 Am. Bankr. Rep. 493; *In re Todd*, (D. C. Vt. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 770; *In re Semmel*, (M. D. Pa. 1902) 118 Fed. 487, 9 Am. Bankr. Rep. 351; *In re Parish*, (N. D. Ia. 1903) 122 Fed. 553, 10 Am. Bankr. Rep. 548; *In re Le Claire*, (N. D. Ia. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733; *In re Dauchy*, (C. C. A. 2d Cir. 1904) 130 Fed. 532, 11 Am. Bankr. Rep. 511; *In re Doherty*, (D. C. Conn. 1904)

135 Fed. 432, 13 Am. Bankr. Rep. 549. And see generally the annotation under the several subdivisions of section 70a, as to what property passes to the trustee in bankruptcy.

*Property acquired after the adjudication* does not vest in the trustee, and the fact that such property has not been scheduled does not constitute a defense to a petition for discharge. *In re Parish*, (N. D. Ia. 1903) 122 Fed. 553, 10 Am. Bankr. Rep. 548.

*Exempt property*.—A bankrupt who, in the schedules accompanying his petition, declares that he has no property, but later on, as a part of his state exemption, claims certain property, is not on this account to be charged with concealing such property so as to lose his right to a discharge. *In re Semmel*, (M. D. Pa. 1902) 118 Fed. 487, 9 Am. Bankr. Rep. 351. See also *In re Todd*, (D. C. Vt. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 770. And see annotation under section 6, *supra*.

A claim for alimony, made by a married woman in a suit for divorce, which was pending at the time of her bankruptcy, is not property which she could have disposed of, such as would vest in her trustee; and her failure to schedule the same is not a concealment of property which defeats her right to a discharge; nor is her refusal to convey to the trustee property subsequently awarded to her as alimony, and which she claims under the statute as her homestead, sufficient ground for refusing a discharge. *In re Le Claire*, (N. D. Ia. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733.

*Intent*.—In order to be effective as an objection to the bankrupt's discharge, it is essential that the transfer, removal, destruction, or concealment of property inhibited by section 14b (4) be made with the intention to hinder, delay, or defraud the bankrupt's creditors. *In re Cornell*, (S. D. N. Y. 1899) 97 Fed. 29, 3 Am. Bankr. Rep. 172; *In re Hirsch*, (S. D. N. Y. 1899) 97 Fed. 571, 3 Am. Bankr. Rep. 344; *In re Morrow*, (N. D. Cal. 1899) 97 Fed. 574, 3 Am. Bankr. Rep. 263; *In re Freund*, (S. D. N. Y. 1899) 98 Fed. 81, 3 Am. Bankr. Rep. 418; *In re Wood*, (S. D. N. Y. 1900) 98 Fed. 972, 3 Am. Bankr. Rep. 572; *In re McBryde*, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729; *In re Wetmore*, (E. D. Pa. 1900) 99 Fed. 703, 3 Am. Bankr. Rep. 700; *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64; *In re Locks*, (W. D. N. Y. 1900) 104 Fed. 783, 5 Am. Bankr. Rep. 136; *In re Bryant*, (E. D. Tenn. 1900) 104 Fed. 789, 5 Am. Bankr. Rep. 114; *In re Conn*, (D. C. Ore. 1901) 108 Fed. 525, 6 Am. Bankr. Rep. 217; *In re Marsh*, (D. C. Vt. 1901) 109 Fed. 602; *In re Eaton*, (N. D. N. Y. 1901) 110 Fed. 731, 6 Am. Bankr. Rep. 531; *In re Todd*, (D. C. Vt. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 779; *In re Lesser*, (C. C. A.

2d Cir. 1902) 114 Fed. 83, 8 Am. Bankr. Rep. 15, *reversing* (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 330; *In re Miner*, (D. C. Ore. 1902) 114 Fed. 998, 8 Am. Bankr. Rep. 248; *In re Beebe*, (E. D. Pa. 1902) 116 Fed. 48, 8 Am. Bankr. Rep. 597; *In re Semmel*, (M. D. Pa. 1902) 118 Fed. 487, 9 Am. Bankr. Rep. 351; *In re Blalock*, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266; *In re Patterson*, (N. D. N. Y. 1903) 121 Fed. 921, 10 Am. Bankr. Rep. 371; *In re Le Claire*, (N. D. Ia. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733; *Woods v. Little*, (C. C. A. 3d Cir. 1905) 134 Fed. 229, 13 Am. Bankr. Rep. 742; *In re Taplin*, (N. D. Ia. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360; *In re Kolster*, (D. C. Nev. 1906) 146 Fed. 138, 17 Am. Bankr. Rep. 52; *In re Berry*, (S. D. N. Y. 1906) 146 Fed. 623, 16 Am. Bankr. Rep. 564; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re Fanning*, (E. D. N. Y. 1907) 155 Fed. 701, 19 Am. Bankr. Rep. 55; *In re McKee*, (E. D. N. Y. 1908) 165 Fed. 269, 21 Am. Bankr. Rep. 306; *Klein v. Powell*, (C. C. A. 3d Cir. 1909) 174 Fed. 640, 23 Am. Bankr. Rep. 494; *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414; *In re Polakoff*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 358; *In re Berner*, (S. D. Ohio) 4 Am. Bankr. Rep. 383; *Matter of Harris*, (D. C. N. J. 1904) 11 Am. Bankr. Rep. 649; *In re Schofield*, (E. D. Pa. 1905) 17 Am. Bankr. Rep. 918; *In re Alleman*, (M. D. Pa. 1908) 20 Am. Bankr. Rep. 745; *In re McLellan*, (N. D. N. Y. 1913) 204 Fed. 482; *In re Julius*, (C. C. A. 2d Cir. 1914) 217 Fed. 3, L. R. A. 1915C 89, wherein the court distinguished the intent to defraud from the intent to hinder or delay, as follows: "The intent to defraud is something distinct from the mere intent to delay or hinder. But there is no distinction between delaying and hindering. . . . There are two classes of transfers under the Act: (1) Those which have been entered into with actual fraudulent intent. (2) Those where, from the terms of the agreement or the nature of the transaction itself, the fraudulent intent is presumed to exist as an inference of law. In the one class the fraudulent intent is always a question of fact, and in the other it is a question of law. Thus if one who is insolvent makes a voluntary transfer of his property, receiving no valuable consideration therefor, the law will infer the intent, even though he may have made the transfer with an honest motive. In such cases no evidence of intention can be received to change that presumption. Such a conveyance necessarily operates to hinder, delay, or defraud the creditors, and the grantor will in such a case be presumed to intend the natural and necessary consequences of his acts."



The right to a discharge is forfeited, if the bankrupt knowingly conceals his property, and the wrongful act, when once committed during the proceedings, may not be avoided, so as to restore the dishonest bankrupt to his former status, and enable him to reap the benefits, notwithstanding the attempt. *In re Sussman*, (M. D. Pa. 1911) 190 Fed. 111.

The mere concealment of property by the bankrupt is not ground for denying a discharge, if it was not done knowingly and fraudulently. *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64.

A fraudulent conveyance by the bankrupt is not in itself a bar to the bankrupt's discharge. *In re Berner*, (S. D. Ohio) 4 Am. Bankr. Rep. 383.

**Preferential transfer.**—Section 14b (4) does not include a mere preferential payment made to a creditor, which does not constitute a transfer of property with intent to defraud other creditors. *In re Maher*, (D. C. Mass. 1906) 144 Fed. 503, 16 Am. Bankr. Rep. 340. See also *In re Hamilton*, (W. D. N. Y. 1904) 133 Fed. 823, 13 Am. Bankr. Rep. 333.

A preference alone, even if it be a voidable one, is not a bar to a discharge. It does not constitute a conveyance of property with intent to delay or defraud creditors. *In re Friedrich*, (D. C. Minn. 1912) 199 Fed. 193.

**Intent alone insufficient.**—While intent is a material inquiry on an issue as to the concealment of the assets by a bankrupt, nevertheless a fraudulent intent alone does not justify a refusal of a discharge; it is necessary that assets belonging to the estate were actually concealed or withheld. *Vehon v. Ullman*, (C. C. A. 7th Cir. 1906) 147 Fed. 694, 17 Am. Bankr. Rep. 435.

**Concealment of firm assets** by one member of a partnership alone will not deprive another partner of his right to a discharge. *In re Schachter*, (S. D. N. Y. 1909) 170 Fed. 683, 22 Am. Bankr. Rep. 389.

**Advice of counsel.**—The failure to schedule, or to turn over to the trustee, certain assets, upon the advice of counsel, to whom the facts have been fully disclosed, and whose advice is sought, received, and acted upon in good faith, and not with the intention of evading the Bankruptcy Law, will tend to relieve the bankrupt in so far as that such failure will not bar his discharge. *In re Hansen*, (D. C. Ore. 1901) 107 Fed. 252, 5 Am. Bankr. Rep. 747; *In re Stoddart*, (D. C. Wash. 1902) 114 Fed. 486, 7 Am. Bankr. Rep. 762; *In re Breitling*, (C. C. A. 7th Cir. 1904) 133 Fed. 146, 13 Am. Bankr. Rep. 126; *Woods v. Little*, (C. C. A. 3d Cir. 1904) 134 Fed. 229, 13 Am. Bankr. Rep. 742; *In re Neely*, (S. D. N. Y. 1904) 134 Fed. 667, 12 Am. Bankr. Rep. 407; *Remmers v. Merchants' Laclede Nat. Bank*, (C. C. A. 8th Cir. 1909) 173 Fed. 484, 23 Am. Bankr. Rep. 78; *In re Kyte*, (M. D. Pa. 1909) 174

Fed. 867, 23 Am. Bankr. Rep. 414; *In re Schreck*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 366; *In re Berner*, (S. D. Ohio) 4 Am. Bankr. Rep. 383; *In re Schofield*, (E. D. Pa. 1905) 17 Am. Bankr. Rep. 918; *In re Alleman*, (M. D. Pa. 1908) 20 Am. Bankr. Rep. 745.

Thus where the question whether a bankrupt's interest in his grandfather's estate was vested or contingent was difficult of solution, and the bankrupt had previously been advised by counsel that he had no interest in his grandfather's estate on which he could raise money, it was held that his failure to schedule such interest as a part of his estate in bankruptcy did not preclude his discharge. *Woods v. Little*, (C. C. A. 3d Cir. 1905) 134 Fed. 229, 13 Am. Bankr. Rep. 742.

So where a bankrupt has borrowed the full surrender value on his life insurance, and had been advised by counsel that it was not necessary to mention the policies in his schedules, whereupon he gave them to his wife, it was held that he was not guilty of a fraudulent concealment of assets. *In re Kyte*, (M. D. Pa. 1909) 174 Fed. 867, 23 Am. Bankr. Rep. 414.

**Specification of objections.**—The specification of objections should state the nature of the ground relied on, and give a description of the property concealed from the trustee, the names of the persons holding the title, the name of the transferee and other facts necessary to identify the transaction. *In re Parish*, (N. D. Ia. 1903) 122 Fed. 553, 10 Am. Bankr. Rep. 548; *In re Ginsburg*, (E. D. Pa. 1904) 130 Fed. 627, 12 Am. Bankr. Rep. 459; *In re Mintzer*, (E. D. N. Y. 1912) 197 Fed. 647.

**Allegation of knowledge and intent.**—The specification charging concealment of assets must contain the allegation that the acts were done knowingly and fraudulently. *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78.

But it has also been held that, since the amendment of 1903, it is not necessary to allege that the transfer was "knowingly and fraudulently" made. *In re Gift*, (M. D. Pa. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244.

**Sufficient specification.**—The specification of objection to the bankrupt's discharge alleging that, within four months immediately preceding the filing of the petition, the bankrupts transferred, removed, destroyed, or concealed, their property, with intent to defraud their creditors, in that, about a week prior to the filing of the petition, and at other times, they concealed large quantities of merchandise in a certain house, with intent to hinder, delay, and defraud their creditors, and thereafter, on a day specified, removed from their place of business and concealed other large quantities of merchandise with like intent, was held to be sufficient. *In re Milgraum*, (E. D. Pa.

1904) 129 Fed. 827, 12 Am. Bankr. Rep. 306.

So, also, it has been held that specifications of objection to the discharge of a bankrupt, alleging that, within four months prior to the filing of his petition, in contemplation of bankruptcy, and with intent to defraud his creditors, he purchased certain household goods specified; which he transferred to a woman to whom he expected to be, and was afterward, married, and which were not included in his schedules, are legally sufficient. *In re Gift*, (M. D. Pa. 1904) 130 Fed. 230, 12 Am. Bankr. Rep. 244.

And it has been held that objections to the discharge of a bankrupt, charging in effect a fraudulent transfer of the bankrupt's property within the four months period, are sufficient. *In re Bradin*, (E. D. Pa. 1910) 179 Fed. 768.

**Insufficient specification.**—A specification of objections to a bankrupt's discharge, that at the time of filing his petition he was the owner of a stock of drugs and general merchandise, no part of which was ever delivered to the trustee in bankruptcy, and that the bankrupt now has possession thereof, has been held to be insufficient in the absence of an allegation that he concealed the same, or in any manner prevented the trustee from taking possession thereof. *In re Taplin*, (N. D. Ia. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360.

**Evidence—Burden of proof on opposing creditors.**—Creditors opposing the bankrupt's application for a discharge, on the ground of his having concealed property from his trustees in bankruptcy, must establish the fact by satisfactory and sufficient evidence, or their opposition will be overruled and the discharge granted. *In re Cornell*, (S. D. N. Y. 1899) 97 Fed. 29; *In re Hirsch*, (S. D. N. Y. 1899) 97 Fed. 571, 3 Am. Bankr. Rep. 344; *In re Howden*, (N. D. N. Y. 1901) 111 Fed. 723, 7 Am. Bankr. Rep. 191; *In re Gaylord*, (C. C. A. 2d Cir. 1901) 112 Fed. 668, 7 Am. Bankr. Rep. 1; *In re Greenberg*, (D. C. Conn. 1902) 114 Fed. 773, 8 Am. Bankr. Rep. 94; *In re Baerncopf*, (E. D. Pa. 1902) 117 Fed. 976, 9 Am. Bankr. Rep. 133; *In re Blalock*, (D. C. S. C. 1902) 118 Fed. 679, 9 Am. Bankr. Rep. 266; *In re Leslie*, (N. D. N. Y. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561; *In re Kolster*, (D. C. Nev. 1906) 146 Fed. 138, 17 Am. Bankr. Rep. 52; *In re Tillyer*, (E. D. Pa. 1905) 147 Fed. 860, 17 Am. Bankr. Rep. 125; *In re Hedley*, (W. D. N. Y. 1907) 156 Fed. 314, 19 Am. Bankr. Rep. 409; *In re Burstein*, (D. C. Conn. 1908) 160 Fed. 765, 20 Am. Bankr. Rep. 399; *In re Delmour*, (S. D. N. Y. 1908) 161 Fed. 589, 20 Am. Bankr.

Rep. 405; *In re Boner*, (N. D. W. Va. 1909) 169 Fed. 727, 22 Am. Bankr. Rep. 151; *In re Howard*, (C. C. A. 2d Cir. 1910) 180 Fed. 399; *In re Margolis*, (D. C. Mass. 1909) 181 Fed. 591; *In re Cohen*, (C. C. A. 2d Cir. 1913) 206 Fed. 457.

**Preponderance of evidence sufficient.**—On specifications of objection to a bankrupt's petition for discharge, it is not necessary to establish concealment of assets beyond a reasonable doubt. A fair preponderance of credible testimony is sufficient. *In re Delmour*, (S. D. N. Y. 1908) 161 Fed. 589, 20 Am. Bankr. Rep. 405; *In re Doyle*, (W. D. N. Y. 1912) 199 Fed. 247; *In re Atlas*, (N. D. Ill. 1914) 219 Fed. 783, following *United States v. Regan*, (1914) 232 U. S. 37, 34 S. Ct. 213, 58 U. S. (L. ed.) 494.

**Suspicion not enough.**—An objection to a bankrupt's discharge because of the fraudulent concealment of assets must be established by clear and convincing proof, and is not the subject of mere suspicion or inference. *In re Howard*, (C. C. A. 2d Cir. 1910) 180 Fed. 399; *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479.

**Property in bankrupt must be shown.**—Specifications in opposition to a bankrupt's application for discharge, on the ground of his having concealed property from his trustee in bankruptcy, must be supported by evidence showing the existence of property in the bankrupt, or in trust for his use, at the time of filing the petition in bankruptcy. *In re Cornell*, (S. D. N. Y. 1899) 97 Fed. 29.

**Where a bankrupt fails to schedule or to surrender** to his trustee goods shown to have been in his possession a short time prior to his bankruptcy, the burden rests upon him to account for the same; and if he fails to do so, the presumption is that he sold them and conceals the proceeds. *Seigel v. Cartel*, (C. C. A. 8th Cir. 1908) 164 Fed. 691, 21 Am. Bankr. Rep. 140.

**An established discrepancy of large amount**, together with proven concealment of some of his assets by the bankrupt from his trustee, are sufficient to make a *prima facie* case for the trustee, calling for the bankrupt's explanation of what became of the property which he is shown to have had, prior to bankruptcy, and which he failed to surrender to the trustee. *In re Denson*, (N. D. Ala. 1912) 195 Fed. 857.

**Res judicata.**—In the case of *In re Krall*, (D. C. Conn. 1912) 196 Fed. 402, the court said: "The question at issue as to concealment of assets was *res adjudicata*, and the record evidence made out a *prima facie* case."

(5) [Discharge in voluntary proceedings.] in voluntary proceedings been granted a discharge in bankruptcy within six years; or [(Inserted 1903, which excepted pending cases) 32 Stat. L. 798.]

This clause (5) was re-enacted without change in 1910 (36 Stat. L. 839).

Section 14b (5) was not retroactive, but applied only to cases begun after amendment took effect (Feb. 5, 1903). *In re Neely*, (S. D. N. Y. 1904) 134 Fed. 667, 12 Am. Bankr. Rep. 407; *In re Seaholm*, (C. C. A. 1st Cir. 1905) 136 Fed. 144, 14 Am. Bankr. Rep. 292. It created no new offense and imposed no new penalty, but only fixed new conditions of discharge in case of petitions filed after its passage. *In re Carleton*, (1904) 131 Fed. 146.

**Discharge within six years.**—A bankrupt is not entitled to be discharged, under section 14b (5), where he has previously been discharged in voluntary proceedings within the preceding six years. *In re Neely*, (S. D. N. Y. 1904) 134 Fed. 667, 12 Am. Bankr. Rep. 407; *In re Seaholm*, (C. C. A. 1st Cir. 1905) 136 Fed. 144, 14 Am. Bankr. Rep. 292; *In re Haase*, (S. D. N. Y. 1907) 155 Fed. 553, 17 Am. Bankr. Rep. 528; *In re Chase*, (D. C. Mass. 1910) 186 Fed. 408; *In re Vaine*, (N. D. N. Y. 1911) 186 Fed. 535; *In re Lachenmaier*, (C. C. A. 7th Cir. 1913) 203 Fed. 32.

Section 14b (5) was intended to prevent the filing of voluntary petitions in bankruptcy by the same person oftener than once in six years, and not merely to space discharges to the same person six years apart. *In re Vaine*, (N. D. N. Y. 1911) 186 Fed. 535.

The words "in voluntary proceedings" refer to the proceedings in which the prior discharge was granted, and not to

the proceedings in which the second discharge is sought. *In re Seaholm*, (C. C. A. 1st Cir. 1905) 136 Fed. 144, 14 Am. Bankr. Rep. 292. See also *In re Neely*, (1904) 134 Fed. 667.

A discharge granted upon a petition filed by the bankrupt as a member of a partnership is one had in voluntary proceedings within the meaning of the provision denying a second discharge within six years. *In re Carleton*, (1904) 131 Fed. 146.

The six years is measured backward from the time of the hearing on the application for the second discharge, and not from the time of the commencement of the second proceeding. *In re Haase*, (S. D. N. Y. 1907) 155 Fed. 553, 17 Am. Bankr. Rep. 528, *affirmed* (1908) 164 Fed. 1022, 90 C. C. A. 667. See also *In re Little*, (C. C. A. 7th Cir. 1905) 137 Fed. 521, 13 Am. Bankr. Rep. 640; *In re Jordan*, (E. D. Pa. 1905) 142 Fed. 292, 15 Am. Bankr. Rep. 449.

The six years is measured backward from the time the application for the discharge is filed and not from the time the court acts on the application. *In re Dunphy*, (D. C. Me. 1913) 206 Fed. 680.

**Discharge refused under former law immaterial.**—An order refusing to discharge a bankrupt, under the Bankruptcy Act of 1867, does not estop the bankrupt from applying for a discharge upon the same facts, and as to the same debt, under the Act of 1898. *In re Herrman*, (S. D. N. Y. 1900) 102 Fed. 753.

(6) [Refusal to obey lawful orders.] in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: [(Inserted 1903, which excepted pending cases) 32 Stat. L. 798.]

This clause (6) was re-enacted without change in 1910 (36 Stat. L. 839).

As to

Duty to answer questions generally, see section 7a (9), and section 21a.

Duty to comply with all lawful orders, see section 7a (2).

Refusal to obey lawful orders or to appear and testify, as contempt, see the several subdivisions of section 41a.

To come within the phrase "approved by the court," as used in section 14b (6), no more formal approval is required from the referee than the overruling of objections, if any are made, and the allowance of the questions. *In re Weinreb*, (C. C. A. 2d Cir. 1907) 153 Fed. 363, 18 Am. Bankr. Rep. 387.

**Refusal to answer proper questions.**—

The refusal of a bankrupt on his examination to answer a question as to what was done with a large sum of money drawn by him from the bank a short time before the bankruptcy is sufficient to warrant the refusal of a discharge, although, after such objection to the discharge was made, he offered to answer the question. *In re Weinreb*, (C. C. A. 2d Cir. 1907) 153 Fed. 363, 18 Am. Bankr. Rep. 387.

**Refusal under claim of privilege.**—The fact that the refusal of a bankrupt to answer material questions, in the course of the proceedings which were approved by the referee, was based on the claim

of his constitutional privilege not to incriminate himself, does not deprive the court of the right to deny him a discharge because of such refusal. The proceeding for a discharge is not a criminal proceeding, and the constitutional protection extends to the protection of the witness in criminal proceedings only. *In re Dresser*, (C. C. A. 2d Cir. 1906) 146 Fed. 383, 16 Am. Bankr. Rep. 561.

**Evasive answers.**—While evasive and disingenuous testimony by a bankrupt is not a ground for refusing a discharge, it is a material consideration in determining his credibility when testifying as to what became of certain money. *In re Leslie*, (N. D. N. Y. 1903) 119 Fed. 406, 9 Am. Bankr. Rep. 561.

But where a bankrupt did not wilfully conceal testimony preventing his creditors from obtaining property, the fact that he apparently gave evasive and disrespectful answers to questions concerning the same is not ground for denying his discharge. *In re Fanning*, (E. D. N. Y. 1907) 155 Fed. 701, 19 Am. Bankr. Rep. 55. And

see to the same effect *In re Cohen*, (W. D. N. Y. 1907) 149 Fed. 908, 18 Am. Bankr. Rep. 84.

**Inability to comply with order.**—*In re McCrea*, (C. C. A. 2d Cir. 1908) 161 Fed. 246, 88 C. C. A. 282, 20 L. R. A. (N. S.) 246, reversing an order denying a discharge, the court said: "It is charged that the bankrupt disobeyed an order of the referee requiring him to produce certain books and papers. He produced some papers, and explained that others were lost or had been destroyed in a fire. He was not proceeded against for contempt, and the special master, who was also the referee issuing the order, was apparently satisfied that his explanation was correct, and found that he did not disobey the order. Upon an examination of the record, we reach no different conclusion. While the attitude of the bankrupt upon his examination was the opposite of that of a frank witness, a finding that he intentionally violated the referee's order would be unwarranted."

**[When trustee may interpose objections.]** *Provided*, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose. [(Inserted 1910, which excepted pending cases) 36 Stat. L. 840.]

This is a proviso to the introductory declaration in section 14b preceding clause (1).

The object of the amendment is to confer upon those most vitally interested—that is, the creditors—power to authorize the trustee to interpose objections. Unless the trustee is so authorized, he is not permitted to intervene by objection. His authority to interpose objections is derived, not from the judge or from the referee, but from the creditors. *In re Hockman*, (E. D. Pa. 1912) 205 Fed. 330.

**Meeting by whom called.**—The section is satisfied if the authority be given at a meeting called by the referee, and the district judge is not required himself to issue the call and hold the meeting, or specially to authorize such call and meeting. *In re Reiff*, (E. D. Pa. 1913) 205 Fed. 399, following *In re Hockman*, (E. D. Pa. 1912) 205 Fed. 330.

**Scope of trustee's authority.**—"The effect of the Act is to grant to the trustee the right to oppose a discharge, provided only the creditors, at a meeting called for that purpose, shall first authorize him to do so. The Act gives to creditors the privilege of determining whether such right be granted to the trustee; but, having determined to authorize him, his right to exercise, and the extent of, such authority is based upon the statute. The action of the creditors is merely a prerequisite. In other

words the action of the creditors, when taken, serves to put him in the same position and to exercise the rights which 'parties in interest' may exercise as a matter of course and without precedent authorization from any one. From this it must follow that when the creditors take such step, the trustee can exercise his authority by presenting 'proofs and pleas,' and that he must under the statute be given 'a reasonable opportunity to be fully heard.' Whether a trustee, being authorized as contemplated by the statute, is in duty bound to exercise such authority, may be open to question, and is not necessary to be decided at this time. But the right to exercise the authority, having been granted or perfected as contemplated by the statute, is no more subject to denial by the court than is the same right residing in 'parties in interest.' By committing to the creditors' meeting the privilege of determining whether the trustee shall have and exercise such right, the law, it seems to me, denies to the referee, or to the court, any discretion to withhold such right and the power of its exercise from the trustee. It must also follow from this that neither the court nor the referee can, in advance, annex to the trustee's right conditions which are repugnant to its free, or at least its reasonable, exercise. Therefore

the conditions denying to the trustee reimbursement for his costs and reasonable expenses in exercising his authority should not have been imposed. What is above stated is true of the condition that the order granting to the trustee authority to oppose the discharge shall not delay the final settlement of the estate more than 60 days. The trustee, if he participate in the proceedings to oppose the discharge, must do so according to the usual course and subject to any reasonable delays that may occur. The expedition of the proceedings is not within his sole control or discretion. All he can do is to proceed with reasonable diligence, and, if he be limited in advance as to time, compliance with such conditions might frustrate the object sought to be accomplished by the authority granted him. Under the terms of sec. 14, the right of the trustee would seem to depend solely upon the action of the creditors' meeting, and no further order of the court or of the referee is contemplated. It may be, as suggested by the referee, that the statute opens the

way for expensive and burdensome litigation, authorized perhaps by a majority against the objection of a minority of creditors. These considerations, however, bear upon the wisdom of the Act, and are not sufficient to give it a construction through which the action of the creditors in meeting is to be deemed merely advisory upon the court. If a majority of the creditors, as parties in interest, desire to oppose a discharge, they may, as the law now stands, in a meeting called for that purpose, and in order to avoid a multiplicity of proceedings by individuals, delegate to the trustee the exercise of their right. They must necessarily contemplate, no doubt desire, that the burdens of the contest, when made by him, fall upon the bankrupt estate. A sufficient safeguard against useless litigation by the trustee will, of course, be found upon his application for allowance of the costs and charges claimed to have been incurred in opposing the discharge." *In re Churchill*, (E. D. Wis. 1912) 197 Fed. 114.

**c [Confirmation of composition.]** The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge. [(1898) 30 Stat. L. 550.]

The effect of the confirmation of a composition has been considered under section 12c, and compositions generally are treated under the other subdivisions of section 12. The setting aside of a composition is annotated under section 13.

**SEC. 15. DISCHARGES, WHEN REVOKED.—a** The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge. [(1898) 30 Stat. L. 550.]

Appointment of trustee after discharge revoked, see section 44a.

**Statutory provisions exclusive.**—The statute prescribes the form and the time within which, and the grounds upon which direct proceedings to revoke a discharge may be had; and the remedy thus given is exclusive. *In re Shaffer*, (1900) 104 Fed. 982.

**Collateral attack.**—A discharge in bankruptcy is not open to collateral attack in a district other than that in which the discharge was granted. *Atlantic Dynamite Co. v. Reger*, (N. D. W. Va. 1912) 200 Fed. 1002. And see generally as to collateral attack on order of discharge, end of note immediately preceding section 14b (1).

**Revocation of discharge.**—Where it appears that a bankrupt has obtained his

discharge through fraud the court may, upon a proper showing presented in due time, revoke such discharge where the actual facts did not authorize the granting thereof. *In re Dietz*, (S. D. N. Y. 1899) 97 Fed. 563, 3 Am. Bankr. Rep. 316; *In re Meyers*, (S. D. N. Y. 1900) 100 Fed. 775, 3 Am. Bankr. Rep. 722; *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728; *In re Hansen*, (D. C. Ore. 1901) 107 Fed. 252, 5 Am. Bankr. Rep. 747; *In re Roosa*, (N. D. Ia. 1902) 119 Fed. 542, 9 Am. Bankr. Rep. 531; *In re Oliver*, (D. C. N. J. 1905) 133 Fed. 832, 13 Am. Bankr. Rep. 552; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re Luftig*, (D. C. Mass. 1905) 162

Fed. 322, 15 Am. Bankr. Rep. 773; *In re Mauzy*, (N. D. W. Va. 1908) 163 Fed. 900, 21 Am. Bankr. Rep. 59.

*When power to revoke may be exercised.*—It is to be borne in mind that the power of the judge to revoke a discharge is confined and limited. It must be exercised (a) upon application of parties in interest; (b) within one year after it has been granted; (c) upon a trial in which it must be shown by petitioners that they have (d) not been guilty of undue laches; (e) that the discharge was obtained through the fraud of the bankrupt; (f) that the knowledge of said fraud has come to the petitioners since the granting of the discharge; and (g) that the actual facts did not warrant the discharge. In each and every one of these particulars the burden of proof is upon the petitioners, and each requirement of the statute is absolutely essential to be proven. *In re Mauzy*, (N. D. W. Va. 1908) 163 Fed. 900, 21 Am. Bankr. Rep. 59; *In re Walsh*, (N. D. N. Y. 1914) 213 Fed. 643, in which the court held that it had no power to revoke a discharge on the ground that a creditor did not receive his notice which was duly mailed; *In re Howard*, (N. D. W. Va. 1913) 201 Fed. 577, wherein the court said: "It will be perceived that to revoke a discharge in bankruptcy involves an exercise of judicial discretion and power far more reaching in effect than the suspension for fraud of a statute of limitation barring the recovery of a debt or single demand of a single creditor; further, that it is in direct opposition to the whole spirit and intent of the Bankruptcy Act. That purpose and intent clearly is to give the bankrupt's creditors his property and to him complete relief from further claims upon him so that he may start over again. His failure may have been solely because of collateral obligations; he may still have the confidence of those who, after his discharge, are willing to sell him property, extend to him credit, help to start him up again in business. To revoke his discharge not alone affects his interest but also all these new obligations that he has incurred to others upon the security and strength of such discharge. Under these conditions, I am inclined to think that this provision was incorporated in the Bankruptcy Act more as a check upon what might be the assumption of the courts under equity powers to revoke these discharges and the enforcement of equity's old rule that no limitation runs against fraud. The limitation here is directly upon the court's power, not upon 'the cause of action' as most limitations are. It provides that the judge 'may' act, not that he shall; that he may act only within the year, after the lapse of which his power to act at all ceases; that

his action within this year must depend not alone upon the fraud of the discharged bankrupt, but also upon the conduct of the petitioner 'party in interest'—that is to say, upon the latter's good faith and diligence in bringing the matter to the judge's attention. In other words, it becomes absolutely necessary for such petitioner, before he can be heard at all, to show that he has not been guilty of laches in bringing forward his complaint."

In the case of *In re Cuthbertson*, (D. C. S. D. 1912) 202 Fed. 286, the court, after reciting the several requisites of an application for discharge, said: "There is no allegation in the petition filed herein with reference to the lack of laches or the petitioner. There is no statement of facts in this petition that in any manner refers to the knowledge of the said fraud by the petitioners, or when such knowledge came to the petitioners. It is questionable whether there is an allegation in this petition that the bankrupt has any interest in the property referred to in the petition. I am of the opinion that this section of the law requires that the 'knowledge of the fraud has come to the petitioner since the granting of the discharge,' and that it is essential, and is jurisdictional. Note in *Re Marionneaux's Case*, 16 Fed. Cas. No. 9,088. In each and every one of the foregoing particulars the burden of proof is upon the petitioner, and every requirement of this statute is absolutely essential to be proven."

The creditor should show that he has not only reason for opposing the discharge, but legal reason and grounds which, if sustained, would result in the refusal of a discharge. *In re Downing*, (N. D. N. Y. 1912) 199 Fed. 329.

*Inducing creditor to withdraw opposition.*—Where a creditor who has filed specifications in opposition to the discharge of a bankrupt is induced to withdraw the same, and suffer the discharge to be granted, in consideration of part payment of his claim made to him by a friend of the bankrupt, it was held to be a fraud upon the Act, and ground for vacating the discharge, although it was done without the procurement or participation of the bankrupt, if he was privy to the arrangement and consented to it. *In re Dietz*, (S. D. N. Y. 1899) 97 Fed. 563, 3 Am. Bankr. Rep. 316.

*Fraud committed before the adjudication of bankruptcy* does not enter into the question of revocation. *In re Hoover*, (1900) 105 Fed. 354.

*The omission to schedule a debt* is not ground for setting aside the discharge. *In re Monroe*, (D. C. Wash. 1902) 114 Fed. 398, 7 Am. Bankr. Rep. 706.

*Section 15 does not apply* where the discharge results by operation of law from the confirmation of the bankrupt's offer

of composition. *In re Jersey Island Packing Co.*, (N. D. Cal. 1907) 152 Fed. 839, 18 Am. Bankr. Rep. 417. See section 13a.

**Time of filing application to revoke.**—The revocation of a discharge must be applied for within one year after the discharge has been granted. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728; *In re Hawk*, (C. C. A. 8th Cir. 1902) 114 Fed. 916, 8 Am. Bankr. Rep. 71; *In re Bimberg*, (S. D. N. Y. 1903) 121 Fed. 942, 9 Am. Bankr. Rep. 601.

**Undue laches.**—An application for the revocation of a discharge will be denied where the applicant has been guilty of undue laches in its presentation to the court. *In re Hoover*, (E. D. Pa. 1900) 105 Fed. 354, 5 Am. Bankr. Rep. 247; *In re Hansen*, (D. C. Ore. 1901) 107 Fed. 252, 5 Am. Bankr. Rep. 747; *In re Oleson*, (N. D. Ia. 1901) 110 Fed. 796, 7 Am. Bankr. Rep. 22; *In re Hawk*, (C. C. A. 8th Cir. 1902) 114 Fed. 916, 8 Am. Bankr. Rep. 71; *In re Upson*, (N. D. N. Y. 1903) 124 Fed. 980, 10 Am. Bankr. Rep. 758; *Arrington v. Arrington*, (E. D. N. C. 1904) 132 Fed. 200, 13 Am. Bankr. Rep. 89; *In re Spicer*, (W. D. N. Y. 1906) 145 Fed. 431; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78; *In re Mauzy*, (N. D. W. Va. 1908) 163 Fed. 900, 21 Am. Bankr. Rep. 59; *Vary v. Jackson*, (C. C. A. 5th Cir. 1908) 164 Fed. 840, 21 Am. Bankr. Rep. 334; *In re Downing*, (N. D. N. Y. 1912) 199 Fed. 329; *Drees v. Waldron*, (C. C. A. 8th Cir. 1914) 212 Fed. 93, where the court said: "The doctrine of laches protects against a proceeding instituted or prosecuted without diligence and where the delay and thus the fault of one party results in an unfair advantage over his adversary. The existence of laches is primarily determined not by the lapse of time but by consideration of justice"; *In re Wright*, (W. D. N. Y. 1910) 24 Am. Bankr. Rep. 437.

**Absence of laches must clearly appear.**—Where a mortgage given by the bankrupt, covering substantially all his personal property, was shown by his schedules, but its validity was not questioned by any creditor during the pending of the case, and until nearly a year after the bankrupt's discharge, the court is not justified in then entertaining a petition for the revocation of the discharge, on the ground that such mortgage was fraudulent, unless it is made clear that the creditor filing it has not been guilty of laches, and that cannot be done by general averments of conclusions to the effect that he has not been guilty of negligence or has acted with due diligence. *In re Oleson*, (N. D. Ia. 1901) 110 Fed. 796, 7 Am. Bankr. Rep. 22.

**Failure to prove claim.**—The fact that a creditor of a bankrupt failed to file or

prove his claim within a year after the adjudication and was thereby precluded from thereafter proving it, or sharing in any dividend which might be declared if the discharge was vacated, does not deprive him of the right to move to vacate such discharge as a party in interest; since, if the discharge were vacated, the creditor would be entitled to collect his claim from any property acquired by the bankrupt after bankruptcy. *In re Bimberg*, (S. D. N. Y. 1903) 121 Fed. 942, 9 Am. Bankr. Rep. 601.

But see *Arrington v. Arrington*, (E. D. N. C. 1904) 132 Fed. 200, 13 Am. Bankr. Rep. 89, wherein it was held that a claimant against the estate is not entitled to have the bankrupt's discharge set aside on account of a claim which was not proved in the bankruptcy proceedings, of which he had notice.

**Failure to object to granting of discharge.**—A creditor who had ample opportunity during the pendency of the proceedings to fully examine the bankrupt as to all matters, and who appeared in opposition to his discharge, and was given time to file specifications of objection, but failed to do so, and permitted the discharge to be granted without further objection, is guilty of such undue laches as will prevent his being heard on a subsequent application to revoke the discharge. *In re Upson*, (N. D. N. Y. 1903) 124 Fed. 980, 10 Am. Bankr. Rep. 758.

**Knowledge of trustee chargeable to creditors.**—The revocation of a discharge for an alleged fraud, which is shown to have come to the knowledge of the petitioner since the discharge was granted, will not be allowed where the trustee had knowledge of all the facts prior to the granting of the discharge; such knowledge being deemed to be that of the creditors whom he represents. *In re Hansen*, (D. C. Ore. 1901) 107 Fed. 252, 5 Am. Bankr. Rep. 747.

**Application for revocation.**—The application for the revocation of a discharge should set forth sufficient facts to warrant the revocation under section 15. *In re Oliver*, (D. C. N. J. 1905) 133 Fed. 832, 13 Am. Bankr. Rep. 582; *Vary v. Jackson*, (C. C. A. 5th Cir. 1908) 164 Fed. 840, 21 Am. Bankr. Rep. 334.

**Must show interest of petitioners.**—An averment in a petition for the revocation of the discharge of a bankrupt, merely that petitioners are "creditors" of the bankrupt, is insufficient to show that they are "parties in interest," entitled to object to the discharge or to file such petition. *In re Chandler*, (C. C. A. 7th Cir. 1905) 138 Fed. 637, 14 Am. Bankr. Rep. 512.

**A bare denial of undue laches, and a mere averment by him that knowledge of fraud has come to the petitioner since the grant of discharge, are not sufficient.** The

facts must be stated, in order that the court, being advised thereof, may determine whether ground is shown for permitting an attack upon the discharge. *In re Oleson*, (1901) 110 Fed. 796.

An amendment of such petition may be allowed as in other cases. *In re Oliver*, (D. C. N. J. 1905) 133 Fed. 832, 13 Am. Bankr. Rep. 582; *In re Chandler*, (C. C. A. 7th Cir. 1905) 138 Fed. 637, 14 Am. Bankr. Rep. 512; *In re Griffin*, (S. D. Ala. 1907) 154 Fed. 537, 19 Am. Bankr. Rep. 78.

But a petition to revoke a discharge cannot be amended after the expiration of one year from the time of the discharge. *In re Wright*, (D. C. N. Y. 1910) 24 Am. Bankr. Rep. 437.

In the case of *In re Howard*, (N. D. W. Va. 1913) 201 Fed. 577, the court refused to permit the amendment of a petition for the revocation of a discharge because it was not made in season. The court said: "Finally, petitioners' attorneys suggest that they should be permitted to amend their petitions. I do not think so. If such application to amend had been made before the expiration of the year, I think I could have allowed such amendment; but it was not. At the end of the year fixed by the statute, there was no sufficient petition filed upon which I could grant hearing to revoke this discharge. To allow these petitioners under guise of amendment to file new and possibly sufficient, possibly insufficient, petitions would be exercising judicial power on my part after, by express enactment, my right to exercise such power had ceased."

**Reference.**—Application having been filed within the prescribed time, and there being no laches on the part of the petitioners, who did not discover the facts of the case until after the discharge, the

matter will, upon due notice to the bankrupt, be referred to the referee as special commissioner, to take evidence and report. *In re Meyers*, (1900) 100 Fed. 775.

Upon vacating the order of discharge, the petition may, when it is deemed proper, be again referred to the referee, with the specifications of objections, for further hearing. *In re Dietz*, (1899) 97 Fed. 563.

**Who may revoke discharge.**—No one but the court may revoke a discharge; and it must be done in the manner prescribed by the statute. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728.

**Revocation by court on its own motion.**—A court of bankruptcy has the general power to amend its decrees in its discretion; and, on its own motion, to vacate a discharge, in the furtherance of justice, before the expiration of a year after it was granted. *In re Bimberg*, (S. D. N. Y. 1903) 121 Fed. 942, 9 Am. Bankr. Rep. 601.

*In Re Dupes*, (1871) 2 Lowell (U. S.) 18, decided under the Act of 1867, but applicable, it would seem, to the present Act, it was held that the court has power, during the term at which an order of discharge was granted, to open the same when justice requires it; and in that case, on application of creditors showing that they were prevented from opposing the original application by excusable accident, etc., the order of discharge was opened to enable them to make a contest.

"The bankrupt cannot surrender or vacate his discharge. He can revive a debt by a new promise, or waive his discharge by failing to plead it when sued; but he cannot vacate the order of discharge. No one can do that except the court, in the way prescribed in the statute." *In re Shaffer*, (1900) 104 Fed. 982.

**SEC. 16. CO-DEBTORS OF BANKRUPTS.**—a The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt. [(1898) 30 Stat. L. 550.]

As to liability of officers, directors, and stockholders of corporations, see the paragraph added to section 4b in 1903.

The manifest purpose of this provision is to preserve the creditor's original remedy, notwithstanding the discharge of the bankrupt, for the collection of the balance of his debt in all cases where some one else, besides the bankrupt, is also liable in any capacity therefor with the bankrupt. The discharge of a debtor in bankruptcy does not extinguish the debt, but relieves him from all legal obligation to pay it, leaving unimpaired all remedies for securing payment thereof out of property upon which it is a lien. *Way v. Barney*, (1911) 116 Minn. 285, 133 N. W.

801, Ann. Cas. 1913A 719, 38 L. R. A. (N. S.) 648.

**Discharge of bankrupt corporation as releasing individual liability of stockholders.**—Bankruptcy proceedings against a corporation do not stand in the way of a resort to the statutory method of enforcing the stockholder's liability. It is not corporate assets, and Congress has not undertaken to provide that the discharge in bankruptcy of a corporation shall release the stockholders. *Selig v. Hamilton*, (1914) 234 U. S. 652, 34 S. Ct. 926, 58 U. S. (L. ed.) 1518.



**Construction of section 16.**—Section 16, if intended to be in derogation of common-law rights and of the express statutory provision of the state where the question arises, should have a strict rather than a liberal construction; so that its effect will be limited rather closely to its terms. *Matter of Benedict*, (N. D. N. Y. 1907) 18 Am. Bankr. Rep. 604.

**Statute refers to codebtors for original debt.**—The Bankrupt Act manifestly refers to codebtors, guarantors, or sureties for the bankrupt on the same or original debt—the debt on which the release is given by the discharge. *Klipstein v. Allen-Miles Co.*, (C. C. A. 5th Cir. 1905) 136 Fed. 385, 14 Am. Bankr. Rep. 15.

**A guarantor for the payment of rent is not relieved from liability by the discharge of the tenant in bankruptcy proceedings;** and this is true even though the tenant's adjudication as a bankrupt so far terminated the relationship of landlord and tenant as to relieve the tenant from further liability for rent. *Witthaus v. Zimmermann*, (1904) 11 Am. Bankr. Rep. 314, 91 App. Div. 202, 86 N. Y. S. 315.

**Lease with surety.**—Notwithstanding this section a referee in bankruptcy has no right to cancel a lease containing a clause requiring the tenant to execute a bond with surety for the payment of at least a substantial portion of the rent for the entire term. *In re Sapinsky*, (W. D. Ky. 1913) 206 Fed. 523.

**A surety on a debt not provable against the bankrupt's estate is not released by the discharge.** *Bernhardt v. Curtis*, (1902) 109 La. 171, 33 So. 125, 94 A. S. R. 445.

**Discharge of a judgment debtor in bankruptcy does not release his codebtor in the judgment.** *Lackey v. Steere*, (1887) 121 Ill. 598, 13 N. E. 518, 2 A. S. R. 135.

**A garnishee who is simply a mortgagee or pledgee of personal property of the bankrupt to secure a debt from him is neither a codebtor nor a guarantor, nor in any manner a surety with or for the bankrupt.** *Marx v. Hart*, (1902) 166 Mo. 503, 66 S. W. 260, 89 A. S. R. 715.

**Garnishment bonds.**—The liability of the surety on a dissolving garnishment bond is not altered by the discharge of the bankrupt defendant; but the discharge generally prevents the happening of the contingency on which that liability depends. *Klipstein v. Allen-Miles Co.*, (C. C. A. 5th Cir. 1905) 136 Fed. 385, 14 Am. Bankr. Rep. 15. See also *National Surety Co. v. Medlock*, (Ga. 1907) 19 Am. Bankr. Rep. 654.

**Fidelity bond.**—Sureties on the fidelity bond of an insurance agent are not discharged by the discharge of their principal after judgment on the bond and pending writ of error. *Boyd v. Agricultural*

*Ins. Co.*, (1904) 20 Colo. App. 28, 76 Pac. 986.

**Release by act of parties remains unaffected.**—Section 16 only applies to the "discharge" in bankruptcy, and cannot be held to refer to, and have in view, any act of the parties effecting a release of liability at common law or in equity. *Matter of Benedict*, (N. D. N. Y. 1907) 18 Am. Bankr. Rep. 604; *Wilkes-Barre First Nat. Bank v. Barnum*, (M. D. Pa. 1908) 20 Am. Bankr. Rep. 439.

**Surety on bond to dissolve attachment.**—The defendant's discharge in bankruptcy, duly pleaded by him, does not bar a plaintiff from prosecuting his claim to judgment, when the plaintiff's suit was commenced more than four months prior to the commencement of proceedings in bankruptcy by the attachment of personal property of the defendant, which attachment was discharged upon the giving of a bond with sureties, with a condition therein that the same should be null and void if the final judgment or decree in the action in which the writ was served should be forthwith paid and satisfied after the rendition thereof. *Butterick Pub. Co. v. E. F. Bowen Co.*, (1911) 33 R. I. 40, 80 Atl. 277, wherein the court said: "The argument of the defendant is that the provision of this section applies only to those secondarily liable on the debt itself, and not to those who became surety for the bankrupt in court proceedings instituted against the bankrupt, and that the discharge prevents the happening of the contingency upon which alone the liability of the surety would arise. It relies in support of this contention largely upon the authorities and the reasoning of *Carpenter v. Turrell*, 100 Mass. 450, which holds that a discharge in bankruptcy is a bar to the further prosecution of a suit against the bankrupt commenced by attachment more than four months before the commencement of the bankruptcy proceedings, if the attachment was dissolved by giving bond under the statutes of Massachusetts, notwithstanding the provisions of the United States Bankrupt Act which preserved the lien of an attachment made four months or more before the commencement of bankruptcy proceedings, and continued the liability of sureties after the discharge in bankruptcy of their principal. Since the decision in *Carpenter v. Turrell*, *supra*, the Massachusetts legislature has enacted a statute permitting the entry of a special judgment against the bankrupt. The enactment of this statute, however, does not affect the weight that should be given to *Carpenter v. Turrell* as an authority in this state, as we have no statute similar to that of Massachusetts. We are of the opinion, however, that the better position is one which preserves to the bankrupt the full benefit of his discharge, and at

the same time does not deprive the creditor of the advantage which the Bankruptcy Law permits him to have by reason of his attachment made more than four months before the commencement of bankruptcy proceedings. This position, more in accord with reason and justice, as it seems to us, is supported by the weight of authority."

**Surety on release bond.**—While there is some conflict, the weight of authority supports the conclusion that a surety on a release bond given in an attachment suit is relieved by the bankruptcy of the defendant. *Windisch-Muhlhauser Brewing Co. v. Simms*, (1911) 129 La. 134, 55 So. 739.

**Surety on appeal bond.**—Where an appeal bond stipulates for the payment of such judgment as may be rendered against the principal in the bond, and before judgment in the Appellate Court the principal obtains a discharge in bankruptcy releasing him from the debt in suit, so that if he pleads the discharge no valid judgment can be rendered against him, the liability of the surety in the bond is also terminated. *House v. Schnading*, (1908) 235 Ill. 301, 85 N. E. 395, *affirming* 138 Ill. App. 498; *Goyer Co. v. Jones*, (1901) 79 Miss. 253, 30 So. 651, *citing* *Wolf v. Stix*, (1878) 99 U. S. 1, 25 U. S. (L. ed.) 309, where the court said: "The cases are numerous in which it has been held—and, we believe, correctly—that, if one is bound as surety for another to pay

any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was to depend." See also *Young v. Howe*, (1907) 150 Ala. 157, 43 So. 488; *Odell v. Wootten*, (1868) 38 Ga. 224; *Fontaine v. Westbrook*, (1871) 65 N. C. 528; *Laffoon v. Kerner*, (1905) 138 N. C. 281, 50 S. E. 654; writ of error dismissed (1906) 203 U. S. 579, 27 S. Ct. 778, 51 U. S. (L. ed.) 326, mem.; *Martin v. Kilbourn*, (1873) 12 Heisk. (Tenn.) 331. *Contra*, as to discharge of a surety in an appeal bond, *Brown, etc., Coal Co. v. Antezak*, (1910) 164 Mich. 110, 128 N. W. 774, 130 N. W. 305, Ann. Cas. 1912B 778; *Fisse v. Einstein*, (1878) 5 Mo. App. 78. See also *Knapp v. Anderson*, (1877) 71 N. Y. 466, *affirming* (1876) 7 Hun (N. Y.) 295.

But where a judgment is rendered against a principal and his surety on an appeal bond the surety becomes liable as a "codebtor" with the principal, and if the principal later is adjudicated a bankrupt, his liability is not altered by the bankrupt's discharge. *Bailey v. Reeves*, (1912) 102 Miss. 438, 59 So. 802, where the court said: "The present case is different from *Goyer Co. v. Jones*, (1901) 79 Miss. 253, 30 So. 651. In that case no judgment had been rendered against the surety on the appeal bond."

**SEC. 17. DEBTS NOT AFFECTED BY A DISCHARGE.**—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as [(1898) 30 Stat. L. 550.]

This introductory paragraph, including the caption, was re-enacted without change in 1903 (32 Stat. L. 798).

As to

Discharge of liability of officers, directors, or stockholders of corporation, see paragraph added to section 4b in 1903.

Discharge of liability of codebtors, see section 16.

Stay of suits on dischargeable claims, see section 11a.

What constitute provable debts, see the several subdivisions of section 63.

This section enumerates the debts provable under section 63a which are not discharged. *Clarke v. Rogers*, (1913) 228 U. S. 534, 33 S. Ct. 587, 57 U. S. (L. ed.) 953; *Friend v. Talcott*, (1913) 228 U. S. 27, 33 S. Ct. 505, 57 U. S. (L. ed.) 718, *affirming* (1909) 179 Fed. 676, 103 C. C. A. 80, 43 L. R. A. (N. S.) 649.

"In view of the well-known purposes of the Bankrupt Law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed." *Per* Mr. Justice McReynolds, in *Gleason*

*v. Thaw*, (1915) 236 U. S. 558, 35 S. Ct. 287, 59 U. S. (L. ed.) 717, 719.

"Debt" is defined in section 1a (11). No claim is within the language of section 17a unless it is a "debt." *Wetmore v. Markoe*, (1904) 196 U. S. 68, 25 S. Ct. 172, 49 U. S. (L. ed.) 390, 2 Ann. Cas. 265. And it could not have been the intention of Congress to extend the operation of a discharge under section 17 to debts that were not provable under section 63a. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; *Friend v. Talcott*, (1913) 228 U. S. 27, 33 S. Ct. 505, 57 U. S. (L. ed.) 718, *affirming* (1909) 179 Fed. 676, 103 C. C. A. 80, 43 L. R. A. (N. S.) 649; *Eastman v. Hibbard*, (1874) 54 N. H. 504, 20 Am. Rep. 157.

A fine imposed by a state court for contempt, committed by wilfully presenting to the court false affidavits, is not released by a discharge in bankruptcy. *In re Koronsky*, (C. C. A. 2d Cir. 1909) 170 Fed. 719, 21 Am. Bankr. Rep. 851;

*In re Hall*, (S. D. N. Y. 1909) 170 Fed. 721, 22 Am. Bankr. Rep. 498.

Compared with provisions in earlier acts—History.—In *Friend v. Talcott*, (1913) 228 U. S. 27, 33 S. Ct. 505, 57 U. S. (L. ed.) 718, Chief Justice White said: "The Bankruptcy Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, in the first section comprehensively stated the classes of claims which were embraced within its scope and expressly excluded certain enumerated classes. No exemption from the operation of a discharge when granted was conferred, and therefore all, who were within the scope of the Act, while enjoying its benefits, were bound by its burdens. Under this Act, in *Chapman v. Forsyth*, (1844) 2 How. 202, it was held that although a claim was excluded from the law if brought in by the voluntary act of the creditor and he thereby participated in the distribution, the creditor by such election waived his right to be treated as not bound by the statute, and consequently the debt or claim was discharged. The Bankruptcy Act of March 2, 1867, ch. 176, 14 Stat. 517, presumably to correct the injustice which arose from excluding from all participation in the distribution of assets those creditors whom it was thought because of the meritorious nature of their debt should not be bound by the discharge, departed from the system of excluding such creditors from the Act and on the contrary adopted the principle of including them in the benefits of the Act and yet at the same time exempting them from the operation of the discharge. To accomplish this result, § 19 of the Act (14 Stat. 525) made a most comprehensive enumeration of provable debts, including as well unliquidated damages for torts as for breaches of contracts. Those things which in the Act of 1841 were stated to be excluded from the operation of the Act were embodied in a particular section (§ 33, 14 Stat. 333) dealing with exemptions from discharge, and to avoid all possible misconception the section provided '... but the debt may be proved, and the dividend thereon shall be a payment on account of said debt.' It is obvious that the present Act embodies the same policy, since the exemptions from discharge which are given by the statute are found in the section devoted to that subject and are stated in words, as we have said, to be exemptions from discharge allowed in favor of provable debts, that is, debts entitled to participate which are given the benefit of an exemption from the operation of the discharge."

State legislation cannot limit or enlarge the effect of a discharge in bankruptcy. *Way v. Barney*, (1911) 116 Minn. 285, 133 N. W. 801, Ann. Cas. 1913A 719, 38 L. R. A. (N. S.) 648.

Discharge not limited to any particular territory.—A discharge in bankruptcy

which discharges the debts of the bankrupt in one state discharges them in all the states. *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (C. C. A. 8th Cir. 1903) 122 Fed. 232, 10 Am. Bankr. Rep. 225.

Valid and existing liens, being protected by the statute, are not discharged. See section 67d, and the annotation thereunder.

Assignment of future wages, see note to section 67d.

The right to a discharge, and its effect, are wholly distinct questions. *In re Marshall Paper Co.*, (C. C. A. 1st Cir. 1900) 102 Fed. 872, 4 Am. Bankr. Rep. 468; *In re McCarty*, (N. D. Ill. 1901) 111 Fed. 151, 7 Am. Bankr. Rep. 40; *In re Eisenberg*, (S. D. N. Y. 1906) 148 Fed. 325, 16 Am. Bankr. Rep. 776; *Matter of Cooper*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 634.

Sections 14 and 17 should be construed together. Each bears upon a different subject; the one relating to the discharge, the other to the debts from which such discharge will relieve the debtor. The matters and things which will prevent a discharge in bankruptcy are different from those which cause a debt to remain effective against the person discharged. Thus the bankrupt may be discharged and still be held liable for the classes of debts mentioned in section 17, subdivisions (1), (2), (3), and (4); and in seeking to hold a party liable, who has been discharged in bankruptcy, the ground for such liability must be found in section 17, and not in section 14, which enumerates grounds upon which a discharge shall be refused. *Katzenstein v. Reid*, (Tex. 1905) 16 Am. Bankr. Rep. 740. See also *In re Tinker*, (S. D. N. Y. 1900) 99 Fed. 79, 3 Am. Bankr. Rep. 580.

Exempted creditor not excluded.—The exemptions do not rest upon any theory of the exclusion of the creditor from the Bankruptcy Act or of deprivation of right to participate in the distribution, but solely on the ground that although such rights are enjoyed, an exemption from the effect of the discharge is superadded. *Friend v. Talcott*, (1913) 228 U. S. 27, 33 S. Ct. 505, 57 U. S. (L. ed.) 718.

All provable debts released.—*In general*.—A discharge in bankruptcy, under the provisions of the statute, discharges the bankrupt from all such debts as were, under section 63, provable against his estate in bankruptcy, excepting such as fall within subdivisions (1), (2), (3), and (4) of section 17. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659, 666; *Tindle v. Birkett*, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121; *Bluthenthal v. Jones*, (1908) 208 U. S. 64, 28 S. Ct. 192, 52 U. S. (L. ed.) 390, 19 Am. Bankr. Rep. 288; *In re Basch*, (S. D.

N. Y. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235; *In re* Bates, (D. C. Vt. 1900) 100 Fed. 263, 4 Am. Bankr. Rep. 56; *In re* Herrman, (S. D. N. Y. 1900) 102 Fed. 753, 4 Am. Bankr. Rep. 139, *affirmed* (C. C. A. 2d Cir. 1901) 106 Fed. 987; Bracken v. Milner, (W. D. Mo. 1900) 104 Fed. 522, 5 Am. Bankr. Rep. 23; *In re* Hilton, (S. D. N. Y. 1900) 104 Fed. 981, 4 Am. Bankr. Rep. 774; Knott v. Putnam, (D. C. Vt. 1901) 107 Fed. 907, 6 Am. Bankr. Rep. 80; *In re* Fife, (W. D. Pa. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258; *In re* Claff, (D. C. Mass. 1901) 111 Fed. 506, 7 Am. Bankr. Rep. 128; Hargadine-McKittrick Dry Goods Co. v. Hudson, (C. C. A. 8th Cir. 1903) 122 Fed. 232, 10 Am. Bankr. Rep. 225, *affirming* (E. D. Mo. 1901) 6 Am. Bankr. Rep. 657; *In re* Brumbaugh, (D. C. Pa. 1904) 128 Fed. 971, 12 Am. Bankr. Rep. 204; Kuntz v. Young, (8th Cir. 1904) 131 Fed. 719, 65 C. C. A. 477; *In re* Hicks, (N. D. N. Y. 1905) 133 Fed. 739, 13 Am. Bankr. Rep. 654; Mackel v. Rochester, (D. C. Mont. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 429; *In re* United Button Co., (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390; *In re* Kuffler, (2d Cir. 1907) 151 Fed. 12, 80 C. C. A. 508; *In re* Adler, (C. C. A. 2d Cir. 1907) 152 Fed. 422, 18 Am. Bankr. Rep. 240; Mathieu v. Goldberg, (S. D. N. Y. 1907) 156 Fed. 541, 19 Am. Bankr. Rep. 191; Pollet v. Cosel, (C. C. A. 1st Cir. 1910) 179 Fed. 488, relying on *In re* Fiegenbaum, (2d Cir. 1903) 121 Fed. 69, 57 C. C. A. 409; *In re* Lineberry, (N. D. Ala. 1910) 183 Fed. 338; Dean v. Justices, (Mass.) 2 Am. Bankr. Rep. 163; *In re* McCauley, (E. D. N. Y. 1900) 4 Am. Bankr. Rep. 122; Burnham v. Pidcock, (1901) 5 Am. Bankr. Rep. 590, 58 App. Div. 273, 68 N. Y. S. 1007; Bryant v. Kinyon, (Mich. 1901) 6 Am. Bankr. Rep. 237; Finnegan v. Hall, (1901) 6 Am. Bankr. Rep. 648, 35 Misc. 773, 72 N. Y. S. 347; Disler v. McCauley, (1901) 7 Am. Bankr. Rep. 138, 66 App. Div. 42, 73 N. Y. S. 270, *reversing* 6 Am. Bankr. Rep. 491; Gee v. Gee, (Minn. 1901) 7 Am. Bankr. Rep. 500; Watertown Carriage Co. v. Hall, (1901) 7 Am. Bankr. Rep. 716, 66 App. Div. 84, 72 N. Y. S. 466; *In re* Benedict, (1902) 8 Am. Bankr. Rep. 463, 37 Misc. 230, 75 N. Y. S. 165; Graham v. Richerson, (Ga. 1902) 8 Am. Bankr. Rep. 700; Wood v. Carr, (Ky. 1903) 10 Am. Bankr. Rep. 577; Zimmerman v. Ketchum, (1903) 11 Am. Bankr. Rep. 190, 66 Kan. 98, 71 Pac. 264; Dight v. Chapman, (1904) 12 Am. Bankr. Rep. 743, 44 Ore. 265, 75 Pac. 585; Howe v. Noyes, (1905) 15 Am. Bankr. Rep. 103, 47 Misc. 338, 93 N. Y. S. 476; New York Inst., etc. v. Crockett, (1907) 17 Am. Bankr. Rep. 233, 117 App. Div. 269, 102 N. Y. S. 412; Fechter v. Postal, (1906) 17 Am. Bankr. Rep. 316, 114 App. Div. 776, 100 N. Y. S. 207; Bond v. Milliken, (1906) 17 Am. Bankr. Rep. 811, 134 Ia.

447, 109 N. W. 774; Kavanaugh v. McIntyre, (1908) 21 Am. Bankr. Rep. 327, 128 App. Div. 722, 112 N. Y. S. 987; Dight v. Chapman, 44 Ore. 265, 75 Pac. 585, 65 L. R. A. 793; Ruhl-Koblegard Co. v. Gillespie, (1907) 61 W. Va. 584, 56 S. E. 898, 11 Ann. Cas. 929, 10 L. R. A. (N. S.) 305; Matter of Arkell, (1901) 65 App. Div. 130, 72 N. Y. S. 555.

What constitute *provable debts* has been fully considered under the several subdivisions of section 63.

A discharge thus means, subject to qualification with respect to demands due or owing to the United States the release of the bankrupt from all of the debts, demands and claims against him which are provable in bankruptcy except such of them as are by the Act excepted. The exception necessarily relates to provable demands, and, to indulge in tautology, is equivalent to the phraseology, "except such provable debts, demands and claims against the bankrupt as are by the Act excepted." *In re* United Button Co., (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390.

"Provable" means susceptible of being proved. Crawford v. Burke, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147.

At what date provable.—"The bankrupt's discharge is from all provable debts and claims which existed on the day on which the petition for adjudication was filed. Zavolo v. Reeves, (1913) 227 U. S. 625, 630, 33 S. Ct. 365, 57 U. S. (L. ed.) 676, 678." Everett v. Judson, (1913) 228 U. S. 474, 33 S. Ct. 568, 57 U. S. (L. ed.) 927, 46 L. R. A. (N. S.) 154.

Agreement to indemnify surety.—Within the intentment of the law provable debts include all liabilities of the bankrupt founded on a contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation, and consequently a discharge in bankruptcy acquits an express obligation of the bankrupt to indemnify his surety against loss by reason of their joint bond conditioned his faithful performance of a building contract broken prior to the bankruptcy although the surety paid the consequent damage thereafter. Williams v. U. S. Fidelity, etc., Co., (1915) 236 U. S. 549, 35 S. Ct. 289, 59 U. S. (L. ed.) 713, *reversing* (1912) 11 Ga. App. 635, 75 S. E. 1067.

Debt due to United States.—In U. S. v. Herron, (1873) 20 Wall. 251, 22 U. S. (L. ed.) 275, it was held that a debt due to the United States, though not for taxes, was barred by a discharge under the Bankruptcy Act of 1867, notwithstanding the United States might have proved its debt and been given priority by the Act. The decision was expressly put upon the ground "that the sovereign authority of the country is not bound by the words of a statute unless named therein, if the

statute tends to restrain or diminish the powers, rights, or interests of the sovereign." To this general proposition assent was given in *Guarantee Title, etc., Co. v. Title Guaranty, etc., Co.*, (1912) 224 U. S. 152, 32 S. Ct. 457, 56 U. S. (L. ed.) 706. As to proof of debts owing to United States see section 57j.

**Judgments.**—A judgment of a state court against a bankrupt, obtained before the filing of his petition in bankruptcy, for fines and costs upon indictments, is provable against his estate, although not entitled to precedence; and a discharge will release him therefrom. *In re Alderson*, (1899) 98 Fed. 588. But see *contra In re Moore*, (1901) 111 Fed. 145. See also *In re Houston*, (1899) 94 Fed. 119; *Miller v. Black*, (1901) 10 Pa. Dist. 255; *Fite v. Fite*, (1910) 110 Ky. 197, 61 S. W. 26, 53 L. R. A. 265.

When it is necessary to consider whether a judgment is released by a discharge in bankruptcy the fact must be determined by the record, and not by any allegation or proof outside of it. *Burnham v. Pidcock*, (1901) 5 Am. Bankr. Rep. 590, 58 App. Div. 273, 68 N. Y. S. 1007.

The New York Code of Civil Procedure (§ 1268) which provided that "if it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which said judgment was recovered, an order must be made directing said judgment be canceled and discharged of record," was held to apply only to judgments entered before a discharge in bankruptcy, for the reason that any other holding would conflict with the doctrine of *res adjudicata*. *Howe v. Noyes*, (1905) 15 Am. Bankr. Rep. 103, 47 Misc. 338, 93 N. Y. S. 476.

Where a creditor who holds a promissory note for the purchase price of goods reduces it to judgment, after a subsequent discharge of the debtor in bankruptcy the creditor cannot enforce an execution based on such judgment against property of the debtor acquired after such discharge. *Ford v. Blackshear Mfg. Co.*, (1913) 140 Ga. 670, 79 S. E. 576.

**A surety on a note made by a bankrupt** prior to his filing his petition in bankruptcy, and duly scheduled, which he, the surety, after the filing of such petition, but before discharge, was obliged to pay, cannot recover from the bankrupt on such note, the claim being released by the discharge. *Hayer v. Comstock*, (1901) 115 Ia. 187, 88 N. W. 351.

**Replevin bond.**—The bankrupt, long prior to his bankruptcy, having given a replevin bond, his liability to the plaintiff in the action of replevin wherein he was one of the defendants is too contingent to be a provable debt under the Bankruptcy Act. *Clemmons v. Brinn*, (Supm. Ct. App. T. 1901) 36 Misc. 157, 72 N. Y. S. 1066.

**Rent payable in instalments.**—An adjudication in bankruptcy during the term

annuls a lease for a term of years, the rent being payable in monthly instalments; and there is no provable debt against the estate, under a state statute, for the rent to accrue thereafter. *In re Jefferson*, (1899) 93 Fed. 948. See also *Hamilton v. McCroskey*, (1901) 112 Ga. 651, 37 S. E. 859.

**An unliquidated claim**, if provable (see section 63b) is barred by the discharge. *Dycus v. Brown*, (1909) 135 Ky. 140, 121 S. W. 1010, 28 L. R. A. (N. S.) 190, though the claim was voluntarily withheld until after the expiration of the time for proving claims; *In re Hilton*, (S. D. N. Y. 1900) 104 Fed. 981, 4 Am. Bankr. Rep. 774.

**Contracts rescinded on ground of fraud.**—Contracts, under which the bankrupt bought goods from certain creditors, having been rescinded on the ground of fraud, and such part thereof as came into his hands having been recovered from the trustee, the creditors may have their claims for the rest of the goods purchased from them and sold by the bankrupt liquidated by the court, and, when so liquidated, may prove such claims against the estate. *In re Hirschman*, (1900) 104 Fed. 69.

**Debt need not have been allowed.**—The fact that a claim against the bankrupt estate was disallowed does not render it a nonprovable debt; and such claim will be barred by a discharge, notwithstanding its disallowance, if it was capable of having been proved, as, for instance, where its disallowance results from a valid defense thereto. *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (C. C. A. 8th Cir. 1903) 122 Fed. 232, 10 Am. Bankr. Rep. 225.

A disallowed claim is not the same thing as a nonprovable debt and is released by the discharge in bankruptcy. *Lesser v. Gray*, (1915) 236 U. S. 70, 35 S. Ct. 227, 59 U. S. (L. ed.) 471.

**One who has been twice adjudged a bankrupt** cannot, in the second proceeding, be discharged from debts which were provable in a first proceeding wherein the bankrupt failed to obtain his discharge; and it is immaterial whether, in the first proceeding, the discharge was formally refused or whether the petition therefor was dismissed for want of prosecution. See cases cited in note to section 14c.

**The Bankruptcy Law supersedes the ordinances and fire regulations of a city**, requiring members of the city's fire department to pay promptly all necessary personal and household expenses, and making the failure to do so ground for discharge, in so far as it affects debts of a fireman dischargeable in a bankruptcy proceeding pending against him. *In re Hicks*, (N. D. N. Y. 1905) 133 Fed. 739, 13 Am. Bankr. Rep. 654.

**Discharge of defendant pending suit.**—An action in attachment was based upon indebtedness due on promissory notes. It

appeared by agreement on the trial, while plaintiffs were submitting evidence, that the defendants, after the filing of the declaration, had been duly adjudicated bankrupts, that in the bankruptcy proceedings the schedules of assets and liabilities were filed as required by law, that the notes held and sued on by the plaintiffs were properly scheduled among the unsecured liabilities of the defendant bankrupts, and that a discharge in bankruptcy had been duly and regularly granted to each of the defendants. It was held that, as it appeared that the indebtedness claimed by the plaintiffs was provable in bankruptcy, the defendants were relieved from liability therefor by the discharge in bankruptcy and a nonsuit was properly granted. *Fort-Mims & Haynes Co. v. Branan-Akers Co.*, (1913) 140 Ga. 131, 78 S. E. 721.

*Property acquired by a bankrupt after his discharge* cannot be subjected to the payment of debts released by the discharge. *Robertson v. Schard*, (1909) 142 Ia. 500, 119 N. W. 529, 134 A. S. R. 430.

*Under the Bankruptcy Act of 1841* it was held that "a certificate of discharge obtained without fraud is a bar to all debts existing against the bankrupt at the time of the discharge and provable under the commission." *Hollister v. Abbott*, (1855) 31 N. H. 442, 64 Am. Dec. 342.

**Discharge of partnership debts.**—Where a partnership has been discharged in bankruptcy, it will be released from its provable debts as effectually as individuals are released therefrom; so also where the individual members of a partnership have petitioned for, and have received, a discharge from their obligation for partnership indebtedness, such discharge will be effective as against such debts. *Loomis v. Wallblom*, (1905) 94 Minn. 392, 102 N. W. 1114, 3 Ann. Cas. 798 and note, 69 L. R. A. 771; *In re Meyers*, (S. D. N. Y. 1899) 96 Fed. 408, 2 Am. Bankr. Rep. 707; *In re Laughlin*, (N. D. Ia. 1899) 96 Fed. 589, 3 Am. Bankr. Rep. 1; *In re McFaun*, (N. D. Ia. 1899) 96 Fed. 592, 3 Am. Bankr. Rep. 66; *Mahoney v. Ward*, (E. D. N. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770; *Jarecki Mfg. Co. v. McElwaine*, (1901) 107 Fed. 249; *In re Hale*, (E. D. N. C. 1901) 107 Fed. 432, 6 Am. Bankr. Rep. 35; *In re Mercur*, (3d Cir. 1903) 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505; *In re Morrison*, (W. D. Tex. 1904) 127 Fed. 186, 11 Am. Bankr. Rep. 498; *In re Kaufman*, (E. D. N. Y. 1905) 136 Fed. 262, 14 Am. Bankr. Rep. 393; *In re Pincus*, (S. D. N. Y. 1906) 147 Fed. 621, 17 Am. Bankr. Rep. 331; *In re Bertenshaw*, (C. C. A. 8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 19 Am. Bankr. Rep. 577; *Matter of Freund*, (N. D. Ia. 1899) 1 Am. Bankr. Rep. 25; *Jarecki Mfg. Co. v. McElwaine*, (C. C. Ind. 1901) 5 Am. Bankr. Rep. 751; *Matter of*

*Feigenbaum*, (S. D. N. Y. 1902) 7 Am. Bankr. Rep. 339; *Dodge v. Kaufman*, (1905) 15 Am. Bankr. Rep. 542, 46 Misc. 248, 91 N. Y. S. 727; *New York Inst., etc. v. Crockett*, (1907) 17 Am. Bankr. Rep. 233, 117 App. Div. 269, 102 N. Y. S. 412; *Berry v. Sheehan*, (1906) 17 Am. Bankr. Rep. 322, 115 App. Div. 488, 101 N. Y. S. 371.

*The discharge of the partnership* discharges that entity only from its debts, and, according to some cases, leaves the partners still subject to their liability to pay the unpaid balance of the claims of the partnership creditors. *In re Bertenshaw*, (C. C. A. 8th Cir. 1907) 157 Fed. 363, 13 Ann. Cas. 986, 19 Am. Bankr. Rep. 577; *In re Everybody's Grocery, etc., Market*, (D. C. Okla. 1908) 173 Fed. 492, 21 Am. Bankr. Rep. 925.

But see *Francis v. McNeal*, (1913) 228 U. S. 695, 33 S. Ct. 701, 57 U. S. (L. ed.) 1029, L. R. A. 1915E 706, where the court said it would be an incongruity to grant a discharge from debts considered as joint and leave the same persons liable for them considered as several.

**Nonprovable debts** are not released. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139; *In re Burka*, (E. D. Mo. 1900) 104 Fed. 326, 5 Am. Bankr. Rep. 12; *In re Marcus*, (D. C. Mass. 1900) 104 Fed. 331, 5 Am. Bankr. Rep. 19, *affirmed* (C. C. A. 1st Cir. 1901) 105 Fed. 907, 5 Am. Bankr. Rep. 365; *In re United Button Co.*, (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390; *In re Havens*, (E. D. N. Y. 1910) 182 Fed. 367; *Stevens v. Meyers*, (1902) 8 Am. Bankr. Rep. 496, 72 App. Div. 128, 76 N. Y. S. 332; *Phenix Nat. Bank v. Waterbury*, (1908) 20 Am. Bankr. Rep. 140, 123 App. Div. 453, 108 N. Y. S. 391; *Phenix Nat. Bank v. Waterbury*, (1910) 23 Am. Bankr. Rep. 250, 197 N. Y. 161, 90 N. E. 435.

**The proper time and place to test the effect of a discharge**, as a release of any particular debt, is when such discharge is properly pleaded as a defense in an action brought for the enforcement of such debt. *In re Thomas*, (S. D. Ia. 1899) 92 Fed. 912, 1 Am. Bankr. Rep. 515; *In re Blumberg*, (E. D. Tenn. 1899) 94 Fed. 476, 1 Am. Bankr. Rep. 633; *In re Rhutassel*, (N. D. Ia. 1899) 96 Fed. 597, 2 Am. Bankr. Rep. 697; *In re Mussey*, (D. C. Mass. 1900) 99 Fed. 71, 3 Am. Bankr. Rep. 592; *In re Tinker*, (S. D. N. Y. 1900) 99 Fed. 79, 3 Am. Bankr. Rep. 580; *In re Marshall Paper Co.*, (C. C. A. 1st Cir. 1900) 102 Fed. 872, 4 Am. Bankr. Rep. 468; *Matter of White*, (N. D. Ala. 1901) 10 Am. Bankr. Rep. 794. See also *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *Bank of Commerce v. Elliott*, (Wis. 1901) 6 Am. Bankr. Rep. 409; *Stevens v. Meyers*, (N. Y. 1902) 8 Am. Bankr. Rep. 496; *Reed v. Dippel*, (Pa. 1906) 17 Am. Bankr. Rep. 371;

Walker v. Muir, (1908) 21 Am. Bankr. Rep. 278, 127 App. Div. 163, 111 N. Y. S. 465.

*The burden is on the plaintiff* to attack a discharge in bankruptcy, and show cause why he should not be bound by it. Broadway Trust Co. v. Mannheim, (1905) 14 Am. Bankr. Rep. 122, 47 Misc. 415, 95 N. Y. S. 93.

*The defense of a discharge in bankruptcy is personal* to the bankrupt. First International Bank of Portal v. Lee, (1913) 25 N. D. 197, 141 N. W. 716.

**Pleading discharge—Necessity of pleading.**—A discharge in bankruptcy is not *per se* an extinguishment of the debt, and no court, other than the court of bankruptcy, is bound to take judicial notice of the discharge; although it is a release, which may be pleaded. Boynton v. Ball, (1887) 121 U. S. 457, 7 S. Ct. 981, 30 U. S. (L. ed.) 985; Collins v. McWalters, (Supm. Ct. Spec. T. 1901) 35 Misc. 648, 72 N. Y. S. 203; Bank of Commerce v. Elliott, (1901) 109 Wis. 648, 85 N. W. 417.

A discharge in bankruptcy, like the statute of limitations or the statute of frauds or a release under seal, to be effective must be pleaded. *In re Wesson*, (1881) 88 Fed. 855; Mack Mfg. Co. v. Van Duerson, (1905) 138 Fed. 953; Herschman v. Justices of Boston, (1915) 220 Mass. 137, 107 N. E. 543; Lovell v. Sneed, (1906) 79 Ark. 204, 95 S. W. 157; Hays v. Ford, (1876) 55 Ind. 52; Lane v. Holcomb, (1903) 182 Mass. 360, 65 N. E. 794; Collins v. McWalters, (1901) 35 Misc. 648, 72 N. Y. S. 203; Bailey v. Kraus, (1903) 39 Misc. 845, mem., 81 N. Y. S. 492.

If at the time of adjudication or afterwards the bankrupt is sued on a provable debt, his sole remedy is to obtain a continuance, if necessary, and plead his discharge, and where this is done all further proceedings are stayed. *Herschman v. Justices of Boston*, (1915) 220 Mass. 137, 107 N. E. 543, wherein the court said: "It accordingly must be held that as the court had jurisdiction of the cause of action and of the parties and the petitioners did not interpose this defense, the judgment is not open to collateral attack and may be enforced by arrest as well as by levy upon their goods, chattels or lands."

Where, however, the declaration in an action at law shows that the indebtedness or liability in suit is provable against the defendant's bankrupt estate in bankruptcy proceedings then pending, and alleges "that in due time the said defendant will procure his coveted discharge, the case may be considered as though the declaration alleged a discharge, and a demurrer must be sustained." *Jenkins v. Pilcher*, (1910) 160 Mich. 349, 125 N. W. 355, 28 L. R. A. (N. S.) 423.

*Not an odious defense.*—"The contention that a discharge of the debt sued upon, by a court of bankruptcy, is not a meritorious defense, is in this state disposed of. Such defense is not more technical or less favored by the courts than that of the statute of limitations, which is held by this court to be a meritorious defense." *Citizens' Nat. Bank of Sisseton v. Branden*, (1910) 19 N. D. 489, 126 N. W. 102, 27 L. R. A. (N. S.) 858, opening a default judgment to admit discharge in bankruptcy as a defense.

*Jurisdictional facts need not be alleged.*—Since the jurisdiction of courts of bankruptcy need not necessarily appear upon the face of the proceedings, the rule that in pleading judgments of domestic courts of record the jurisdiction of the court need not be affirmatively shown by stating the facts upon which it attached, applies to the pleading of a discharge in bankruptcy. *Bryant v. Kinyon*, (1901) 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801, holding that it was not necessary to allege the residence of the bankrupt within the district where the Bankruptcy Court was situate.

*On demurrer to an answer setting up a discharge*, the court will assume that notice was given to individual and firm creditors; that an inventory of all individual property and interest in the firm was duly scheduled; and that every other step in the proceeding prior to, and at the time of, the discharge was, in all respects, regular and statutory. *Jarecki Mfg. Co. v. McElwaine*, (1901) 107 Fed. 249.

*Negating exceptions.*—As to negating the statutory exceptions to the operation of a discharge, the rule applies that "where an exception is contained in the enacting clause of a statute, it must be negated by the pleader who seeks to bring his case within the statute, but it is not necessary that this should be done in express words; it is sufficient if the facts pleaded clearly negative the exception." *Maxwell v. Evans*, (1883) 90 Ind. 596, 46 Am. Rep. 234.

As to negating the exception in section 17a (3) see the note to clause (3).

*"A plea puis darrein continuance* [setting up a discharge in bankruptcy] waives all prior pleas, and amounts to an admission of the cause of action set up in the plaintiff's declaration." *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147.

**Evidence of discharge.**—See section 21f. *Custard v. Wigderson*, (1907) 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740; *Hamon v. Foust*, (1912) 127 Tenn. 32, 150 S. W. 418, Ann. Cas. 1914A 1103 and note.

**Revival of discharged debt—Moral obligation supporting new promise.**—"It is settled that a discharge, while releasing

the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt." *Zavelo v. Reeves*, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676, Ann. Cas. 1914D 664. To the same point see 3 R. C. L. 324-328 and the following cases: *Gruenberg v. Trainor*, (N. Y. 1903) 11 Am. Bankr. Rep. 776; *Citizens' Loan Ass'n v. Boston, etc., R. Co.*, (Mass. 1907) 19 Am. Bankr. Rep. 650; *Wolfe v. Eberlein*, (1883) 74 Ala. 99, 49 Am. Rep. 809; *Griel v. Solomon*, (1886) 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733; *Mallin v. Wenham*, (1904) 209 Ill. 252, 70 N. E. 564, 101 A. S. R. 233, 65 L. R. A. 602; *Stern v. Smith*, (1907) 225 Ill. 430, 80 N. E. 307, 116 A. S. R. 151; *Post v. Losey*, (1887) 111 Ind. 74, 12 N. E. 121, 40 Am. Rep. 677; *Needham v. Matthewson*, (1909) 81 Kan. 340, 105 Pac. 436, 135 A. S. R. 374, 19 Ann. Cas. 146, 26 L. R. A. (N. S.) 274; *Way v. Sperry*, (1850) 6 Cush. (Mass.) 238, 52 Am. Rep. 779; *Citizens' Loan Ass'n v. Boston, etc., R. Co.*, (1907) 196 Mass. 528, 82 N. E. 696, 124 A. S. R. 584, 13 Ann. Cas. 365, 14 L. R. A. (N. S.) 1025; *Dusenbury v. Hoyt*, (1873) 63 N. Y. 521, 13 Am. Rep. 543; *Firestone Tire, etc., Co. v. Agnew*, (1909) 194 N. Y. 165, 86 N. E. 1116, 16 Ann. Cas. 1150, 24 L. R. A. (N. S.) 628; *In re Field*, (1830) 2 Rawle (Pa.) 351, 21 Am. Dec. 454; *Earnest v. Parke*, (1835) 4 Rawle (Pa.) 452, 27 Am. Dec. 280; *Kingston v. Wharton*, (1816) 2 Serg. & R. (Pa.) 208, 7 Am. Dec. 638; *Farmers', etc., Bank v. Flint*, (1845) 17 Vt. 508, 44 Am. Dec. 351.

An oral promise to pay a discharged debt, in the absence of a statute providing otherwise, will suffice, and to nullify this result statutes have been enacted in many jurisdictions requiring a promise in writing signed by the person sought to be charged. *Way v. Sperry*, (1850) 6 Cush. (Mass.) 238, 52 Am. Dec. 779; *Farmers', etc., Bank v. Flint*, (1845) 17 Vt. 508, 44 Am. Dec. 351; *Mandell v. Levy*, (1905) 47 Misc. 147, 93 N. Y. S. 545; *Holt v. Akarman*, (1913) 84 N. J. L. 371, 86 Atl. 408, where the court said: "At common law a verbal promise to pay by a bankrupt after his adjudication, whether made before or after his discharge, was effectual and revived the debt. And this continued to be so until the enactment of the Bankrupt Act, 6 Geo. IV, ch. 16. Evan's Stats. vol. 4, p. 454. The 131st section of this Act provides: 'That no bankrupt after his certificate shall have been allowed under any present or future commission shall be liable to pay or satisfy any debt, claim or demand, upon any contract, promise or agreement made or to be made after the suing out of the commission unless such promise, contract or agreement be made in writing,

signed by the bankrupt, or by some person thereto lawfully authorized.' It is obvious that this statute expressly sanctions the making of such promise, contract, or agreement, before the granting of the certificate. Its effect was to require a more solemn act than a mere verbal promise. It left the common law unaltered in so far as to permit such promise, contract, or agreement to be made before the granting of the certificate, but required that the evidence of such promise, contract, or agreement be in writing signed by the bankrupt or his authorized agent. Bearing this in mind, it at once becomes clear why Baron Parke, in *Kirkpatrick v. Tattersall*, [130 M. & W. (Eng.) 766], said that it was immaterial whether the promise was made before or after the granting of the certificate, it was effective so long as it was a written express promise to pay notwithstanding the granting of the certificate. It also must not be overlooked that the English statute was a part of the Bankrupt Act and is regulatory in its nature regarding the status of the bankrupt after adjudication and the conditions under which he may incur liability for a debt provable under the Act after adjudication and after discharge. There is no such provision in the United States Bankrupt Act of July 1, 1898. In the United States the matter in this regard is left wholly to state legislation."

*Date of new promise.*—"In reason, as well as by greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, it has been commonly held a promise to pay a provable debt, notwithstanding the discharge, is as effectual when made after the filing of the petition and before the discharge as if made after the discharge. Our attention is not called to any decision in point arising under the present Bankruptcy Act; but we deem it clear that the same rules should be applied." *Zavelo v. Reeves*, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676, Ann. Cas. 1914D 664.

An express promise to pay a provable debt is binding when made at any time after the filing of a petition in bankruptcy, whether before or after discharge. *In re Hawkes*, (1913) 204 Fed. 309; *Moore v. Trounstone*, (1906) 126 Ga. 116,



54 N. E. 810, 7 Ann. Cas. 971 and note; Wolfe v. Eberlein, (1883) 74 Ala. 99, 49 Am. Rep. 809; Dicks v. Andrews, (1909) 132 Ga. 601, 64 S. E. 788, 16 Ann. Cas. 1070; Stern v. Smith, (1907) 225 Ill. 430, 80 N. E. 307, 116 A. S. R. 151; Katz v. Moessinger, (1880) 7 Ill. App. 536; Knapp v. Hoyt, (1881) 57 Ia. 591, 10 N. W. 925, 42 Am. Rep. 59; Otis v. Gazlin, (1850) 31 Me. 567; Old Town Nat. Bank v. Parker, (1913) 121 Md. 61, 87 Atl. 1105; McWillie v. Kirkpatrick, (1855) 28 Miss. 802, 74 Am. Dec. 125; Wiggins v. Hodgdon, (1884) 63 N. H. 39; Holt v. Akarman, (1913) 84 N. J. L. 371, 86 Atl. 408; Jersey City Ins. Co. v. Archer, (1890) 122 N. Y. 376, 25 N. E. 338; Fraley v. Kelly, (1872) 67 N. C. 78; Sundling v. Willey, (1905) 19 S. D. 293, 103 N. W. 38, 9 Ann. Cas. 644 and note; Goldstein v. Saur, (Tex. 1913) 162 S. W. 441; Coe v. Rosene, (1911) 66 Wash. 73, 118 Pac. 881, Ann. Cas. 1913C 741, 38 L. R. A. (N. S.) 577; Custard v. Wiggerson, (1907) 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740; Hill v. Trainer, (1880) 49 Wis. 537, 5 N. W. 926; Kirkpatrick v. Tattersall, (1845) 13 M. & W. (Eng.) 766. See also Pearsall v. Tabour, (1908) 98 Minn. 248, 108 N. W. 808; Stern v. Gerber, (1912) 137 N. Y. S. 879.

In Kentucky it has been held that a promise made before a discharge in bankruptcy has been obtained, and therefore while the debt is a valid subsisting obligation, is without any consideration to uphold it, does not cancel or supersede the original obligation, and is not operative to keep the obligation alive after the discharge. *Graves v. McGuire*, (1881) 79 Ky. 532; *Thornberry v. Dils*, (1882) 80 Ky. 241; *Ogden v. Redd*, (1877) 13 Bush (Ky.) 581. But where a bankrupt promised his creditor that he would pay the debt if the creditor would pay certain taxes upon the bankrupt's property for a certain year, it was held that the payment of the taxes formed a sufficient consideration for the promise, and that the promise was enforceable after the discharge in bankruptcy. *Thornberry v. Dils*, (1882) 80 Ky. 241.

A promise to pay, notwithstanding an anticipated discharge, made before the institution of bankruptcy proceedings, is itself released by the discharge. *Nelson v. Stewart*, (1875) 54 Ala. 115, 25 Am. Rep. 660.

**Express promise required.**—In order to revive a debt discharged in bankruptcy the new promise must be express, thus differing from the promise required at common law to take a debt out of the operation of the statute of limitations. 3 R. C. L. 326; *Griel v. Solomon*, (1886) 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733; *Stern v. Smith*, (1907) 225 Ill. 430, 80 N. E. 307, 116 A. S. R. 151; *Needham v. Matthewson*, (1909) 81 Kan. 340, 105 Pac.

436, 135 A. S. R. 374, 19 Ann. Cas. 146 and note, 26 L. R. A. (N. S.) 274; *Bennett v. Everett*, (1855) 3 R. I. 152, 67 Am. Dec. 498.

The promise cannot be implied or inferred, and so it is held that partial payments on a debt discharged in bankruptcy are not sufficient evidence of a new promise to pay, to revive the debt. *Needham v. Matthewson*, (1909) 81 Kan. 340, 105 Pac. 436, 135 A. S. R. 374, 19 Ann. Cas. 146 and note, 26 L. R. A. (N. S.) 274; *Griel v. Solomon*, (1886) 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733; *Stern v. Smith*, (1907) 225 Ill. 430, 80 N. E. 307, 116 A. S. R. 151; *Willetts v. Cotherson*, (1879) 3 Ill. App. 644; *Tolle v. Smith*, (1895) 98 Ky. 464, 33 S. W. 410; *Merriam v. Bayley*, (1848) 1 Cush. (Mass.) 77, 48 Am. Dec. 591; *Cambridge Sav. Inst. v. Littlefield*, (1850) 6 Cush. (Mass.) 210; *Stark v. Stinson*, 23 N. H. 259; *Lawrence v. Harrington*, (1890) 122 N. Y. 408, 25 N. E. 406; *Wheeler v. Simmons*, (1891) 60 Hun (N. Y.) 404, 15 N. Y. S. 462; *In re Hazleton*, (1868) 1 W. N. C. (Pa.) 67; *McDonald v. Notman*, (1878) 25 Grant Ch. (U. C.) 608.

And of course a partial payment on a debt discharged in bankruptcy does not fulfil the requirement in certain jurisdictions that such debt can be revived only by a new promise in writing. *Ames v. Storer*, (1888) 80 Me. 243, 14 Atl. 67; *Jacobs v. Carpenter*, (1894) 161 Mass. 16, 36 N. E. 676; *Heim v. Chapman*, (1898) 171 Mass. 347, 50 N. E. 529; *Meyer v. Bartels*, (1907) 56 Misc. 621, 107 N. Y. S. 778.

"The mere acknowledgment of a debt or the expression of an intention to pay is not sufficient to revive the debt." *Coe v. Rosene*, (1911) 66 Wash. 73, 118 Pac. 881, Ann. Cas. 1913C 741 and note, 38 L. R. A. (N. S.) 577.

A clear, distinct, and unequivocal promise is necessary to revive a debt discharged in bankruptcy. *Sundling v. Willey*, (1905) 19 S. D. 293, 103 N. W. 38, 9 Ann. Cas. 644 and note; *Coe v. Rosene*, (1911) 66 Wash. 73, 118 Pac. 881, Ann. Cas. 1913C 741 and note, 38 L. R. A. (N. S.) 577; *Moore v. Trounstone*, (1906) 126 Ga. 116, 54 S. E. 810, 7 Ann. Cas. 971; *Stern v. Smith*, (1907) 225 Ill. 430, 80 N. E. 307, 116 A. S. R. 151; *Shockey v. Mills*, (1880) 71 Ind. 288, 36 Am. Rep. 196; *Meech v. Lamon*, (1885) 103 Ind. 515, 3 N. E. 159, 53 Am. Rep. 540; *Knapp v. Hoyt*, (1881) 57 Ia. 591, 10 N. W. 925, 42 Am. Rep. 59; *Shaw v. Burney*, (1882) 86 N. C. 331, 41 Am. Rep. 461; *McDougall v. Page*, (1882) 55 Vt. 187, 45 Am. Rep. 602.

**Conditional promise.**—A binding promise to pay may be either absolute or conditional; but if made dependent upon a contingency or a condition the promisee cannot maintain an action on the promise unless he pleads and proves the happening of the contingency or the performance

of the condition. *Griel v. Solomon*, (1886) 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733; *Stern v. Smith*, (1907) 225 Ill. 430, 80 N. E. 307, 116 A. S. R. 151; *Bennett v. Everett*, (1855) 3 R. I. 152, 67 Am. Dec. 498.

**Promise must have been accepted.**—To revive a debt which has been discharged in bankruptcy, a conditional promise thereafter to pay the original obligation in instalments must be accepted by the creditor. *Smith v. Stanchfield*, (Minn. 1901) 7 Am. Bankr. Rep. 498; *International Harvester Co. v. Lyman*, (Minn. 1903) 10 Am. Bankr. Rep. 450.

**Basis of action to recover revived debt.**—There is a conflict of authority as to

whether the action should be brought on the original obligation, supported by the new promise, or on the new promise supported by the older liability. 3 R. C. L. 327. The better opinion seems to be that the cause of action rests on the new promise, not upon the old debt. *Wolfe v. Eberlein*, (1883) 74 Ala. 99, 49 Am. Rep. 809; *Needham v. Matthewson*, (1909) 81 Kan. 340, 105 Pac. 436, 135 A. S. R. 374, 19 Ann. Cas. 146, 26 L. R. A. (N. S.) 274; *Stafford v. Bacon*, (1841) 1 Hill (N. Y.) 532, 37 Am. Dec. 366; *Fraley v. Kelly*, (1883) 88 N. C. 227, 43 Am. Rep. 743; *In re Field*, (1830) 2 Rawle (Pa.) 351, 21 Am. Dec. 454.

(1) **[Taxes.]** are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; [(1898) 30 Stat. L. 550.]

This clause (1) was re-enacted without change in 1903 (32 Stat. L. 798).

Taxes are considered under section 64a.

(2) **[Liabilities for tort, fraud, etc.]** are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; [(amended 1903, which excepted pending cases) 32 Stat. L. 798.]

As originally enacted this clause (2) read as follows:

"(2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another;" [30 Stat. L. 550.]

- I. False pretenses or representations, 716.
- II. Willful and malicious injuries, 720.
- III. Miscellaneous, 722.

#### I. FALSE PRETENSES OR REPRESENTATIONS.

**Liability for obtaining property by false pretenses or false representations—**

**In general.**—As the Bankruptcy Law was originally enacted it provided for an exception from the discharge of "judgments" in an action for obtaining property by false pretenses or false representations. The amendment of 1903 substituted the word "liabilities" for the word "judgments," so that now a discharge in bankruptcy does not relieve the person discharged as to such "liabilities" as are created by obtaining property by false pretenses or false representations. *Forsyth v. Vehmeyer*, (1900) 177 U. S. 177, 20 S. Ct. 623, 44 U. S. (L. ed.) 723; *Bullis v. O'Beirne*, (1904) 195 U. S. 606, 25 S. Ct. 118, 49 U. S. (L. ed.) 340, 13 Am. Bankr. Rep. 108; *In re Blumberg*, (E. D. Tenn. 1899) 94 Fed. 476, 1 Am. Bankr. Rep. 633; *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (E. D. Mo. 1901) 111 Fed. 361, 3 Am. Bankr. Rep.

657; *Western Union Cold Storage Co. v. Hurd*, (W. D. Mo. 1902) 116 Fed. 442, 8 Am. Bankr. Rep. 633; *In re Wollock*, (N. D. Ill. 1903) 120 Fed. 516, 9 Am. Bankr. Rep. 685; *Machel v. Rochester*, (D. C. Mont. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 429; *Brown v. United Button Co.*, (C. C. A. 3d Cir. 1906) 149 Fed. 48, 17 Am. Bankr. Rep. 565; *Mathieu v. Goldberg*, (S. D. N. Y. 1907) 156 Fed. 541, 19 Am. Bankr. Rep. 191; *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25; *In re Lewis*, (E. D. N. Y. 1908) 163 Fed. 137, 20 Am. Bankr. Rep. 711; *In re Koronsky*, (C. C. A. 2d Cir. 1909) 170 Fed. 719, 21 Am. Bankr. Rep. 851, following *In re Hall*, (S. D. N. Y. 1909) 170 Fed. 721, 22 Am. Bankr. Rep. 498; *Frank v. Michigan Paper Co.*, (C. C. A. 4th Cir. 1910) 179 Fed. 776; *Gleason v. Thaw*, (C. C. A. 3d Cir. 1911) 185 Fed. 345; *In re Nuttall*, (S. D. N. Y. 1912) 201 Fed. 557; *Matter of Arkell*, (1901) 6 Am. Bankr. Rep. 650, 65 App. Div. 130, 72 N. Y. S. 555; *In re Bullis*, (1902) 7 Am. Bankr. Rep. 238, 68 App. Div. 508, 73 N. Y. S. 1047; *Colwell v. Tinker*, (1902) 7 Am. Bankr. Rep. 334, 169 N. Y. 531,

537, 62 N. E. 668; *Gee v. Gee*, (Minn. 1901) 7 Am. Bankr. Rep. 500; *Morse v. Kaufman*, (Va. 1902) 7 Am. Bankr. Rep. 549; *Barnes Mfg. Co. v. Norden*, (N. J. 1902) 7 Am. Bankr. Rep. 553; *Frey v. Torrey*, (1902) 8 Am. Bankr. Rep. 196, 70 App. Div. 168, 75 N. Y. S. 40, *affirmed* (1903) 175 N. Y. 501, 67 N. E. 1082; *Berry v. Jackson*, (Ga. 1902) 8 Am. Bankr. Rep. 485; *Stevens v. Meyers*, (1902) 8 Am. Bankr. Rep. 496, 72 App. Div. 128, 76 N. Y. S. 332; *Katzenstein v. Reid*, (Tex. 1905) 16 Am. Bankr. Rep. 740; *Powell v. Ricker*, (Vt. 1907) 18 Am. Bankr. Rep. 651; *Shepard v. Morgan*, (1908) 19 Am. Bankr. Rep. 866, 123 App. Div. 128, 108 N. Y. S. 379; *Matter of Benoit*, (1908) 20 Am. Bankr. Rep. 270, 124 App. Div. 142, 108 N. Y. S. 889; *Kavanaugh v. McIntyre*, (1908) 21 Am. Bankr. Rep. 327, 128 App. Div. 722, 112 N. Y. S. 987; *Maxwell v. Martin*, (1909) 22 Am. Bankr. Rep. 93, 130 App. Div. 80, 114 N. Y. S. 349; *Standard Sewing Mach. Co. v. Kattell*, (1909) 22 Am. Bankr. Rep. 376, 132 App. Div. 539, 117 N. Y. S. 32; *Nichols v. Doak*, (1908) 22 Am. Bankr. Rep. 737, 48 Wash. 457, 93 Pac. 919; *Frank v. Michigan Paper Co.*, (C. C. A. 4th Cir. 1910) 24 Am. Bankr. Rep. 261; *O'Beirne v. Allegheny, etc., R. Co.*, (1897) 151 N. Y. 384, 45 N. E. 873.

*The statute should be liberally construed so as to prevent the discharge in bankruptcy from relieving against a liability which would not exist but for the fraudulent conduct of the bankrupt.* *Gaddy v. Witt*, (Tex. 1911) 142 S. W. 926.

**Question for court.**—The amendment of 1903, by substituting the word "liabilities" for the word "judgments," has imposed upon the court of bankruptcy the duty of determining whether the debt sought to be excepted is, or is not, a liability for obtaining property by false pretenses or false representations. *Gleason v. Thaw*, (C. C. A. 3d Cir. 1911) 185 Fed. 345.

**"Judgments in actions for frauds"** were expressly excepted prior to the amendment of section 17a (2) in 1903. For judgments that were held to be within that clause see *Bullis v. O'Beirne*, (1904) 195 U. S. 606, 25 S. Ct. 118, 49 U. S. (L. ed.) 340; *Mackel v. Rochester*, (1905) 135 Fed. 904; *Packer v. Whittier*, (C. C. A. 1899) 91 Fed. 511; *Moody v. Muscogee Mfg. Co.*, (1910) 134 Ga. 721, 68 S. E. 604, 20 Ann. Cas. 301; *Oberreich v. Foster*, (1909) 148 Ill. App. 397; *Nichols v. Doak*, (1908) 48 Wash. 457, 93 Pac. 919, 125 A. S. R. 942; *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (1903) 122 Fed. 232, 58 C. C. A. 596, *affirming* (1901) 111 Fed. 361; *In re Ennis*, (1909) 171 Fed. 755; *In re Blumberg*, (1899) 94 Fed. 476; *In re Rhutassel*, (1899) 96 Fed. 597; *Lippincott v. Herman*, (1904) 179 Mo. 350, 78 S. W. 1132; *Goodman v. Her-*

*man*, (1903) 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885; *Olds v. Forrester*, (1905) 126 Ia. 456, 102 N. W. 419; *Barnes Cycle Co. v. Haines*, (1905) 69 N. J. Eq. 651, 61 Atl. 515; *Barnes Mfg. Co. v. Norden*, (1902) 67 N. J. L. 493, 51 Atl. 454; *Burnham v. Pidcock*, (1901) 58 App. Div. 273, 68 N. Y. S. 1007; *Matter of Benoit*, (1908) 124 App. Div. 142, 108 N. Y. S. 889, *affirmed* (1909) 194 N. Y. 549 mem., 87 N. E. 1115; *Matter of Arkell*, (1901) 65 App. Div. 130, 72 N. Y. S. 555; *Spaulding v. Wolfe*, (1906) 115 App. Div. 890, 100 N. Y. S. 1144; *In re Benedict*, (1902) 37 Misc. 230, 75 N. Y. S. 165; *Crosby v. Miller*, (1903) 25 R. I. 172, 55 Atl. 328; *In re Peterson*, (1904) 77 Vt. 226, 59 Atl. 828.

**"Property" as including professional services of attorney.**—In *Gleason v. Thaw*, (1915) 236 U. S. 558, 35 S. Ct. 287, 59 U. S. (L. ed.) 717, *affirming* (C. C. A. 2d Cir. 1912) 196 Fed. 359, it was held that professional services of an attorney and counselor-at-law were not "property" within the meaning of this section. The court said: "The accurate delimitation of the concept 'property' would afford a theme especially apposite for amplificative philosophic disquisition; but the Bankrupt Law is a prosy thing, intended for ready application to the everyday affairs of practical business, and when construing its terms we are constrained by their usual acceptance in that field of endeavor. The word 'property,' without restriction, occurs more than seventy times in the Act. Not once does it plainly refer to professional services, and, except in very few instances, to include them within its intentment would produce a patent absurdity. Reference to the following provisions will suffice to indicate the sense of the word therein. Section 1 (15) declares one shall be deemed insolvent 'whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed . . . shall not, at a fair valuation, be sufficient in amount to pay his debts.' Section 3a provides that 'acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder . . . or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer,' etc. Section 50 provides, in respect of trustees' bonds, '(d) the court shall require evidence as to the actual value of the property of sureties; . . . (f) the actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond, shall equal at least the amount of such bond.' And § 60d brings the two things into sharp contrast—'If a debtor shall, directly or indirectly, in contemplation of the filing of a petition

by or against him, pay money or transfer property to an attorney and counselor-at-law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee, etc. Congress, we think, never intended that property in the paragraph under consideration should include professional services. At most it denotes something subject to ownership, transfer or exclusive possession and enjoyment, which may be brought within the dominion and control of a court through some recognized process. This is certainly the full extent of the word's meaning as employed in ordinary speech and business, and the same significance attaches to it in many carefully prepared writings. The constitutions of many states provide that *all property* shall be taxed, but it has never been supposed that this applies to professional services. We do not overlook, nor do we intend to qualify, what this court has said in other cases. Our sole present concern is with the interpretation of a particular statute; the scope and purpose of constitutional limitations are in no way involved—they depend upon considerations of a wholly different character. In view of the well-known purposes of the Bankrupt Law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed; and while much might be said in favor of extending these to liabilities incurred for services obtained by fraud, the language of the Act does not go so far."

It had previously been held in *Gleason v. Thaw*, (C. C. A. 3d Cir. 1911) 185 Fed. 345, a controversy between the same parties, and presenting the identical question, that the language used in section 17a (2), by which liabilities for obtaining property by false pretenses are excepted from the provable debts discharged in bankruptcy, is the usual and most general language for describing a specific crime. It refers to substantive things—to a *res*—and not to services rendered.

Money is "property" within the meaning of the word as used in this section. *Hallagan v. Dowell*, (Ia. 1913) 139 N. W. 883.

Inducing the abandonment of a suit on a note and surrender of the instrument by a promise to pay the same, when falsely made to secure time to conceal assets and take advantage of bankruptcy proceedings, did not deprive the plaintiff of his cause of action and was not such fraud as would except the debt from the operation of a discharge in bankruptcy. *Jenkins v. Pilcher*, (1910) 160 Mich. 349, 125 N. W. 355, 28 L. R. A. (N. S.) 423.

A judgment obtained by a railroad company against a ticket agent for money collected by him for tickets sold, and misappropriated to his own use, is not one

for a debt which is a liability for obtaining property by false pretenses or false representations. *In re Wenham*, (S. D. N. Y. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690.

A debt arising from an overpayment, made to the bankrupt through mistake, which he refused to refund, is not created by his fraud, within the meaning of the Act, and is released by his discharge; although his denial of liability, when advised of the mistake, may have been a mere pretense. *Western Union Cold Storage Co. v. Hurd*, (W. D. Mo. 1902) 116 Fed. 442, 8 Am. Bankr. Rep. 633.

**Reduction of liability to judgment immaterial.**—The character of the "liability," as that word is used in section 17a (2), is not changed by the fact that the liability has been reduced to judgment. *Boynton v. Ball*, (1887) 121 U. S. 457, 466, 7 S. Ct. 981, 30 U. S. (L. ed.) 985; *Tinker v. Colwell*, (1904) 193 U. S. 473, 24 S. Ct. 505, 48 U. S. (L. ed.) 754, 11 Am. Bankr. Rep. 568; *Peters v. U. S.*, (C. C. A. 7th Cir. 1910) 24 Am. Bankr. Rep. 206.

Under the law as amended by the Act of 1903, as well as under the Act of 1867, the creditors' claim for a liability created by false representations need not have been reduced to judgment in order to be excepted from the operation of the discharge. *Dilley v. Simmons Nat. Bank*, (1913) 108 Ark. 342, 158 S. W. 144.

"That some torts may be waived and be the basis of provable claims is decided in *Crawford v. Burke*, (1904) 195 U. S. 176, 187, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 151." *Clarke v. Rogers*, (1913) 228 U. S. 534, 33 S. Ct. 587, 57 U. S. (L. ed.) 953.

Where a claimant waives the tort growing out of a false pretense or representation and proceeds on the implied contract, his claim is one that is provable in bankruptcy, under section 63; and, consequently, is not within the exception provided for by section 17a (2). *Tindle v. Birkett*, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121, *affirming* (1902) 15 Am. Bankr. Rep. 179, 171 N. Y. 520, 64 N. E. 210; *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (E. D. Mo. 1901) 111 Fed. 361, 6 Am. Bankr. Rep. 657; *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; *Talcott v. Friend*, (C. C. A. 7th Cir. 1910) 179 Fed. 676; *Fechter v. Postal*, (1906) 17 Am. Bankr. Rep. 316, 114 App. Div. 776, 100 N. Y. S. 207; *Strauch v. Flynn*, (Minn. 1909) 22 Am. Bankr. Rep. 246.

*Claims for damages arising out of false and fraudulent representations*, inducing sales of merchandise, may be proved under the Bankruptcy Act, as debts "founded upon an open account or upon a contract, expressed or implied," if the sellers see

fit to waive the tort and take their places with the other creditors of the bankrupt estate; and are, therefore, barred by a discharge in bankruptcy. *Tindle v. Birkett*, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121, *affirming* (1902) 15 Am. Bankr. Rep. 179, 171 N. Y. 520, 64 N. E. 210.

*Creditor bound by his election to waive tort.*—Where brokers, by fraud, induced a customer to authorize them to purchase stocks for him and to deposit margins therefor, and afterwards converted such stocks and became bankrupt, it was held that the customer had his option either to sue for a rescission of the contract on the ground of fraud, or for the conversion; and that when he did the latter he waived the fraud and affirmed the contract, and had no standing to claim that the bankrupt's liability was one for obtaining property by false pretenses. *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679.

*Effect of waiving the tort.*—A creditor entitled to prosecute a claim against the bankrupt in contract or tort, who accepts a dividend under a composition, is not thereby precluded from suing in tort to recover a balance. *Friend v. Talcott*, (1913) 228 U. S. 27, 33 S. Ct. 505, 57 U. S. (L. ed.) 718.

*False representations need not be in writing.*—There is no requirement in section 17 as to the manner in which the false pretenses or false representations shall be conveyed to the defrauded party; and it was not intended that such pretenses or representations should be in writing, or that such intention should be read from section 14b (3) into section 17a (2). *Katzenstein v. Reid*, (Tex. 1905) 16 Am. Bankr. Rep. 740.

*Judgment against the bankrupt for deceit in the sale of a farm was not released by the discharge in bankruptcy.* *In re Shepardson*, (D. C. Vt. 1915) 220 Fed. 186.

*A false representation by one partner, by means of which property was obtained by the firm, will be imputed to the other partners to the extent of holding them civilly liable for the debt, and their discharge in bankruptcy will not discharge their liability for such debt.* *Frank v. Michigan Paper Co.*, (C. C. A. 4th Cir. 1910) 179 Fed. 776, 24 Am. Bankr. Rep. 261.

*Fraudulent sale.*—It having been alleged and found that a sale of goods, delivered to the debtor, upon which a judgment has been obtained, was procured by false representations, the debt will come under section 17a (2) or (4), and the discharge will not release the debtor therefrom. *In re Lewensohn*, (1900) 99 Fed. 73. See also *In re Cole*, (1901) 106 Fed. 837, holding that the bankrupt is not released by discharge from a judgment in

an action for defrauding plaintiff by false representations.

*False statements to surety.*—The applicability of this section to obtaining money from a third party as the results of false statements made to a surety was considered but not decided in *In re Dunfee*, (N. D. N. Y. 1913) 206 Fed. 745.

*Promissory notes given by bankrupt.*—In *Rudstrom v. Sheridan*, (1913) 122 Minn. 262, 142 N. W. 313, the facts were as follows: The defendant's husband was indebted to the plaintiff upon certain overdue obligations which he was unable to pay. In settlement of the same the husband made and delivered to the plaintiff several promissory notes payable at future dates. The defendant became a joint maker upon those new notes. The husband and wife at the time of the transaction agreed to procure the indorsement of a relative of the wife, who was financially responsible. This they failed to do. The old notes were not surrendered, nor did plaintiff part with any property or property right in reliance upon the agreement to procure such indorsement. The defendant subsequently became a bankrupt, and in due proceedings in the Bankruptcy Court was discharged from all her debts. It was held that the transaction stated did not amount to "obtaining property by false pretenses or false representations," and that the defendant was by her discharge released from liability on the notes.

*Constructive fraud.*—The debts excepted from the operation of a discharge, under section 17a (2), because of having accrued by the procurement of property by false pretenses or representations, do not include debts based upon a constructive or implied fraud. The statute extends only to positive fraud, or fraud in fact, which involves moral turpitude or intentional wrong. *In re Blumberg*, (E. D. Tenn. 1899) 94 Fed. 476, 1 Am. Bankr. Rep. 633; *Western Union Cold Storage Co. v. Hurd*, (W. D. Mo. 1902) 116 Fed. 442, 8 Am. Bankr. Rep. 633; *In re Wenham*, (S. D. N. Y. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690; *Gleason v. Thaw*, (C. C. A. 3d Cir. 1911) 185 Fed. 345; *Cooper Grocery Co. v. Gaddy*, (Tex. 1911) 141 S. W. 825; *Matter of Arkell*, (1901) 6 Am. Bankr. Rep. 650, 65 App. Div. 130, 72 N. Y. S. 555; *Gee v. Gee*, (Minn. 1901) 7 Am. Bankr. Rep. 500; *Matter of Floyd*, (S. D. N. Y. 1905) 15 Am. Bankr. Rep. 277; *Johnson v. Bruckheimer*, (N. Y. 1909) 22 Am. Bankr. Rep. 242.

*Purchase of goods with intent not to pay.*—In *In re Nuttall*, (S. D. N. Y. 1912) 201 Fed. 557, the court said: "I doubt if our courts will ever hold that the purchase of goods at an agreed price, accompanied by an intent on the part of the purchaser not to pay for them, in the absence of any representation whatever as

to the ability of the purchaser to pay, or any representation of a fact tending to induce a sale and secure a delivery of the property, and in the absence of any acts or conduct tending to avoid or prevent inquiry as to financial condition, creates a liability for obtaining property by false pretenses or false representations. Such a holding will be a far advance on the doctrines enunciated in *Dambmann v. Schulting* [75 N. Y. 55, 85 N. Y. 622], (*Graham v. Meyer* [99 N. Y. 611], and *Cleveland v. Richardson* [132 U. S. 318, 10 S. Ct. 100, 33 U. S. (L. ed.) 384]. In *Atlanta Skirt Co. v. Jacobs*, 8 Ga. App. 299, 68 S. E. 1077, 25 Am. Bankr. Rep. 895, the court did hold that: 'A false representation may consist in the purchasing of goods with no present purpose of paying for them and in contemplation of a fraudulent insolvency. To buy goods without a present intention to pay is a false representation of one's intention. Therefore to buy goods without a present intention to pay will avoid a discharge.' This I am not prepared to sanction. Is it a false pretense or representation not to disclose one's intent not to pay? It may be that the defendants were guilty of fraud (*Ames v. Moir*, 138 U. S. 306, 312, 11 S. Ct. 311, 34 U. S. (L. ed.) 951); but a debt created by the fraud of a person thereafter adjudged a bankrupt is dischargeable, unless same was created by his fraud 'while acting as an officer or in any fiduciary capacity' (*Crawford v. Burke*, 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; *Tindle v. Birkett*, 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762). Of course, this does not apply to the 'fraud' involved in 'obtaining property by false pretenses or false representations.'"

## II. WILFUL AND MALICIOUS INJURIES.

**Wilful and malicious injuries—In general.**—Liability for wilful and malicious injuries to the person or property of another is not released by a discharge in bankruptcy. *Tinker v. Colwell*, (1904) 193 U. S. 473, 485, 24 S. Ct. 505, 508, 48 U. S. (L. ed.) 754, 11 Am. Bankr. Rep. 568; *In re Colaluca*, (D. C. Mass. 1904) 133 Fed. 255, 13 Am. Bankr. Rep. 292; *Thompson v. Judy*, (C. C. A. 6th Cir. 1909) 169 Fed. 553, 22 Am. Bankr. Rep. 154; *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; *In re Toklas*, (E. D. N. Y. 1912) 201 Fed. 377; *Leicester v. Hoadley*, (Kan. 1903) 9 Am. Bankr. Rep. 318; *McDonald v. Brown*, (1902) 10 Am. Bankr. Rep. 58, 23 R. I. 546, 51 Atl. 213; *McChristal v. Clisbee*, (1906) 16 Am. Bankr. Rep. 838, 190 Mass. 120, 5 Ann. Cas. 769, 76 N. E. 511; *Bond v. Milliken*, (1906) 17 Am. Bankr. Rep. 811, 134 Ia. 447, 109 N. W. 774; *Flanders v. Mullin*, (1907) 18 Am. Bankr. Rep. 708, 80 Vt. 124, 66 Atl. 789; *National Surety Co. v. Medlock*, (Ga. 1907) 19 Am. Bankr. Rep. 654; *Kava-*

*naugh v. McIntyre*, (1908) 21 Am. Bankr. Rep. 327, 128 App. Div. 722, 112 N. Y. S. 987; *Tompkins v. Williams*, (N. Y. 1910) 23 Am. Bankr. Rep. 886; *Peters v. U. S.*, (C. C. A. 7th Cir. 1910) 24 Am. Bankr. Rep. 206; *Bever v. Swecker*, (1908) 138 Ia. 721, 116 N. W. 704.

**Wilful and malicious injury defined.**—Wilful and malicious injury, in the Bankruptcy Act and everywhere in the law, does not necessarily involve hatred or ill will as a state of mind, but arises from a wrongful act, done intentionally, without just cause or excuse. In order to come within that meaning as a judgment for a wilful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained. *Tinker v. Colwell*, (1904) 193 U. S. 473, 485, 24 S. Ct. 505, 508, 48 U. S. (L. ed.) 754, 11 Am. Bankr. Rep. 568, *affirming* (1902) 169 N. Y. 531, 62 N. E. 668, 98 A. S. R. 587, 68 L. R. A. 765. See also *Leicester v. Hoadley*, (1903) 66 Kan. 172, 71 Pac. 318, 65 L. R. A. 523; *Kavanaugh v. McIntyre*, (1908) 128 App. Div. 722, 112 N. Y. S. 987.

A wrongful act done intentionally without just cause or excuse is "wilful and malicious." *McChristal v. Clisbee*, (1906) 190 Mass. 120, 76 N. E. 511, 5 Ann. Cas. 769, 3 L. R. A. (N. S.) 702; *In re Munro*, (N. D. N. Y. 1912) 195 Fed. 817.

The phrase "wilful and malicious injuries to the person or property of another" must be held to cover all cases in which the facts of intent and malice are judicially ascertained by direction of the law, however the act may be characterized by the allegation. *Flanders v. Mullin*, (1907) 18 Am. Bankr. Rep. 708, 80 Vt. 124, 66 Atl. 789, 12 Ann. Cas. 1010.

**The wrong must be both "wilful and malicious"** in order that an action founded thereon shall survive the discharge in bankruptcy of the wrongdoer. *Flanders v. Mullin*, (1907) 18 Am. Bankr. Rep. 708, 80 Vt. 124, 66 Atl. 789, 12 Ann. Cas. 1010; *Kavanaugh v. McIntyre*, (1908) 21 Am. Bankr. Rep. 327, 128 App. Div. 722, 112 N. Y. S. 987.

**Injury to person and property means** causing damage to the subject matter of the rights, not depriving the owner of them. *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679.

**Statute relates to torts.**—It is evident that the statutory exception relates to torts, and not to breaches of contract. *Bond v. Milliken*, (1906) 17 Am. Bankr. Rep. 811, 134 Ia. 447, 109 N. W. 774, 120 A. S. R. 440.

**Not restricted to physical injury.**—The injuries contemplated in section 17a (2) are not restricted to those which are inflicted upon the physical person of the party, but extend to those inherent rights of the person which stand in the same

class as his right to security from violence done to his body. *Thompson v. Judy*, (C. C. A. 6th Cir. 1909) 169 Fed. 553, 22 Am. Bankr. Rep. 154.

*Injury caused by dog bite.*—In *In re Lorde*, (E. D. N. Y. 1906) 144 Fed. 320, it was held that a judgment against the landlord of an apartment house for damages for injuries caused by the bite of a vicious dog kept by a tenant was dischargeable in bankruptcy.

*False imprisonment and malicious prosecution* are wilful and malicious injuries; and liabilities therefor are not affected by a discharge in bankruptcy. *McChristal v. Clisbee*, (1906) 16 Am. Bankr. Rep. 838, 190 Mass. 120, 76 N. E. 511, 5 Ann. Cas. 769; *Mason v. Perkins*, (1904) 180 Mo. 702, 79 S. W. 683, 103 A. S. R. 591.

But where, in an action for false imprisonment, it appears that the defendant honestly believed that the person arrested had committed the crime, and promptly withdrew the charge upon the discovery that such person was innocent, the action is not so obviously against good morals, and does not involve such moral turpitude, as to compel the court to disregard the fundamental characteristics of such an action for the purpose of bringing it within the exception of section 17a (2), especially where malice has neither been alleged nor proved. *Johnson v. Bruckheimer*, (N. Y. 1909) 22 Am. Bankr. Rep. 242.

*Assault and battery.*—A judgment for injury occasioned by an assault and battery is not released by a discharge in bankruptcy proceedings. *In re Colaluca*, (D. C. Mass. 1904) 133 Fed. 255, 13 Am. Bankr. Rep. 292; *McChristal v. Clisbee*, (1906) 16 Am. Bankr. Rep. 838, 190 Mass. 120, 76 N. E. 511, 5 Ann. Cas. 769.

*Effect of giving bond for discharge as poor person.*—Where a defendant against whom a judgment has been obtained for an assault, on being arrested on execution makes application to take the poor debtor's oath, and gives a recognizance therefor, such recognizance is merely a cumulative security for the original judgment, and a judgment subsequently rendered thereon constitutes a liability for a wilful and malicious injury to the person which is not released by a discharge in bankruptcy. *In re Colaluca*, (D. C. Mass. 1904) 133 Fed. 255, 13 Am. Bankr. Rep. 292.

*Forcible detainer.*—A judgment for damages for forcible entry and detainer is not dischargeable in bankruptcy. *In re Munro*, (N. D. N. Y. 1912) 195 Fed. 817.

*A liability on account of a libel* is not released by a discharge in bankruptcy. *McDonald v. Brown*, (1902) 10 Am. Bankr. Rep. 58, 23 R. I. 546, 51 Atl. 213, 91 A. S. R. 659, 58 L. R. A. 768; *National Surety Co. v. Medlock*, (Ga. 1907) 19 Am. Bankr. Rep. 654.

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*A judgment for slander* is not a liability from which a bankrupt is discharged; such judgment being within the exceptions provided for by section 17a (2). *Sanderson v. Hunt*, (1903) 116 Ky. 435, 76 S. W. 179, 3 Ann. Cas. 168.

*A conversion of property* is not a "wilful and malicious injury to person or property," within the meaning of section 17a (2); consequently a liability therefor is released by a discharge in bankruptcy proceedings. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659; *Tindle v. Birkett*, (1907) 205 U. S. 185, 27 S. Ct. 430, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121; *In re Adler*, (C. C. A. 2d Cir. 1907) 152 Fed. 422, 18 Am. Bankr. Rep. 240; *In re Wenham*, (S. D. N. Y. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690; *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; *Burnham v. Pidcock*, (1901) 5 Am. Bankr. Rep. 590, 58 App. Div. 273, 68 N. Y. S. 1007; *Fechter v. Postel*, (1906) 17 Am. Bankr. Rep. 316, 114 App. Div. 776, 100 N. Y. S. 207; *Lewis v. Shaw*, (1907) 19 Am. Bankr. Rep. 866, 122 App. Div. 96, 106 N. Y. S. 1012; *Kavanaugh v. McIntyre*, (1908) 21 Am. Bankr. Rep. 327, 128 App. Div. 722, 112 N. Y. S. 987; *Maxwell v. Martin*, (1909) 22 Am. Bankr. Rep. 93, 130 App. Div. 80, 114 N. Y. S. 349.

In the case of *In re Arnao*, (W. D. N. Y. 1914) 210 Fed. 395, the court held that a conversion showing a design or willingness to inflict a wrong upon another was such a wilful and malicious injury as would bar a discharge.

*A conversion of stock by a firm of brokers* will constitute wilful and malicious injury to property if done without just cause or excuse as where the firm being in financial straits deliberately sells the stock without the consent of the owner and uses the proceeds for its own purposes. In such a case members of the firm are not discharged who knew nothing of the conversion. *Kavanaugh v. McIntyre*, (1914) 210 N. Y. 175, 104 N. E. 135, affirming 151 App. Div. 910, 135 N. Y. S. 1120, wherein the court said: "Counsel for the defendants argue that the construction here given renders section 17 tautological, and that is true to some extent. Prior to the amendment of 1903, subdivision 2 of section 17 excepted in general terms from the effect of a discharge in bankruptcy judgments in actions for wilful and malicious injuries to the property of another, while subdivision 4 excepted specifically debts created by the bankrupt's frauds while acting in a trust capacity. The difference in the main between these subdivisions was that No. 2 applied only to debts reduced to judgment, while No. 4 applied to the debts particularly enumerated, whether reduced to judgment or

not. This distinction was struck out by the amendment of 1903, and some overlapping must occur. Some cases will fall within both subdivisions. But that is not a reason for limiting the words 'wilful and malicious injury to property,' contained in subdivision 2. The classification made originally by section 17 has been somewhat disarranged, but the meaning of the section is plain enough. It is also argued on behalf of the defendants that they did not actually participate in the injury done to the plaintiff's property, and that the wrongful acts were committed by other members of the firm. The individual members of a copartnership are civilly liable for torts of which they have no knowledge, committed by any member of the firm in the course of the partnership business. *In re Peck*, (1912) 206 N. Y. 55, 99 N. E. 258, Ann. Cas. 1914A 798, 41 L. R. A. (N. S.) 1223; *Castle v. Bullard*, (1859) 23 How. 172, 16 U. S. (L. ed.) 424. The case is therefore precisely within the words of section 17, subd. 2, of the Bankruptcy Act, defining debts which are not released by the discharge in bankruptcy. The words are: 'A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except as . . . are liabilities . . . for wilful and malicious injuries to the person or property of another.' If the defendants are civilly liable for the acts of other members of the firm, which amount to a wilful and malicious injury to the property of the plaintiff, that ends the argument. They are not released by the discharge in bankruptcy, no matter whether they participated in the acts which caused the injury or not."

*The wrongful and fraudulent appropriation of the property of another* is a "wilful and malicious injury" to such property. *Hallagan v. Dowell*, (Ia. 1913) 139 N. W. 883.

A judgment for damages in an action for trover does not, in itself, carry with it an implication of obtaining property by false pretenses or false representations. The burden is on the judgment creditors to show that their debt is within one of the classes not affected by the discharge. The court will not infer that the debt is within one of the classes named from a mere certificate of an alias execution showing that the cause of action "arose from the wilful and malicious act or neglect" of the relator. *Ex p. Peterson*, (1905) 77 Vt. 226, 59 Atl. 828.

### III. MISCELLANEOUS.

**Liabilities for alimony**, due or to become due, are not released by a discharge of the debtor in bankruptcy proceedings. *Audubon v. Shufeldt*, (1901) 181 U. S. 575, 21 S. Ct. 735, 45 U. S. (L. ed.) 1009, 5 Am. Bankr. Rep. 829; *Wetmore v. Markoe*, (1904) 196 U. S. 68, 25 S. Ct. 172, 49 U. S. (L. ed.) 390, 13 Am. Bankr.

Rep. 1; *In re Shepard*, (S. D. N. Y. 1899) 97 Fed. 187, 5 Am. Bankr. Rep. 857; *In re Nowell*, (D. C. Mass. 1900) 99 Fed. 931, 3 Am. Bankr. Rep. 837; *Turner v. Turner*, (D. C. Ind. 1901) 108 Fed. 785, 6 Am. Bankr. Rep. 289; *In re Smith*, (N. D. N. Y. 1899) 3 Am. Bankr. Rep. 67; *Deen v. Bloomer*, (1901) 191 Ill. 416, 61 N. E. 131; *Welty v. Welty*, (1902) 195 Ill. 335, 63 N. E. 161, 88 A. S. R. 208; *People v. Grell*, (1900) 65 N. Y. S. 522; *Maisner v. Maisner*, (1901) 62 App. Div. 286, 70 N. Y. S. 1107. See also *In re Van Orden*, (1899) 96 Fed. 86; *Barclay v. Barclay*, (1900) 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; *Young v. Young*, (Supm. Ct. Spec. T. 1901) 35 Misc. 335, 71 N. Y. S. 944.

"Although there was no such express exemption in the bankruptcy statute prior to the amendment in 1903, that amendment was merely declaratory of the true meaning and sense of the statute as originally enacted." *In re Williams*, (1913) 208 N. Y. 32, 101 N. E. 853, 46 L. R. A. (N. S.) 719.

**Judgment on decree of another state.**—It has been held that where a divorce has been decreed in one state, and alimony has been allowed therein, a judgment procured in another state, based upon such right to alimony, is not released by a discharge in bankruptcy proceedings. *In re Williams*, (1913) 208 N. Y. 32, 101 N. E. 853, 46 L. R. A. (N. S.) 719, *affirming* (1912) 152 App. Div. 385, 136 N. Y. S. 707.

**Support of wife or child.**—Liabilities due for the maintenance or support of the bankrupt's wife or children are not affected by his discharge. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139; *In re Baker*, (D. C. Kan. 1899) 96 Fed. 954, 3 Am. Bankr. Rep. 101; *In re Shepard*, (S. D. N. Y. 1899) 97 Fed. 187; *In re Hubbard*, (N. D. Ill. 1899) 98 Fed. 710, 3 Am. Bankr. Rep. 528; *McKittrick v. Cahoon*, (1903) 89 Minn. 383, 95 N. W. 223.

**The phrase "for maintenance or support of wife or child"** refers only to the involuntary liability under the common law for support of wife and children, and to any one who relieves their want; and to liabilities accruing under bonds or the like, given for such support by requirement of courts and magistrates. "It does not refer to liabilities for goods purchased by a husband or parent, as in this case, and used by wife or child." *Schellenberg v. Mullaney*, (1906) 16 Am. Bankr. Rep. 542, 112 App. Div. 384, 98 N. Y. S. 432.

**Medical attendance furnished to wife or child.**—The exception as to liabilities "for maintenance or support of wife or child" does not apply to a debt for medical attendance furnished to the wife or child of the bankrupt at his request.



and while the normal family relations subsist between him and the recipient of the services. *In re Ostrander*, (E. D. N. Y. 1905) 139 Fed. 592, 15 Am. Bankr. Rep. 96.

*An agreement by a man to pay to his divorced wife an annuity so long as she remains unmarried, for her support and that of their children, is not dischargeable in bankruptcy.* *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139.

**Criminal conversation.**—Even prior to the enactment of the amendment of 1903, which specifically excepts liabilities for criminal conversation, it was held that a judgment for damages for criminal conversation is one recovered in an action "for wilful and malicious injuries to the person or property of another" within the meaning of section 17a (2). *Tinker v. Colwell*, (1904) 193 U. S. 473, 24 S. Ct. 505, 48 U. S. (L. ed.) 754, 11 Am. Bankr. Rep. 568, *affirming* (1902) 7 Am. Bankr. Rep. 334, 169 N. Y. 531, 62 N. E. 668, 98 A. S. R. 587, 58 L. R. A. 765, which *affirmed* (N. Y. 1901) 6 Am. Bankr. Rep. 434.

**Judgment for alienation of affections.**—A judgment obtained by a wife, against another woman, for damages sustained by the wife by reason of the alienation of the affection of her husband, is not released by the discharge of the judgment debtor under proceedings in bankruptcy, where such alienation has been accomplished by schemes and devices of the judgment debtor, and resulted in the loss of support, and impairment of health, to the wife. *Leicester v. Hoadley*, (1903) 86 Kan. 172, 71 Pac. 318, 65 L. R. A. 523, holding the wrong to be a wilful and malicious injury both to person and to property.

**Liability for seduction.**—Under the express provision of the statute a liability accruing, or a judgment recovered, for the seduction of an unmarried female is not released by a discharge in bankruptcy. *In re Freche*, (D. C. N. J. 1901) 109 Fed. 620, 6 Am. Bankr. Rep. 479; *Distler v. McCauley*, (N. Y. 1901) 6 Am. Bankr. Rep. 491. See also *Bond v. Milliken*, (1906) 17 Am. Bankr. Rep. 811, 134 Ia. 447, 109 N. W. 774.

It had been held prior to the amendment that where a seduced woman was permitted by statute to prosecute an action in her own name, the debt was not discharged. *In re Maples*, (D. C. Mont. 1901.) 105 Fed. 919. See also *In re Freche*, (1901) 109 Fed. 620.

**Breach of promise to marry.**—A liability accruing, or a judgment recovered, for the breach of a contract to marry, is released by a discharge in bankruptcy; and is not within the exceptions specified in section 17a (2). *In re McCauley*, (E. D. N. Y. 1900) 101 Fed. 223, 4 Am. Bankr.

Rep. 122; *In re Fife*, (W. D. Pa. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258; *Finnegan v. Hall*, (1901) 6 Am. Bankr. Rep. 648, 35 Misc. 773, 72 N. Y. S. 347; *Bond v. Milliken*, (1906) 17 Am. Bankr. Rep. 811, 134 Ia. 447, 109 N. W. 774; *Biela v. Urbanczyk*, (1905) 38 Tex. Civ. App. 213, 85 S. W. 451. See also *In re Brumbaugh*, (D. C. Pa. 1904) 128 Fed. 971.

Thus it has been held that where, in an action for breach of promise to marry, there is no proof of the seduction of the plaintiff or of malice tending to show an attempted injury to character, a judgment is released by the defendant's discharge in bankruptcy, even though he went into bankruptcy for the sole purpose of evading the payment of such judgment. *Finnegan v. Hall*, (1901) 6 Am. Bankr. Rep. 648, 35 Misc. 773, 72 N. Y. S. 377.

**Judgment for breach of promise of marriage accompanied by seduction.**—This section prevents the discharge of a bankrupt for a judgment for breach of promise of marriage accompanied by seduction. *In re Warth*, (C. C. A. 2d Cir. 1912) 200 Fed. 408, wherein the court said: "The action was in form for breach of promise to marry. The seduction was in form but an aggravation of the damage. The strict rule of the common law that a woman who consents cannot complain directly of the greatest possible wrong, had to be adhered to. But the action while in form upon contract was in substance for the gross fraud which the man perpetrated in taking advantage of the confidential relation established by the marriage engagement to accomplish the woman's dishonor. The substantial damages which the petitioner obtained were not for the deprivation of the matrimonial alliance, but for the loss of character and the ever-continuing shame and sorrow. It has been the policy of the Bankruptcy Act to discharge honest debtors but not to afford a shield to wilful wrongdoers and to avoid the possibility that seducers might take advantage of it. Congress in 1903 passed an amendment providing that liability for 'the seduction of an unmarried female' should not be discharged. The provision is broad and we have no doubt applies and was intended to apply to every case where there is liability for seduction whether the action to enforce such liability be based, as is permitted in some states, directly upon the essential wrong, or by reason of the limitations of the common law, be founded upon the incident—the refusal to marry. To say that Congress intended to distinguish between these cases is to say that it intended to further favor seducers in those jurisdictions where they are already favored by adherence to an artificial form of action which often operates to prevent the enforcement of a morally just demand.

The contention is made that as the action is in form for breach of contract some portion of the damages awarded must have been for the loss of the matrimonial alliance and that as the judgment cannot be split up all must be discharged.

As already pointed out, however, the real wrong for which the plaintiff recovered was for the seduction, and in the absence of any showing to the contrary it will be presumed that the substantial damages were awarded for that."

(3) [Debts not scheduled.] have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or [(1898) 30 Stat. L. 550.]

This clause (3) was re-enacted without change in 1903 (32 Stat. L. 798).

What constitutes due scheduling has been considered under section 7a (8).

Debts not duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, are not released by the bankrupt's discharge, unless such creditor has notice or actual knowledge of the proceedings in bankruptcy. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1; *Birkett v. Columbia Bank*, (1904) 195 U. S. 345, 25 S. Ct. 38, 49 U. S. (L. ed.) 231, 12 Am. Bankr. Rep. 691, *affirming* (1903) 9 Am. Bankr. Rep. 481, 174 N. Y. 112, 66 N. E. 652, 102 A. S. R. 478; *In re Beerman*, (N. D. Ga. 1901) 112 Fed. 662, 7 Am. Bankr. Rep. 431; *In re Monroe*, (D. C. Wash. 1902) 114 Fed. 398, 7 Am. Bankr. Rep. 706; *Karter v. Fields*, (1903) 140 Ala. 352, 37 So. 204; *Tyrrel v. Hammerstein*, (1900) 6 Am. Bankr. Rep. 430, 33 Misc. 505, 67 N. Y. S. 717; *Webster City Steel Radiator Co. v. Chamberlin*, (1908) 137 Ia. 717, 115 N. W. 504; *Hayer v. Comstock*, (Ia. 1901) 7 Am. Bankr. Rep. 493; *Gilmore v. Farmer*, (1910) 156 Ill. App. 70; *Zimmerman v. Ketchum*, (1903) 11 Am. Bankr. Rep. 190, 66 Kan. 98, 71 Pac. 264; *Wineman v. Fisher*, (1904) 135 Mich. 604, 98 N. W. 404; *Broadway Trust Co. v. Manheim*, (1905) 14 Am. Bankr. Rep. 122, 47 Misc. 415, 419, 95 N. Y. S. 93; *Longfield v. Minnesota Sav. Bank*, (1905) 14 Am. Bankr. Rep. 413, 95 Minn. 54, 103 N. W. 706; *Wright-Dalton-Bell-Anchor Store Co. v. St. Louis, etc., R. Co.*, (1910) 142 Mo. App. 50, 125 S. W. 517; *Armstrong v. Sweeney*, (1905) 73 Neb. 775, 103 N. W. 436; *Westheimer v. Howard*, (1905) 14 Am. Bankr. Rep. 547, 47 Misc. 145, 93 N. Y. S. 518; *Schiller v. Weinstein*, (1905) 15 Am. Bankr. Rep. 183, 47 Misc. 622, 94 N. Y. S. 763; *Haack v. Thiese*, (1906) 16 Am. Bankr. Rep. 699, 51 Misc. 3, 99 N. Y. S. 905; *Bergmann v. Manes*, (1910) 141 App. Div. 102, 125 N. Y. S. 973; *Sutherland v. Lasher*, (1903) 41 Misc. 249, 84 N. Y. S. 56, *affirmed* (1903) 87 App. Div. 633, 84 N. Y. S. 1148; *Matter of Boom*, (1905) 48 Misc. 632, 96 N. Y. S. 215; *Custard v. Wiggerson*, (Wis. 1907) 17 Am. Bankr. Rep. 337; *Reed v.*

*Dippel*, (1906) 17 Am. Bankr. Rep. 371, 16 Pa. Dist. Ct. 126; *Cagliostro v. Indelli*, (1907) 17 Am. Bankr. Rep. 685, 53 Misc. 44, 102 N. Y. S. 918; *Weidenfeld v. Tillinghast*, (N. Y. 1907) 18 Am. Bankr. Rep. 531; *Murphy v. Blumenreich*, (1908) 19 Am. Bankr. Rep. 910, 123 App. Div. 645, 108 N. Y. S. 175; *Fider v. Manheim*, (1899) 78 Minn. 309, 81 N. W. 2; *Collins v. McWalters*, (1901) 35 Misc. 648, 72 N. Y. S. 203; *Matter of David*, (1904) 44 Misc. 516, 90 N. Y. S. 85; *Feldmark v. Weinstein*, (1904) 45 Misc. 329, 90 N. Y. S. 478; *Bernheim v. Bloch*, (1904) 45 Misc. 581, 91 N. Y. S. 40; *Reinhardt v. Friederick*, (Ind. 1915) 108 N. E. 258; *Miller v. Guasti*, (1912) 226 U. S. 170, 33 S. Ct. 49, 57 U. S. (L. ed.) 173; *Raley v. D. Sullivan & Co.*, (Tex. 1913) 159 S. W. 99; *Sloan v. Grollman*, (1910) 113 Md. 192, 77 Atl. 577, Ann. Cas. 1912A 544.

Under the Bankruptcy Act of 1841 it was held that, in the absence of fraud, the mere fact that an indebtedness was not included in the bankrupt's schedule of his creditors did not render the discharge inoperative as to such indebtedness. *Hurd v. Indiana Mut. F. Ins. Co.*, (1848) 1 Ind. 162; *Magoon v. Warfield*, (1851) 3 G. Greene (Ia.) 293; *Rogers v. Western Marine, etc., Ins. Co.*, (1846) 1 La. Ann. 161; *Burnside v. Brigham*, (1844) 8 Metc. (Mass.) 75; *Hubbell v. Cramp*, (1844) 11 Paige (N. Y.) 310; *Mitchell v. Singletary*, (1850) 19 Ohio 291; *Doner v. Dana*, (1850) 22 Vt. 337. But it was held that the wilful omission to schedule a creditor's claim might constitute such fraud as would render the discharge inoperative to release the omitted claim. *Burnside v. Brigham*, (1844) 8 Metc. (Mass.) 75; *Hubbell v. Cramp*, (1844) 11 Paige (N. Y.) 310.

Under the Bankruptcy Act of 1867 it was held that the fact that the claim of a creditor was omitted from the bankrupt's list of creditors, and that the creditor had no knowledge or notice of the bankruptcy proceeding, did not prevent a discharge from being operative against such creditor's claim. *Lamb v. Brown*, (1862) 12 Nat. Bankr. Reg. 522, 14 Fed. Cas. No. 8,011; *Jones v. Knox*, (1874)

51 Ala. 387; *Sawyer v. Rector*, (1888) 5 Dak. 110, 37 N. W. 741; *Hoffman v. Haight*, (1883) 3 Mackey (D. C.) 21; *Heard v. Arnold*, (1876) 56 Ga. 570; *Payne v. Able*, (1870) 7 Bush (Ky.) 344, 3 Am. Rep. 316; *Symonds v. Barnes*, (1871) 59 Me. 191, 8 Am. Rep. 418; *Williams v. Coggeshall*, (1853) 11 Cush. (Mass.) 442; *Burpee v. Sparhawk*, (1871) 108 Mass. 111, 47 Am. Bankr. Rep. 320; *Black v. Blazo*, (1875) 117 Mass. 17; *Heim v. Chapman*, (1898) 171 Mass. 347, 50 N. E. 529; *Benedict v. Smith*, (1882) 48 Mich. 593, 12 N. W. 866; *Graves v. Wright*, (1884) 53 Mich. 425, 19 N. W. 129. *Compare* *Hill v. Robbins*, (1870) 1 Mich. N. P. 305; *Thornton v. Hogan*, (1876) 63 Mo. 143; *Marshall v. Sumner*, (1879) 59 N. H. 218, 47 Am. Rep. 194; *Platt v. Parker*, (1875) 4 Hun (N. Y.) 135. (But see *Poillon v. Lawrence*, (1879) 77 N. Y. 207, 1878) reversing 43 Super. Ct. 385; *Jones v. LeBaron*, (1875) 3 Den. (N. Y.) 37; *Rayl v. Lapham*, (1875) 27 Ohio St. 452; *Howland v. Carson*, (1876) 28 Ohio St. 625; *Brown v. Kroh*, (1877) 31 Ohio St. 492; *Pattison v. Wilbur*, (1873) 10 R. I. 448; *Eberhardt v. Wood*, (1880) 6 Lea (Tenn.) 467; *Blum v. Ricks*, (1873) 39 Tex. 112; *Brown v. Causey*, (1882) 56 Tex. 340. See *Batchelder v. Low*, (1871) 43 Vt. 662, 5 Am. Rep. 311; *Thomas v. Jones*, (1875) 39 Wis. 124.

*The fact that the bankrupt disputes the claim of a creditor* will not prevent his failure to schedule the claim from rendering the discharge inoperative. *Tyrrel v. Hammerstein*, (1900) 33 Misc. 505, 67 N. Y. S. 717.

*Objection cannot be urged for the first time on appeal* that a discharge in bankruptcy pleaded by the defendant was not effectual against the plaintiff's debt because it was not scheduled and the plaintiff had no notice or knowledge of the bankruptcy proceeding. *Bond v. Milliken*, (1907) 134 Ia. 447, 109 N. W. 774, 120 A. S. R. 440.

*If the claim of a creditor is duly scheduled*, it is immaterial as regards the effect of the discharge that the creditor has no notice or actual knowledge of the bankruptcy proceedings. *Beck, etc., Hardware Co. v. Crum*, (1906) 127 Ga. 94, 56 S. E. 242.

*Proof of omission of claim from schedule.*—In some jurisdictions it is held that the discharge is *prima facie* evidence of the release of all provable debts, and that the burden is upon a creditor to show that his claim was not duly scheduled. *Alling v. Straka*, (1905) 118 Ill. App. 184; *Laffoon v. Kerner*, (1905) 138 N. C. 281, 50 S. E. 654.

In other jurisdictions it is held, however, that the burden is upon the debtor to show that a particular claim asserted against him was properly scheduled in the bankruptcy proceedings so as to be discharged thereby. *Fields v. Rust*,

(1904) 36 Tex. Civ. App. 350, 82 S. W. 331; *Bailey v. Gleason*, (1903) 76 Vt. 115, 56 Atl. 537.

In New York the cases are in conflict upon this point. In some cases it has been held that the burden of proving that a debt was properly scheduled is upon the person seeking to obtain the benefit of the discharge in bankruptcy. *Grabber v. Gault*, (1905) 103 App. Div. 511, 93 N. Y. S. 76 (First Department); *Weidenfeld v. Tillinghast*, (1907) 54 Misc. 90, 104 N. Y. S. 712, *affirmed* (1907) 104 N. Y. S. 902; *Lutz v. Kalmus*, (1909) 115 N. Y. S. 230. See also *Woodward v. Schaefer*, (1904) 91 N. Y. S. 104. In other cases, however, the contrary has been held. *Matter of Peterson*, (1910) 137 App. Div. 435, 121 N. Y. S. 738 (Fourth Department); *Matter of Peterson*, (1910) 68 Misc. 10, 124 N. Y. S. 907. The case of *New York Deaf and Dumb Inst. v. Crockett*, (1907) 117 App. Div. 269, 102 N. Y. S. 412, has sometimes been considered as supporting the view that the burden of proving that a debt was not duly scheduled is upon the creditor. All that was held in that case, however, was that where a member of a partnership filed a petition in bankruptcy including as a liability a debt due to a certain person, who was not described as a partnership creditor, the burden of proving that a debt of the partnership to that person was not properly scheduled was upon the creditor, where it did not appear that the petitioner was otherwise indebted to him.

There is also a conflict of authority as to whether oral testimony is competent to prove that the claim of a creditor was not scheduled. In *Thomson v. Caverley*, (1909) 148 Ill. App. 295, which was a decision of the first district, the court said: "The discharge in bankruptcy was a complete defense to the judgment, even as against the assignor, and it stands to reason that the advantage thus given by the judgment of a federal court cannot be overcome and avoided by the testimony of what an available document does not contain. One might as well maintain that parol proof that a conveyance lacked a covenant material to make it effective to convey title was sufficient to defeat it, without the production of the conveyance itself, as to contend that the legal effect of a discharge in bankruptcy could be overcome by negative parol testimony as to what some schedules of the bankrupt did not contain." But in *Hughes v. Clark*, (1902) 109 Ill. App. 107, a decision of the third district, the court said: "It does not appear defendant in error was a party to the bankruptcy proceedings, or had notice of the same. It was proved by oral testimony that his name was not in the schedule, or list of creditors, and it is urged that it was error

to admit such oral proof. We think, however, there was no error in such ruling of the court, as the evidence was negative merely, and it was unnecessary to offer voluminous records, merely to prove that defendant in error was not named therein."

**Knowledge of bankruptcy proceedings.**—Even though a debt has not been duly scheduled, as required by section 7a (8), it will be none the less discharged if the creditor has such knowledge of the proceedings in bankruptcy as will permit of his participation therein in time to prove his claim against the estate. *Clauster v. Soble*, (1903) 10 Am. Bankr. Rep. 446, 22 Pa. Super. Ct. 631; *Dight v. Chapman*, (1904) 12 Am. Bankr. Rep. 743, 44 Ore. 265, 75 Pac. 585; *Kaufman v. Schreier*, (1905) 17 Am. Bankr. Rep. 314, 108 App. Div. 298, 95 N. Y. S. 729; *Morrison v. Vaughan*, (1907) 18 Am. Bankr. Rep. 704, 119 App. Div. 184, 104 N. Y. S. 169; *Delta County Bank v. McGranahan*, (1905) 37 Wash. 307, 79 Pac. 796. And see also to the same effect *In re Beerman*, (N. D. Ga. 1901) 112 Fed. 662; *Santa Rosa Bank v. White*, (1903) 139 Cal. 703, 73 Pac. 577; *Alling v. Straka*, (1905) 118 Ill. App. 184; *Zimmerman v. Ketchum*, (1903) 66 Kan. 98, 71 Pac. 264; *Jones v. Walter*, (1903) 115 Ky. 556, 74 S. W. 249; *Reynolds v. Whittemore*, (1904) 99 Me. 108, 58 Atl. 415; *Wineman v. Fisher*, (1904) 135 Mich. 604, 98 N. W. 404; *Atkinson v. Elmore*, (1903) 103 Mo. App. 403, 77 S. W. 492.

**Time of acquiring knowledge.**—In *Birkett v. Columbia Bank*, (1904) 195 U. S. 345, 25 S. Ct. 38, 49 U. S. (L. ed.) 231, 12 Am. Bankr. Rep. 691, *affirming* (1903) 9 Am. Bankr. Rep. 481, it was said: "Actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law, in time to give him an equal opportunity with other creditors; not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends."

**Knowledge of bankruptcy proceedings on the part of a creditor of the bankrupt**, which is not acquired until after discharge, though in time to prove his claim, and to move, under section 15, to revoke his discharge, is not the "actual knowledge of the proceedings in bankruptcy" which, under section 17, is essential to the release, by the discharge, of provable debts which have not been duly scheduled in time for proof and allowance. *Birkett v. Columbia Bank*, (1904) 195 U. S. 345, 25 S. Ct. 38, 49 U. S. (L. ed.) 231, 12 Am. Bankr. Rep. 691, *followed in* *Reynolds v. Whittemore*, (1904) 99 Me. 108, 58 Atl. 415. See also *Troy v. Rudnick*, (1908) 198 Mass. 563, 85 N. E. 177.

**General character of knowledge required.**—It has been held that the knowledge on the part of the unlisted creditor

of the bankruptcy proceedings, referred to in the statute, is actual knowledge as distinguished from constructive notice. *Santa Rosa Bank v. White*, (1903) 139 Cal. 703, 73 Pac. 577; *Strickland v. Capital City Mills*, (1906) 74 S. C. 16, 54 S. E. 220, 7 L. R. A. (N. S.) 426. But in *Jones v. Walter*, (1903) 115 Ky. 556, 74 S. W. 249, the court said: "There is evidently a difference between the words 'notice' and 'actual knowledge' of the proceedings in bankruptcy, as used in the statute." And in *Knapp v. Harold*, (1903) 25 Ohio Cir. Ct. 213, the court said that constructive notice or actual knowledge was all that the statute required.

**Knowledge of agent.**—Where knowledge of bankruptcy proceedings on the part of an agent of the creditor is relied on as knowledge of the creditor it must be clearly shown that the scope of the agent's authority was such that he was authorized to receive such notice for his principal and convey the knowledge to his principal. *Collins v. Crews*, (1907) 3 Ga. App. 238, 59 S. E. 727 (holding that notice of the bankruptcy proceeding given the salesman of the creditor who sold the goods to the bankrupt out of which the creditor's claim arose was not notice to the creditor); *Gilmore v. Farmer*, (1910) 156 Ill. App. 70.

In *Webster City Steel Radiator Co. v. Chamberlin*, (1908) 137 Ia. 717, 115 N. W. 504, it was held that the fact that the attorney, whom a creditor had employed to file his claim for a mechanic's lien, was employed by the debtor in his subsequent bankruptcy proceedings, and in accordance with an understanding between the attorney and the bankrupt the creditor's claim was not scheduled, did not show that the creditor had knowledge of the bankruptcy proceedings.

In *Strickland v. Capital City Mills*, (1906) 74 S. C. 16, 54 S. E. 220, 7 L. R. A. (N. S.) 426, it was held that knowledge of the bankruptcy proceedings on the part of an attorney authorized to represent a judgment creditor in the state court on an appeal from the judgment was not knowledge on the part of the creditor.

On the other hand knowledge of an authorized agent has been held knowledge of the principal. *Atkinson v. Elmore*, (1903) 103 Mo. App. 403, 77 S. W. 492.

In *Dight v. Chapman*, (1904) 44 Ore. 265, 75 Pac. 585, 65 L. R. A. 793, it was held that where the receiver of an insolvent corporation had notice of the bankruptcy proceedings of a debtor to the corporation, the corporation would be considered as having such knowledge.

Where the evidence is conflicting the question whether an alleged agent acted within the scope of his authority in receiving notice of the bankruptcy proceeding is

for the determination of the jury. *Gilmore v. Farmer*, (1910) 156 Ill. App. 70.

While in a proper case a principal may be charged with knowledge of bankruptcy proceedings possessed by his agent, such knowledge of a creditor's agent is not imputable to the creditor where the agent's interest in the matter is adverse to that of the creditor, there being no presumption that an agent under such circumstances will impart his knowledge to his principal. *Dight v. Chapman*, (1904) 44 Ore. 285, 75 Pac. 585, 65 L. R. A. 793.

**Burden of proof of knowledge.**—Where it appears that the claim of a creditor was not duly scheduled, to render the discharge available against such claim, the burden of proof is upon the bankrupt to show that the creditor had proper knowledge of the bankruptcy proceedings. *Sloan v. Grollman*, (1910) 113 Md. 192, 77 Atl. 577, Ann. Cas. 1912A 544 and note; *Collins v. Crews*, (1907) 3 Ga. App. 238, 59 S. E. 727; *Wineman v. Fisher*, (1904) 135 Mich. 604, 98 N. W. 404; *Armstrong v. Sweeney*, (1905) 73 Neb. 775, 103 N. W. 436; *Graber v. Gault*, (1905) 103 App. Div. 511, 93 N. Y. S. 76; *Collins v. McWatters*, (1901) 35 Misc. 648, 72 N. Y. S. 203; *Weidenfeld v. Tillinghast*, (1907) 54 Misc. 90, 104 N. Y. S. 712; *Lutz v. Kalmus*, (1909) 115 N. Y. S. 230. *Compare Alling v. Straka*, (1905) 118 Ill. App. 184; *Matter of Peterson*, (1910) 137 App. Div. 435, 121 N. Y. S. 738, *affirming* (1909) 64 Misc. 217, 118 N. Y. S. 1077; *Laffoon v. Kerner*, (1905) 138 N. C. 281, 50 S. E. 654.

This burden would not be satisfactorily met by the bankrupt's testimony that he mailed a letter to the creditor containing the information of the bankruptcy proceedings, as against the creditor's absolute denial of receipt of the letter or knowledge from any other source. *Sloan v. Grollman*, (1910) 113 Md. 192, 77 Atl. 577, Ann. Cas. 1912A 544.

**Pleading discharge.**—See also the black letter caption *Pleading discharge* in the first note to section 17a, preceding clause (1).

In pleading a discharge in bankruptcy in bar of an action, it has been held not to be necessary to aver that the creditor's claim on which the action is brought was duly scheduled, as the failure to schedule is a matter for special replication to the plea setting up the discharge. *B. F. Roden Grocery Co. v. Leslie*, (1910) 169 Ala. 579, 53 So. 815; *Alling v. Straka*, (1905) 118 Ill. App. 184.

But in *Biela v. Urbanczyk*, (1905) 38 Tex. Civ. App. 213, 85 S. W. 451, the contrary was held, the court, after setting out the statute, saying: "From this it is evident that the discharge is no release unless the particular claim has been scheduled by the bankrupt, or unless the creditor had notice or actual knowl-

edge of the bankruptcy proceedings. By the terms of the Bankruptcy Act, a discharge would be without effect upon claims not scheduled and where the creditor had no notice or knowledge of the proceedings. Therefore, in order to state a case of discharge in bankruptcy as to the claim against which it is pleaded as a release, it seems to us that it was essential for the plea to allege that the claim was scheduled, or that the claimant had knowledge of the bankruptcy proceedings; otherwise the discharge, by the very terms of the act, was without any effect upon the claim."

And in *Bailey v. Gleason*, (1903) 76 Vt. 115, 56 Atl. 537, the court said: "The statute excepts from the operation of the discharge certain classes of provable debts. It is not necessary for the defendant to show by the plea that the debt was not within any of these excepted classes. It is for the plaintiff to bring the debt within some exception by his replication. We are aware that some courts hold otherwise, but we adopt this rule as more consistent with the established principles of pleading. The exception relating to debts not scheduled in time for proof and allowance, although included in the list referred to, is a provision of a different character. This relates to matters essential to the operation of the discharge upon claims of every nature. To give the discharge effect as to the claim in suit, it must appear, not only that the debt was provable, but that it was duly scheduled by the debtor or that the creditor had knowledge of the proceedings. It is this which gives the court jurisdiction of the particular creditor, and makes its discharge a discharge from his claim. The ordinary presumptions of regularity do not touch him, for unless named in the schedule he is unknown to the proceedings. Unless connected with the proceedings by the schedule or by knowledge of them, there is no discharge as to him. So in pleading the discharge in bar of his claim there must be an allegation of that which makes the discharge effective against him."

In *Balk v. Harris*, (1902) 130 N. C. 381, 41 S. E. 940, *reversed* on other grounds (1905) 198 U. S. 215, 25 S. Ct. 625, 49 U. S. (L. ed.) 1023, 3 Ann. Cas. 1084, it was held that in pleading a discharge in bankruptcy *puis darrein continuance* it should be alleged either that the claim in such suit was duly scheduled in the bankruptcy proceedings or that the plaintiff had knowledge of the proceedings in bankruptcy in time to have proved his claim and shared in the distribution of the assets of the defendant's estate in bankruptcy, otherwise the court might, in its discretion, refuse to allow the plea. And see *Laffoon v. Kerner*, (1905) 138 N. C. 281, 50 S. E. 654, wherein the above case is explained.

And in *Karter v. Fields*, (1903) 140

Ala. 352, 37 So. 204, where pending an appeal by the defendant a discharge in bankruptcy was granted him, and the plaintiff afterwards moved to dismiss the appeal on the ground that thereby the defendant was dismissed from all his debts, it was held that it should be shown that the debt in suit was either duly scheduled or that the plaintiff had notice of the bankruptcy proceedings, otherwise the discharge would not affect the claim in suit.

In *Jones v. Walter*, (1903) 115 Ky. 556, 74 S. W. 249, a petition was filed to enjoin the collection of an execution

on the ground of the judgment debtor's discharge in bankruptcy. The petition alleged that the creditor's claim was not duly scheduled in time for proof and allowance for the reason that the debtor had forgotten its existence, but that the creditor had "notice or actual knowledge" of the proceedings in bankruptcy. Objection to the petition was made on the ground that the allegation of "notice or actual knowledge" was bad, being an alternative pleading. The petition, however, was sustained on the ground that the allegation was in the language of the statute.

(4) [**Fraud, etc., in fiduciary capacity.**] were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. [(1898) 30 Stat. L. 550.]

This clause (4) was re-enacted without change in 1903 (32 Stat. L. 798).

A debt created by fraud, embezzlement, misappropriation, or defalcation, while acting as an officer, or in any fiduciary capacity, will not be released by the discharge of the debtor in bankruptcy. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 668; *In re Butts*, (N. D. N. Y. 1903) 120 Fed. 960, 10 Am. Bankr. Rep. 15; *Harper v. Rankin*, (4th Cir. 1905) 141 Fed. 626, 72 C. C. A. 320, 15 Am. Bankr. Rep. 608; *Mathieu v. Goldberg*, (S. D. N. Y. 1907) 156 Fed. 541, 19 Am. Bankr. Rep. 191; *In re Gulick*, (S. D. N. Y. 1911) 186 Fed. 350; *Claffin Dry Goods Co. v. Eason*, (E. D. Tex. 1899) 2 Am. Bankr. Rep. 263; *Morse v. Kaufman*, (Va. 1902) 7 Am. Bankr. Rep. 549; *Watertown Carriage Co. v. Hall*, (1903) 11 Am. Bankr. Rep. 15, 176 N. Y. 313, 68 N. E. 629; *Haggerty v. Badkin*, (N. J. 1907) 18 Am. Bankr. Rep. 302.

The term "fraud" in this section should receive the same construction that was given to it under the Act of 1867. It means positive fraud as distinct from implied fraud, or fraud in law. *Western Union Cold Storage Co. v. Hurd*, (1902) 116 Fed. 442 (citing *Neal v. Clark*, (1877) 95 U. S. 704, 24 U. S. (L. ed.) 586; *Bracken v. Milner*, (1900) 104 Fed. 522).

The term "fraud" in the clause of the Bankruptcy Act of 1867, defining the debts from which a bankrupt is not relieved by a discharge under the Bankruptcy Act, was held to mean positive fraud, or fraud in fact involving moral turpitude or intentional wrong; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. While the later Bankrupt Act differs in language from the Act of 1867 the purposes of the Acts are the same, and the term "fraud" in the later Act is to be given the same meaning as

in the Act of 1867. *Dilley v. Simmons Nat. Bank*, (1913) 108 Ark. 342, 158 S. W. 144. See also *Louisville & N. R. Co. v. Bryant*, (1912) 149 Ky. 359, 149 S. W. 830.

A private banker who accepts deposits with full knowledge of his insolvency, concealing the fact from the depositor, is guilty of fraud; and his discharge in bankruptcy is no defense to an action to recover the amount deposited. *Frey v. Torrey*, (1902) 8 Am. Bankr. Rep. 196, 70 App. Div. 166, 75 N. Y. S. 40, affirmed (1903) 175 N. Y. 501, 67 N. E. 1082.

**Embezzlement.**—A claim created by embezzlement is by the express provisions of the clause not affected by a discharge in bankruptcy. *Ex p. Butler-Keyser Mfg. Co.*, (1911) 174 Ala. 237, 56 So. 960.

All the elements of the language of the statute are necessary in order to come within its terms as a debt which is not released by a discharge in bankruptcy. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; *In re Basch*, (S. D. N. Y. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235; *In re Woods*, (S. D. Ga. 1903) 121 Fed. 599, 9 Am. Bankr. Rep. 615; *Barrett v. Prince*, (7th Cir. 1906) 143 Fed. 302, 74 C. C. A. 440; *In re Adler*, (C. C. A. 2d Cir. 1907) 152 Fed. 422, 18 Am. Bankr. Rep. 240; *In re Wenham*, (S. D. N. Y. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690; *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; *In re Gulick*, (S. D. N. Y. 1911) 186 Fed. 350; *Reeves v. McCracken*, (N. J. 1905) 13 Am. Bankr. Rep. 680; *Lewis v. Shaw*, (1907) 19 Am. Bankr. Rep. 866, 122 App. Div. 99, 106 N. Y. S. 1012.

The words "while acting as an officer or in any fiduciary capacity," as used in section 17 a (4), extend to fraud, embezzlement, and misappropriation, as well as to defalcation. *Chapman v. Foreyth*, (1944)

2 How. 202, 11 U. S. (L. ed.) 236; Crawford v. Burke, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; Bullis v. O'Beirne, (1904) 195 U. S. 606, 25 S. Ct. 118, 49 U. S. (L. ed.) 340; Tindle v. Birkett, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121, *affirming* (1905) 15 Am. Bankr. Rep. 179, 183 N. Y. 267, 76 N. E. 25; *In re* Basch, (S. D. N. Y. 1899) 97 Fed. 761, 3 Am. Bankr. Rep. 235; Knott v. Putnam, (D. C. Vt. 1901) 107 Fed. 907, 6 Am. Bankr. Rep. 80; *In re* Butts, (N. D. N. Y. 1903) 120 Fed. 966, 10 Am. Bankr. Rep. 16; *In re* Harper, (W. D. Va. 1904) 133 Fed. 970, 13 Am. Bankr. Rep. 430; Barrett v. Prince, (C. C. A. 7th Cir. 1906) 143 Fed. 302, 16 Am. Bankr. Rep. 64; *In re* Adler, (C. C. A. 2d Cir. 1906) 144 Fed. 659, 16 Am. Bankr. Rep. 416; *In re* Wenham, (S. D. N. Y. 1906) 153 Fed. 910, 16 Am. Bankr. Rep. 690; *In re* Ennis, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679; Bryant v. Kinyon, (Mich. 1901) 6 Am. Bankr. Rep. 237; Matter of Bullis, (1902) 7 Am. Bankr. Rep. 238, 68 App. Div. 508, 73 N. Y. S. 1047; Gee v. Gee, (Minn. 1901) 7 Am. Bankr. Rep. 500; Morse v. Kaufman, (Va. 1902) 7 Am. Bankr. Rep. 549; Reeves v. McCracken, (N. J. 1905) 13 Am. Bankr. Rep. 680; Matter of Floyd, (S. D. N. Y. 1905) 15 Am. Bankr. Rep. 277; Lewis v. Shaw, (1907) 19 Am. Bankr. Rep. 866, 122 App. Div. 96, 106 N. Y. S. 1012.

The word "officer" includes an officer of a private corporation. *Tatum v. Leigh*, (1911) 136 Ga. 791, 72 S. E. 236, Ann. Cas. 1912D 216; *In re* Gulick, (1911) 186 Fed. 350. See *Harper v. Rankin*, (1905) 141 Fed. 626, 72 C. C. A. 320, *affirming* judgment in *In re* Harper, (1904) 133 Fed. 970.

"Fiduciary capacity" — *General rule.* — The term "fiduciary capacity" is construed to be limited to special and technical trusts and does not include those arising by implication of law from the contract of parties. *American Agric. Chemical Co. v. Berry*, (1913) 110 Me. 528, 87 Atl. 218, Ann. Cas. 1915A 1293 and note, 45 L. R. A. (N. S.) 1106; *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; *Re* Basch, (1899) 97 Fed. 761; *Bracken v. Milner*, (1900) 104 Fed. 522; *In re* Wenham, (1906) 153 Fed. 910; *In re* Camelo, (1912) 195 Fed. 632; *Matter of Floyd*, (1905) 15 Am. Bankr. Rep. 277; *Young v. Clark*, (1907) 7 Cal. App. 194, 93 Pac. 1056; *Boyd v. Agricultural Ins. Co.*, (1904) 20 Colo. App. 28, 76 Pac. 986; *Ehrhart v. Rork*, (1904) 114 Ill. App. 509; *American Surety Co. v. Spice*, (1912) 119 Md. 1, 85 Atl. 1031; *Bryant v. Kinyon*, (1901) 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801; *Gee v. Gee*, (1901) 84 Minn. 384, 87 N. W. 1116; *Karger v. Orth*, (1911) 116 Minn. 124, 133 N. W. 471; *Martin v. Starrett*,

(1915) 97 Neb. 653, 151 N. W. 154; *Reeves v. McCracken*, (1905) 69 N. J. Eq. 203, 60 Atl. 332, *affirmed* (1908) 73 N. J. Eq. 729, 69 Atl. 247; *In re* Benedict, (1902) 37 Misc. 230, 75 N. Y. S. 165; *Lewis v. Shaw*, (1907) 122 App. Div. 96, 106 N. Y. S. 1012; *Crosby v. Miller*, (1903) 25 R. I. 172, 55 Atl. 328; *Stickney v. Parmenter*, (1901) 74 Vt. 58, 52 Atl. 73. See also *Keefauver v. Hevenor*, (1914) 163 App. Div. 531, 148 N. Y. S. 434. *Compare* *Haggerty v. Badkin*, (1907) 72 N. J. Eq. 473, 66 Atl. 420; *Shipley v. Platts*, (1903) 17 S. D. 357, 97 N. W. 1. Taking no notice of the decision in *Upshur v. Briscoe*, (1891) 138 U. S. 365, 11 S. Ct. 313, 34 U. S. (L. ed.) 931, decided under the Act of 1867, an agent to loan and collect money appointed by an instrument denominating him a "trustee," has been held to be acting in a fiduciary capacity, apparently giving effect to the instrument as one creating an express trust. *Williams v. Virginia-Carolina Chemical Co.*, (1913) 182 Ala. 413, 62 So. 755.

The bankruptcy statute does not refer, when using the words "fiduciary capacity," to a debt "founded upon an open contract, or upon a contract express or implied," even though suit may be brought in trover thereon. *In re* Toklas Bros., (E. D. N. Y. 1912) 201 Fed. 377.

"Fiduciary capacity" within the meaning of the statute must be a fiduciary relation existing previously to and independently of the particular transaction out of which the debt arises. *Bryant v. Kinyon*, (1901) 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801; *Hennequin v. Clews*, (1879) 77 N. Y. 427, 33 Am. Rep. 641. The words "while acting" are significant for that construction. *Cronan v. Cotting*, (1870) 104 Mass. 245, 6 Am. Rep. 232.

*Under former Bankruptcy Acts.* — In enacting section 17, cl. 4, Congress must be presumed to have known the construction placed by the courts on the words "fiduciary capacity" as used in former Bankrupt Acts. *In re* Harper, (W. D. Va. 1904) 133 Fed. 970, 13 Am. Bankr. Rep. 430.

The Bankruptcy Act of 1841 excepted from the operation of a discharge debts "created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity." Under that Act, applying the rule of *ejusdem generis*, it was held that the words "fiduciary capacity" meant special, and not implied, trusts, that being the class of trusts to which the officers specifically mentioned belong. *Chapman v. Forsyth*, (1844) 2 How. 202, 11 U. S. (L. ed.) 236; *Austill v. Crawford*, (1845) 7 Ala. 335; *Commercial Bank v. Buckner*, (1846) 2 La. Ann. 1023; *Wolcott v. Hodge*, (1860) 15 Gray (Mass.) 547, 77 Am. Dec. 381; *Williamson v. Dickens*, (1844) 27 N. C. 259; *Bissell v. Couchaine*, (1846) 15 Ohio

58; *Pankey v. Nolan*, (1845) 6 Humph. (Tenn.) 154. See also *Slayton v. Wells*, (1893) 66 Vt. 62, 28 Atl. 632 (state insolvency law with similar provision).

The Bankruptcy Act of 1867 declared that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged." Notwithstanding the removal of the basis for the application of the rule of *ejusdem generis* it was held under that Act, as under the Act of 1841, that "fiduciary character" was limited to special or technical trusts. *Neal v. Clark*, (1877) 95 U. S. 704, 24 U. S. (L. ed.) 586 (*dictum*); *Hennequin v. Clews*, (1883) 111 U. S. 676, 4 S. Ct. 576, 28 U. S. (L. ed.) 565; *Noble v. Hammond*, (1889) 129 U. S. 65, 9 S. Ct. 235, 32 U. S. (L. ed.) 621; *Upshur v. Briscoe*, (1891) 138 U. S. 365, 11 S. Ct. 313, 34 U. S. (L. ed.) 931; *Grover, etc., Sewing-Mach. Co. v. Clinton*, (1873) 5 Biss. 324, 11 Fed. Cas. No. 5,845; *Keime v. Graff*, (1878) 17 Nat. Bankr. Reg. 319, 14 Fed. Cas. No. 7,650 (pointing out that the doctrine *noscitur a sociis* might be applied, "fiduciary character" being coupled with "public officer"); *Woolsey v. Cade*, (1875) 54 Ala. 378, 25 Am. Rep. 711; *Du Pont v. Beck*, (1881) 81 Ind. 271; *Maxwell v. Evans*, (1883) 90 Ind. 596, 46 Am. Rep. 234; *Goddin v. Neal*, (1884) 99 Ind. 334; *Morrison v. Savage*, (1880) 56 Md. 142; *Cronan v. Cotting*, (1870) 104 Mass. 245, 6 Am. Rep. 232; *Woodward v. Towne*, (1879) 127 Mass. 41, 34 Am. Rep. 337; *Green v. Chilton*, (1880) 57 Miss. 598, 34 Am. Rep. 483; *Gibson v. Gorman*, (1882) 44 N. J. L. 325; *Hennequin v. Clews*, (1879) 77 N. Y. 427, 33 Am. Rep. 641; *Palmer v. Hussey*, (1882) 87 N. Y. 303, *affirmed* (1886) 119 U. S. 96, 7 S. Ct. 158, 30 U. S. (L. ed.) 362; *Lawrence v. Harrington*, (1890) 122 N. Y. 408, 25 N. E. 406; *Mulock v. Byrnes*, (1891) 129 N. Y. 23, 29 N. E. 244; *Keeler v. Snodgrass*, (1882) 8 Ohio Dec. (Reprint) 490, 8 Cinc. L. Bul. 219; *Curtis v. Waring*, (1879) 92 Pa. St. 104; *Scott v. Porter*, (1880) 93 Pa. St. 38, 39 Am. Rep. 719; *Kaufman v. Alexander*, (1880) 53 Tex. 562. *Compare In re Seymour*, (1867) 1 Ben. 348, 21 Fed. Cas. No. 12,684; *Fulton v. Hammond*, (1882) 11 Fed. 291; *Herman v. Lynch*, (1881) 26 Kan. 435, 40 Am. Rep. 320; *Lemcke v. Booth*, (1871) 47 Mo. 385, 4 Am. Rep. 326; *Whitaker v. Chapman*, (1870) 3 Lans. (N. Y.) 155; *Gay v. Farron*, 13 Ohio Dec. (Reprint) 989, 2 Cinc. Super. Ct. 426. Under that Act it was held that "a debt is not created by a person while acting in a 'fiduciary character' merely because it is created under circumstances in which trust or confidence is reposed in the debtor, in the popular sense of those terms." *Upshur v. Briscoe*, (1891) 138 U. S. 365, 11 S. Ct. 313, 34 U. S. (L. ed.) 931. The Act also was held to apply only to a debt created by a person who was already a

fiduciary when the debt was created. *Upshur v. Briscoe*, (1891) 138 U. S. 365, 11 S. Ct. 313, 34 U. S. (L. ed.) 931; *Cronan v. Cotting*, (1870) 104 Mass. 245, 6 Am. Rep. 232. The fact that the instrument out of which the debt arose termed the relationship a "trust" one, was held to be immaterial. *Upshur v. Briscoe*, (1891) 138 U. S. 365, 11 S. Ct. 313, 34 U. S. (L. ed.) 931.

*The fact that a state court has decided* that a debt sued on was created by the fraud of the debtor while acting in a fiduciary capacity, and that an execution has been issued thereupon, does not bind the court of bankruptcy, upon an application for a restraining order, to regard such debt as one from which the discharge will not release the bankrupt debtor; the determination of that point being for the Bankruptcy Court itself. *Knott v. Putnam*, (1901) 107 Fed. 907. See also *Bracken v. Milner*, (1900) 104 Fed. 522; *In re Carmichael*, (1899) 96 Fed. 594; *Matter of Bullis*, (1902) 68 App. Div. 508, 73 N. Y. S. 1047; *Warren v. Robinson*, (1900) 21 Utah 429, 61 Pac. 28.

*Application of rule, in general.*—The mere confidence reposed in a buyer by a seller of goods is not the fiduciary relation contemplated by the Bankruptcy Act. *Goodman v. Herman*, (1903) 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885 (Act of 1898), *followed in Lippincott v. Herman*, (1904) 179 Mo. 350, 78 S. W. 1132.

The liability of the purchaser of goods under an agreement that, until the whole consideration was paid, the title should remain in the purchaser, the consideration not being paid, is not "a fiduciary debt" falling under section 17a (4). *Bryant v. Kinyon*, (1901) 127 Mich. 152, 86 N. W. 551, 53 L. R. A. 801.

And on the same principle where money is delivered to a person either to invest on joint account or return, no fiduciary relation, such as is contemplated by the Bankruptcy Act, is created. *Hill v. Sheibley*, (1882) 68 Ga. 556. To like effect is *Pierce v. Shippee*, (1878) 90 Ill. 371.

Nor is a fiduciary relation created by a loan of bonds to be returned, with compensation for their use. *Grannis v. Cubbedge*, (1883) 71 Ga. 582.

The right of a wife with respect to paraphernal property, under the Louisiana law, has not the elements of a technical trust to except it from a discharge in bankruptcy. *Fleitas v. Richardson*, (1893) 147 U. S. 550, 13 S. Ct. 495, 37 U. S. (L. ed.) 276.

The failure of one to whom an award is made to divide the same as agreed with another person creates no debt in a fiduciary capacity. *Goddin v. Neal*, (1884) 99 Ind. 334.

Stockholders in a corporation do not stand in a fiduciary relation to corporate creditors as to unpaid stock subscriptions, under the Bankruptcy Act. *Morrison v. Savage*, (1880) 56 Md. 142.



The words "fiduciary capacity" having reference only to technical trusts, a debt arising out of an implied understanding, had on a conveyance in the ordinary form of an absolute deed from R. to M. of certain parts of R.'s real estate, no trust being expressly declared, is not excepted from the operation of a discharge. *Reeves v. McCracken*, (1905) 69 N. J. Eq. 203, 60 Atl. 332, *affirmed* (1908) 73 N. J. Eq. 729, 69 Atl. 247.

An assignee for the benefit of creditors, however, acts in a fiduciary capacity, and a defalcation by him creates a debt excepted from a discharge. *Field v. Howry*, (1903) 132 Mich. 687, 94 N. W. 213 (also receiver under order of court); *Kingsland v. Spalding*, (1848) 3 Barb. Ch. (N. Y.) 341.

*Reduction of liability to judgment.*—The original character of the liability of one acting in a fiduciary capacity is not lost by being reduced to judgment. *Brown v. Hannagan*, (1911) 210 Mass. 246, 96 N. E. 714.

An ordinary bailee has frequently been held not to act in a fiduciary capacity within the meaning of the Acts. *Maxwell v. Evans*, (1883) 90 Ind. 596, 46 Am. Rep. 234 (banker holding special deposit; Act of 1867); *Sumner v. Richie*, (1880) 54 Ia. 554, 6 N. W. 752 (warehousemen); *Fowles v. Treadwell*, (1844) 24 Me. 377 (owner of attached property holding same for sheriff); *Phillips v. Russell*, (1856) 42 Me. 360 (bailee of money); *Halpine v. May*, (1868) 100 Mass. 498 (apparently state Insolvency Law; possibly under Act of 1867); *Hervy v. Devereux*, (1875) 72 N. C. 463.

A naked bailee of money, under an express contract to keep the same safely and pay it over on request, is not acting in a fiduciary capacity within the meaning of section 17a (4). *Lewis v. Snaw*, (1907) 19 Am. Bankr. Rep. 866, 122 App. Div. 99, 106 N. Y. S. 1012.

*Factor, commission merchant, etc.*—It is well settled that a debt due by a factor or commission merchant or a person holding similar relation to another for money collected and which he refuses to pay over, is not a debt accruing in a fiduciary capacity, so as to prevent its release by a discharge in bankruptcy. *American Agr. Chemical Co. v. Berry*, (1913) 110 Me. 528, 87 Atl. 218, Ann. Cas. 1915A 1293 and note, 45 L. R. A. (N. S.) 1106; *Neale v. Clark*, (1877) 95 U. S. 704, 24 U. S. (L. ed.) 586; *Hennequin v. Clews*, (1883) 111 U. S. 676, 4 S. Ct. 576, 28 U. S. (L. ed.) 565; *Noble v. Hammond*, (1880) 129 U. S. 65, 9 S. Ct. 238, 32 U. S. (L. ed.) 621; *Upshur v. Briscoe*, (1890) 138 U. S. 365, 11 S. Ct. 313, 34 U. S. (L. ed.) 931; *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; *Chapman v. Forsyth*, 2 How. 202, 11 U. S. (L. ed.) 236; *Zeperink v. Card*, (1882) 3 McCrary 549, 11 Fed. 295; *In re Adler*,

(1907) 152 Fed. 422, 81 C. C. A. 564; *Mathieu v. Goldberg*, (1907) 156 Fed. 541; *Re Ennis*, (1909) 171 Fed. 755; *Keime v. Graff*, (1878) 17 Nat. Bankr. Reg. 319, 13 Fed. Cas. No. 7,650; *Owsley v. Cobin*, (1877) 2 Hughes 433, 18 Fed. Cas. No. 10,636; *Re Smith*, (1878) 9 Ben. 494, 22 Fed. Cas. No. 12,976. See also *Re Butts*, (1903) 120 Fed. 986; *In re Woods*, (1903) 121 Fed. 599; *Bills v. Schliep*, (1903) 127 Fed. 103, 62 C. C. A. 103; *Barrett v. Prince*, (1906) 143 Fed. 302, 74 C. C. A. 440; *Austill v. Crawford*, (1845) 7 Ala. 335; *Woolsey v. Cade*, (1875) 54 Ala. 378, 27 Am. Rep. 711; *Young v. Clark*, (1907) 7 Cal. App. 194, 93 Pac. 1056; *Chipley v. Frierson*, (1882) 18 Fla. 639; *Georgia R. Co. v. Cubbedge*, (1885) 75 Ga. 321, *overruling* *Meador v. Sharpe*, (1874) 54 Ga. 125 and *Gilreath v. Holston Salt, etc., Co.*, (1881) 67 Ga. 702; *Du Pont v. Beck*, (1881) 81 Ind. 271; *Commercial Bank v. Buckner*, (1846) 2 La. Ann. 1023; *Hayman v. Pond*, (1843) 7 Mete. (Mass.) 328; *Bryant v. Kinyon*, (1901) 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801; *In re Benedict*, (1902) 37 Misc. 230, 57 N. Y. S. 165. See also *Keefauver v. Hevenor*, (1914) 163 App. Div. 531, 148 N. Y. S. 434; *Keeler v. Snodgrass*, (1882) 8 Ohio Dec. (Reprint) 490, 8 Ohio L. J. 219, 8 Cinc. L. Bul. 490; *Curtis v. Waring*, (1879) 92 Pa. St. 104; *Scott v. Porter*, (1880) 93 Pa. St. 38, 39 Am. Rep. 719. See *Slayton v. Wells*, (1893) 66 Vt. 62, 28 Atl. 632 (state Insolvency Law with provision similar to Act of 1841).

Previous to the authoritative determination of the question, many courts had held the contrary. *In re Seymour*, (1867) 1 Ben. 348, 21 Fed. Cas. No. 12,684; *Re Kimball*, (1868) 2 Ben. 554, 14 Fed. Cas. No. 7,768, *affirmed* (1869) 6 Blatchf. 202, 14 Fed. Cas. No. 7,769, *followed* in *Mayberry v. Cook*, (1898) 121 Cal. 588, 54 Pac. 95 (state Insolvency Law); *Herman v. Lynch*, (1881) 26 Kan. 435, 40 Am. Rep. 320; *Banning v. Bleakley*, (1875) 27 La. Ann. 257, 21 Am. Rep. 554; *Brown v. Garrard*, (1876) 28 La. Ann. 870; *Desobry v. Tete*, (1879) 31 La. Ann. 809, 33 Am. Rep. 232; *Lemcke v. Booth*, (1871) 47 Mo. 385, 4 Am. Rep. 326; *Brunswig v. Taylor*, (1876) 2 Mo. App. 351; *Brooks v. Yocum*, (1890) 42 Mo. App. 516; *Whitaker v. Chapman*, (1870) 3 Lans. (N. Y.) 155; *Hardenbrook v. Collson*, (1881) 24 Hun (N. Y.) 475, 61 How. Pr. 426; *Gay v. Farran*, 13 Ohio Dec. (Reprint) 989, 2 Cinc. Super. Ct. 426.

A debt due by a bankrupt in the character of a commission merchant, arising out of his failure to account for the value of goods consigned to him for sale on commission, on a contract to return the goods or their specific proceeds, is not a debt created by the bankrupt's "fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity," and

therefore will be released by his discharge in bankruptcy. *In re Basch*, (S. D. N. Y. 1899, 97 Fed. 761.

A broker having, upon a customer's order, bought and then sold cotton, a debt for the proceeds of such sale is a debt from which, as a bankrupt, he will be freed by his discharge, and the court will grant an injunction protecting him, until the question of such discharge be decided, from arrest and imprisonment under an execution issuing from a state court. *Knott v. Putnam*, (1901) 107 Fed. 907.

*Pledgee or pledgor*.—A debt arising from the conversion of bonds or stock by one with whom they have been pledged as collateral security does not arise in a fiduciary capacity. *Hennequin v. Clews*, (1883) 111 U. S. 676, 4 S. Ct. 576, 28 U. S. (L. ed.) 565; *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147; *Matter of Floyd*, (1905) 15 Am. Bankr. Rep. 277; *Hennequin v. Clews*, (1879) 77 N. Y. 427, 33 Am. Rep. 641; *Stratford v. Jones*, (1885) 97 N. Y. 586; *Crosby v. Miller*, (1903) 25 R. I. 172, 55 Atl. 328.

And the general balance due from a broker to a customer on a margin account stands in the same position. *In re Gaylord*, (1902) 113 Fed. 131.

Where persons who have pledged accounts collect the same and convert the proceeds, the debt so created does not arise in a fiduciary capacity. *In re Toklas*, (1912) 201 Fed. 377. *Compare White v. Pratt*, 5 Denio (N. Y.) 269; *J. L. Mott Iron Works v. Toumey*, (1904) 94 App. Div. 216, 87 N. Y. S. 1020.

An action at law for the conversion by brokers of stocks owned by plaintiff, but held by defendants as pledgees, although it is alleged that they induced the plaintiff to purchase such stocks by fraud, is not one to recover a debt created by defendants' "fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity." *In re Ennis*, (S. D. N. Y. 1909) 171 Fed. 755, 22 Am. Bankr. Rep. 679.

*The relation between partners*, while in a sense fiduciary, is not so within the meaning of the Bankruptcy Act. *Inge v. Stillwell*, (1912) 88 Kan. 33, 127 Pac. 527, 42 L. R. A. (N. S.) 1093; *Gee v. Gee*, (1901) 84 Minn. 384, 87 N. W. 1116; *Karger v. Orth*, (1911) 116 Minn. 124, 133 N. W. 471. See also *Barber v. Sterling*, (1877) 68 N. Y. 267. *Compare Hagerty v. Badkin*, (1907) 72 N. J. Eq. 473, 66 Atl. 420.

Misappropriation by a partner of partnership funds is not a misappropriation by him while acting in a "fiduciary capacity." *Karger v. Orth*, (1911) 116 Minn. 124, 133 N. W. 471; *Gee v. Gee*, (1901) 84 Minn. 384, 87 N. W. 1116.

The plaintiff and the defendant were equal partners in a private bank of which the former was president and the latter

cashier. The cashier was permitted to manage the bank and certain other business of the firm as he chose; the result being a considerable loss. The president sued the cashier for the loss, alleging fraud and mismanagement while acting as partner in a fiduciary capacity or relation. The defendant pleaded a discharge in bankruptcy; the plaintiff, who had notice of the proceedings, having filed no claim therein. It was held that such discharge was a good defense; the relation between partners, under the circumstances indicated, not being the fiduciary relation referred to in section 17. *Inge v. Stillwell*, (1912) 88 Kan. 33, 127 Pac. 527, 42 L. R. A. (N. S.) 1093.

During the existence of a partnership formed by two persons for the purpose of conducting a banking business, the managing partner does not act "in any fiduciary capacity;" nor is he an "officer." *Martin v. Starrett*, (1915) 97 Neb. 653, 151 N. W. 154.

*Agent or attorney*.—An agent converting funds of his principal is not acting in a fiduciary capacity, and such a debt is not within the exception in the Bankruptcy Acts. *Grover, etc., Sewing-Mach. Co. v. Clinton*, (1873) 5 Biss. 324, 11 Fed. Cas. No. 5,845; *Noble v. Hammond*, (1889) 129 U. S. 65, 9 S. Ct. 235, 32 U. S. (L. ed.) 621; *Bracken v. Milner*, (1900) 104 Fed. 522 (agent to loan and collect money). *Compare Fulton v. Hammond*, (1882) 11 Fed. 291; *Williams v. Virginia-Carolina Chemical Co.*, (1913) 182 Ala. 413, 62 So. 755 (agent to loan and collect); *Boyd v. Agricultural Ins. Co.*, (1904) 20 Colo. App. 28, 76 Pac. 986; *Matteson v. Kellogg*, (1854) 15 Ill. 548 (agent to invest); *Herman v. Lynch*, (1881) 26 Kan. 435, 40 Am. Rep. 320 (agent to purchase exchange); *Commercial Bank v. Buckner*, (1846) 2 La. Ann. 1023 (collecting agent); *American Surety Co. v. Spice*, (1912) 119 Md. 1, 85 Atl. 1031 (insurance agent); *Woodward v. Towne*, (1879) 127 Mass. 41, 34 Am. Rep. 337; *Shaw v. Vaughan*, (1884) 52 Mich. 405, 18 N. W. 126 (banker acting as collecting agent); *Green v. Chilton*, (1880) 57 Miss. 598, 34 Am. Rep. 483 (agent to collect); *Palmer v. Hussey*, (1882) 87 N. Y. 303, *affirmed* (1886) 119 U. S. 96, 7 S. Ct. 158, 30 U. S. (L. ed.) 362; *Lawrence v. Harrington*, (1890) 122 N. Y. 408, 25 N. E. 406; *Mulock v. Byrnes*, (1891) 129 N. Y. 23, 29 N. E. 244; *Guilfoyle v. Anderson*, (1880) 9 Daly (N. Y.) 64; *Clarke v. Milliken*, (1911) 70 Misc. 492, 127 N. Y. S. 339 (bankers and brokers). See also *Rowe v. Guilleaume*, (1879) 18 Hun (N. Y.) 556; *Keefauver v. Hevenor*, (1914) 163 App. Div. 531, 148 N. Y. S. 434. *Compare White v. Platt*, (1848) 5 Denio (N. Y.) 269; *Flagg v. Ely*, (1846) 1 Edm. Sel. Cas. (N. Y.) 206; *Williamson v. Dickens*, (1844) 27 N. C. 259; *Bissell v. Cou chaine*, (1846) 15 Ohio 59. See also

*Strader v. Baldwin*, (1847) 1 Ohio Dec. (Reprint) 219 note, 4 West. L. J. 528. *Compare Shipley v. Platts*, (1903) 17 S. D. 357, 97 N. W. 1; *Pankey v. Nolan*, (1845) 6 Humph. (Tenn.) 154; *Kaufman v. Alexander*, (1880) 53 Tex. 562.

A judgment obtained by a railroad company, against a ticket agent, for money collected by him for tickets sold and misappropriated to his own use, is not one for a debt created by his fraud, embezzlement, misappropriation, or defalcation, while acting as an officer or in a fiduciary capacity within the meaning of sec. 17a (4). *In re Wenham*, (S. D. N. Y. 1906) 153 Fed. 910, 16, Am. Bankr. Rep. 690.

An agent intrusted by his principal with beer to deliver to laborers under his supervision and to collect the pay therefor and pay the money over to such principal is not acting in a "fiduciary capacity" within the meaning of this section. *In re Camelo*, (N. D. N. Y. 1912) 195 Fed. 632.

But where an agent to loan money takes a trust deed to his partner as trustee and on a sale under the deed purchases, converting the proceeds and taking a deed in his own name, it has been held that the debt created thereby arises in a fiduciary capacity. *Bracken v. Milner*, (1900) 104 Fed. 522 (Act of 1898).

An attorney-at-law has been held not to act in a fiduciary capacity. *Wolcott v. Hodge*, (1860) 15 Gray (Mass.) 547, 77 Am. Dec. 381 (Act of 1841). While the rule limiting the exception in the Acts to special trusts, and the application of the rule to agents, would seem to support this conclusion, there are cases to the contrary. *Heffren v. Jayne*, (1872) 39 Ind. 463, 13 Am. Rep. 281 (Act of 1867); *Flanagan v. Pearson*, (1874) 42 Tex. 1, 19 Am. Rep. 40 (Act of 1867); *McAdoo v. Lummis*, (1875) 43 Tex. 227 (Act of 1867).

An attorney in fact does not act in a fiduciary capacity. *Woodward v. Towne*, (1879) 127 Mass. 41, 34 Am. Rep. 337.

**Auctioneer.**—Previous to the decision in the leading case of *Chapman v. Forsyth*, (1844) 2 How. 202, 11 U. S. (L. ed.) 236, limiting the exception to special or technical trusts, it had been held, under the Act of 1841, that an auctioneer stood in a "fiduciary character." *In re Lord*, (1842) 15 Fed. Cas. No. 8,501 (Act of 1841). And the same conclusion was reached under the Act of 1867, without any consideration of the authorities, although it appears that *Chapman v. Forsyth*, *supra*, was cited by counsel. *Jones v. Russell*, (1871) 44 Ga. 460. The latter case was subsequently overruled in *Georgia R. Co. v. Cubbedge*, (1885) 75 Ga. 321 (Act of 1867). And an auctioneer was held, in *Gibson v. Gorman*, (1882) 44 N. J. L. 325 (Act of 1867), not to act in a fiduciary capacity.

**Surety of fiduciary.**—The liability of a surety on the bond of a public officer for

defalcations of his principal does not arise in a fiduciary capacity. *U. S. v. Throckmorton*, (1868) 8 Nat. Bankr. Reg. 309, 28 Fed. Cas. No. 16,516; *Fowler v. Kendall*, (1858) 44 Me. 448; *McMinn v. Allen*, (1872) 67 N. C. 131.

The same is true of the surety of a guardian. *Ex p. Taylor*, (1877) 1 Hughes 617, 23 Fed. Cas. No. 13,773; *Jones v. Knox*, (1871) 46 Ala. 53, 7 Am. Rep. 583; *Simpson v. Simpson*, (1879) 80 N. C. 332; *Davis v. McCurdy*, (1880) 50 Wis. 569, 7 N. W. 665.

The same rule applies to a surety on an administrator's bond. *Steele v. Graves*, (1880) 68 Ala. 21; *Miller v. Gillespie*, (1875) 59 Mo. 220; *Eberhardt v. Wood*, (1880) 6 Lea (Tenn.) 467. And to a surety on a bail bond. *Jones v. State*, (1873) 28 Ark. 119.

In *Reitz v. People*, (1874) 72 Ill. 435, the court said: "The guardian is liable on account of his fiduciary character, aside from his bond. Even if his bond were invalid on account of material errors and omission in its language, he would still be personally liable for any failure to discharge the duties of his trust with fidelity, to the same extent he would have been had his bond been in all respects valid. The surety, however, merely guarantees the acts of his principal. No trust or confidence is reposed in him. He has nothing to do with the person or property of the ward, and has no control over the conduct of the guardian. He is liable simply on his contract, and according to its terms. We perceive no difference in principle between his failure to comply with this, and any other contract he might make, in which the ward is interested. Certainly the liability of the surety upon the bond of the guardian cannot, by any fair construction of language, be said to be a debt created by him while acting in a fiduciary character, so as to bring it within the exception referred to."

**Executor, administrator or guardian.**—A misappropriation by an executor creates a debt arising in a fiduciary capacity. *Morris v. Covey*, (1912) 104 Ark. 226, 148 S. W. 257; *Laramore v. McKinzie*, (1878) 60 Ga. 532; *Crisfield v. State*, (1880) 55 Md. 192; *Brown v. Hannagan*, (1911) 210 Mass. 246, 96 N. E. 714. See also *Forbes v. Keyes*, (1906) 193 Mass. 38, 78 N. E. 733.

But an agreement by an executor guaranteeing the payment of a demand against the estate and admitting the possession of sufficient assets, the claim turning out to be unenforceable, is not a debt arising in a fiduciary capacity. *Amoskeag Mfg. Co. v. Barnes*, (1870) 49 N. H. 312.

A misappropriation by an administrator stands on the same ground as a misappropriation by an executor, and a claim therefore is not discharged. *Light v. Merriam*, (1882) 132 Mass. 283; *Stickney v. Parmenter*, (1901) 74 Vt. 58, 52 Atl. 73.

The amount which a guardian has used of funds of his ward also is a debt in a fiduciary capacity. *Re Maybin*, (1876) 15 Nat. Bankr. Reg. 468, 16 Fed. Cas. No. 9,337; *Carlin v. Carlin*, (1871) 8 Bush (Ky.) 141; *Halliburton v. Carter*, (1874) 55 Mo. 435; *Simpson v. Simpson*, (1879) 80 N. C. 332. See also *Coleman v. Davies*, (1872) 45 Ga. 489; *McDonald v. State*, (1881) 77 Ind. 26; *Cromer v. Cromer*, (1877) 29 Grat. (Va.) 280.

*Trustee of express trust*.—It is clear that a trustee in a deed of trust who converts the proceeds arising from a sale under the trust deed creates a debt in a fiduciary capacity. *Bracken v. Milner*, (1900) 104 Fed. 522; *Ruff v. Milner*, (1902) 92 Mo. App. 620. See also *Pinkston v. Brewster*, (1848) 14 Ala. 315 (Act of 1841).

And where, by an antenuptial contract, a husband is created a trustee for his wife with reference to her separate property and the income therefrom, a conversion by him of such property creates a debt arising out of a fiduciary capacity. *Donovan v. Haynie*, (1880) 67 Ala. 51 (Act of 1867).

On similar principles a husband, appointed by the court as a trustee to receive the share of his wife in the proceeds of a partition sale, acts in a fiduciary capacity. *Mock v. Howell*, (1888) 101 N. C. 443, 8 S. E. 167 (Act of 1867).

However, where funds were placed in the hands of a person, to use as he saw fit, and to pay a certain annuity to a named person, and return the principal or pay it over on the death of the annuitant, it was held that a fiduciary relation was not thereby created. *Upshur v. Briscoe*, (1891) 138 U. S. 365, 11 S. Ct. 313, 34 U. S. (L. ed.) 931 (Act of 1867).

*Embezzlement by bank officer*.—An indebtedness created by the embezzlement and misappropriation of the funds of a bank, by the debtor while acting in the capacity of vice-president thereof, and having full control of its affairs, is one created by his fraud, embezzlement, and misappropriation, while acting in a fiduciary capacity, within the meaning of section 17a (4). *Harper v. Rankin*, (4th Cir. 1905) 141 Fed. 626, 72 C. C. A. 320, 15 Am. Bankr. Rep. 608.

## CHAPTER IV

### COURTS AND PROCEDURE THEREIN

SEC. 18. PROCESS, PLEADINGS, AND ADJUDICATIONS.—*a* [Service of petition—return—publication.] Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time. [(Amended 1903, which excepted pending cases) 32 Stat. L. 798.]

As originally enacted section 18a read as follows:

"SEC. 18. PROCESS, PLEADINGS, AND ADJUDICATIONS.—*a*. Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States." [30 Stat. L. 551.]

In 1903 it was amended "so as to read as" in the text.

As to

Averments, amendment, etc., of petition, see section 59b.

Who may file petitions, see section 59a and b.

Commencement of proceedings.—The filing of a petition in bankruptcy is the commencement of bankruptcy proceedings, and it operates as a *lis pendens* and notice to all the world. *Mueller v. Nugent*,

(1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405, 7 Am. Bankr. Rep. 224; *York Mfg. Co. v. Cassell*, (1906) 201 U. S. 344, 26 S. Ct. 481, 50 U. S. (L. ed.) 782, 15 Am. Bankr. Rep. 638; *In re Lewis*, (S. D. N. Y. 1899) 91 Fed. 632, 1 Am. Bankr. Rep. 458; *Southern L. & T. Co. v. Benbow*, (W. D. N. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; *In re Appel*, (D. C. Neb. 1900) 103 Fed. 931, 4 Am. Bankr. Rep. 722; *In re Stein*, (C. C. A. 2d Cir. 1901) 105 Fed. 749, 5 Am. Bankr. Rep. 288; *In re Pekin Plow Co.*, (C. C. A. 8th Cir. 1901) 112 Fed. 308, 7 Am. Bankr. Rep. 369; *In re Krinsky*, (S. D. N. Y. 1902) 112 Fed. 972, 7 Am. Bankr. Rep. 535; *In re Gutman*, (S. D. N. Y. 1902) 114 Fed. 1009, 8 Am. Bankr. Rep. 252; *In re Fraizer*, (W. D. Mo. 1902) 117 Fed. 746, 9 Am. Bankr. Rep. 21; *In re Kellogg*, (C. C. A. 2d Cir. 1903) 121 Fed. 333, 10 Am. Bankr. Rep. 7; *In re Breslauer*, (N. D. N. Y. 1903) 121 Fed. 910, 10 Am. Bankr. Rep. 33; *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; *In re Reynolds*, (D. C. Mont. 1904) 127 Fed. 760, 11 Am. Bankr. Rep. 758, 760; *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492; *In re Tweed*, (N. D. Ia. 1904) 131 Fed. 355, 12 Am. Bankr. Rep. 648; *In re Mertens*, (N. D. N. Y. 1904) 131 Fed. 507, 12 Am. Bankr. Rep. 698; *In re Smith*, (N. D. Ia. 1904) 132 Fed. 301, 13 Am. Bankr. Rep. 103; *In re Kolin*, (C. C. A. 7th Cir. 1905) 134 Fed. 557, 13 Am. Bankr. Rep. 531; *In re Granite City Bank*, (C. C. A. 8th Cir. 1905) 137 Fed. 818, 14 Am. Bankr. Rep. 404; *Illinois State Bank v. Cox*, (C. C. A. 7th Cir. 1906) 143 Fed. 91, 16 Am. Bankr. Rep. 32; *In re Mertens*, (C. C. A. 2d Cir. 1906) 144 Fed. 818, 15 Am. Bankr. Rep. 362, 369; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *Shute v. Patterson*, (C. C. A. 8th Cir. 1906) 147 Fed. 509, 17 Am. Bankr. Rep. 99; *Lovell v. Wentz*, (N. D. Ala. 1910) 181 Fed. 555; *In re Flatland*, (C. C. A. 9th Cir. 1912) 196 Fed. 310; *In re Lewis*, (S. D. N. Y. 1899) 1 Am. Bankr. Rep. 458; *Matter of Frischberg*, (S. D. N. Y. 1902) 8 Am. Bankr. Rep. 607.

**An action for malicious prosecution will lie** for the institution and prosecution of a proceeding in bankruptcy without probable cause and with a malicious intent, although not accompanied by any actual seizure of the alleged bankrupt's property. *Wilkinson v. Goodfellow-Brooks Shoe Co.*, (E. D. Mo. 1905) 141 Fed. 218, 15 Am. Bankr. Rep. 554.

**Application of rules of practice generally.**—General Order 37 provides for the use of the equity rules, and the practice and procedure in cases at law, as nearly as may be; and authorizes the modification thereof, and a change in the time allowed for the return of process, for ap-

pearance, pleadings, etc. *Shute v. Patterson*, (C. C. A. 8th Cir. 1906) 147 Fed. 509, 17 Am. Bankr. Rep. 99.

**All process, summons, and subpoenas** should issue out of the court, under the seal thereof, and be tested by the clerk. R. S. sec 911 in title JUDICIARY; *In re Pierce*, (D. C. Colo. 1901) 111 Fed. 516, 6 Am. Bankr. Rep. 747; *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11.

**Alias writ may issue.**—The fact that the subpoena, issued for the defendant in involuntary proceedings in bankruptcy, was not served before the return day, does not terminate the proceedings; but the court has power to grant an *alias* subpoena. *Gleason v. Smith*, (C. C. A. 3d Cir. 1906) 145 Fed. 895, 16 Am. Bankr. Rep. 602.

**The return day** should be fixed by the issuance of the subpoena. *In re L. Humbert Co.*, (N. D. Ia. 1900) 100 Fed. 439, 4 Am. Bankr. Rep. 76.

**The official forms** should be used when their use is possible. *Mahoney v. Ward*, (E. D. N. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770; *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696; *In re White*, (E. D. Pa. 1905) 135 Fed. 199, 14 Am. Bankr. Rep. 241.

**Section 18a** refers only to the manner of the service of the subpoena, and not to its form. It does not require that the writ of subpoena shall contain the memorandum provided for by equity rule 12. *Matter of Wing Yick*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 360.

**Form No. 4** is an "order to show cause upon creditors' petition."

**Form No. 5** is "subpoena to alleged bankrupt."

**Petition.**—The petition in involuntary bankruptcy should allege the issuable facts relied upon, specifically and with reasonable and sufficient certainty. *In re Nelson*, (1899) 98 Fed. 76, wherein it was held that the allegation that the bankrupt had, within four months, transferred, while insolvent, large amounts and values of his property to one or more of his creditors, with an intent to prefer said creditors over his other creditors, was insufficient as an allegation of fact. See also *In re Mingo Valley Creamery Assoc.*, (1900) 100 Fed. 282; *In re Ewing*, (C. C. A. 1902) 115 Fed. 707; *In re Randall*, (1869) *Deady* (U. S.) 557.

The petition is demurrable if its allegations do not show that the defendant's occupation or business does not bring him within the excepted classes mentioned in section 4b. *In re Taylor*, (C. C. A. 1900) 102 Fed. 728.

A petition against a corporation must show that its business is such as to bring it within the terms of section 4b describing corporations which may be adjudged involuntary bankrupts. *In re Chicago-Joplin Lead, etc., Co.*, (1900) 104 Fed. 67.

On collateral attack, however, an adjudication will not be held void because of the omission of such allegation. *In re Columbia Real-Estate Co.*, (1900) 101 Fed. 965. Nor, it seems, is such objection available when first taken on appeal. *In re Stern*, (C. C. A. 1902) 116 Fed. 604.

The petitioners' claims should be so described as to show that they are provable against the alleged bankrupt. *In re Mercur*, (1899) 95 Fed. 634; *In re Hadley*, (1875) 12 Nat. Bankr. Reg. 366, 11 Fed. Cas. No. 5,894; *In re Western Sav., etc., Co.*, (1877) 4 Savy. (U. S.) 190.

**Petition in partnership cases.**—As there is no special official form for a petition in involuntary bankruptcy against a partnership, the prescribed form (see Form No. 3 in note to section 30) of a creditors' petition should be used, with such changes as may meet the exigencies of the case. *Mather v. Coe*, (1899) 92 Fed. 333.

A partnership is a distinct entity, which requires a petition specifically directed against it, and resulting in an adjudication irrespective of and in addition to any that may be made against the individual members of the firm. Whatever proceedings are instituted should disclose from the beginning the character which is proposed for them; if the partnership is intended to be reached, the petition and proceedings should be appropriate to that end; if only the individual members, the petition and proceedings should be governed by that circumstance. This is more than a mere matter of form. *In re Mercur*, (1902) 116 Fed. 655, holding that where a long interval has elapsed after proceedings have been instituted against two persons individually, and not as partners, if it is desired to reach the partnership the only course to pursue is to file a new petition in separate proceedings and not attempt to ingraft it by amendment upon the existing proceedings.

When the members of a firm which files a voluntary petition desire to be adjudicated bankrupts individually, that is, as against individual creditors as well as against firm creditors, they should each file an individual petition. And in such case, where there are two partners, three estates are to be administered and three discharges sought. *In re Farley*, (1902) 115 Fed. 359, *disapproving In re Langslow*, (1899) 98 Fed. 869; *In re Gay*, (1899) 98 Fed. 870; and *following In re Barden*, (1900) 101 Fed. 553.

See further as to proceedings in partnership cases, *supra*, notes to section 5.

**Multifarious petitions.**—A creditor's petition in involuntary bankruptcy should not incorporate with the prayer for an adjudication allegations that other creditors have received voidable preferences, or a prayer for an injunction forbidding the state court receiver of the alleged bankrupt from distributing the property in his

hands, or a prayer for the seizure of his property held by adverse claimants. Such matters must be determined in separate proceedings; and the objectionable allegations will be struck out from the petition on the ground of multifariousness. *Mather v. Coe*, (1899) 92 Fed. 333. To the same effect see *In re Ogles*, (1899) 93 Fed. 427.

The petition in involuntary bankruptcy and the application for a warrant to the marshal "ought to be separated in practice, whether it is required by the statute or not." *In re Kelly*, (1899) 91 Fed. 504.

**Amendment of petition.**—The petition in involuntary bankruptcy against a firm alleged that the various partners had, during the greater part of the preceding six months, their respective domiciles in the district where the petition was filed; while, as shown by evidence, no one of the partners had had his domicile therein for the prescribed time. Upon the respondent's motion it was held that the petition should be dismissed, unless amended. *In re Blair*, (1900) 99 Fed. 76.

General Order in Bankruptcy No. 11, which deals with amendments to a petition and schedules, was not intended to abrogate or restrict the general power of amendment in other respects vested in the court. *In re Bellah*, (1902) 116 Fed. 69.

Upon the hearing before the referee in involuntary bankruptcy where an additional act of bankruptcy, not mentioned in the petition, is disclosed by the testimony of the bankrupt, an amendment including such act will be deemed to have been made. *In re Miller*, (1900) 104 Fed. 704.

A petition which omits to state the details of alleged preferences is insufficient but amendable. *In re Cliffe*, (1899) 94 Fed. 354, wherein it was held that the defect had been waived by the respondent.

Leave to amend a petition in bankruptcy setting up other and additional acts of bankruptcy was refused in *White v. Bradley Timber Co.*, (1902) 116 Fed. 768.

In the case of *In re Hyde, etc., Mfg. Co.*, (1900) 103 Fed. 617, it was held that an amended petition could not be changed into an original petition and made the basis of a new proceeding by deleting the word "amended."

Formal defects in a petition may be amended *nunc pro tunc* in the course of subsequent proceedings. *In re Meyers*, (1899) 97 Fed. 757. See also *In re Lange*, (1899) 97 Fed. 197; *In re Mercur*, (1899) 95 Fed. 634.

**Amendments are liberally allowed** unless it is sought thereby to present entirely new grounds for maintaining the petition, or the motion to amend is not seasonably made. *In re Bininger*, (1870) 7 Blatchf. (U. S.) 262; *In re Craft*, (1868) 6

Blatchf. (U. S.) 177; *In re Gallinger*, (1870) 1 Sawy. (U. S.) 224; *In re Henderson*, (1881) 9 Fed. 196; *In re Leonard*, (1871) 4 Nat. Bankr. Reg. 562, 15 Fed. Cas. No. 8,255; *In re Freudenfels*, (1879) 9 Fed. Cas. No. 5,112a; *Reed v. Cowley*, (1868) 1 Nat. Bankr. Reg. 516, 20 Fed. Cas. No. 11,644.

*Amendments properly allowed relate back* to the date of filing the original petition. *Sherman v. International Bank*, (1878) 8 Biss. (U. S.) 371.

**Withdrawal and dismissal of petition.**—*In re Cronin*, (1899) 98 Fed. 584, it was held that where one of the creditors in an involuntary petition insists upon an adjudication, the court cannot dismiss the petition, if the statutory grounds exist and no fraud, mistake, or bad faith is shown, although the other petitioning creditors consent to the dismissal, and although a compromise would be in the best interest of the creditors.

**Reinstatement after voluntary dismissal.**—Creditors filed a petition in bankruptcy against a debtor and had it dismissed at their own request. Other creditors, after waiting a year, filed a petition for reinstatement. The delay was held to be unreasonable, and the application was refused. *In re Jemison Mercantile Co.*, (C. C. A. 1902) 112 Fed. 966.

**Delay in issuing a subpoena** does not necessarily nullify the proceedings which are deemed to have been commenced by the filing of the petition. *In re Lewis*, (1899) 91 Fed. 632. See also *In re Appel*, (1900) 103 Fed. 931.

**Mode of service—Personal service on bankrupt unnecessary.**—The personal service referred to in section 18 is not personal service upon the alleged bankrupt himself. *In re Norton*, (N. D. N. Y. 1906) 148 Fed. 301, 17 Am. Bankr. Rep. 504. See also *In re Magid-Hope Silk Mfg. Co.*, (D. C. Mass. 1901) 110 Fed. 352, 6 Am. Bankr. Rep. 610.

Thus it has been held that service by leaving a copy of the petition in involuntary proceedings, with the subpoena, with the clerk of a hotel, of which the bankrupt was proprietor, and where he usually resided, was sufficient, although the bankrupt was absent in another town, sick and unconscious, and died two days later without regaining consciousness. *In re Risteen*, (D. C. Mass. 1903) 122 Fed. 732, 10 Am. Bankr. Rep. 494.

So also service may be made either personally or by leaving the petition and subpoena at the bankrupt's dwelling house or usual place of abode, with some adult person who is a member of or resident in the family, if at the time of the service he has such place of abode or dwelling house, and such adult person is there found. *In re Norton*, (N. D. N. Y. 1906) 148 Fed. 301, 17 Am. Bankr. Rep. 504.

1 F. S. A.—47

**Service outside district.**—Where service of the order on a petition in involuntary bankruptcy is made upon the defendant outside the district, without an appearance on his part, no order can be made which will apply to him in person, but the proceeding will affect only property within the district which can come into possession of the trustee. *In re Appel*, (D. C. Neb. 1900) 103 Fed. 931, 4 Am. Bankr. Rep. 722.

**Service by publication.**—If the bankrupt cannot be found and cannot be served within the district, the court will, on a proper showing, make an order for service by publication. *In re Murray*, (N. D. Ia. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601.

Publication is to be made in the manner provided by the Act of March 3, 1875, ch. 137, § 8 (now Judicial Code, § 57 in title JUDICIARY), which is the law referred to in the latter part of section 18a. *In re Risteen*, (1903) 122 Fed. 732; *Sidney L. Bauman Diamond Co. v. Hart*, (5th Cir. 1911) 192 Fed. 498, 113 C. C. A. 104. See also last two paragraphs of this note.

**Service on foreign corporations.**—*In re Magid-Hope Silk Mfg. Co.*, (1901) 110 Fed. 352, it was held that in bankruptcy proceedings taken against a foreign corporation service upon the state commissioner of corporations, duly appointed attorney by the corporation in question to receive service of process within the state, was sufficient service.

**Where the defendant is a lunatic** and is personally served, additional notice by publication is advisable, but not indispensable. *In re Burka*, (1901) 107 Fed. 674.

**The committee or guardian of a lunatic** defendant should be brought in by process as well as the lunatic. *In re Burka*, (1901) 107 Fed. 674.

**Service in partnership cases.**—If a member of a firm refuses to join in a petition by the others to have the firm adjudged bankrupt, the proceeding becomes as to the nonjoining member an involuntary one; if he can be found, personal service of notice must be made; but, if personal service cannot be had, then, upon filing before the judge (or the referee, if the case has been referred by the clerk) an affidavit showing that personal service of notice cannot be made, an order of publication of notice will be made, as provided for in section 18a. *In re Murray*, (1899) 96 Fed. 600.

**Effect of failure to serve defendant.**—Where a subpoena was returned by the marshal "not found," it was held that the petition did not become *functus officio* by the failure of the petitioners to proceed further, but that under section 59f other creditors may be permitted to join and prosecute the petition. *In re Stein*, (C. C. A. 1901) 105 Fed. 749.

**Objection to service.**—An objection to an involuntary bankruptcy petition, that the court had no jurisdiction because the subpoena was improperly served, can be raised only by motion or by defense at the trial, and not by demurrer. *In re Seaboard Fire Underwriters*, (S. D. N. Y. 1905) 137 Fed. 987, 13 Am. Bankr. Rep. 722. See also *Romaine v. Union Ins. Co.*, (W. D. Tenn. 1886) 28 Fed. 625.

**Defective service — waiver.**—An appearance by the bankrupt will, as a general rule, cure defects or irregularities in the service, and even an entire want of serv-

ice. *In re Smith*, (D. C. Conn. 1902) 117 Fed. 961, 9 Am. Bankr. Rep. 98.

The order for service by publication must designate a day upon which the absent defendant or bankrupt is required to appear and demur, answer or plead. *Sidney L. Bauman Diamond Co. v. Hart*, (5th Cir. 1911) 192 Fed. 498, 113 C. C. A. 104.

**Publishing order of court.**—The order of the court directing substituted service upon the absent defendant or bankrupt must be published. *Sidney L. Bauman Diamond Co. v. Hart*, (5th Cir. 1911) 192 Fed. 498, 113 C. C. A. 104.

**b [Time to plead to petition.]** The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow. [(Amended 1903) 32 Stat. L. 798.]

This subdivision b was re-enacted without change in 1903 in the same act that amended section 18a (32 Stat. L. 798).

**Right to appear and plead.**—A bankrupt, or any of his creditors, may appear and plead to a petition in involuntary bankruptcy proceedings at any time within five days after the return day, or within such further time as the court may allow. *In re Simonson*, (D. C. Ky. 1899) 92 Fed. 904, 1 Am. Bankr. Rep. 197; *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266; *In re Heinsfurter*, (S. D. Ia. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 109; *In re L. Humbert Co.*, (N. D. Ia. 1900) 100 Fed. 439, 4 Am. Bankr. Rep. 76; *In re Mutual Mercantile Agency*, (S. D. N. Y. 1901) 111 Fed. 152, 6 Am. Bankr. Rep. 607; *Day v. Beck, etc.*, *Hardware Co.*, (C. C. A. 5th Cir. 1902) 114 Fed. 834, 8 Am. Bankr. Rep. 175; *In re Ewing*, (C. C. A. 2d Cir. 1902) 115 Fed. 707, 8 Am. Bankr. Rep. 269; *In re Stern*, (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569; *Bradley Timber Co. v. White*, (C. C. A. 5th Cir. 1903) 121 Fed. 779, 10 Am. Bankr. Rep. 329; *In re C. Moench, etc., Co.*, (W. D. N. Y. 1903) 123 Fed. 977, 10 Am. Bankr. Rep. 590; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492; *Lockman v. Lang*, (C. C. A. 8th Cir. 1904) 132 Fed. 1, 11 Am. Bankr. Rep. 597; *In re Hark*, (E. D. Pa. 1905) 135 Fed. 603, 14 Am. Bankr. Rep. 400; *In re Belle Fourche First Nat. Bank*, (C. C. A. 8th Cir. 1907) 152 Fed. 64, 18 Am. Bankr. Rep. 265; *In re Cooper*, (E. D. Pa. 1908) 159 Fed. 956, 20 Am. Bankr. Rep. 392; *Matter of Gorman*, (D. C. Hawaii 1906) 15 Am. Bankr. Rep. 587.

Thus where a petition in involuntary bankruptcy alleges the giving of an unlawful preference to a particular creditor

of the bankrupt, that creditor may, on his own petition, intervene and be made a party defendant, with leave to plead to the petition. *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266.

Whether a creditor who resists the adjudication has a provable debt is not determined *in limine*. *In re C. Moench, etc., Co.*, (W. D. N. Y. 1903) 123 Fed. 977, 10 Am. Bankr. Rep. 590.

**Tort claimants**, whose claims are not provable in bankruptcy, have no standing to contest the adjudication. *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 166 Fed. 284, 21 Am. Bankr. Rep. 531.

**Receivers appointed by a Circuit Court** for the property of corporations, who are in possession of the property and conducting the business under orders of the court, have the right to contest the proceedings in bankruptcy against such corporations. *In re Hudson River Electric Power Co.*, (N. D. N. Y. 1909) 173 Fed. 934, 21 Am. Bankr. Rep. 915; *In re Gold Run Mining, etc., Co.*, (D. C. Colo. 1912) 200 Fed. 162.

**The time to plead is fixed by the statute** and will only be extended for good cause. *In re Simonson*, (D. C. Ky. 1899) 92 Fed. 904, 1 Am. Bankr. Rep. 197; *In re Heinsfurter*, (S. D. Ia. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 109; *In re Mutual Mercantile Agency*, (S. D. N. Y. 1901) 111 Fed. 152, 6 Am. Bankr. Rep. 607; *In re Cooper*, (E. D. Pa. 1908) 159 Fed. 956, 20 Am. Bankr. Rep. 392.

**Stipulation extending time to answer.**—*In re Simonson*, (1899) 92 Fed. 904, affirmed in *Simonson v. Sinsheimer*, (C. C. A. 1899) 95 Fed. 948, and reaffirmed in *Simonson v. Sinsheimer*, (C. C. A. 1900) 100 Fed. 426, it was held that the



time to plead could not be extended by an agreement between counsel for the petitioning creditors and counsel for the bankrupt.

**Power of court to admit other parties.**—Section 18b provides that the bankrupt or any creditor may appear. That is a grant of right to bankrupts and to creditors, but the statute in no sense declares against the power of the court to admit other parties who are in a legitimate way interested in the questions involved in the proposition of adjudication. *Blackstone v. Everybody's Store*, (C. C. A. 1st Cir. 1913) 207 Fed. 752.

**Waiver of objection to jurisdiction.**—Where a defendant does not confine his answer to an objection to the jurisdiction but in addition pleads generally to the merits of the petition, traversing the allegations of insolvency and the acts of bankruptcy charged, such a pleading, notwithstanding any reservation therein to the pleader, waives all special or personal privileges of the defendant in respect to the jurisdiction of the court. *Clark-Herrin-Campbell Co. v. H. B. Claffin Co.*, (C. C. A. 5th Cir. 1914) 218 Fed. 429.

**Appearance within reasonable time.**—If a party who files an involuntary petition desires to put in default all those persons who have a right to appear and plead to the petition, he should issue the usual subpoena, and then the law fixes the time within which every one who has a right to plead may appear; otherwise, the adjudication will not be binding on those who do not consent to it if they appear within a reasonable time and ask to plead. *B-R Electric & Telephone Mfg. Co. v. Ætna Life Ins. Co.*, (C. C. A. 8th Cir. 1913) 206 Fed. 885.

**Adjudication within five days voidable.**—An order of adjudication in involuntary bankruptcy is voidable by a creditor, if made within five days after the return day, even though the bankrupt voluntarily appears and consents to it. *B-R Electric & Telephone Mfg. Co. v. Ætna Life Ins. Co.*, (C. C. A. 8th Cir. 1913) 206 Fed. 885.

**Demurrer to petition.**—The petition when insufficient may be met by a demurrer. *Citizens' Bank v. W. C. De Pauw Co.*, (C. C. A. 1901) 105 Fed. 926; *In re Harper*, (1900) 105 Fed. 900; *Dressel v. North State Lumber Co.*, (1901) 107 Fed. 255; *Oren v. Harley*, 3 Nat. Bankr. Reg. 263; *In re Benham*, 8 Nat. Bankr. Reg. 94; *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381.

A demurrer, however, will be deemed to have been waived by answering to the merits. *In re Cliffe*, (E. D. Pa. 1899) 94 Fed. 354, 2 Am. Bankr. Rep. 317; *Leidigh Carriage Co. v. Stengel*, (C. C. A. 6th Cir. 1899) 95 Fed. 637, 2 Am. Bankr. Rep. 385; *In re Herzikopf*, (S. D. Cal. 1902) 118 Fed. 101, 9 Am. Bankr. Rep. 90.

And although a demurrer to a petition in involuntary bankruptcy proceedings is sustained, the petition will not, as a rule, be dismissed without first giving the petitioners an opportunity to apply for leave to amend. *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492.

A plea may be filed where the jurisdiction of the court is challenged because of facts not apparent on the face of the petition. See *In re Plotke*, (C. C. A. 1900) 104 Fed. 964.

**Answer—Generally.**—The bankrupt, or any creditor, may answer the petition, and set up any defense or counterclaim which may be available as a good and sufficient reason why an adjudication of bankruptcy should not be made. As in the case of an answer in other equitable proceedings, the facts relied upon must be stated with as much clearness and certainty as they will permit of, for the purpose of affording the petitioners an opportunity of meeting them, and giving the court the information necessary to judge of their sufficiency. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153; *In re John A. Etheridge Furniture Co.*, (D. C. Ky. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 112; *Mather v. Coe*, (1899) 92 Fed. 333; *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266; *In re Cliffe*, (E. D. Pa. 1899) 94 Fed. 354, 2 Am. Bankr. Rep. 317; *Leidigh Carriage Co. v. Stengel*, (C. C. A. 6th Cir. 1899) 95 Fed. 637, 2 Am. Bankr. Rep. 383; *Hill v. Levy*, (E. D. Va. 1899) 98 Fed. 94, 3 Am. Bankr. Rep. 374; *In re Paige*, (N. D. Ohio 1899) 99 Fed. 538, 3 Am. Bankr. Rep. 679; *In re Taylor*, (C. C. A. 7th Cir. 1900) 102 Fed. 728, 4 Am. Bankr. Rep. 515; *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484; *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381; *Bradley Timber Co. v. White*, (C. C. A. 5th Cir. 1903) 121 Fed. 779, 10 Am. Bankr. Rep. 329, affirming (S. D. Ala. 1902) 9 Am. Bankr. Rep. 441; *Troy Wagon Works v. Vastbinder*, (M. D. Pa. 1904) 130 Fed. 232, 12 Am. Bankr. Rep. 352; *Rise v. Bordner*, (M. D. Pa. 1905) 140 Fed. 566, 15 Am. Bankr. Rep. 297; *In re Harris*, (N. D. Ala. 1907) 155 Fed. 218, 19 Am. Bankr. Rep. 635; *In re Cooper*, (E. D. Pa. 1908) 159 Fed. 956, 20 Am. Bankr. Rep. 392; *Consolidated Rubber Tire Co. v. Vehicle Equipment Co.*, (1907) 19 Am. Bankr. Rep. 862, 121 App. Div. 764, 106 N. Y. S. 599.

**Form of answer.**—An answer to a petition in involuntary bankruptcy should follow the simple form of denial prescribed by form No. 6. If responsive to multifarious matter in the petition, or unnecessarily defensive, it must be prepared in

proper form, and refiled as of the original date; the original answer, however, remaining on file. *Mather v. Coe*, (N. D. Ohio 1899) 92 Fed. 333, 1 Am. Bankr. Rep. 504; *Bradley Timber Co. v. White*, (C. C. A. 5th Cir. 1903) 121 Fed. 779, 10 Am. Bankr. Rep. 329.

**Authority to answer for corporation.**—Objection that an answer in the name of a corporation defendant was signed by president without authority is waived by acquiescence of the corporation and its creditors in the adjudication. *In re Columbia Real-Estate Co.*, (1900) 101 Fed. 965.

**Formal amendments to an answer filed by a creditor to a petition in involuntary bankruptcy against his debtor may be made at any time before adjudication.** *Goldman v. Smith*, (1899) 93 Fed. 185; *In re Harris*, (N. D. Ala. 1907) 155 Fed. 216, 19 Am. Bankr. Rep. 635; *Knapp, etc., Co. v. Drew*, (C. C. A. 8th Cir. 1908) 160 Fed. 413, 20 Am. Bankr. Rep. 355.

**Answer as evidence.**—A creditor, in his answer to the petition in involuntary bankruptcy, alleged that the debtor was not insolvent; and the case was submitted on the pleadings. It was held that the allegation in the answer must be taken as true, and that the adjudication of bankruptcy upon the pleadings was error. *In re Taylor*, (C. C. A. 1900) 102 Fed. 728.

**The answer will be taken as true in the absence of a replication.** *In re Taylor*, (C. C. A. 7th Cir. 1900) 102 Fed. 728, 4 Am. Bankr. Rep. 515; *Brinkley v. Smithwick*, (E. D. N. C. 1903) 126 Fed. 686, 11 Am. Bankr. Rep. 500; *In re Sedgwick*, (D. C. Mass. 1915) 223 Fed. 655.

**Failure to deny matter alleged in petition equivalent to admission.**—The averment in a petition for an adjudication of bankruptcy that the respondent is not a wage-earner, not being denied in the an-

swer, may be taken as admitted. *Hoffschlaeger Co. v. Young Nap*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 517.

**Reservation of right to move for dismissal.**—It has been held that where an alleged involuntary bankrupt admitted his insolvency in the answer, a reservation of a right to move to dismiss the proceedings for irregularities and want of notice is too indefinite to be considered. *Brinkley v. Smithwick*, (E. D. N. C. 1903) 126 Fed. 686, 11 Am. Bankr. Rep. 500.

**Creditors cannot answer voluntary petition.**—The statute does not authorize the creditors of a proposed voluntary bankrupt to file answers in opposition to his petition for adjudication. *In re Jehu*, (N. D. Ia. 1899) 94 Fed. 638, 2 Am. Bankr. Rep. 498; *In re Ives*, (C. C. A. 6th Cir. 1902) 113 Fed. 911, 7 Am. Bankr. Rep. 692; *In re Carleton*, (D. C. Mass. 1902) 115 Fed. 246, 8 Am. Bankr. Rep. 270.

**Withdrawal of answer.**—A debtor who contests an involuntary proceeding in bankruptcy against him does so in his own behalf and not in the interest of his creditors, and is at liberty to withdraw his opposition at any time, when done in good faith, without notice to his creditors. *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80.

**Demurrer to answer.**—The question of the sufficiency of an answer to a petition in involuntary bankruptcy cannot be raised by a demurrer; that can be done only by setting the case down for hearing on the bill and answer as in equity practice. *Goldman v. Smith*, (1899) 93 Fed. 182.

**Practice in equity governs proceedings in bankruptcy in matters not regulated by special statutory provisions.** *In re Columbia Real Estate Co.*, (C. C. A. 1902) 112 Fed. 646. See also General Order No. 37 and the first note to section 2.

**c [Verification of pleadings.]** All pleadings setting up matters of fact shall be verified under oath. [(1898) 30 Stat. L. 551.]

**Verification—Form.**—A verification before a notary public must show in its statement of the venue that it was made within the jurisdiction of the notary. *In re Brumelkamp*, (1899) 95 Fed. 814.

In verifying a petition in voluntary bankruptcy no formal affidavit, or affidavit of any sort, is needed. If an oath or affirmation is made to the effect that the statements contained in the petition subscribed are true it is sufficient. *In re Bellah*, (1902) 116 Fed. 69.

**By petitioners.**—Where the truth of the matters of fact alleged in a petition in involuntary bankruptcy is within the knowledge of the petitioning creditors, the petition should be verified by them in person. *In re Nelson*, (W. D. Wis. 1899) 98 Fed.

76, 2 Am. Bankr. Rep. 556. See also *Matter of McConnell*, (W. D. N. Y. 1904) 11 Am. Bankr. Rep. 418.

But a petition in bankruptcy is not subject to a motion to dismiss for want of jurisdiction, because of the failure of one of the petitioners to verify it. *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381. See also *In re Scull*, (1847) 7 Ben. 371, 21 Fed. Cas. No. 12,568.

**An authorized agent is qualified to verify such a petition when his principals are at a distance and he is acquainted with the facts.** *Matter of Livingston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357.

**Verification by attorney.**—But the statute does not require a petition in involun-

tary bankruptcy to be verified by the creditor personally, and such verification may be made by his attorney if he has knowledge of the facts. *In re Chequasset Lumber Co.*, (S. D. N. Y. 1901) 112 Fed. 56, 7 Am. Bankr. Rep. 87; *In re Herzikopf*, (S. D. Cal. 1902) 118 Fed. 101, 9 Am. Bankr. Rep. 90; *In re Hunt*, (M. D. Ia. 1902) 118 Fed. 282, 9 Am. Bankr. Rep. 251; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *Rogers v. De Soto Placer Min. Co.*, (C. C. A. 9th Cir. 1905) 136 Fed. 407, 14 Am. Bankr. Rep. 252; *In re Livingston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357. See also *In re Nelson*, (1899) 98 Fed. 76; *Leidigh Carriage Co. v. Stengel*, (C. C. A. 1899) 95 Fed. 637, and *infra*, notes to section 20a.

But where an attorney in fact for the petitioning creditors swore that the statements made in the petition were true to the best of his knowledge and belief, without distinguishing the facts based on knowledge from those based on information only, the verification was held to be insufficient. *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118.

**Verification by corporation.**—A corporation can act only through its officers or agents, and where its name is subscribed by an individual to a petition in involuntary bankruptcy, and the petition purports to be verified by the same person, it is necessary that such person should set forth under oath or affirmation that he was authorized to sign and verify the petition on behalf of the corporation. The omission of such an averment, unless remedied, is fatal, but is not an incurable defect jurisdictional or otherwise. *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310. See also *In re Stevenson*, (1899) 94 Fed. 110; *In re Dupree*, (1899) 97 Fed. 28.

**Verification by corporation and partnership.**—A petition in involuntary bankruptcy, in which a corporation and a partnership join, may be verified for the corporation by its president, and for the partnership by one of its members. *Walker v. Woodside*, (C. C. A. 9th Cir. 1908) 164 Fed. 680, 21 Am. Bankr. Rep. 132.

**d [Determining issues of fact — jury trial.]** If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes [sic] the adjudication or dismiss the petition. [(1898) 30 Stat. L. 551.]

As to necessity of notice to creditors prior to dismissal of petition, see section 59g.

**Failure to appear.**—A bankrupt by failing to appear in involuntary bankruptcy

**Time of verification.**—In the case of *In re Miller*, (N. D. Ia. 1912) 192 Fed. 730, specifications of ground of opposition to a discharge were allowed to be verified after they had been filed.

**Bankrupt's attorney taking verification as notary.**—The notary before whom the petition for adjudication in voluntary bankruptcy and the schedule were verified was the bankrupt's attorney; but it was not shown that he was the record attorney for the bankrupt in any litigation then pending in the court, although he afterwards acted as such in the bankruptcy proceedings. It was held that the adjudication should not be set aside. *In re Kindt*, (1900) 98 Fed. 403.

Verification is not jurisdictional, and a defective verification cannot, in any event, result more seriously than to check the proceedings until a proper verification shall be made. *In re Simonson*, (1899) 92 Fed. 910; *In re Chequasset Lumber Co.*, (1901) 112 Fed. 56; *Green River Deposit Bank v. Craig*, (1901) 110 Fed. 137; *Leidigh Carriage Co. v. Stengel*, (C. C. A. 1899) 95 Fed. 637. See also *In re McNaughton*, 8 Nat. Bankr. Reg. 44; *In re Sargent*, 13 Nat. Bankr. Reg. 144; *In re Simmons*, 10 Nat. Bankr. Reg. 254; *Wald v. Wehl*, (1881) 6 Fed. 163; *Matter of O'Halloran*, (1875) 8 Ben. (U. S.) 128.

The tender of a plea and answer on the merits, even although the answer is not permitted to be filed, waives the objection to a petition in involuntary bankruptcy that the verification is insufficient and informal. *Simonson v. Sinsheimer*, (C. C. A. 1899) 95 Fed. 948, affirming *In re Simonson*, (1899) 92 Fed. 904, and reaffirmed in *Simonson v. Sinsheimer*, (C. C. A. 1900) 100 Fed. 426.

**Amendment.**—Defects or irregularities in the verification of a petition may be amended. *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118. See also *In re Chequasset Lumber Co.*, (S. D. N. Y. 1901) 112 Fed. 56, 7 Am. Bankr. Rep. 87. See further as to verification of specifications of objections to the discharge of a bankrupt, the annotations to section 14b.

proceedings does not change them into voluntary proceedings. *In re Taylor*, (C. C. A. 1900) 102 Fed. 728.

**Answer — Sufficiency and effect.**—When a petition in bankruptcy sets forth the

necessary jurisdictional facts and is in conformity with the provisions of the Act of Congress, an adjudication must follow the petition unless an answer is interposed. Such answer may be filed by creditors and when the hearing is had upon the petition and answer, the averments of the answer must be taken as true. However, an answer is not an obstacle to the adjudication, unless it is so far responsive as to raise an issue of fact or law, to be passed upon in some one of the modes provided in the practice in bankruptcy for the determination of such questions. *In re Cohn*, (E. D. Pa. 1915) 220 Fed. 956.

**Determination of issues—By judge.**—The statute requires that the testimony be weighed and considered by a district judge, and that his personal judgment be exercised in the determination of each issue, leaving no authority for delegation of either duty to a ministerial officer. *Ex p. Steele*, (N. D. Ala. 1908) 162 Fed. 694, 20 Am. Bankr. Rep. 446; *In re King*, (C. C. A. 7th Cir. 1910) 179 Fed. 694; *In re Ward*, (C. C. A. 3d Cir. 1912) 194 Fed. 89.

*But reference to a special master*, or like ministerial officer, may be ordered, to hear and report the testimony (with or without advisory findings thereupon), when an issue triable by the judge alone involves extended testimony, and its hearing in open court appears to be impracticable. The court, however, can confer no authority upon the referee (as master or otherwise) to decide these issues, nor to rule thereon either finally or temporarily. *Clark v. American Mfg., etc., Co.*, (C. C. A. 4th Cir. 1900) 101 Fed. 962, 4 Am. Bankr. Rep. 351; *In re Lacov*, (C. C. A. 2d Cir. 1904) 134 Fed. 237, 13 Am. Bankr. Rep. 400; *In re King*, (C. C. A. 7th Cir. 1910) 179 Fed. 694.

*As to jury trials* see generally the annotation under section 19.

**Guardian ad litem for lunatic defendant.**—An application for the appointment of a guardian *ad litem* in involuntary bankruptcy proceedings against an absent lunatic's estate will not be delayed because process has not been published. *In re Burka*, (1901) 107 Fed. 674.

**Evidence—Burden of proof.**—On the hearing to determine whether or not the debtor shall be adjudged bankrupt, the burden of proof rests with the petitioners, and in order to warrant an adjudication it is necessary to establish every essential allegation made in the petition. *In re West*, (C. C. A. 2d Cir. 1901) 108 Fed. 940, 5 Am. Bankr. Rep. 734; *In re Scott*, (D. C. Mass. 1901) 111 Fed. 144, 7 Am. Bankr. Rep. 39; *In re Pilger*, (E. D. Wis. 1902) 118 Fed. 206, 9 Am. Bankr. Rep. 244; *Philpot v. O'Brien*, (C. C. A. 1st Cir. 1903) 126 Fed. 167, 11 Am. Bankr. Rep. 205; *Troy Wagon Works v. Vastbinder*, (M. D. Pa. 1904) 130 Fed. 232, 12

Am. Bankr. Rep. 352; *McGowan v. Knittel*, (3d Cir. 1905) 137 Fed. 453, 69 C. C. A. 595; *Jones v. Burnham*, (C. C. A. 3d Cir. 1905) 138 Fed. 986, 15 Am. Bankr. Rep. 85; *In re Kehler*, (C. C. A. 2d Cir. 1908) 159 Fed. 55, 19 Am. Bankr. Rep. 513; *Birmingham Coal, etc., Co. v. Southern Steel Co.*, (N. D. Ala. 1908) 160 Fed. 212, 20 Am. Bankr. Rep. 151; *In re Hudson River Electric Power Co.*, (N. D. N. Y. 1909) 173 Fed. 934, 21 Am. Bankr. Rep. 915; *In re Hughes*, (S. D. N. Y. 1910) 183 Fed. 872; *In re Ceballos*, (D. C. N. J. 1908) 20 Am. Bankr. Rep. 467.

As to the matter which it is necessary to allege in the petition, and consequently to prove on the determination of the issue, see the annotation under section 59b.

**Determination on pleadings.**—When all the essential allegations of the creditors' petition are formally admitted to be true, the court should speedily enter an adjudication of bankruptcy. *Vulcan Sheet Metal Co. v. North Platte Valley Irr. Co.*, (C. C. A. 8th Cir. 1915) 220 Fed. 106.

Where, after the filing of answers to a petition in involuntary bankruptcy presenting issues of fact, the petitioners move for an adjudication on the pleadings, they thereby admit the facts properly pleaded in the answers, in accordance with the general rules of equity practice; and the only question presented is as to the legal sufficiency of the answers. If the motion is denied, the defendants are entitled to a final decree dismissing the petition. *In re Waugh*, (C. C. A. 9th Cir. 1904) 133 Fed. 281, 13 Am. Bankr. Rep. 187.

There is an official form of "adjudication that debtor is not a bankrupt" (and consequent dismissal of the petition) and another for an adjudication of bankruptcy. Forms Nos. 11 and 12.

**Effect of adjudication.**—An adjudication in bankruptcy operates *in rem* and places the bankrupt's entire estate, including property previously transferred in fraud of creditors, *in custodia legis*, and under the jurisdiction of the court of bankruptcy, in which court alone all persons claiming rights in the estate, or seeking to participate in it, must assert their claims. *Lazarus v. Prentice*, (1914) 234 U. S. 263, 34 S. Ct. 851, 58 U. S. (L. ed.) 1305; *Carter v. Hobbs*, (D. C. Ind. 1899) 92 Fed. 594, 1 Am. Bankr. Rep. 215; *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385. And see the annotation under section 70a and 70a (5).

*An adjudication gives complete jurisdiction to the court of bankruptcy in rem as well as in personam.* *Carter v. Hobbs*, (D. C. Ind. 1899) 92 Fed. 594, 1 Am. Bankr. Rep. 215; *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *Shute v. Patterson*, (C. C. A. 8th Cir. 1906) 147 Fed. 509, 17 Am. Bankr. Rep. 99; *Clay*

*v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385.

A corporation is not dissolved by an adjudication that it is bankrupt. *National Surety Co. v. Medlock*, (Ga. 1907) 19 Am. Bankr. Rep. 654.

*Adjudication as res judicata*.—An adjudication in bankruptcy is entitled to the same verity as other judgments or decrees of courts of competent jurisdiction; and it cannot be collaterally attacked as to such matters as were necessarily decided therein. *In re Cornell*, (S. D. N. Y. 1899) 97 Fed. 29, 3 Am. Bankr. Rep. 172; *In re Skinner*, (N. D. Ia. 1899) 97 Fed. 190, 3 Am. Bankr. Rep. 163; *In re Henry Ulfelder Clothing Co.*, (N. D. Cal. 1899) 98 Fed. 409, 3 Am. Bankr. Rep. 425; *In re Mason*, (W. D. N. C. 1900) 99 Fed. 256, 3 Am. Bankr. Rep. 599; *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *In re Goodale*, (N. D. N. Y. 1901) 109 Fed. 783, 6 Am. Bankr. Rep. 493; *In re Chappell*, (E. D. Va. 1901) 113 Fed. 545, 7 Am. Bankr. Rep. 608; *In re Lynan*, (C. C. A. 2d Cir. 1903) 127 Fed. 123, 11 Am. Bankr. Rep. 466; *In re Hintze*, (D. C. Mass. 1905) 134 Fed. 141, 13 Am. Bankr. Rep. 721; *In re Virginia Hardwood Mfg. Co.*, (W. D. Ark. 1905) 139 Fed. 209, 15 Am. Bankr. Rep. 135; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *Edelstein v. U. S.*, (C. C. A. 8th Cir. 1906) 149 Fed. 636, 17 Am. Bankr. Rep. 649; *In re Belle Fourche First Nat. Bank*, (C. C. A. 8th Cir. 1907) 152 Fed. 64, 11 Ann. Cas. 355, 18 Am. Bankr. Rep. 265; *Manson v. Williams*, (C. C. A. 1st Cir. 1907) 153 Fed. 525, 18 Am. Bankr. Rep. 674; *In re Letson*, (C. C. A. 8th Cir. 1907) 157 Fed. 78, 19 Am. Bankr. Rep. 506; *Huttig Mfg. Co. v. Edwards*, (C. C. A. 8th Cir. 1908) 160 Fed. 619, 20 Am. Bankr. Rep. 349; *In re Hecox*, (C. C. A. 8th Cir. 1908) 164 Fed. 823, 21 Am. Bankr. Rep. 314; *Gilbertson v. U. S.*, (C. C. A. 7th Cir. 1909) 168 Fed. 672, 22 Am. Bankr. Rep. 32; *In re Dempster*, (C. C. A. 8th Cir. 1909) 172 Fed. 353, 22 Am. Bankr. Rep. 751; *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385; *U. S. v. Freed*, (S. D. N. Y. 1910) 179 Fed. 236; *In re V. & M. Lumber Co.*, (N. D. Ala. 1910) 182 Fed. 231; *In re Polakoff*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 358; *Bear v. Chase*, (C. C. A. 4th Cir. 1899) 3 Am. Bankr. Rep. 746; *In re Clisdell*, (N. D. N. Y. 1900) 4 Am. Bankr. Rep. 95, reversing (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 424; *Wilson v. Parr*, (1902) 8 Am. Bankr. Rep. 230, 115 Ga. 629, 42 S. E. 5; *Pepperdine v. Seymour Bank*, (Mo. 1903) 10 Am. Bankr. Rep. 573; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 12 Am. Bankr. Rep. 781, 123 Ia. 432, 99 N. W. 121; *In re Harper*,

(W. D. Va. 1904) 13 Am. Bankr. Rep. 430; *Matter of Continental Corp.*, (N. D. Ohio 1905) 14 Am. Bankr. Rep. 538.

But as to matters which were not in issue the rule is otherwise; thus an adjudication in involuntary bankruptcy is not *res judicata* as to the validity of amount of the petitioning creditors' claims when offered for allowance, or to share in dividends. *Matter of Continental Corp.*, (N. D. Ohio 1905) 14 Am. Bankr. Rep. 538. See also *In re Henry Ulfelder Clothing Co.*, (N. D. Cal. 1899) 98 Fed. 409, 3 Am. Bankr. Rep. 425.

*Time of insolvency*.—While it is true that the filing of a petition and adjudication in bankruptcy does not generally establish the insolvency of the bankrupt at any date prior to such filing, it is equally certain that in the case of an involuntary proceeding, where insolvency is one of the issues, the bankrupt by the adjudication is conclusively proven to have been insolvent at the time of the commission of the act of bankruptcy. *Lazarus v. Eagen*, (M. D. Pa. 1912) 206 Fed. 518.

*Adjudication where two petitions are filed*.—Under general orders in bankruptcy No. 7, which provides that "in case two or more petitions shall be filed against the same individual in different districts the first hearing shall be had in the district in which the debtor has his domicile," it has been held that the first hearing should be had in the district in which he has had his domicile during the greater part of the preceding six months, and which has jurisdiction on the ground of such domicile, rather than in a district to which he subsequently removed and in which he was domiciled at the time of the filing of the petitions. *In re Isaacson*, (S. D. N. Y. 1908) 161 Fed. 777, 20 Am. Bankr. Rep. 430.

Where two petitions are filed alleging different acts of bankruptcy, and the defendant answers but one, which charges the earlier act, general order No. 7 has no application; and the case will proceed upon the petition which is confessed, the other remaining in abeyance. *In re Harris*, (N. D. Ala. 1907) 155 Fed. 216, 19 Am. Bankr. Rep. 635.

*Amendment of order of adjudication*.—An order of adjudication is amendable as to clerical errors at any time. *In re Hale*, (1901) 107 Fed. 432.

*Vacating adjudication*.—An application to vacate an adjudication may be made to the court which granted it, either by the bankrupt or a creditor; such application is a proceeding in the nature of a motion for a new trial, or of a bill to review and vacate a judgment. *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *In re Salaberry*, (N. D. Cal. 1901) 107 Fed. 95, 5 Am. Bankr. Rep. 847; *In re*

Scott, (D. C. Mass. 1901) 111 Fed. 144, 7 Am. Bankr. Rep. 39; *In re Ives*, (E. D. Mich. 1901) 111 Fed. 495, 6 Am. Bankr. Rep. 653; *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365, 8 Am. Bankr. Rep. 69; *In re Lynan*, (C. C. A. 2d Cir. 1903) 127 Fed. 123, 11 Am. Bankr. Rep. 466; *In re Niagara Contracting Co.*, (W. D. N. Y. 1904) 127 Fed. 782, 11 Am. Bankr. Rep. 643; *In re Urban*, etc., Realty Title Co., (D. C. N. J. 1904) 132 Fed. 140, 12 Am. Bankr. Rep. 687; *In re Imperial Corp.*, (S. D. N. Y. 1904) 133 Fed. 73, 13 Am. Bankr. Rep. 199; *In re Hintze*, (D. C. Mass. 1905) 134 Fed. 141, 13 Am. Bankr. Rep. 721; *In re Sully*, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *In re Belle Fourche First Nat. Bank*, (C. C. A. 8th Cir. 1907) 152 Fed. 64, 11 Ann. Cas. 355, 18 Am. Bankr. Rep. 265; *In re Tully*, (E. D. N. Y. 1907) 156 Fed. 634, 19 Am. Bankr. Rep. 604; *Altonwood Park Co. v. Gwynne*, (C. C. A. 2d Cir. 1908) 160 Fed. 448, 20 Am. Bankr. Rep. 31; *In re Hecox*, (C. C. A. 8th Cir. 1908) 164 Fed. 823, 21 Am. Bankr. Rep. 314; *In re New England Breeders' Club*, (C. C. A. 1st Cir. 1909) 169 Fed. 586, 22 Am. Bankr. Rep. 124, *reversing* (D. C. N. H. 1908) 165 Fed. 517, 21 Am. Bankr. Rep. 349.

An objection to the jurisdiction of the court to adjudge a corporation a bankrupt may be taken after the adjudication has been made, by an application to set it aside, where the want of jurisdiction did not appear from the pleadings; but it should be done promptly after the facts appear from the evidence taken. *In re Waxelbaum*, (S. D. N. Y. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 395; *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *In re Plotke*, (C. C. A. 7th Cir. 1900) 104 Fed. 964, 5 Am. Bankr. Rep. 171; *In re Garneau*, (C. C. A. 7th Cir. 1904) 127 Fed. 677, 11 Am. Bankr. Rep. 679; *In re Niagara Contracting Co.*, (W. D. N. Y. 1904) 127 Fed. 782, 11 Am. Bankr. Rep. 643.

Prompt action is necessary on an application for vacation; and one who fails to act within a reasonable time after he acquires knowledge of the causes on which he intends to rely for vacation will be deemed guilty of laches. *In re Mason*, (W. D. N. C. 1900) 99 Fed. 256, 3 Am. Bankr. Rep. 599; *In re Niagara Contracting Co.*, (W. D. N. Y. 1904) 127 Fed. 782, 11 Am. Bankr. Rep. 643; *In re Urban*, etc., Realty Title Co., (D. C. N. J. 1904) 132 Fed. 140, 12 Am. Bankr. Rep. 687; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *In re Belle Fourche First Nat. Bank*, (C. C. A. 8th Cir. 1907) 152 Fed. 64, 11 Ann. Cas. 355, 18 Am. Bankr. Rep. 265; *Altonwood Park*

*Co. v. Gwynne*, (C. C. A. 2d Cir. 1908) 160 Fed. 448, 20 Am. Bankr. Rep. 31; *In re Marion Contract, etc., Co.*, (W. D. Ky. 1909) 166 Fed. 618, 22 Am. Bankr. Rep. 81.

One who has actual knowledge of the institution of bankruptcy proceedings is not entitled to have the adjudication set aside, after a composition has been confirmed, merely because her testator was not named as a partner in the proceeding. *In re Coe*, (S. D. N. Y. 1907) 157 Fed. 308, 19 Am. Bankr. Rep. 618.

**Voluntary proceedings.**—A creditor cannot maintain a petition to vacate an adjudication on a petition in voluntary bankruptcy proceedings. *In re Ives*, (C. C. A. 6th Cir. 1902) 113 Fed. 911, 7 Am. Bankr. Rep. 692. See also notes to section 18e.

**Jurisdictional objection when too late.**—“Creditors, when bankruptcy proceedings have been commenced, must promptly, by motion or petition to vacate the adjudication, object to the jurisdiction of the court, or the objection is waived. A creditor cannot prove his debt and file the same, . . . participate in the election of a trustee, distribute the estate, use the proceeds for his benefit, and then, on the application of the bankrupt for a final discharge, for the first time object to the jurisdiction.” *In re Mason*, (1900) 99 Fed. 256.

**Costs.**—On the dismissal of a petition in involuntary bankruptcy, the court will make such order as to the costs and expenses as the facts warrant. *In re Salaberry*, (N. D. Cal. 1901) 107 Fed. 95, 5 Am. Bankr. Rep. 847; *In re Morris*, (E. D. Pa. 1902) 115 Fed. 591; *In re Haeseler-Kohlhoff Carbon Co.*, (E. D. Pa. 1905) 135 Fed. 867; *In re Charles W. Aschenbach Co.*, (C. C. A. 2d Cir. 1910) 183 Fed. 305.

Costs will be allowed to an alleged bankrupt, on the dismissal of an involuntary petition against him, only after the filing of his bill of costs with the clerk and notice to the petitioning creditors. *In re Haeseler-Kohlhoff Carbon Co.*, (E. D. Pa. 1905) 135 Fed. 867, 14 Am. Bankr. Rep. 381.

An execution creditor having intervened and opposed the adjudication, denying respondent's insolvency, where a petition in involuntary bankruptcy had been filed against a corporation, the costs of the proceedings so far as the same were occasioned by the opposition of the creditor were, upon the failure of his contention and the making of the adjudication, held to be taxable against him. *In re Carolina Cooperage Co.*, (1899) 96 Fed. 604.

**Costs in contested adjudications.**—Concerning costs in contested involuntary adjudications, see General Order No. 34.

**e [Where no pleadings filed.]** If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition. [(1898) 30 Stat. L. 551.]

**Premature adjudication.**—Where an adjudication against a corporation was made on the day of the filing of the involuntary petition it was held not conclusive upon creditors who did not appear, and they were allowed to attack such adjudication collaterally in proceedings which they had previously set on foot in another district. *In re Elmira Steel Co.*, (1901) 109 Fed. 456, wherein the court said: "While under section 18 of the Bankrupt Act, jurisdiction of the bankrupt and of creditors may be obtained by voluntary appearance, it is only of him who so appears that jurisdiction is thereby obtained. Such an appearance by one does not give jurisdiction of the others.

Jurisdiction of them could be obtained only by lapse of time, limited in the manner prescribed by section 18. Until that time had expired, the court had and could have no jurisdiction to pass judgment against them."

In *Day v. Beck, etc., Hardware Co.*, (C. C. A. 1902) 114 Fed. 834, in computing the time for filing an answer, the court held that the defendant had been prematurely adjudged a bankrupt.

**Adjudication by default.**—If neither the bankrupt nor any of his creditors appears and pleads in opposition to the petition, it becomes the duty of the judge, on the day following the last day for appearing and pleading or as soon thereafter as practicable, to make an adjudication or dismiss the petition. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153; *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *In re American Brewing Co.*, (C. C. A. 7th Cir. 1902) 112 Fed. 752, 7 Am. Bankr. Rep. 463; *Day v. Beck, etc., Hardware Co.*, (C. C. A. 5th Cir. 1902) 114 Fed. 834, 8 Am. Bankr. Rep. 175; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80.

If the petition contains the proper allegations and is not contested, or the parties contesting withdraw their contest, an adjudication follows as of course, and is binding on all parties in interest. *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80.

Creditors may not be deprived of their right to an adjudication on the ground that it will not benefit them. *Matter of L. Hee*, (D. C. Hawaii 1904) 13 Am. Bankr. Rep. 8.

**Conclusiveness of adjudication.**—Where a debtor is adjudged bankrupt upon an involuntary petition in default of answer, the adjudication is as binding upon creditors and bankrupt as is an adjudication

following a hearing, and is conclusive as to the commission of the acts of bankruptcy as alleged in the petition. *In re American Brewing Co.*, (C. C. A. 7th Cir. 1902) 112 Fed. 752, 7 Am. Bankr. Rep. 463.

**Default does not change nature of proceeding.**—The default of the defendant to a petition in involuntary bankruptcy, through failure to appear, does not convert the proceeding into one of voluntary bankruptcy. *In re L. Humbert Co.*, (N. D. Ia. 1900) 100 Fed. 439, 4 Am. Bankr. Rep. 76; *In re Taylor*, (C. C. A. 7th Cir. 1900) 102 Fed. 728, 4 Am. Bankr. Rep. 515.

**Court cannot adjudicate on admissions and waiver of defendant.**—On a petition in involuntary bankruptcy there can be no adjudication, or reference of the case by the clerk to the referee, on a written admission by the respondent of the acts of bankruptcy charged, and a waiver of service of the subpoena and of the time for appearance. *In re L. Humbert Co.*, (N. D. Ia. 1900) 100 Fed. 439, 4 Am. Bankr. Rep. 76.

**Vacating adjudications.**—Adjudications which are found to be erroneous or irregular may be set aside by the Bankruptcy Court. *In re Altman*, (1899) 95 Fed. 263; *In re Russell*, (1899) 97 Fed. 32; *Mahoney v. Ward*, (1900) 100 Fed. 278; *In re Woodside Coal Co.*, (1900) 105 Fed. 56; *In re Maples*, (1901) 105 Fed. 919; *In re Hicks*, (1901) 107 Fed. 910, holding that such adjudications may be set aside at any time during the bankruptcy proceedings. See also *In re Waxelbaum*, (1899) 97 Fed. 562.

**Schedule showing no property.**—In *In re Maples*, (1901) 105 Fed. 919, it was held that the adjudication of bankruptcy should be set aside on motion and the proceedings dismissed for want of jurisdiction in the case of a petition in involuntary bankruptcy, the schedule showing no property except state exemptions and only a single debt, namely a judgment from which a discharge would not release the petitioner. See also *In re Hansen*, (1901) 107 Fed. 252.

**Adjudications in voluntary cases.**—Creditors cannot move to set aside an adjudication made on petition of the bankrupt, since they have no right to oppose such adjudication. *In re Ives*, (C. C. A. 1902) 113 Fed. 911, where the court said that the dictum in *In re Altman*, (1899) 95 Fed. 263, was not opposed to this view. But see *In re Scott*, (1901) 111 Fed. 145, *In re Waxelbaum*, (1899) 98 Fed. 589.

*Interest of applicant to vacate.*—In *In re Columbia Real-Estate Co.*, (1900) 101 Fed. 935, it was held that the creditor had not a lien upon the bankrupt's property nor any provable claim or demand thereon such as to enable him to maintain a petition to set aside a bankruptcy adjudication, but that want of jurisdiction is a question which the court should consider whenever and however it may be raised, and that even if the petitioner be a stranger to the proceedings and not entitled to be heard as of right, the court may hear him as *amicus curiæ* upon a

petition to set aside an adjudication for lack of jurisdiction.

*Petition filed after lapse of several terms.*—A court of bankruptcy has no jurisdiction to set aside an adjudication after the lapse of several terms since the adjudication was made, the exception in section 15a to the rule that federal courts are without power to rescind their judgments, decrees, or orders, when proceedings are not taken therefor during the term in which they are entered, not applying here. *In re Ives*, (1901) 111 Fed. 495.

**f [Judge absent — reference to referee.]** If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee. [(1898) 30 Stat. L. 551.]

*Reference on absence of judge.*—If the judge of the court of bankruptcy is absent from the district, or the division of the district, in which the petition is filed, at the time of its filing, the clerk should forthwith refer the case to the proper referee. *In re Murray*, (N. D. Ia. 1899) 96 Fed. 600, 3 Am. Bankr. Rep. 601. See also *Gilbertson v. U. S.*, (C. C. A. 7th Cir. 1909) 168 Fed. 672, 22 Am. Bankr. Rep. 32.

*Form No. 15* is "order of reference in judge's absence."

*When petition may be referred.*—The clerk cannot refer a petition in involuntary bankruptcy to the referee for adjudication, except in cases where no issue is made by the bankrupt or any creditor upon the facts averred in the petition, and where the judge is absent from the district or from the division of the district

where the petition is filed, on the next day after the last day on which pleadings may be filed. *In re L. Humbert Co.*, (N. D. Ia. 1900) 100 Fed. 439, 4 Am. Bankr. Rep. 76.

*Reference by deputy clerk.*—Under R. S. sec. 558 (now Judicial Code, § 4 in title JUDICIARY), authorizing the appointment of a deputy district court clerk, such clerk has power to perform all the ministerial acts of the clerk, including the power to make an order of reference on the filing of a bankruptcy petition. *Gilbertson v. U. S.*, (C. C. A. 7th Cir. 1909) 168 Fed. 672, 22 Am. Bankr. Rep. 32.

But see *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153, wherein it was held that a deputy clerk of a court of bankruptcy has no authority to refer a petition in bankruptcy to the referee.

**g [Hearing on voluntary petition — absence of judge.]** Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee. [(1898) 30 Stat. L. 551.]

*Dismissal before adjudication.*—Upon the filing of a voluntary petition in bankruptcy, and before an adjudication thereon, creditors may move to set the petition aside or dismiss it, on the ground that the court has no jurisdiction, the residence or domicile of the debtor being in another district; and thereupon the court may inquire into the facts of jurisdiction, and make the adjudication or dismiss the petition, according to the result. *In re Waxelbaum*, (S. D. N. Y. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392.

*Dismissal after adjudication.*—An adjudication of bankruptcy made *ex parte* on a voluntary petition is not conclusive on creditors although not appealed from; and they may, by petition, ask a dismissal of the proceedings upon facts appearing on the bankrupt's examination, and a showing that the court is without jurisdiction. *In re Garneau*, (C. C. A. 7th Cir. 1904) 127 Fed. 677, 11 Am. Bankr. Rep. 679.

*When proceedings will not be dismissed.*—Where an order of adjudication has been



entered, without objection, on a voluntary petition alleging the petitioner's residence within the district, and the court has proceeded to administer the estate, the proceeding will not be dismissed, on motion of a judgment creditor, on the ground that at the time of the application the bankrupt had not resided in the district for the required period, if it appears that the petition was filed in good faith and the bankrupt is still a resident of the district, but in such case the order of adjudication will be set aside and a new one entered as of a later date. *In re Tully*, (E. D. N. Y. 1907) 156 Fed. 634, 19 Am. Bankr. Rep. 604; *In re McKee*, (N. D. Tex. 1914) 214 Fed. 885.

**Simultaneous pendency of voluntary and involuntary proceedings.**—Where a bankrupt, against whom an involuntary petition is pending, files a voluntary petition, notice should be given the creditors who filed the involuntary petition before proceeding on the voluntary one, and such steps should then be taken with respect to the two petitions as appears to be for the best interest of the estate. *In re Dwyer*, (D. C. N. D. 1902) 112 Fed. 777, 7 Am. Bankr. Rep. 532. Where an involuntary petition has been filed by creditors, but the debtor has not appeared thereto, and no proceedings have been taken thereon, the debtor is not precluded from filing a voluntary petition thereafter, as the two petitions are in different rights. The court will then direct an adjudication in the voluntary proceeding, staying the involuntary proceeding in the meanwhile, reserving to petitioning creditors the right to prove their costs and expenses against the estate, with leave to prosecute their petition, if subsequently it be found necessary to protect rights which could not be saved by adjudication under the voluntary petition. There will also be reserved to creditors the right to prove their claims and obtain dividends under the voluntary petition without prejudice to their rights under the involuntary petition, if further proceedings are taken thereon. The Bankruptcy Court has equitable jurisdiction to make all these orders. *In re Stegar*, (1902) 113 Fed. 978.

Where an involuntary petition is pending, and administration under a voluntary petition will cause preferences to which objection is taken in the involuntary petition to become unassailable by reason of the lapse of the four months prescribed by section 60b, the debtor should not be adjudged bankrupt on his voluntary petition. *In re Dwyer*, (1902) 112 Fed. 777.

"The pendency of an involuntary petition before adjudication does not necessarily invalidate a subsequent voluntary petition filed in the same district or in another district. The former petition may be invalid for lack of jurisdiction, when the facts appear, and other considerations

may sometimes justify, or even make desirable, a subsequent voluntary petition." *In re Waxelbaum*, (1899) 98 Fed. 589.

**Adjudication concurrent with filing of petition.**—By this section adjudication in cases of voluntary bankruptcy is to be concurrent with the filing of the petition and must operate as of that day. *Crowe v. Baumann*, (N. D. N. Y. 1911) 190 Fed. 399.

**Petitions by partners or partnerships.**—A voluntary petition by a firm, the individual members joining therein, constitutes only a single proceeding, notwithstanding the fact that each member seeks a discharge from debts of all kinds. *In re Gay*, (1899) 98 Fed. 870. See also *In re L. Humbert Co.*, (1900) 100 Fed. 439; *In re Langslow*, (1899) 98 Fed. 869. But compare *In re Barden*, (1900) 101 Fed. 553.

A voluntary petition alleged that the petitioner and another were partners, and prayed that the firm, but not either partner, should be adjudged bankrupt. The other member, not being notified, did not appear. It was held that the adjudication against the petitioning member was unauthorized and should be set aside. *In re Russell*, (1899) 97 Fed. 32.

Where a member of a firm desires release from firm as well as individual debts, his petition as an individual must set this out, as must also the notice of the creditors' first meeting, the petition for discharge, and the notices to creditors thereof. *In re Russell*, (1899) 97 Fed. 32. See also *In re Hartman*, (1899) 96 Fed. 593.

Where a petition, asking that the firm be adjudged bankrupt, is filed by one or more members thereof, there being, however, other members who do not join, the latter must have notice of the matter and of the time for hearing, before any adjudication can be made. *In re Murray*, (1899) 96 Fed. 601.

Certain partners filed a voluntary petition, asking that the firm be adjudicated bankrupt. The other partners did not join and were not notified. After the adjudication a paper, unverified, qualified in its terms, and signed by their attorneys only, was filed purporting to be the consent of those who did not join. It was held that the original defect was not remedied thereby. *In re Altman*, (1899) 95 Fed. 263.

**Amendment of petition.**—Where a petition by a member of a firm seeking a discharge from individual and firm debts omits allegations essential in such cases, it may be amended, and the court may open an adjudication for the purpose of amendment. *In re Laughlin*, (1899) 96 Fed. 539.

**Reference of petition by one member of firm.**—"When a petition on behalf of a part of the members of a firm is filed in

the clerk's office, it cannot then be classed as an involuntary proceeding, because it may never become such, and in the absence of the judge from the district or division it is the duty of the clerk to refer the case to the proper referee." *In re Murray*, (1899) 96 Fed. 602.

The adjudication on a voluntary petition is *ex parte*, and the creditors are not heard to contest it. *In re Jehu*, (1899) 94 Fed. 638; *Johnson v. Norris*, (C. C. A. 5th Cir. 1911) 190 Fed. 459.

Vacating adjudication.—See *supra*, notes to section 18c.

**SEC. 19. JURY TRIALS.—a [When demandable—waiver.]** A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived. [(1898) 30 Stat. L. 551.]

**Right to trial by jury.**—The only issues on which a person against whom an involuntary petition in bankruptcy has been filed is entitled of right to a jury trial are with respect to his insolvency, and the commission of the acts of bankruptcy with which he is charged. *Elliott v. Toeppner*, (1902) 187 U. S. 327, 23 S. Ct. 133, 47 U. S. (L. ed.) 200, 9 Am. Bankr. Rep. 50; *Bray v. Cobb*, (E. D. N. C. (1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153; *Simonson v. Sinsheimer*, (C. C. A. 6th Cir. 1900) 100 Fed. 426, 3 Am. Bankr. Rep. 824; *In re Christensen*, (N. D. Ia. 1900) 101 Fed. 802, 4 Am. Bankr. Rep. 99; *Day v. Beck, etc., Hardware Co.*, (C. C. A. 5th Cir. 1902) 114 Fed. 834, 8 Am. Bankr. Rep. 175; *Morss v. Franklin Coal Co.*, (M. D. Pa. 1903) 125 Fed. 998, 11 Am. Bankr. Rep. 423; *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160, 17 Am. Bankr. Rep. 128; *Dokken v. Page*, (C. C. A. 8th Cir. 1906) 147 Fed. 438, 17 Am. Bankr. Rep. 228; *Stephens v. Merchants' Nat. Bank*, (C. C. A. 7th Cir. 1907) 154 Fed. 341, 18 Am. Bankr. Rep. 560; *Bernard v. Abel*, (C. C. A. 9th Cir. 1907) 156 Fed. 649, 19 Am. Bankr. Rep. 383; *Schloss v. Strellow*, (C. C. A. 3d Cir. 1907) 156 Fed. 662, 19 Am. Bankr. Rep. 359; *In re Harris*, (S. D. Ala. 1907) 156 Fed. 875, 19 Am. Bankr. Rep. 204; *Buffalo Milling Co. v. Lewisburg Dairy Co.*, (M. D. Pa. 1908) 159 Fed. 319, 20 Am. Bankr. Rep. 279; *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482; *Carpenter v. Cudd*, (C. C. A. 4th Cir. 1909) 174 Fed. 603.

**Right to jury trial absolute where it exists.**—The right to a jury trial, on written application therefor, for the purposes specified in section 19a, is absolute, and cannot be withheld at the discretion of the court. In that respect it differs from the trial of an issue out of chancery, which the court of equity is not bound to grant, nor bound by the verdict if such trial be granted. The court cannot, as the chancellor may, enter judgment contrary to the

verdict; but the verdict may be set aside, or the judgment may be reversed for error of law, as in common-law cases. *Elliott v. Toeppner*, (1902) 187 U. S. 327, 23 S. Ct. 133, 47 U. S. (L. ed.) 200, 9 Am. Bankr. Rep. 54.

But there is no right to a jury trial on issues of fact arising in bankruptcy proceedings, which are of an equitable nature. See *Barton v. Barbour*, (1881) 104 U. S. 126, 26 U. S. (L. ed.) 672.

**Who may demand jury trial.**—The right to a jury trial of the question of an involuntary bankrupt's insolvency, and of alleged acts of bankruptcy, is limited to the bankrupt; and it cannot be extended to intervening creditors contesting such issues. *In re Herzikopf*, (C. C. A. 9th Cir. 1903) 121 Fed. 544, 9 Am. Bankr. Rep. 745.

Nor is the bankrupt entitled to a jury trial on the question whether the petitioners are creditors, unless the court sees fit to allow it. *Morss v. Franklin Coal Co.*, (M. D. Pa. 1903) 125 Fed. 998.

**Time to make demand.**—In a case of involuntary bankruptcy a demand for a trial by jury, as to the commission of the acts of bankruptcy alleged, and the fact of solvency, must be made by the debtor at or before the expiration of the time allowed for an answer, unless the time is extended by the court. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153. See also *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355.

**Proceedings for contempt** are not within the purview of this section. *Ripon Knitting Works v. Schreiber*, (E. D. Wash. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299.

**Form No. 7** is an "order for jury trial." Submission of questions incidental to insolvency—**Question as to partnership.**—The respondent in proceedings in involuntary bankruptcy is entitled to go to the jury upon everything affecting the question of his solvency; and where a determination of an issue as to whether he was a

partner, as charged, decides the question of his solvency, such issue must be submitted to a jury. *Buffalo Milling Co. v. Lewisburg Dairy Co.*, (M. D. Pa. 1908) 159 Fed. 319, 20 Am. Bankr. Rep. 279.

But in *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160, 17 Am. Bankr. Rep. 128, it was held that on an involuntary bankruptcy petition against the members of an insolvent partnership, the question whether one of the alleged partners was in fact a member of the firm is not a question which should be submitted to a jury.

**Amount of indebtedness and valuation of property.**—An issue as to the insolvency of an alleged bankrupt involves, as elements, the questions of the amount of his indebtedness, and the fair valuation of his property, both of which he is entitled to have determined by a jury; and the court cannot make a preliminary finding as to the validity and amount of the claims of certain creditors which will be conclusive on the jury upon the trial of such issues. *Schloss v. Strellow*, (C. C. A. 3d Cir. 1907) 156 Fed. 662, 19 Am. Bankr. Rep. 359; *In re Farthing*, (E. D. N. C. 1913) 202 Fed. 557.

**Trial according to common law.**—When, on an issue of fact as to the existence of ground for adjudication, a jury trial is demanded as of right, the trial proceeds according to the course of common law. *Elliott v. Toepfner*, (1902) 187 U. S. 327, 23 S. Ct. 133, 47 U. S. (L. ed.) 200, 9 Am. Bankr. Rep. 54; *Duncan v. Landis*, (C. C. A. 3d Cir. 1901) 106 Fed. 839, 5 Am. Bankr. Rep. 649; *In re Ward*, (D. C. N. J. 1908) 161 Fed. 755, 20 Am. Bankr. Rep. 482.

**Burden of proof.**—On a trial by jury the burden of proving insolvency was on the petitioners. *McGowan v. Knittel*, (C. C. A. 3d Cir. 1905) 137 Fed. 453, 15 Am. Bankr. Rep. 1.

**A motion by both parties for a peremptory instruction** is equivalent to a request for a finding of the facts by the court, and, if the court directs a verdict for one of the parties, both are concluded

by the facts thereby found. *Bradley Timber Co. v. White*, (C. C. A. 5th Cir. 1903) 121 Fed. 779, 10 Am. Bankr. Rep. 329.

**Direction of verdict.**—If the evidence on the question of insolvency is of such a conclusive character that upon it as a whole the court would feel constrained to set aside a verdict of solvency, if one were rendered, it may direct a verdict of insolvency although there be conflicting evidence as to details not essential to a conclusion. *In re Iron Clad Mfg. Co.*, (C. C. A. 2d Cir. 1912) 197 Fed. 280.

**Waiver of right to jury trial.**—*Failure to demand.*—The failure of an alleged involuntary bankrupt to formally apply for a jury, in writing, at or before the time when an answer is required, operates as a waiver of the statutory right to a trial by jury. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153; *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355; *Oil Well Supply Co. v. Hall*, (C. C. A. 4th Cir. 1904) 128 Fed. 875, 11 Am. Bankr. Rep. 738; *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160, 17 Am. Bankr. Rep. 128.

**Waiver by admissions made in answer.**—The statute does not entitle an alleged bankrupt to a jury trial where by his answer he admits his insolvency and the commission of the alleged acts of bankruptcy, but alleges that he is not amenable to bankruptcy proceedings because chiefly engaged in farming. *Stephens v. Merchants' Nat. Bank*, (C. C. A. 7th Cir. 1907) 154 Fed. 341, 18 Am. Bankr. Rep. 560.

**Failure to deny commission of act of bankruptcy.**—In the case of a petition in involuntary bankruptcy alleging the making of a general assignment for creditors, where the defense set up by the debtor is that the petitioning creditors are estopped, by their conduct, with reference to the assignment, to maintain a petition based thereon, he is not entitled to a trial by jury. *Simonson v. Sinsheimer*, (C. C. A. 6th Cir. 1900) 100 Fed. 426, 3 Am. Bankr. Rep. 824.

**b [Attendance of jury — certifying case to other court.]** If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance. [(1898) 30 Stat. L. 551.]

Circuit Courts are abolished by Judicial Code, sec. 289, in title JUDICIARY.

**c [Laws as to jury trials applicable.]** The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United

States laws now in force or such as may be hereafter enacted in relation to trials by jury. [(1898) 30 Stat. L. 551.]

**Submission of matters in controversy to jury.**—The submission of issues of fact to a jury in an involuntary bankruptcy proceeding, under section 19c, is within the discretion of the judge of the Bankruptcy Court, and the verdict returned is wholly advisory. *In re Rude*, (D. C. Ky. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319; *Morss v. Franklin Coal Co.*, (M. D. Pa. 1903) 125 Fed. 998, 11 Am. Bankr. Rep. 423; *Oil Well Supply Co. v. Hall*, (C. C. A. 4th Cir. 1904) 128 Fed. 875,

11 Am. Bankr. Rep. 738; *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160, 17 Am. Bankr. Rep. 128; *Carpenter v. Cudd*, (4th Cir. 1909) 174 Fed. 603, 98 C. C. A. 449; *In re Wakefield*, (N. D. Cal. 1910) 182 Fed. 247.

An adverse claimant of property in possession of the trustee has a right to a trial by jury in a plenary suit brought against him in the Bankruptcy Court by the trustee. *Per Wallace, C. J.*, in *In re Russell*, (C. C. A. 1900) 101 Fed. 248.

**SEC. 20. OATHS, AFFIRMATIONS.—a [Who may administer.]** Oaths required by this Act, except upon hearings in court, may be administered by

(1) referees;

(2) **[Authorized officers.]** officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and

A notary public is an officer authorized to administer oaths in proceedings in the courts of the United States by Act of Aug. 15, 1876, ch. 304, 19 Stat. L. 206, in title NOTARIES PUBLIC, and an oath taken before him is sufficiently authenticated, *prima facie*, by what purport to be the notary's official signature and seal, although made in a different state from that in which the proceedings are pending, and without regard to the special requirements of the state statutes. *In re Pancoast*, (E. D. Pa. 1904) 129 Fed. 643, 12 Am. Bankr. Rep. 275. See also *In re Kindt*, (S. D. Ia. 1900) 98 Fed. 403, 3 Am. Bankr. Rep. 443; *In re Kimball*, (D. C. Mass. 1899) 100 Fed. 777, 4 Am. Bankr. Rep. 144.

A notary's certificate of acknowledgment to the power of attorney to a proxy of the bankrupt's creditor is sufficient, though having no venue, where it complies with Form No. 21. *In re Henschel*, (C. C. A. 2d Cir. 1902) 113 Fed. 443, 7 Am. Bankr. Rep. 662, reversing (S. D. N. Y. 1901) 109 Fed. 861, 6 Am. Bankr. Rep. 305.

As to the requisites of a notarial seal, see *In re Nebe*, (1875) 11 Nat. Bankr. Reg. 289, 17 Fed. Cas. No. 10,073; *In re Phillips*, (1876) 14 Nat. Bankr. Reg. 219, 19 Fed. Cas. No. 11,098; and *In re Port Huron Dry Dock Co.*, (1876) 14 Nat. Bankr. Reg. 253, 19 Fed. Cas. No. 11,293, which were cases arising under the Bankrupt Act of 1867.

**Verification before attorney for affiant.**—It has been held that it is not a valid

objection to the proof of a claim against the estate of a bankrupt, that the officer taking the verification thereof is the creditor's attorney. *In re Kimball*, (D. C. Mass. 1899) 100 Fed. 777, 4 Am. Bankr. Rep. 144.

But see *In re Brumelkamp*, (N. D. N. Y. 1899) 95 Fed. 814, 2 Am. Bankr. Rep. 318, wherein it was held that the verification of the petition and schedules were defective in that they were made before a notary public who was the attorney of the bankrupt. See also *In re Nebe*, (1875) 11 Nat. Bankr. Reg. 289, 17 Fed. Cas. No. 10,073, wherein it was held that a creditor's proof of claim was insufficient because his oath thereto was taken by a notary already employed to represent him at creditors' meetings.

But the fact that the notary, before whom the oath was taken, subsequently becomes the affiant's attorney, does not invalidate the verification. *In re Kindt*, (S. D. Ia. 1900) 98 Fed. 403, 3 Am. Bankr. Rep. 443.

A justice of the peace, if authorized by the state law to take acknowledgments, may take the acknowledgment of a creditor to a letter of attorney to be used in the selection of a trustee. *In re Roy*, (W. D. N. Y. 1910) 185 Fed. 551, 26 Am. Bankr. Rep. 4.

A commissioner of deeds is authorized to take the verification of a petition in bankruptcy. *In re Morse*, (N. D. N. Y. 1914) 210 Fed. 900.

(3) [Diplomatic or consular officers.] diplomatic or consular officers of the United States in any foreign country.

Diplomatic and consular officers.—An acknowledgment of a power of attorney before a diplomatic or consular officer in a foreign country is sufficient to authorize

the proof of a creditor's claim before the referee. *In re Sugenhimer*, (S. D. N. Y. 1899) 91 Fed. 744, 1 Am. Bankr. Rep. 425.

§ [Affirmations.] Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath. [(1898) 30 Stat. L. 552.]

SEC. 21. EVIDENCE.—a [Compulsory attendance of witnesses.] A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act: [(Amended 1903, which excepted pending cases) 32 Stat. L. 798.]

As originally enacted section 19a read as follows:

"Section 21. EVIDENCE.—a A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act." [30 Stat. L. 552.]

In 1903 it was amended "so as to read as" in the text.

As to examination of bankrupt, see section 7a (9).

Examination of third persons is the subject to which these annotations are confined.

Purpose and scope of examination.—*Purpose of examination.*—"The examinations thus provided are not intended as means of producing testimony pertinent to issues then on trial, but their object is to afford to the creditors and the officer charged with administering the trust, full information touching the bankrupt's estate, in order that necessary steps may be taken for its possession and preservation." *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 755, 2 Am. Bankr. Rep. 822 [citing *In re Earle*, (1869) 3 Nat. Bankr. Rep. 304, 8 Fed. Cas. No. 4,244; *Re Krueger*, (1872) 2 Lowell 182, 14 Fed. Cas. No. 7,942; *In re Lathrop*, 14 Fed. Cas. No. 8,106; *Matter of Stuyvesant Bank*, (1872) 6 Ben. 33, 23 Fed. Cas. No. 13,582; *In re Mendenhall*, (1874) 9 Nat. Bankr. Reg. 285, 17 Fed. Cas. No. 9,423]; *In re Cobb*, (D. C. Mass. 1901) 7 Am. Bankr. Rep. 104. See also *In re Horgan*, (C. C. A. 1899) 98 Fed. 415, wherein the court added that they "are intended to enable creditors to discover transactions which may affect the right of the bankrupt to obtain a discharge."

Hence it is not necessary, in order to authorize the examination, that any suit

should be pending. *In re Fixen*, (1899) 96 Fed. 748.

*For discovery.*—The provisions of the Bankruptcy Act authorizing the examination of third persons as witnesses in bankruptcy proceedings, and requiring them to produce books and documents when called for, are intended to enable creditors to find grounds of opposition to the bankrupt's discharge, if any exist, and to enable the trustee to discover assets of the estate which may be applied to the payment of the bankrupt's debts. *In re Horgan*, (C. C. A. 2d Cir. 1899) 98 Fed. 414, 3 Am. Bankr. Rep. 253; *In re Bryant*, (M. D. Pa. 1911) 188 Fed. 530.

*Scope of examination.*—The examination concerning "the acts, conduct and property of a bankrupt" provided by this section is no less broad in its scope than the examination of the bankrupt himself provided by section 7a (9) concerning "all matters which may affect the administration and settlement of his estate." *Ulmer v. United States*, (C. C. A. 6th Cir. 1915) 219 Fed. 641. "In general, a large latitude of inquiry should be allowed," and the examination "is of necessity to a considerable extent a fishing examination." *In re Foerst*, (1899) 93 Fed. 190.

On the other hand, it is the duty of the court to see that the examination does not transcend the limit of a legitimate investigation for the purposes contemplated

by the statutory provision. *In re Horgan*, (C. C. A. 1899) 98 Fed. 415. Section 21a "should be liberally construed, so as to enforce full and frank answers by witnesses who are being examined under its provisions as to the 'acts, conduct, or property of the bankrupt.' . . . But the Act does not demand such liberality of construction when it is sought to inquire into the acts, conduct, or property of any person other than the bankrupt himself." *In re Carley*, (1901) 106 Fed. 863.

"The Act does not authorize . . . any examination whatever into matters other than those specifically mentioned, which might, however, include cases where the acts, conduct, or property of the witness are so connected or interwoven with those of the bankrupt as to make them virtually the same by reason of community of interest." *In re Carley*, (1901) 106 Fed. 863.

However, the examination is not intended as a means of producing testimony, pertinent to issues on trial, and is not directed to a defined issue between parties. *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 755, 2 Am. Bankr. Rep. 822; *In re Wilcox*, (C. C. A. 2d Cir. 1900) 109 Fed. 628, 6 Am. Bankr. Rep. 362; *Matter of Adler*, (E. D. La. 1908) 21 Am. Bankr. Rep. 302.

But the exercise of a wide discretion by the Bankruptcy Court will not be interfered with by an appellate court except when it has been manifestly abused. *In re Horgan*, (C. C. A. 1899) 98 Fed. 415.

A creditor's mere affidavit of belief does not authorize the examination of the witness as to matters which the witness positively declares have no relation to the acts, conduct, or property of the bankrupt. *In re Carley*, (1901) 106 Fed. 865. But see *People's Bank v. Brown*, (C. C. A. 1902) 112 Fed. 652, and *In re Fixen*, (1899) 96 Fed. 748, holding that the relevancy or irrelevancy of the testimony sought is not a matter for the witness, but for the court.

In *In re Horgan*, (C. C. A. 1899) 98 Fed. 414, it was held, under the circumstances there stated, that the president of a corporation under examination was properly fined for contempt in refusing to produce the books of the corporation for inspection.

The witness cannot decline to testify on the ground that his answers may furnish evidence against him in any suit the trustee may decide to institute against the witness. *In re Cliffe*, (1899) 97 Fed. 540; *In re Fay*, (1870) 3 Nat. Bankr. Reg. 660, 8 Fed. Cas. No. 4,708. See also *In re Horgan*, (C. C. A. 1899) 98 Fed. 415; *In re Pioneer Paper Co.*, (1869) 7 Nat. Bankr. Reg. 250, 19 Fed. Cas. No. 11,178; *Garrison v. Markley*, (1872) 7 Nat. Bankr. Reg. 246, 10 Fed. Cas. No. 3,256.

**Adjudication as condition precedent to examination.**—An adjudication in bankruptcy is not a condition precedent to the proceedings provided for in this section. *Cameron v. U. S.*, (C. C. A. 2d Cir. 1911) 192 Fed. 548, *reversed* on other grounds (1914) 231 U. S. 710, 34 S. Ct. 244, 58 U. S. (L. ed.) 448.

"*Process of administration.*"—An estate is "in process of administration" and an examination ordered is within the jurisdiction of the court, after the filing of the petition in bankruptcy and the appointment of a receiver. *Cameron v. U. S.*, (1914) 231 U. S. 710, 34 S. Ct. 244, 58 U. S. (L. ed.) 448, *reversing* on other grounds (C. C. A. 2d Cir. 1911) 192 Fed. 548.

**Who may be examined.**—In accordance with the provisions of section 21a, any competent witness, including the bankrupt and his wife, may be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration. *In re Feinberg*, (1869) 3 Ben. 162, 8 Fed. Cas. No. 4,716; *In re Cliffe*, (E. D. Pa. 1899) 97 Fed. 540, 3 Am. Bankr. Rep. 257; *In re McCormick*, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340; *In re Sumner*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; *In re Carley*, (D. C. Ky. 1901) 106 Fed. 862, 5 Am. Bankr. Rep. 554; *People's Bank v. Brown*, (C. C. A. 3d Cir. 1902) 112 Fed. 652, 7 Am. Bankr. Rep. 475; *In re Pursell*, (D. C. Conn. 1902) 114 Fed. 371, 8 Am. Bankr. Rep. 96; *In re Hemstreet*, (N. D. Ia. 1902) 117 Fed. 568, 8 Am. Bankr. Rep. 760; *In re Williams*, (W. D. Tenn. 1903) 123 Fed. 321, 10 Am. Bankr. Rep. 538; *In re Watkinson*, (E. D. Pa. 1904) 130 Fed. 218, 12 Am. Bankr. Rep. 370; *In re Andrews*, (D. C. Mass. 1904) 130 Fed. 383, 12 Am. Bankr. Rep. 267; *In re Sutter*, (S. D. N. Y. 1904) 131 Fed. 654, 11 Am. Bankr. Rep. 632; *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785; *Smith v. Au Gres Tp.*, (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745; *In re Marcus*, (D. C. Vt. 1908) 160 Fed. 229, 20 Am. Bankr. Rep. 397; *In re Alper*, (S. D. N. Y. 1907) 162 Fed. 207, 19 Am. Bankr. Rep. 612; *In re Schwartz & Co.*, (S. D. N. Y. 1912) 201 Fed. 166; *In re Connelly*, (E. D. N. Y. 1913) 204 Fed. 479; *In re Felts*, (N. D. Ia. 1909) 205 Fed. 983; *In re Pierce*, (W. D. Wash. 1914) 210 Fed. 389; *Rawlins v. Hall-Epps Clothing Co.*, (C. C. A. 5th Cir. 1914) 217 Fed. 884.

Prior to the amendment of 1903, which included the bankrupt's wife in the class of designated persons, it was held that the bankrupt's wife, not brought in as a party, could not be examined under this section in a state where her common-law incompetence had not been removed by statute. *In*

*re* Mayer, (1899) 97 Fed. 328; *In re* Fowler, (1899) 93 Fed. 417; *In re* Jefferson, (1899) 96 Fed. 826. And under the Bankrupt Act of 1867 the husband's communications to his wife regarding his property were privileged, though the Act in terms authorized the examination of the wife for good cause shown. *Re* Gilbert, (1869) 1 Lowell (U. S.) 340. *In re* Foerst, (1899) 93 Fed. 190, the bankrupt's wife was examined concerning the time when and manner in which she received moneys in her possession, but the question of competency was not raised, the state statute removing the common-law restriction.

**Right to have examination discretionary.**—While the statute authorizes the court, on a creditor's application, to summon a third person for examination regarding the affairs or estate of a bankrupt, it does not give a creditor an unqualified right to demand the issuance of such a summons, the awarding of which is in all cases discretionary. *In re* Andrews, (D. C. Mass. 1904) 130 Fed. 383.

**Examination of claimant against estate.**—A party in interest, objecting to the allowance of a claim proved against the estate of a bankrupt, is entitled, in support of his objection, to examine the claimant and other witnesses, if their attendance can be secured without embarrassing delay. *In re* Sumner, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123.

**Adverse claimant may be examined irrespective of where he may be sued.**—The provisions of the Bankruptcy Act determining the forum in which suits by a trustee in bankruptcy against an adverse claimant may be brought, do not in any way limit the right of the trustee to examine any competent witness concerning the acts, conduct, or property of the bankrupt; and he may examine a creditor, whose claim he disputes, concerning the extent and nature of the bankrupt's alleged indebtedness to him, without regard to the question as to what court, federal or state, would have jurisdiction of the trustee's suit against such creditor if he should decide to sue. *In re* Cliffe, (E. D. Pa. 1899) 97 Fed. 540, 3 Am. Bankr. Rep. 257.

**Examination of secured creditor.**—Where a bankruptcy proceeding has been referred generally to the referee, he has jurisdiction to order a secured creditor to appear before him for examination. *In re* Abbey Press, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11.

**Trustee in insolvency proceedings.**—A trustee in bankruptcy may require the examination of a trustee in insolvency appointed under the state laws more than four months before the commencement of the bankruptcy proceedings, concerning the disposition made by him of the bankrupt's assets. *In re* Pursell, (D. C. Conn. 1902) 114 Fed. 371, 8 Am. Bankr. Rep. 96.

A bankrupt's husband cannot be compelled to testify without payment to him of his lawful fees. *In re* Marcus, (D. C. Vt. 1908) 160 Fed. 229, 20 Am. Bankr. Rep. 397.

**Waiver of objection to subpoena.**—Where a witness appeared for examination before a referee in bankruptcy, without objection on the ground that the subpoena was not sealed, it was held that the defect was waived. *In re* Abbey Press, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11.

**Suit pending not necessary.**—It is not necessary to the ordering of such an examination that there should be a suit pending by or against the bankrupt or his estate. *In re* Fixen, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822.

**Examination of books and papers.**—The right to examine witnesses, under section 21a, includes the right to examine such books and written instruments as relate to the acts, conduct, or property of the bankrupt, and are under the control or in the possession of the witness. *In re* Fixen, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re* Hark, (E. D. Pa. 1905) 136 Fed. 986, 14 Am. Bankr. Rep. 624; *In re* Hess, (E. D. Pa. 1905) 136 Fed. 988, 14 Am. Bankr. Rep. 826; *In re* Sully, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304; *In re* Davis Tailoring Co., (D. C. N. J. 1906) 144 Fed. 285, 16 Am. Bankr. Rep. 486; *In re* Wheeler, (C. C. A. 2d Cir. 1907) 158 Fed. 603, 19 Am. Bankr. Rep. 461, reversing (D. C. Conn. 1907) 18 Am. Bankr. Rep. 421; *In re* U. S. Graphite Co., (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 280; *In re* Ironclad Mfg. Co., (C. C. A. 2d Cir. 1912) 201 Fed. 66.

**Relevancy for court to determine.**—A witness cannot refuse to produce the books and papers called for, or to answer questions relating thereto, on the ground that they contain nothing relating to the bankrupt's property, as this matter is not left to the opinion of the witness, but must be determined by the court. *In re* Fixen, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822.

**Examination asked in bad faith will be denied.**—An application by a creditor for leave to examine the books of a bankrupt, in the hands of his trustee, should be denied where it fairly appears that it is not made in good faith in his own interest, but in the interest of one who is not a creditor and who has no right to such examination. *In re* Sully, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304.

**Application for examination — Who may apply.**—The application for the examination of a witness, under section 21a, may be made by any officer, the bankrupt, or a creditor. *In re* Jehu, (N. D. Ia. 1899) 94 Fed. 638, 2 Am. Bankr. Rep. 498; *In re* Howard, (N. D. Cal. 1899) 95 Fed. 415, 2

Am. Bankr. Rep. 582; *In re Walker*, (D. C. N. D. 1899) 96 Fed. 550, 3 Am. Bankr. Rep. 35; *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re Horgan*, (C. C. A. 2d Cir. 1899) 98 Fed. 414, 3 Am. Bankr. Rep. 253; *In re Andrews*, (D. C. Mass. 1904) 130 Fed. 383, 12 Am. Bankr. Rep. 267; *In re Alphin*, etc., Cotton Co., (E. D. Ark. 1904) 131 Fed. 824, 12 Am. Bankr. Rep. 653; *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11; *In re Fleischer*, (S. D. N. Y. 1907) 151 Fed. 81, 18 Am. Bankr. Rep. 194; *In re Kuffler*, (E. D. N. Y. 1907) 153 Fed. 667, 18 Am. Bankr. Rep. 587; *In re U. S. Graphite Co.*, (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 280; *In re Robinson*, (D. C. Minn. 1910) 179 Fed. 724; *In re Thompson*, (W. D. Pa. 1910) 179 Fed. 874.

**Any creditor may apply for examination.**—At the first meeting of creditors, in a proceeding in bankruptcy, any person who is actually a creditor of the bankrupt, and whose debt is provable under the Act, is entitled to examine the bankrupt, although he has not made formal proof of his claim; and the fact that his name is included in the bankrupt's list of creditors will be *prima facie* sufficient evidence of his having a provable debt. *In re Walker*, (D. C. N. D. 1899) 96 Fed. 550, 3 Am. Bankr. Rep. 35.

**Formal application unnecessary.**—An order made by a referee in bankruptcy, at the instance of the trustee, requiring a designated person to appear and be examined as a witness concerning the acts, conduct, and property of the bankrupt, is valid without a formal application showing what questions are to be asked upon the examination, or as to what particular facts the witness is to be interrogated. The simple application or demand of the trustee for such an order is all that is required to support it. *In re Howard*, (N. D. Cal. 1899) 95 Fed. 415, 2 Am. Bankr. Rep. 582.

**When application refused.**—In the absence of a showing of an emergency an application for an order for examination will be refused where the bankruptcy petition had been drifting along for nearly 18 months, and (so far as the record discloses) no effort had been made to determine the issues presented by the creditors' petition and the demurrer and the answers thereto. *In re Wilkes-Barre Light Co.*, (C. C. A. 3d Cir. 1913) 208 Fed. 539.

**Under the Bankruptcy Act of 1867** it seems to have been the practice to require an affidavit, showing cause to believe that the person to be examined could disclose something beneficial to the creditors, and his examination was confined to the subjects specified. *Re Gilbert*, (1869) 1 Lowell (U. S.) 340.

**Ancillary jurisdiction.**—A United States District Court has ancillary jurisdiction to order the examination of witnesses,

under section 21a, in aid of a proceeding pending in another district. *In re Elkus*, (1910) 216 U. S. 115, 30 S. Ct. 377, 54 U. S. (L. ed.) 407 (*relying on Babbitt v. Dutcher*, (1910) 216 U. S. 102, 30 S. Ct. 372, 54 U. S. (L. ed.) 402, 17 Ann. Cas. 969); *In re Sutter*, (S. D. N. Y. 1904) 131 Fed. 654, 11 Am. Bankr. Rep. 632; *In re Robinson*, (D. C. Minn. 1910) 179 Fed. 724. And see also, as to the right to take depositions of witnesses residing out of the district, note to section 21b. As to the right to exercise ancillary jurisdiction generally, see section 2 (20) and the annotation thereunder.

Where it is sought to examine a resident of another state, in support of a creditor's specifications of objection to a bankrupt's discharge, an application for an order requiring the witness to appear before a referee in bankruptcy and submit to examination should be made to the federal District Court of the district wherein the witness resides. *In re Robinson*, (D. C. Minn. 1910) 179 Fed. 724.

**Notice of examination.**—No notice need be given to the bankrupt of the examination of a witness by the trustee, under section 21a. *In re Cobb*, (D. C. Mass. 1901) 7 Am. Bankr. Rep. 104.

Where a claimant against the bankrupt estate had no notice, at the time of the examination of the bankrupt and other witnesses, that the evidence taken thereon would be used against him on the hearing of his claim, it was held that such evidence was inadmissible against him. *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863. See also the annotation under section 57d.

**Conduct of examination.**—As a general rule the examination must be confined to an inquiry as to the acts, conduct, and property of the bankrupt; and while the scope of such examination is necessarily broad, and considerable latitude must be allowed, matter which is clearly immaterial and irrelevant should be excluded. *In re Foerst*, (S. D. N. Y. 1899) 93 Fed. 190, 1 Am. Bankr. Rep. 259; *In re Howard*, (N. D. Cal. 1899) 95 Fed. 415, 2 Am. Bankr. Rep. 582; *In re Hayden*, (S. D. Fla. 1899) 96 Fed. 199, 1 Am. Bankr. Rep. 670; *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re Horgan*, (C. C. A. 2d Cir. 1899) 98 Fed. 414, 3 Am. Bankr. Rep. 253; *In re Brundage*, (N. D. Ia. 1900) 100 Fed. 613, 4 Am. Bankr. Rep. 47; *In re Carley*, (D. C. Ky. 1901) 106 Fed. 862, 5 Am. Bankr. Rep. 554; *In re Pursell*, (D. C. Conn. 1902) 114 Fed. 371, 8 Am. Bankr. Rep. 96; *In re Williams*, (W. D. Tenn. 1903) 123 Fed. 321, 10 Am. Bankr. Rep. 538; *In re Romine*, (N. D. W. Va. 1905) 138 Fed. 837, 14 Am. Bankr. Rep. 785; *In re Reid*, (E. D. Mich. 1906) 155 Fed. 933, 17 Am. Bankr. Rep. 477; *In re Wheeler*, (C. C. A. 2d Cir. 1907) 158 Fed. 603, 19 Am. Bankr. Rep. 461; *In re Ruos*, (E. D. Pa.



1908) 159 Fed. 252, 20 Am. Bankr. Rep. 281; *U. S. v. Wechsler*, (S. D. N. Y. 1905) 16 Am. Bankr. Rep. 1; *In re Walton*, 1 Nat. Bankr. N. 533; *In re Pittner*, 2 Nat. Bankr. N. 915.

*Ordinarily the examination is made by the trustee*, and after his appointment a creditor should apply to him. If the trustee refuses to undertake the examination, the creditor may apply to the court for an order directing him to do so. To order the trustee to examine is manifestly a matter of discretion. Doubtless the creditor may apply to the court in order to carry on the examination himself, but the court is not wholly without discretion to refuse the application. The examination of third persons concerning the bankrupt estate is anomalous; and, if wholly beyond the control of the court's discretion, it would be oppressive. *In re Andrews*, (D. C. Mass. 1904) 130 Fed. 383.

*Determining competency of witness.*—Where, in a proceeding before a referee in bankruptcy, a question arises concerning the competency of a witness, the referee should decide it in the first instance, and should not certify the question to the court until requested to do so in a proper manner. *In re Ruos*, (E. D. Pa. 1908) 159 Fed. 252, 20 Am. Bankr. Rep. 281; *In re Harrison Bros.*, (M. D. Pa. 1912) 197 Fed. 320.

*Competency of witness as to transactions with deceased person.*—In a proceeding in a federal court, the competency of a witness to testify to a transaction with a deceased person is covered by R. S. sec. 858, title WITNESSES herein, and is to be governed by that section, and not by the statutes of the state. *Smith v. Au Gres Tp.*, (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745.

*Determining relevancy and materiality of questions.*—The witness cannot refuse to answer questions relating to the bankrupt's property on the ground that the inquiry is irrelevant and immaterial; the question of relevancy and materiality being one for the court. *People's Bank v. Brown*, (C. C. A. 3d Cir. 1902) 112 Fed. 652, 7 Am. Bankr. Rep. 475; *In re Ruos*, (E. D. Pa. 1908) 159 Fed. 252, 20 Am. Bankr. Rep. 281.

*Full and frank answers required.*—Section 21a should be liberally construed, so as to enforce full and frank answers by a witness in aid of the bankruptcy proceedings. *In re Carley*, (D. C. Ky. 1901) 106 Fed. 862, 5 Am. Bankr. Rep. 554.

*"Concerning the property of a bankrupt"* means the discovery of the existence, whereabouts, or disposition of property, and cannot be extended so as to draw from unwilling outsiders evidence as to the value of what the bankrupt admittedly owned and had in possession, and which was in the hands of his trustee. *In re Seligman*, (S. D. N. Y. 1911) 192 Fed. 750.

*Disclosure of personal affairs.*—A question should not be excluded, or the witness be excused from replying to it, because of his assertion that his answer, if made, would disclose the personal affairs of himself or of others, not material to the subject of the inquiry. *People's Bank v. Brown*, (C. C. A. 3d Cir. 1902) 112 Fed. 652, 7 Am. Bankr. Rep. 475.

But the statute does not authorize an inquiry as to the private affairs of a witness, which have no relation to the "acts, conduct, or property" of the bankrupt. *In re Carley*, (D. C. Ky. 1901) 106 Fed. 862, 5 Am. Bankr. Rep. 554.

*Objection that testimony may be subsequently used against witness.*—A creditor of the bankrupt, being examined as a witness in the proceedings, cannot refuse to answer questions concerning the nature, extent, or evidences of his claims against the bankrupt, on the ground that his answers may furnish evidence which may be used against him in a civil suit thereafter to be brought by the trustee in bankruptcy. *In re Cliffe*, (E. D. Pa. 1899) 97 Fed. 540, 3 Am. Bankr. Rep. 257.

*A state statute which provides a rule of evidence will be enforced in the court of bankruptcy.* *In re Reid*, (E. D. Mich. 1906) 155 Fed. 933, 17 Am. Bankr. Rep. 477.

*Examination before masters and commissioners.*—The Bankruptcy Law gives the court power to appoint special masters, or commissioners, to hold hearings under section 21a. *In re Stark*, (E. D. N. Y. 1907) 155 Fed. 694, 18 Am. Bankr. Rep. 467.

*Privileged communications.*—The question whether certain communications are privileged is to be determined by the court and not by the witness. *People's Bank v. Brown*, (C. C. A. 3d Cir. 1902) 112 Fed. 652, 7 Am. Bankr. Rep. 475; *In re Reid*, (E. D. Mich. 1906) 155 Fed. 933, 17 Am. Bankr. Rep. 477.

But testimony, although privileged, may be used for all purposes, when once it is brought out. *In re Bendheim*, (S. D. N. Y. 1910) 180 Fed. 918.

*Incriminating evidence.*—A witness called under the provisions of section 21a will not be obliged to give incriminating evidence against himself; and this rule also applies to documentary evidence, although the court may order the production of the writing to ascertain, by inspection, whether the objection thereto is well founded. *Counselman v. Hitchcock*, (1892) 142 U. S. 547, 12 S. Ct. 195, 35 U. S. (L. ed.) 1110; *In re Feldstein*, (S. D. N. Y. 1900) 103 Fed. 269, 4 Am. Bankr. Rep. 321; *In re Smith*, (S. D. N. Y. 1902) 112 Fed. 509, 7 Am. Bankr. Rep. 213; *In re Nachman*, (1902) 114 Fed. 995; *In re Kanter*, (S. D. N. Y. 1902) 117 Fed. 356, 9 Am. Bankr. Rep. 104; *In re Hess*, (E. D. Pa. 1905) 134 Fed. 109, 14 Am. Bankr. Rep. 559; *In re Hark*, (E. D. Pa. 1905) 136

Fed. 986, 14 Am. Bankr. Rep. 624; *In re* Hooks Smelting Co., (E. D. Pa. 1905) 138 Fed. 954, 15 Am. Bankr. Rep. 83; *In re* Rosenblatt, (E. D. Pa. 1906) 143 Fed. 663, 16 Am. Bankr. Rep. 306.

**Contempt in refusal to answer.**—*In re* Fixen, (1899) 96 Fed. 748, it was held that the witness should not be punished for contempt for refusing to answer questions or to produce books, as he did so under the advice of counsel given in good faith, and was willing to submit to an examination.

**Right of witness to counsel.**—A witness is not entitled as a matter of strict legal right to the aid of counsel upon his examination. *In re* Fredenberg, (1868) 2 Ben. 133, 9 Fed. Cas. No. 5,075; *In re* Feinberg, (1869) 3 Ben. 162, 8 Fed. Cas. No. 4,716; *In re* Stuyvesant Bank, (1872) 6 Ben. 33, 23 Fed. Cas. No. 13,582; *In re* Comstock, (1875) 3 Sawy. (U. S.) 517, 6 Fed. Cas. No. 3,080; *In re* Howard, (N. D. Cal. 1899) 95 Fed. 415, 2 Am. Bankr. Rep. 582. But it may be permitted, in the discretion of the court, where the examination is of such a nature as to warrant it.

*In re* Abbey Press, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11; *In re* Hark, (E. D. Pa. 1905) 136 Fed. 986, 14 Am. Bankr. Rep. 624; *In re* Cobb, (D. C. Mass. 1901) 7 Am. Bankr. Rep. 104; *Matter of* Adler, (E. D. La. 1908) 21 Am. Bankr. Rep. 302.

**Further examination.**—The bankrupt is required to attend for examination before the referee whenever reasonably required by creditors for the purpose of objecting to his discharge; and the fact that he attended on the return day of the order to show cause why his discharge should not be granted, does not relieve him from further examination if deemed necessary by the referee. *In re* Mellen, (1899) 97 Fed. 326.

**Testimony available only pro hac vice.**—Inasmuch as the testimony of third persons on these examinations is not directed to a defined issue and may embrace more or less hearsay, such testimony is not admissible against the bankrupt on opposition to his application for discharge. *In re* Wilcox, (C. C. A. 1900) 109 Fed. 628.

**[Examination of bankrupt's wife.]** *Provided*, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt. [(Inserted 1903, which excepted pending cases) 32 Stat. L. 798.]

This proviso was not in section 21a as originally enacted.

**Examination of bankrupt's wife.**—A certain latitude must be permitted in the examination of the bankrupt's wife, and, where there is reasonable ground therefor, she may be examined to determine whether a business conducted in her name is in fact hers or the bankrupt's; and she may also be asked such questions as are pertinent to that inquiry. *In re* Worrell, (E. D. Pa. 1903) 125 Fed. 159, 10 Am. Bankr. Rep. 744.

The wife of a bankrupt, under examination as a witness at the instance of the trustee or the creditors, may be questioned as to money or other property in her possession, and as to how and when the same was received or acquired; provided only that the testimony shows such questions to be reasonably pertinent to the subject of inquiry. *In re* Foerst, (S. D. N. Y. 1899) 93 Fed. 190.

**b [Depositions — right to take.]** The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided. [(1898) 30 Stat. L. 552.]

**Right to take depositions.**—A court having charge of the administration of a bankrupt's estate has power to order that any person having knowledge "concerning the acts, conduct, or property" of the bankrupt, but who resides without the district or state, and more than one hundred miles from the court, shall be examined before a commissioner in accordance with the provisions of the general statutes or practice in equity cases; and persons so ordered to be examined may be compelled by proper process, as in other cases, to ap-

pear and testify. *In re* Carley, (D. C. Ky. 1901) 106 Fed. 862; *In re* Hemstreet, (N. D. Ia. 1902) 117 Fed. 568, 8 Am. Bankr. Rep. 760; *In re* Williams, (W. D. Tenn. 1903) 123 Fed. 321, 10 Am. Bankr. Rep. 538; *In re* Cole, (D. C. Me. 1904) 133 Fed. 414, 13 Am. Bankr. Rep. 300; *In re* Robinson, (D. C. Minn. 1910) 179 Fed. 724; *In re* Washington Steel, etc., Co., (W. D. Wash. 1914) 210 Fed. 984. And see the cases cited in note to section 21a, under the heading *Ancillary Jurisdiction*.

**c [Notice of taking depositions.]** Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt. [(1898) 30 Stat. L. 552.]

**d [Certified copies as evidence.]** Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence. [(1898) 30 Stat. L. 552.]

**e [Certified copy of order approving trustee's bond.]** A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened. [(1898) 30 Stat. L. 552.]

This section authorizes and requires all custodians of the property of the bankrupt, wherever situated, to deliver it to the trustee. *In re Moore*, (1900) 104 Fed. 869. On adjudication the title to the bankrupt's property becomes vested in the trustee,

with actual or constructive possession and is placed in the custody of the Bankruptcy Court. *Mueller v. Nugent*, (1901) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405.

**f [Certified copy of orders.]** A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made. [(1898) 30 Stat. L. 552.]

**Copy of order granting discharge.**—This section provides, in effect, that a certified copy of the order granting a discharge shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and the fact that the order was made. *Custard v. Wiggerson*, (Wis. 1907) 17 Am. Bankr. Rep. 337.

The provision of this section was made in contemplation of the fact that the bankrupt might thereafter be sued on debts existing at the date of the filing of the petition in bankruptcy; and was intended to relieve him of the necessity of introducing a copy of the entire proceedings, so that he might obtain the benefit of

his discharge by the mere production of a certified copy of the order. There are only a few cases dealing with the subject, but they almost uniformly hold that where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order makes out a *prima facie* defense, the burden being then cast upon the plaintiff to show that, because of the nature of the claim, failure to give notice, or other statutory reason, the debt sued on was by law excepted from the operation of the discharge. *Kreitlein v. Ferger*, (1915) 238 U. S. 21, 35 S. Ct. 685, 59 U. S. (L. ed.) 1184.

**g [Evidence of revesting title in bankrupt.]** A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart. [(1898) 30 Stat. L. 552.]

**SEC. 22. REFERENCE OF CASES AFTER ADJUDICATION.**—**a [Judge may refer case.]** After a person has been adjudged a bankrupt the judge may

cause the trustee to proceed with the administration of the estate, or refer it [(1898) 30 Stat. L. 552.]

**Necessity of adjudication.**—Section 22a, providing for reference of bankruptcy proceedings, permits no such reference until after adjudication. *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835, reversing 19 Am. Bankr. Rep. 33.

**Jurisdiction of referee.**—In *In re Matthews*, (1901) 109 Fed. 603, it was held that power exists in a referee, to whom a case has been referred generally, under this section, not only to sell property of the adjudged bankrupt free from liens, where the lienholders had submitted themselves to his jurisdiction, but also to declare the priorities, following *In re Wor-*

land, (1899) 92 Fed. 893. *In re Emerick*, (1900) 101 Fed. 231.

"Referees in bankruptcy are appointed by the courts of bankruptcy, and take the same oath of office as judges of United States courts. Each case in bankruptcy is referred by the court of bankruptcy to a referee, and he exercises much of the judicial authority of that court." *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183.

In the General Orders, Nos. 12, 22, and 23, are provisions concerning the order referring a case to a referee and his duties thereunder, the taking of testimony before him and orders made by him and review of the same by the judge.

(1) [General or special reference.] generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or [(1898) 30 Stat. L. 552.]

A general reference, made under this section, authorizes the referee "to take such further proceedings as are required" by the Act. Presumably, therefore, it continues in force until such proceedings are no longer required. *U. S. v. Sondheim*, (D. C. Mass. 1910) 188 Fed. 378.

**Special reference.**—A bankruptcy proceeding may be referred to the referee by a special order or on special issues, his power depending on the order of reference. *In re Sweeney*, (C. C. A. 6th Cir. 1909) 168 Fed. 612, 21 Am. Bankr. Rep. 866.

**Conclusions of referee.**—Whether a referee to whom a matter is sent to find the facts should state his conclusions upon the case, seems to be a question upon which there has been a wide difference of

opinion, but in the case of *In re Baker*, (D. C. Mass. 1913) 212 Fed. 765, the court, on a motion to strike out the referee's recommendation, held that it was proper for the referee to state his conclusions on the facts found by him.

**Special reference superseded by general reference.**—The powers of a special referee, appointed on petition of a receiver for the property of an alleged bankrupt pending a hearing on the petition, with authority to examine the bankrupt and other witnesses in relation to the property and assets of the bankrupt generally, are superseded on the making of an adjudication and an order of general reference. *In re Ruos*, (E. D. Pa. 1908) 164 Fed. 749, 21 Am. Bankr. Rep. 257.

(2) [To any referee within territorial jurisdiction.] to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district. [(1898) 30 Stat. L. 552.]

**Reference discretionary.**—The reference of a case under this section is a matter within the discretion of the court, guided by what appears to be the convenience of the parties in interest. *In re Western Invest. Co.*, (E. D. Okla. 1908) 21 Am. Bankr. Rep. 367.

**Referee must reside in district.**—Sec-

tion 22a (2) refers to referees in bankruptcy appointed within the district where the case is pending; and the court has no jurisdiction to refer a case to a referee appointed and residing in another district for any purpose. *In re Schenectady Engineering, etc., Co.*, (N. D. N. Y. 1906) 147 Fed. 868, 17 Am. Bankr. Rep. 279.

b [Transfer of case to different referee.] The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another. [(1898) 30 Stat. L. 552.]

As to absence or disability of referee as cause for transfer, see section 43.

**Transfer of case.**—Relationship between the bankrupt and the deputy clerk of the District Court, in whose office a petition was filed, will be cause for transferring the case to another seat of the court in

the same district and division, and ordering the record to be filed and docketed in the office of the clerk of the court at the latter place. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153.

**SEC. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.**—*a* [Circuit courts.] The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. [(1898) 30 Stat. L. 552.]

The Circuit Court of the United States was abolished by section 289 of the Judicial Code (in title JUDICIARY), which also provides, by section 291 thereof, that "wherever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts." The code went into effect Jan. 1, 1912. See the title JUDICIARY.

**Jurisdiction of referee.**—Referees as well as District Courts have jurisdiction under this section. *In re Kornit Mfg. Co.*, (D. C. N. J. 1911) 192 Fed. 392.

**Jurisdiction of Circuit Court**—*Generally.*—It was not intended by this section to increase the jurisdiction of the United States Circuit Courts in bankruptcy matters, but rather to limit it to such suits and controversies as are within the jurisdiction given such courts by the acts creating them, that is, controversies in law and in equity with adverse claimants where the requisite jurisdictional amount is involved and diverse citizenship exists (the citizenship test being, because of the Bankruptcy Act, that of the bankrupt and not that of the trustee), or there is a cause of action arising under the Constitution or laws of the United States. *Lovell v. Newman*, (1913) 227 U. S. 412, 33 S. Ct. 375, 57 U. S. (L. ed.) 577. See also *Bush v. Elliott*, (1906) 202 U. S. 477, 26 S. Ct. 668, 50 U. S. (L. ed.) 1114, 15 Am. Bankr. Rep. 656.

The clause of this section restricting the conferred jurisdiction "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants," while relating to the Circuit Courts only, and not to the District Courts of the United States, indicates the intention of Congress that the ascertainment,

as between the trustees in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy. *Lovell v. Newman*, (1913) 227 U. S. 412, 33 S. Ct. 375, 57 U. S. (L. ed.) 577.

**Adverse claimants.**—Adverse claimants in bankruptcy proceedings may, in a proper case, sue or be sued in the Circuit (now District) Court of the United States, when the bankrupt might have sued there on the same cause of action, viz., where there is a diversity of citizenship and the requisite amount is involved. *In re MacDougall*, (N. D. N. Y. 1909) 175 Fed. 400, 23 Am. Bankr. Rep. 762.

If a party contesting the right of a trustee in bankruptcy to property is claiming in the right of the bankrupt, the case is one for summary proceeding in the District Court, as a court of bankruptcy; but if claiming adversely, by title paramount, then it is a case for the Circuit Court (now District Court) in the exercise of general jurisdiction) or the state court, as the facts may warrant. *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1906) 156 Fed. 504, 19 Am. Bankr. Rep. 244.

This section has no application where the controversy is not one with an adverse "claimant" as to right or title of the trustee to any property claimed by the trustee to have passed to him under the adjudication in bankruptcy as part of the bankrupt estate, but involves transactions between the defendant and the trustee himself, subsequent to the adjudication. Thus in a suit by the trustee in trover to recover the value of property that had belonged to the bankrupt estate and had been converted by the defendant to his own use after title to the property had been

vested in the trustee by virtue of the adjudication in bankruptcy, jurisdiction of the Circuit (now District) Court cannot be maintained under section 23 of the Bankruptcy Act, but, as in any other case where the requisite amount is involved, may be based upon diversity of citizenship between the trustee personally and the defendant. *McEldowney v. Card*, (E. D. Tenn. 1911) 193 Fed. 475.

This section does not confer jurisdiction upon the Circuit (now District) Courts in all controversies in which trustees as such are involved, but only in those between a trustee and "adverse claimants" of the bankrupt's property, involving, generally speaking, "the ascertainment as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy." *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175.

The jurisdiction herein conferred includes a suit by the trustee to recover a money debt due from the defendant to the bankrupt and claimed by the trustee as the property of the bankrupt. *Bush v. Elliott*, (1906) 202 U. S. 477, 26 S. Ct. 668, 50 U. S. (L. ed.) 1114.

*Suits against trustee.*—It was once held not entirely clear that the United States District Court in bankruptcy could entertain a suit by an adverse claimant seeking to establish his ownership of property alleged to be wrongfully held by the trustee as assets of the bankrupt estate. *J. B. McFarlan Carriage Co. v. Solanas*, (C. C. A. 1901) 106 Fed. 149. But it was held that such a suit may be maintained in the United States Circuit (now District) Court, if the other requisites to jurisdiction exist, or in the proper state court, provided the suit does not involve a seizure of the property which the Bankruptcy Court has in its custody. *J. B. McFarlan Carriage Co. v. Solanas*, (C. C. A. 1901) 106 Fed. 145; *In re Russell*, (C. C. A. 1900) 101 Fed. 248. See also *Chattanooga Nat. Bank v. Rome Iron Co.*, (1899) 99 Fed. 82; *In re Baudouine*, (C. C. A. 1900) 101 Fed. 574; *Truda v. Osgood*, (N. H. 1901) 51 Atl. 633, holding that an action of trover against the trustee could be maintained in the state court; *Weeks v. Fowler*, (N. H. 1902) 51 Atl. 624, holding that the state court had no jurisdiction of an action of replevin against the trustee even with the consent of the latter.

*Cause of action arising under laws of United States.*—A Circuit (now District) Court had jurisdiction of an action by a trustee in bankruptcy against a national bank to recover usurious interest received by the defendant from the bankrupt, in violation of R. S. secs. 5197, 5198 (NATIONAL BANKS), such action being one

arising under the laws of the United States, which might have been brought in such court by the bankrupt, regardless of the citizenship of the parties. *Reed v. American-German Nat. Bank*, (W. D. Ky. 1907) 155 Fed. 233, 19 Am. Bankr. Rep. 140.

*To establish validity of lien.*—A Circuit (now District) Court, or other court of equity, has jurisdiction of a suit against a trustee in bankruptcy to establish the validity and lien of a pledge, made by the bankrupt, of property which has come into the hands of the trustee. *Chattanooga Nat. Bank v. Rome Iron Co.*, (N. D. Ga. 1899) 99 Fed. 82, 3 Am. Bankr. Rep. 582.

*Jurisdiction over bankrupt essential.*—The jurisdiction of a Circuit (now District) Court of a suit by an adverse claimant of property against a trustee in bankruptcy is expressly excluded by section 23a, where it would not have had jurisdiction if the suit had been against the bankrupt. *Hatch v. Curtin*, (C. C. Mass. 1906) 146 Fed. 200, 16 Am. Bankr. Rep. 629. See also *Goodier v. Barnes*, (N. D. N. Y. 1899) 94 Fed. 798.

*Diversity of citizenship* between trustees in bankruptcy and the defendant is not necessary to the exercise by a Circuit (now District) Court of its jurisdiction. under section 23a, of a suit brought by such trustees upon an alleged cause of action for moneys due the bankrupt at and prior to the adjudication in bankruptcy, where the citizenship of the bankrupt and the defendant is such that the former might have sued in the federal court but for the bankruptcy proceedings. *Bush v. Elliott*, (1906) 202 U. S. 477, 26 S. Ct. 668, 50 U. S. (L. ed.) 1114, 15 Am. Bankr. Rep. 656.

But a Circuit (now District) Court has no jurisdiction of a bill in equity by a trustee in bankruptcy to set aside an alleged fraudulent conveyance of property by the bankrupt, when the bankrupt, the trustee, and the defendant are all citizens of the same state. *Goodier v. Barnes*, (N. D. N. Y. 1899) 94 Fed. 798, 2 Am. Bankr. Rep. 328.

The removal from a state court to a federal Circuit (now District) Court for diverse citizenship, of a suit by a trustee in bankruptcy for the conversion of property, the title to which vested in him by the adjudication in bankruptcy, places such suit in the federal court as if it had been commenced there on that ground of jurisdiction, within the rule (Judicial Code, § 128 in title JUDICIARY) making the judgment of the Circuit Court of Appeals final when the jurisdiction of the Circuit (now District) Court depends entirely on diverse citizenship, and not as if it had been commenced there by consent of defendant. *Spencer v. Duplan Silk Co.*, (1903) 191 U. S. 526, 24 S. Ct. 174, 48 U. S. (L. ed.) 287, 11 Am. Bankr. Rep. 563.

**Jurisdictional amount essential.**—A trustee or receiver in bankruptcy cannot remove a cause into a federal court, on the ground that it is one arising under the laws of the United States, unless it clearly appears that the requisite jurisdictional amount is involved. *Swofford v. Cornucopia Mines*, (C. C. Ore. 1905) 140 Fed. 957, 15 Am. Bankr. Rep. 564.

**Matters pertaining to administration of bankrupt estate — Determination of validity and priority liens.**—A Circuit Court of the United States was without jurisdiction of a suit the object of which is to determine liens upon, and priorities in the distribution of, a bankrupt's estate in process of administration by a District Court, the jurisdiction of the latter court in such matter being original and exclusive; and it was immaterial that the property, which was in the custody of the Bankruptcy Court, was within the territorial jurisdiction of the Circuit Court, or that the suit was instituted by leave of the Bankruptcy Court. *Bray v. U. S. Fidelity, etc., Co.*, (C. C. A. 4th Cir. 1909) 170 Fed. 689, 22 Am. Bankr. Rep. 363.

**Suit to compel trustee to pay over assets.**—A Circuit Court was without jurisdiction of a suit in equity against trustees in bankruptcy to require them to pay over the proceeds of property claimed by complainant, but which was sold by defend-

ants under an order of the Bankruptcy Court as assets of a bankrupt estate. *Treat v. Wooden*, (C. C. Mass. 1905) 138 Fed. 934, 14 Am. Bankr. Rep. 736.

**Bill by creditor.**—Section 23a does not authorize the maintenance of a bill, by a simple contract creditor, to set aside alleged fraudulent conveyances in aid of a bankruptcy proceeding against the grantor. *Viquesney n. Allen*, (C. C. A. 4th Cir. 1904) 131 Fed. 21, 12 Am. Bankr. Rep. 402.

**The words "acquired or claimed" are synonymous**, both alluding to property adversely held by third parties, but which by the terms of the Bankruptcy Act become vested in the trustee upon his qualification as such. *In re Bender*, (W. D. Ark. 1901) 106 Fed. 873, 5 Am. Bankr. Rep. 632.

**Jurisdiction of state court.**—A proceeding to enjoin a trustee in bankruptcy from cutting and removing timber on land claimed to have been purchased from the bankrupt and which the plaintiff was in possession of at the time of the adjudication of bankruptcy is properly brought in a state court. *Bennette v. Lewis*, (Tex. 1915) 176 S. W. 660.

**Appellate jurisdiction of Supreme Court over decisions of Circuit Court of Appeals**, see Act of Jan. 28, 1915, § 4, *infra*, p. 833, following section 25a (3).

**b [Suits by trustee — where brought.]** Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e. [(Amended 1903 and 1910, both of which excepted pending cases) 32 Stat. L. 798, 36 Stat. L. 840.]

As originally enacted section 23b read as follows:

"b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." [30 Stat. L. 552.]

In 1903 it was amended "so as to read as follows:"

"b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e." [32 Stat. L. 798, 799.]

In 1910 it was amended "so as to read as" in the text.

Appellate jurisdiction of decisions in suits brought under section 23b is probably to some extent affected by section 4 of the Act of Jan. 28, 1915, ch. 22, *infra*, p. 833, following section 25a (3).

- I. Jurisdiction of adverse claims, 761.
- II. Jurisdiction as affected by possession, 765.
- III. Jurisdiction by consent, 767.
- IV. Recovery of preferential and fraudulent transfers, 769.
- V. Summary and plenary jurisdiction, 770.
- VI. Jurisdiction of state courts, 772.

#### I. JURISDICTION OF ADVERSE CLAIMS.

**Bona fide adverse claims.**—A suit brought by a trustee in bankruptcy, for the recovery of property alleged to be a part of the assets of the estate, against a *bona fide* adverse claimant thereof, must, excepting as to those cases which fall within the provisions of sections 60b, 67e, or 70e, be

brought and prosecuted in a court wherein it might have been brought and prosecuted if proceedings in bankruptcy had not been instituted; in such cases the Bankruptcy Court has no jurisdiction unless it is given or acquired by the consent, express or implied, of such adverse claimant; or unless the property, which forms the subject matter of the claim, is in the possession of the court of bankruptcy. *Bardes v. Havarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175; *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, 5 Am. Bankr. Rep. 623; *Louisville Trust Co. v. Cominger*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413, 7 Am. Bankr. Rep. 421; *Pickens v. Roy*, (1902) 187 U. S. 177, 23 S. Ct. 78, 47 U. S. (L. ed.) 128, 9 Am. Bankr. Rep. 47; *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, 14 Am. Bankr. Rep. 102; *Bush v. Elliott*, (1906) 202 U. S. 477, 26 S. Ct. 668, 50 U. S. (L. ed.) 1114, 15 Am. Bankr. Rep. 656; *Harris v. Mt. Pleasant First Nat. Bank*, (1910) 216 U. S. 382, 30 S. Ct. 296, 23 Am. Bankr. Rep. 632; *In re Buntrock Clothing Co.*, (1899) 92 Fed. 886; *In re Cohn*, (1899) 98 Fed. 75; *In re Ward*, (D. C. Mass. 1900) 104 Fed. 985, 5 Am. Bankr. Rep. 215; *In re Seebold*, (C. C. A. 1901) 105 Fed. 910; *In re Silberhorne*, (1900) 105 Fed. 899; *Woodruff v. Cheeves*, (C. C. A. 1901) 105 Fed. 606; *In re Tollet*, (1900) 105 Fed. 427; *Pickens v. Dent*, (C. C. A. 1901) 106 Fed. 653; *Smith v. Belford*, (C. C. A. 1901) 106 Fed. 660; *In re Sheinbaum*, (1901) 107 Fed. 247; *Blumberg v. Bryan*, (C. C. A. 1901) 107 Fed. 673; *In re San Gabriel Sanatorium Co.*, (C. C. A. 9th Cir. 1901) 111 Fed. 892, *reversing on rehearing* (C. C. A. 9th Cir. 1900) 102 Fed. 310, 4 Am. Bankr. Rep. 197; *Real Estate Trust Co. v. Thompson*, (1902) 112 Fed. 945; *In re Shoemaker*, (1902) 112 Fed. 648; *In re Wells*, (1902) 114 Fed. 222; *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *Beach v. Macon Grocery Co.*, (C. C. A. 5th Cir. 1902) 116 Fed. 143, 8 Am. Bankr. Rep. 751; *In re Rosenberg*, (E. D. Pa. 1902) 116 Fed. 402, 8 Am. Bankr. Rep. 624; *Stelling v. G. W. Jones Lumber Co.*, (C. C. A. 1902) 116 Fed. 261; *In re Baird*, (1902) 116 Fed. 765; *In re Rusch*, (C. C. A. 1902) 116 Fed. 272; *Havens, etc., Co. v. Pierek*, (C. C. A. 7th Cir. 1903) 120 Fed. 244, 9 Am. Bankr. Rep. 569; *In re Kellogg*, (C. C. A. 2d Cir. 1903) 121 Fed. 333, 10 Am. Bankr. Rep. 7; *In re Knickerbocker*, (W. D. N. Y. 1903) 121 Fed. 1004, 10 Am. Bankr. Rep. 381; *In re Rochford*, (C. C. A. 8th Cir. 1903) 124 Fed. 182, 10 Am. Bankr. Rep. 608; *Beach v. Macon Grocery Co.*, (5th Cir. 1903) 125 Fed. 513, 60 C. C. A. 557, 11 Am. Bankr. Rep. 104; *In re Flynn*, (E. D. N. C. 1903) 126 Fed. 422, 11 Am. Bankr. Rep. 318; *Gregory v. Atkinson*, (1904) 127 Fed. 184;

*In re Teschmacher*, (E. D. Pa. 1904) 127 Fed. 728, 11 Am. Bankr. Rep. 547; *In re Scherber*, (D. C. Mass. 1904) 131 Fed. 121, 12 Am. Bankr. Rep. 616; *In re New York Car Wheel Works*, (W. D. N. Y. 1904) 132 Fed. 203, 13 Am. Bankr. Rep. 61; *Hinds v. Moore*, (C. C. A. 8th Cir. 1905) 134 Fed. 221, 14 Am. Bankr. Rep. 1, *reversing* (W. D. Tenn. 1904) 129 Fed. 922, 12 Am. Bankr. Rep. 136; *In re Andre*, (C. C. A. 2d Cir. 1905) 135 Fed. 736, 13 Am. Bankr. Rep. 132; *In re Hadden Rodee Co.*, (E. D. Wis. 1904) 135 Fed. 886, 13 Am. Bankr. Rep. 604; *In re Griesler*, (C. C. A. 2d Cir. 1905) 136 Fed. 754, 13 Am. Bankr. Rep. 508; *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Mundle*, (S. D. N. Y. 1905) 139 Fed. 691, 14 Am. Bankr. Rep. 680; *In re Gilroy*, (S. D. N. Y. 1905) 140 Fed. 733, 14 Am. Bankr. Rep. 627; *Brumby v. Jones*, (C. C. A. 5th Cir. 1905) 141 Fed. 318, 15 Am. Bankr. Rep. 578; *In re Berkowitz*, (E. D. Pa. 1906) 143 Fed. 598, 16 Am. Bankr. Rep. 251; *In re Davis Tailoring Co.*, (D. C. N. J. 1906) 144 Fed. 285, 16 Am. Bankr. Rep. 486; *In re Blake*, (C. C. A. 8th Cir. 1906) 150 Fed. 279, 17 Am. Bankr. Rep. 668; *In re Adamo*, (E. D. N. Y. 1907) 151 Fed. 716, 18 Am. Bankr. Rep. 181; *In re Bailey*, (E. D. N. Y. 1907) 156 Fed. 691, 19 Am. Bankr. Rep. 470; *In re Edwards*, (S. D. Ala. 1907) 156 Fed. 794, 19 Am. Bankr. Rep. 632; *In re Haley*, (C. C. A. 6th Cir. 1908) 158 Fed. 74, 19 Am. Bankr. Rep. 313; *In re Horgan*, (C. C. A. 1st Cir. 1907) 158 Fed. 774, 19 Am. Bankr. Rep. 857; *In re Walsh*, (N. D. Ia. 1908) 163 Fed. 352, 20 Am. Bankr. Rep. 472; *In re Horgan*, (C. C. A. 1st Cir. 1908) 164 Fed. 415, 21 Am. Bankr. Rep. 31; *In re Squier*, (E. D. N. Y. 1908) 165 Fed. 515, 21 Am. Bankr. Rep. 346; *In re Driggs*, (S. D. N. Y. 1909) 171 Fed. 897, 22 Am. Bankr. Rep. 621; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 998, 22 Am. Bankr. Rep. 863; *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 882, 23 Am. Bankr. Rep. 242; *Cooney v. Collins*, (C. C. A. 9th Cir. 1910) 176 Fed. 189, 23 Am. Bankr. Rep. 840; *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851; *Copeland v. Martin*, (C. C. A. 5th Cir. 1910) 182 Fed. 805; *In re Lineberry*, (N. D. Ala. 1910) 183 Fed. 338; *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913; *In re Pickens*, (N. D. Ga. 1911) 184 Fed. 954; *In re Glenn*, (E. D. Pa. 1911) 185 Fed. 554; *In re Tarbox*, (D. C. Mass. 1910) 185 Fed. 985; *In re Gill*, (C. C. A. 8th Cir. 1911) 190 Fed. 726; *In re Plymouth Elevator Co.*, (D. C. S. D. 1911) 191 Fed. 633; *In re Iron Clad Mfg. Co.*, (E. D. N. Y. 1912) 194 Fed. 906; *Young v. Allen*, (C. C. A. 6th Cir. 1913) 207 Fed. 318; *In re Yorkville Coal Co.*, (C. C. A. 2d Cir. 1914) 211 Fed. 619.

*Scheduling of property by bankrupt immaterial.*—A federal District Court, sitting in bankruptcy, has no jurisdiction to try title to personalty scheduled by the



bankrupt as a part of his assets, as against a buyer claiming under an alleged executed sale thereof. *In re Flynn*, (E. D. N. C. 1903) 126 Fed. 422, 11 Am. Bankr. Rep. 318.

*Independent suits against strangers.*—United States District Courts have no jurisdiction over independent suits brought by a trustee in bankruptcy to assert a title to money or property as assets of the bankrupt, against strangers to the bankruptcy proceedings, unless by consent of the proposed defendant; such jurisdiction being denied to them by section 23 of the Bankruptcy Act of 1898. *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175; *In re Kellogg*, (C. C. A. 2d Cir. 1903) 121 Fed. 333, 10 Am. Bankr. Rep. 7.

*Absolute ownership unnecessary.*—*In Jaquith v. Rowley*, (1903) 188 U. S. 620, 23 S. Ct. 369, 47 U. S. (L. ed.) 620, 9 Am. Bankr. Rep. 525, it was held that it is not necessary, in order to be an adverse claimant, that one should claim to be the absolute owner of the property in question.

*Pledgee.*—The surety on a bankrupt's bail bond, in whose hands property was deposited by the bankrupt to indemnify him for his liability, is an adverse claimant within the meaning of section 23b. *Jaquith v. Rowley*, (1903) 188 U. S. 620, 23 S. Ct. 369, 47 U. S. (L. ed.) 620, 9 Am. Bankr. Rep. 525; *In re Horgan*, (C. C. A. 1st Cir. 1907) 158 Fed. 774, 19 Am. Bankr. Rep. 857.

*Recipient of property in payment of debt.*—A claim by one who acquired possession of the property of a bankrupt before the filing of the petition in bankruptcy, that such property was delivered to him in part payment of a debt, and that he had no reasonable cause to believe that a preference was thereby intended, is clearly an adverse claim, of which a referee has not jurisdiction to summarily determine on its merits, except by the claimant's consent. *In re Adams*, (D. C. R. I. 1904) 130 Fed. 788, 12 Am. Bankr. Rep. 368.

*Claim of assignee for creditors for services and disbursements.*—A court of bankruptcy has no jurisdiction to adjudicate the merits of the claim of a general assignee of the bankrupt, to retain out of the bankrupt's estate money disbursed by him, or claimed on account of his commission as such assignee, before the bankruptcy proceedings were begun, unless such assignee consents to the exercise of such jurisdiction. *Louisville Trust Co. v. Comingo*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413, 7 Am. Bankr. Rep. 421; *Sinsheimer v. Simonson*, (C. C. A. 6th Cir. 1901) 107 Fed. 898, 5 Am. Bankr. Rep. 537.

*Controversy between trustee and mortgagee.*—The Act does not confer upon a District Court of the United States, as a court of bankruptcy, jurisdiction of a con-

troversy between a trustee and a mortgagee of the bankrupt to determine the validity of the mortgage, unless with the consent of such mortgagee. *In re San Gabriel Sanatorium Co.*, (C. C. A. 9th Cir. 1901) 111 Fed. 892, 7 Am. Bankr. Rep. 206, reversing (C. C. A. 9th Cir. 1900) 102 Fed. 310, 4 Am. Bankr. Rep. 197.

But in the case of *In re Kellogg*, (1902) 113 Fed. 120, it was held that where property is in the lawful possession of the trustee, the Bankruptcy Court has jurisdiction, upon full hearing, to determine the question of validity and amount of a mortgage lien thereon, *distinguishing In re San Gabriel Sanatorium Co.*, *supra*, on the ground that in the latter case the title to the property was not in the trustee at the time the question was before the court; and *In re Baudouine*, (C. C. A. 1900) 101 Fed. 574, on a similar ground.

*Ordering restitution of dividend.*—Where, upon reconsideration of a claim, the Bankruptcy Court rejected it and ordered the claimant to repay to the trustee a dividend already received, it was held that the order was not a suit within the meaning of section 23b, and was legally made. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171.

*Attaching creditors of a bankrupt*, whose levies constitute the preference on which the adjudication in bankruptcy is based, do not occupy the position of third persons in possession of property claimed to belong to the bankrupt, or adverse claimants dealing therewith, so as to render it necessary that proceedings against them should be by bill in equity or other plenary process. *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746; *Stanton v. Wooden*, (C. C. A. 9th Cir. 1910) 179 Fed. 61.

*Against agent or general assignee of bankrupt.*—Where property of a bankrupt has come into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim, the Bankruptcy Court has power, on petition and rule to show cause, to order a surrender of the property to the trustee in bankruptcy and to imprison the party for non-compliance with the order. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405 [reversing (C. C. A. 1901) 105 Fed. 581, which reversed the same case *sub nom.* *Wayne Knitting Mills v. Nugent*, (1900) 104 Fed. 530]; *In re Moore*, (1900) 104 Fed. 869; *In re Knickerbocker*, (W. D. N. Y. 1903) 121 Fed. 1004, 10 Am. Bankr. Rep. 381.

And in *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, it was held that the bankrupt's assignee for the benefit of creditors is merely an agent of the bankrupt, without an adverse interest in himself, and is subject to the orders of the Bankruptcy Court in

summary proceedings. See also *In re Krinsky*, (1902) 112 Fed. 972; *In re Macon Sash, etc., Co.*, (1901) 112 Fed. 323; *In re Smith*, (1899) 92 Fed. 135; *In re Gutwillig*, (C. C. A. 1899) 92 Fed. 337; *Davis v. Bohle*, (C. C. A. 1899) 92 Fed. 325.

Where a general assignee of the bankrupt asserts a claim to the property assigned on account of disbursements made and commissions accruing prior to the filing of the petition in bankruptcy, the Bankruptcy Court has no jurisdiction to adjudicate the merits of his claim in summary proceedings against him without his consent. *Louisville Trust Co. v. Comingor*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413, *affirming Sinsheimer v. Simonson*, (C. C. A. 1901) 107 Fed. 898. To the same effect see *Smith v. Belford*, (C. C. A. 1901) 106 Fed. 658; *In re Klein*, (1902) 116 Fed. 523.

*Against transferee of bankrupt.*—The Bankruptcy Court has no jurisdiction, on petition by the trustee and rule to show cause, to order a third party to surrender property where the petition shows that the respondent claims it under a transfer from the bankrupt by way of preference and fraudulent conveyance. *In re Michie*, (1902) 116 Fed. 749.

*As to who are adverse claimants under a will*, see *In re Baudouine*. (C. C. A. 2d Cir. 1900) 101 Fed. 574, 3 Am. Bankr. Rep. 651, *reversing* (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

*Colorable adverse claims.*—The court of bankruptcy has, however, the right to determine whether a claim adverse to that of the trustee is real or merely colorable; and such determination may be had by a summary proceeding. If it is decided that the claim is *bona fide*, the parties will be relegated to a plenary suit in the proper court; but if the court decides that the alleged adverse claim is fictitious, or merely colorable, or that the claimant is simply the *alter ego* of the bankrupt, it will proceed summarily to dispose of it. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *Louisville Trust Co. v. Comingor*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413; *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *In re Michie*, (D. C. Mass. 1902) 116 Fed. 749, 8 Am. Bankr. Rep. 734; *In re Knickerbocker*, (W. D. N. Y. 1903) 121 Fed. 1004, 10 Am. Bankr. Rep. 381; *In re Weinger*, (S. D. N. Y. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 424; *In re Teschmacher*, (E. D. Pa. 1904) 127 Fed. 728, 11 Am. Bankr. Rep. 547; *In re Kane*, (N. D. N. Y. 1904) 131 Fed. 386, 12 Am. Bankr. Rep. 444; *In re Andre*, (2d Cir. 1905) 135 Fed. 736, 68 C. C. A. 374, 13 Am. Bankr. Rep. 132; *In re Ellis Bros. Printing Co.*, (W. D. N. Y. 1907) 156 Fed. 430, 19 Am. Bankr. Rep. 472; *In re Friedman*, (C. C. A. 2d Cir. 1908) 161 Fed. 260, 20 Am. Bankr.

Rep. 37; *In re Walsh*, (N. D. Ia. 1908) 163 Fed. 352, 20 Am. Bankr. Rep. 472; *In re Holbrook Shoe, etc., Co.*, (D. C. Mont. 1908) 165 Fed. 973, 21 Am. Bankr. Rep. 511; *In re Hayden*, (D. C. Mass. 1908) 172 Fed. 623, 22 Am. Bankr. Rep. 764; *In re Famous Clothing Co.*, (W. D. N. Y. 1910) 179 Fed. 1015; *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913; *In re Tarbox*, (D. C. Mass. 1910) 185 Fed. 985; *Ommen v. Talcott*, (C. C. A. 2d Cir. 1911) 188 Fed. 401; *In re Iron Clad Mfg. Co.*, (E. D. N. Y. 1912) 194 Fed. 906; *Thomasville First Nat. Bank v. Hopkins*, (C. C. A. 5th Cir. 1912) 199 Fed. 873; *Shea v. Lewis*, (C. C. A. 8th Cir. 1913) 206 Fed. 877; *In re Yorkville Coal Co.*, (C. C. A. 2d Cir. 1914) 211 Fed. 619.

But the United States District Court has no jurisdiction to act in *personam* against a stranger to the bankruptcy proceedings who resides in another federal district and is served with notice or process only in that district. In such a case he may appear and have the proceeding against him dismissed. *In re Waukesha Water Co.*, (1902) 116 Fed. 1009.

*Duty to determine validity of adverse claim.*—On adverse claims being made to property, it is the duty of the referee to hear the testimony in order to determine whether the claim is real or merely colorable. *In re Holbrook Shoe, etc., Co.*, (D. C. Mont. 1908) 165 Fed. 973, 21 Am. Bankr. Rep. 511.

*The mere assertion of a claim of title to property adverse to a trustee in bankruptcy*, even with an intention to protect it by the usual process of law, will not preclude the Bankruptcy Court from exercising its power to proceed summarily; but it is only when the evidence indicates that the asserted claim is not false or fraudulent that such court is deprived of jurisdiction. *In re Ellis Bros. Printing Co.*, (W. D. N. Y. 1907) 156 Fed. 430, 19 Am. Bankr. Rep. 472; *In re Famous Clothing Co.*, (W. D. N. Y. 1910) 179 Fed. 1015.

*Property held under process from state court.*—Where property of a bankrupt is held adversely to his estate, under a claim of seizure on process from a state court, the court of bankruptcy has jurisdiction to summarily inquire and determine whether the adverse claim has an actual basis or is merely colorable. *In re Weinger*, (S. D. N. Y. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 424.

*Possession without claim of title.*—Where the property of a bankrupt was alleged to be in the possession of a third person, who, though not admitting possession, claimed no title to any of the property, he could not object to the Bankruptcy Court's jurisdiction to order him to surrender the property to the trustee. *In re Fogelman*, (E. D. N. Y. 1911) 188 Fed. 755.

*The trustee cannot enlarge the referee's jurisdiction merely by alleging that the*

claim under which the property is held has no merit, or is fraudulent, or by calling it "merely colorable," when no other reasons appear for so describing it. *In re Tarbox*, (D. C. Mass. 1910) 185 Fed. 985.

**Scope of section.**—This section relates only to suits brought by trustees and has no restrictive effect on the right of receivers (or trustees for that matter) to maintain or defend their possession of goods seized as those of the bankrupt. *In re Lipman*, (D. C. N. J. 1912) 201 Fed. 169.

**Possession of property gives jurisdiction thereover.**—If the property is not in the possession of the bankrupt at the time he filed his petition but is in other persons claiming adverse rights thereto, then the Bankruptcy Court has no jurisdiction over the property involved, as a part of the bankrupt estate. *Chicago Title, etc., Co. v. National Storage Co.*, (1913) 260 Ill. 485, 103 N. E. 227.

**Petition held to fall within the provision of this section.** *In re Raphael*, (C. C. A. 7th Cir. 1911) 192 Fed. 874.

## II. JURISDICTION AS AFFECTED BY POSSESSION.

**Possession of property gives jurisdiction thereover.**—When a court of bankruptcy has acquired possession of the *res*, either actual or constructive, that is, where the property was in the possession of the bankrupt at the time the petition in bankruptcy was filed against him, or where such property has been taken possession of by the officers of the court, such as the referee, receiver, marshal, or trustee, it is then in *custodia legis*, and the court has, by virtue of such possession, jurisdiction to hear and determine all adverse claims asserted thereto. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36; *Murphy v. John Hoffman Co.*, (1909) 211 U. S. 562, 29 S. Ct. 154, 53 U. S. (L. ed.) 327, 21 Am. Bankr. Rep. 487; *Babbitt v. Dutcher*, (1910) 216 U. S. 102, 30 S. Ct. 372, 54 U. S. (L. ed.) 402, 17 Ann. Cas. 969; *Keegan v. King*, (D. C. Ind. 1899) 96 Fed. 758, 3 Am. Bankr. Rep. 79; *In re Russell*, (2d Cir. 1900) 101 Fed. 248, 41 C. C. A. 323; *In re Kellogg*, (C. C. A. 2d Cir. 1903) 121 Fed. 333, 10 Am. Bankr. Rep. 7; *In re Rochford*, (C. C. A. 8th Cir. 1903) 124 Fed. 182, 10 Am. Bankr. Rep. 608; *In re Knight*, (W. D. Ky. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 6; *In re Weinger*, (S. D. N. Y. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 424; *In re Briskman*, (W. D. N. Y. 1904) 132 Fed. 201, 13 Am. Bankr. Rep. 57; *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Henderson*, (N. D. W. Va. 1905) 142 Fed. 568, 16 Am. Bankr. Rep. 91; *In re Schermerhorn*, (C. C. A. 8th Cir. 1906) 145 Fed. 341, 16

Am. Bankr. Rep. 507; *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1906) 156 Fed. 504, 19 Am. Bankr. Rep. 244; *Cleminshaw v. International Shirt, etc., Co.*, (N. D. N. Y. 1908) 165 Fed. 797, 21 Am. Bankr. Rep. 616; *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 882, 23 Am. Bankr. Rep. 242; *In re Swofford Bros. Dry Goods Co.*, (W. D. Mo. 1910) 180 Fed. 549; *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913; *Wilson v. Parr*, (1902) 8 Am. Bankr. Rep. 230, 115 Ga. 629, 42 S. E. 5; *Crosby v. Spear*, (1904) 11 Am. Bankr. Rep. 613, 98 Me. 542, 57 Atl. 881, 99 A. S. R. 424; *Matter of Cameron*, (E. D. Mich. 1908) 20 Am. Bankr. Rep. 790.

**Upon the filing of a petition in bankruptcy**, followed by an adjudication, all property in the possession of the bankrupt, of which he claims the ownership, passes at once into the custody of the court of bankruptcy, and becomes subject to its jurisdiction to determine, by plenary action or summary proceeding, as the nature of the case demands, all adverse or conflicting claims thereto, whether of title or of lien; and that court may, by the process of injunction, protect its jurisdiction against interference. *Whitney v. Wenman*, (1905) 198 U. S. 539, 25 S. Ct. 778, 49 U. S. (L. ed.) 1157, 14 Am. Bankr. Rep. 45; *Murphy v. John Hoffman Co.*, (1909) 211 U. S. 562, 29 S. Ct. 154, 53 U. S. (L. ed.) 327, 21 Am. Bankr. Rep. 487; *Beach v. Macon Grocery Co.*, (5th Cir. 1902) 116 Fed. 143, 53 C. C. A. 463, 8 Am. Bankr. Rep. 751; *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 689; *In re Schermerhorn*, (C. C. A. 8th Cir. 1906) 145 Fed. 341, 16 Am. Bankr. Rep. 507; *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 882, 23 Am. Bankr. Rep. 242; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148.

**Goods in actual possession of a bankrupt** at the time of his adjudication as such, and at the time of the reference of the case to a referee, who directs them to be locked in a store, are in custody of the United States court, from which they cannot be taken upon any process from a state court. *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183, 4 Am. Bankr. Rep. 178. See also *In re Mertens*, (N. D. N. Y. 1904) 131 Fed. 507, 12 Am. Bankr. Rep. 698.

**Possession by act of officers.**—When the court of bankruptcy through the act of its officers, such as referees, receivers, marshals, or trustees, has taken possession of a *res*, as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and its possession cannot be disturbed by the process of another court. *Murphy v. John Hoffman Co.*, (1909) 211

U. S. 562, 29 S. Ct. 154, 53 U. S. (L. ed.) 327, 21 Am. Bankr. Rep. 487.

*An uncertain or fleeting occupancy by the officers of the Bankruptcy Court, however, is not sufficient to change the ordinary rule which gives the state courts jurisdiction over property which is in its possession; nor will the mere constructive possession of the Bankruptcy Court be effective as against the possession of the state court in every case. See Frank v. Vollkommer, (1907) 205 U. S. 521, 523, 529, 27 S. Ct. 596, 599, 51 U. S. (L. ed.) 911; In re Rathman, (C. C. A. 8th Cir. 1910) 183 Fed. 913. And see the annotation, infra, this note, under VI, Jurisdiction of State Courts.*

*Possession acquired for preservation of estate.*—The District Court has jurisdiction of a controversy in a case in which it finds it absolutely necessary, for the preservation of the estate, to take the possession of the property from an adverse claimant by means of its receiver or the marshal, under section 2 (3), and the determination of the issue thus raised between the trustee and the adverse claimant is a proceeding in bankruptcy, as distinguished from a controversy at law or in equity, within the true interpretation of section 23. *In re Rochford*, (C. C. A. 8th Cir. 1903) 124 Fed. 182, 10 Am. Bankr. Rep. 608. And see the annotation under section 2 (3), of the Bankruptcy Act.

*Controversies between estates in bankruptcy.*—A court of bankruptcy has jurisdiction to determine a controversy as to the ownership of property between the trustees of two different estates, both of which are being administered by such court. *In re Rosenberg*, (E. D. Pa. 1902) 116 Fed. 402, 8 Am. Bankr. Rep. 624.

Property which has been unlawfully taken from the custody of the Bankruptcy Court, or its officers, may be recovered, and restored to the trustee or other proper officer, by a summary or other proceeding instituted for that purpose. *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183, 4 Am. Bankr. Rep. 178; *In re Whitener*, (C. C. A. 1900) 105 Fed. 180; *In re Reynolds*, (D. C. Mont. 1904) 127 Fed. 760, 11 Am. Bankr. Rep. 758; *In re Briskman*, (W. D. N. Y. 1904) 132 Fed. 201, 13 Am. Bankr. Rep. 57; *In re Rose Shoe Mfg. Co.*, (C. C. A. 2d Cir. 1909) 168 Fed. 39, 21 Am. Bankr. Rep. 725; *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385. See also *In re Gutman*, (1902) 114 Fed. 1009, applying the same rule where the property was in the constructive possession of the court when a prior mortgagee thereof took it into his possession. And the Bankruptcy Court has jurisdiction to enjoin the prosecution of an action of replevin in a state court against the trustee to recover property in his possession. *In re Russell*, (C. C. A. 1900) 101 Fed. 248.

*Where an attachment is dissolved by force of section 67c and f*, the attaching creditor and the officer levying the attachment cease to have any color of right to the possession of the property, and the Bankruptcy Court may order them to surrender it to the proper officer of that court. *In re Tune*, (1902) 115 Fed. 906. See also *Bear v. Chase*, (C. C. A. 1900) 99 Fed. 920; *In re Hammond*, (1899) 98 Fed. 845; *In re Kenney*, (1899) 97 Fed. 554; *In re Francis-Valentine Co.*, (C. C. A. 1899) 94 Fed. 793. *Contra, In re Franks*, (1899) 95 Fed. 635.

*Surrender of possession.*—Where the possession of property has been relinquished by the court of bankruptcy, or its duly authorized officer, the jurisdiction of the court thereover, as a general rule, ceases. *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, 14 Am. Bankr. Rep. 102; *Hinds v. Moore*, (C. C. A. 6th Cir. 1905) 134 Fed. 221, 14 Am. Bankr. Rep. 1, reversing (W. D. Tenn. 1904) 129 Fed. 922, 12 Am. Bankr. Rep. 136; *In re Berkowitz*, (E. D. Pa. 1906) 143 Fed. 598, 16 Am. Bankr. Rep. 251.

*Order of surrender improvidently granted.*—Where an *ex parte* order permitting a claimant of property in the possession of a bankrupt to sue the trustee in a state court to determine the claimant's right thereto was improvidently granted, the court, on being advised of all the facts, had power to vacate such order, and enjoin the claimant from proceeding further in the state court. *In re Schermerhorn*, (C. C. A. 8th Cir. 1906) 145 Fed. 341, 16 Am. Bankr. Rep. 507.

*Surrender as affected by subsequent possession.*—The vacation by a court of bankruptcy of its order enjoining any interference under process from a state court with certain property then in the possession of the receiver in bankruptcy cannot be deemed an abandonment by the court of bankruptcy of its possession of the property to be dealt with by the state court, where, in the meantime, there had been various dealings with the property by the Bankruptcy Court, including a sale by the trustee in bankruptcy. *Murphy v. John Hofman Co.*, (1909) 211 U. S. 562, 29 S. Ct. 154, 53 U. S. (L. ed.) 327, 21 Am. Bankr. Rep. 487.

*Unauthorized surrender by officer.*—The Bankruptcy Court may draw to itself the determination of all controversies over the property in its possession, and when it once lawfully attaches its jurisdiction cannot be destroyed or impaired by the unauthorized surrender of possession of the property by the officers of the court, or through a seizure thereof by an adverse claimant. *Whitney v. Wenman*, (1905) 198 U. S. 539, 25 S. Ct. 778, 49

U. S. (L. ed.) 1157, 14 Am. Bankr. Rep. 45; *In re Schermerhorn*, (C. C. A. 8th Cir. 1906) 145 Fed. 341, 16 Am. Bankr. Rep. 507.

**Possession of, or under, assignee for creditors.**—A court of bankruptcy has jurisdiction of a proceeding by a trustee to recover property from an assignee to whom it was conveyed by the bankrupt, for the benefit of creditors, within four months prior to the bankruptcy. *In re Stokes*, (E. D. Pa. 1901) 106 Fed. 312, 6 Am. Bankr. Rep. 262; *In re Knight*, (W. D. Ky. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 6; *O'Dell v. Boyden*, (C. C. A. 6th Cir. 1906) 150 Fed. 731, 10 Ann. Cas. 239, 17 Am. Bankr. Rep. 757; *In re Stewart*, (C. C. A. 6th Cir. 1910) 179 Fed. 222; *In re McCrum*, (C. C. A. 2d Cir. 1914) 214 Fed. 207.

**A purchaser from an assignee in insolvency** who holds the property under a general assignment, when the sale is made before a trustee has been appointed, but after and with knowledge of the filing of a petition in bankruptcy, has no title superior to that of the bankrupt's estate; but his equities in respect to the goods, or to the money that he has paid for them, may depend upon many circumstances, and can be settled in the District Court as a court of bankruptcy. *Bryan v. Bernheimer*, (1900) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, 5 Am. Bankr. Rep. 623.

**Court may require assignee to account.**—A court of bankruptcy has jurisdiction to require an accounting from an assignee for creditors of a bankrupt, under an assignment which constitutes an act of bankruptcy; and where he appears and submits his account and enters upon a hearing without objection, the court does not lose jurisdiction to require him to turn over property to the trustee because he asserts title to a part of such property in himself. *In re Thompson*, (C. C. A. 2d Cir. 1904) 128 Fed. 575, 11 Am. Bankr. Rep. 719; *In re McCrum*, (C. C. A. 2d Cir. 1914) 214 Fed. 207.

### III. JURISDICTION BY CONSENT.

**"Consent" defined.**—"Consent" as used in this section means consent to the tribunal in which the controversy is to be carried on and not to the mode of procedure, which is regulated by general principles of law unless other provision is made. *In re Raphael*, (C. C. A. 7th Cir. 1911) 192 Fed. 874.

The consent provided for was not intended to enlarge the jurisdiction of the Circuit (now District) Courts so as to give them a jurisdiction which they would not have because of diverse citizenship and a requisite amount in controversy or by reason of a cause of action arising under the Constitution or laws of the United States. *Lovell v. Newman*,

(1913) 227 U. S. 412, 33 S. Ct. 375, 57 U. S. (L. ed.) 577.

**Effect of consent.**—A court of bankruptcy may, under section 23b, acquire jurisdiction, by the consent of the defendant, for the purpose of suits brought by a trustee in bankruptcy in the performance of the duties imposed upon him under the statute. The necessary consent may be given by such acts or conduct of the parties as will give jurisdiction in other cases; and where jurisdiction has been obtained in this manner the court will proceed to determine all of the rights of the parties to the subject matter in controversy. *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, 5 Am. Bankr. Rep. 623; *In re Connolly*, (E. D. Pa. 1900) 100 Fed. 620, 3 Am. Bankr. Rep. 842; *In re Emrich*, (W. D. Pa. 1900) 101 Fed. 231, 4 Am. Bankr. Rep. 89; *In re Steuer*, (D. C. Mass. 1900) 104 Fed. 976, 5 Am. Bankr. Rep. 209; *In re Riker*, (S. D. N. Y. 1901) 107 Fed. 96, 5 Am. Bankr. Rep. 720; *Boonville Nat. Bank v. Blakey*, (C. C. A. 7th Cir. 1901) 107 Fed. 891, 6 Am. Bankr. Rep. 13; *Philips v. Turner*, (C. C. A. 5th Cir. 1902) 114 Fed. 726, 8 Am. Bankr. Rep. 171; *In re Durham*, (D. C. Md. 1902) 114 Fed. 750, 8 Am. Bankr. Rep. 115; *Stelling v. G. W. Jones Lumber Co.*, (C. C. A. 7th Cir. 1902) 116 Fed. 261, 8 Am. Bankr. Rep. 521; *Chauncey v. Dyke*, (C. C. A. 8th Cir. 1902) 119 Fed. 1, 3, 9 Am. Bankr. Rep. 444, modifying *In re Matthews*, (W. D. Ark. 1901) 109 Fed. 603, 6 Am. Bankr. Rep. 96; *Havens, etc., Co. v. Pierek*, (C. C. A. 7th Cir. 1903) 120 Fed. 244, 9 Am. Bankr. Rep. 569; *In re Antigo Screen Door Co.*, (C. C. A. 7th Cir. 1903) 123 Fed. 249, 10 Am. Bankr. Rep. 359; *In re Rochford*, (C. C. A. 8th Cir. 1903) 124 Fed. 182, 10 Am. Bankr. Rep. 608; *In re Hymes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477; *Ryttenberg v. Schefer*, (S. D. N. Y. 1904) 131 Fed. 313, 11 Am. Bankr. Rep. 652; *In re Kolin*, (C. C. A. 7th Cir. 1905) 134 Fed. 557, 13 Am. Bankr. Rep. 531; *In re Hadden Rodee Co.*, (E. D. Wis. 1904) 135 Fed. 886, 13 Am. Bankr. Rep. 604; *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Porterfield*, (N. D. W. Va. 1905) 138 Fed. 192, 15 Am. Bankr. Rep. 11; *In re Platteville Foundry, etc., Co.*, (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291; *In re Blake*, (C. C. A. 8th Cir. 1906) 150 Fed. 279, 17 Am. Bankr. Rep. 668; *Knapp, etc., Co. v. Drew*, (C. C. A. 8th Cir. 1908) 160 Fed. 413, 20 Am. Bankr. Rep. 355; *In re Elletson Co.*, (N. D. W. Va. 1909) 174 Fed. 859, 23 Am. Bankr. Rep. 530; *In re MacDougall*, (N. D. N. Y. 1909) 175 Fed. 400, 23 Am. Bankr. Rep. 762; *In re V. & M. Lumber Co.*, (N. D. Ala. 1910) 182 Fed. 231; *Sheppard v. Lincoln*, (S. D.

N. Y. 1910) 184 Fed. 182; *McEldowney v. Card*, (E. D. Tenn. 1911) 193 Fed. 475; *Le Master v. Spencer*, (C. C. A. 8th Cir. 1913) 203 Fed. 210.

A general appearance of a defendant, and the filing of a demurrer on grounds going to the merits, as well as to the jurisdiction of the court, waives an objection that the court is without jurisdiction of the defendant's person. *Knapp, etc., Co. v. Drew*, (C. C. A. 8th Cir. 1908) 160 Fed. 413, 20 Am. Bankr. Rep. 355; *Sheppard v. Lincoln*, (S. D. N. Y. 1910) 184 Fed. 182; *Detroit Trust Co. v. Pontiac Savings Bank*, (C. C. A. 6th Cir. 1912) 196 Fed. 29.

But where a general appearance had been entered by a defendant to a petition by a trustee in bankruptcy, it was held not equivalent to a consent to be sued in the Bankruptcy Court so as to prevent him from objecting to the court's jurisdiction on the filing of an amended petition, such amended petition stating for the first time a case authorizing relief against him. *In re Hemy-Hutchinson Pub. Co.*, (1900) 105 Fed. 909.

So also it has been held that an adverse claimant summoned into the Bankruptcy Court on a rule to show cause why the money or property in his hands shall not be surrendered for administration in bankruptcy does not consent to the jurisdiction by resisting the proceeding, where he objects to the jurisdiction before the entry of a final order against him. *Louisville Trust Co. v. Cominger*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413, affirming *Sinsheimer v. Simonson*, (C. C. A. 1901) 107 Fed. 898. To the same effect see *Marshall v. Knox*, (1872) 16 Wall. 551, 21 U. S. (L. ed.) 481; *Smith v. Belford*, (C. C. A. 1901) 106 Fed. 658; *In re Michie*, (1902) 116 Fed. 749.

When an adverse claimant voluntarily comes into a court of bankruptcy and claims property in the possession of the trustee, wherever situated, or asserts a lien thereon and seeks to have it established, enforced, or protected, the proceeding becomes a "proceeding in bankruptcy" in the course of collecting the estate, reducing the same to money, and distributing the same, and a "controversy" in relation to the estate within the jurisdiction of the Bankruptcy Court. *In re MacDougall*, (N. D. N. Y. 1909) 175 Fed. 400, 23 Am. Bankr. Rep. 762.

Where a bank submits to the jurisdiction of a Bankruptcy Court by asking that a chattel mortgage lien be sustained and its claims allowed out of the proceeds of property in the hands of the trustee, it consents that the issues raised by the petition and answer should be heard and determined by the Bankruptcy Court as a part of the proceedings in bankruptcy and cannot subsequently challenge the

jurisdiction. *In re Durham*, (1902) 114 Fed. 750.

**Presenting claims.**—Where a bank, claiming security under a deed of trust executed more than four months before the institution of bankruptcy proceedings, voluntarily submitted to the jurisdiction of the Bankruptcy Court by presenting its claim for adjudication, and the bankrupt's estate was wholly in the possession of the court, the referee has jurisdiction to adjudicate the validity of the deed in a summary proceeding. *In re Elletson Co.*, (N. D. W. Va. 1909) 174 Fed. 859, 23 Am. Bankr. Rep. 530.

**Consent does not validate unlawful procedure.**—Section 23b refers to consent to the tribunal in which the controversy is to be carried on, and not to the mode of procedure; and where that is unlawful, the appearance of the defendant, and his contesting the proceedings, do not confer jurisdiction. *Sinsheimer v. Simonson*, (C. C. A. 6th Cir. 1901) 107 Fed. 898, 5 Am. Bankr. Rep. 537.

**Matters disconnected with bankruptcy proceedings.**—A claimed indebtedness from one creditor of a bankrupt to another, growing out of transactions not connected with the bankruptcy proceedings, cannot be litigated in such proceedings or adjusted in the distribution of dividends. *In re Girard Glazed Kid Co.*, (E. D. Pa. 1905) 136 Fed. 511, 14 Am. Bankr. Rep. 485.

**Effect of objection to jurisdiction.**—The failure of adverse claimants to abandon their claims to property not in the possession of the receiver in bankruptcy, after their objections to the jurisdiction of a court of bankruptcy to act on the receiver's petition for directions respecting a sale have been overruled, does not amount to a waiver of their objections or a consent to an exercise of jurisdiction. *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, 14 Am. Bankr. Rep. 102.

An adverse claimant brought into a court of bankruptcy by citation and ordered to turn over property, and who before entry of final decree against him specially objects on the ground that the court is without jurisdiction, cannot be held to have consented to such jurisdiction. *In re Horgan*, (C. C. A. 1st Cir. 1907) 158 Fed. 774, 19 Am. Bankr. Rep. 857.

An assignee of a bankrupt cannot be deemed to have consented to the jurisdiction of the Bankruptcy Court because he participated in the proceedings before the referee, where he made formal protest to the exercise of such jurisdiction before the final order was entered. *Louisville Trust Co. v. Cominger*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413, 7 Am. Bankr. Rep. 421.

#### IV. RECOVERY OF PREFERENTIAL AND FRAUDULENT TRANSFERS.

**Jurisdiction to recover property fraudulently or preferentially transferred.**—Prior to the amendment of 1903, suits for the recovery of property fraudulently or preferentially transferred, in violation of the provisions of sections 60b, 67e, or 70e, in the absence of consent, could be brought only in the court wherein such action might have been prosecuted if bankruptcy proceedings had not been instituted. *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175; *Mitchell v. McClure*, (1900) 178 U. S. 539, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1182; *Hicks v. Knost*, (1900) 178 U. S. 541, 20 S. Ct. 1006, 44 U. S. (L. ed.) 1183; *Wall v. Cox*, (1901) 181 U. S. 244, 21 S. Ct. 642, 45 U. S. (L. ed.) 845; *Boonville Nat. Bank v. Blakey*, (C. C. A. 1901) 107 Fed. 891; *Perkins v. McCauley*, (1899) 98 Fed. 286; *Pickens v. Dent*, (C. C. A. 1901) 106 Fed. 653; *Camp v. Zellars*, (C. C. A. 1899) 94 Fed. 799; *Burnett v. Morris Mercantile Co.*, (1899) 91 Fed. 365. The foregoing decisions of the Supreme Court evidently overruled *Hall v. Kincell*, (C. C. A. 1900) 102 Fed. 301; *In re San Gabriel Sanatorium Co.*, (C. C. A. 1900) 102 Fed. 310, unless the latter can be sustained on another ground; *In re Baudouine*, (C. C. A. 1900) 101 Fed. 574; *Lehman v. Crosby*, (1900) 99 Fed. 542; *Norcross v. Nathan*, (1900) 99 Fed. 414; *Pepperdine v. Headley*, (1900) 98 Fed. 863; *Shutts v. Aurora First Nat. Bank*, (1899) 98 Fed. 705; *In re Woodbury*, (1900) 98 Fed. 833; *Louisville Trust Co. v. Marx*, (1899) 98 Fed. 456; *In re Newberry*, (1899) 97 Fed. 24; *Murray v. Beal*, (1899) 97 Fed. 567; *Robinson v. White*, (1899) 97 Fed. 33; *In re Crystal Spring Bottling Co.*, (1899) 96 Fed. 945; *Carter v. Hobbs*, (1899) 92 Fed. 594. For the purpose of remedying this, the Bankruptcy Law was amended in 1903 so as to permit suits for the recovery of fraudulent and preferential transfers, under sections 60b and 67e, in the court of bankruptcy, concurrently with the state court, without the consent of the defendant. *Gregory v. Atkinson*, (E. D. Mo. 1904) 127 Fed. 183, 11 Am. Bankr. Rep. 495; *Johnston v. Forsyth Mercantile Co.*, (S. D. Ga. 1904) 127 Fed. 845, 11 Am. Bankr. Rep. 669; *Horskins v. Sanderson*, (D. C. Vt. 1904) 132 Fed. 415, 13 Am. Bankr. Rep. 102; *Delta Nat. Bank v. Easterbrook*, (C. C. A. 5th Cir. 1904) 133 Fed. 521, 13 Am. Bankr. Rep. 338; *Lawrence v. Lowrie*, (M. D. Pa. 1903) 133 Fed. 995, 13 Am. Bankr. Rep. 297; *Parker v. Black*, (W. D. N. Y. 1906) 143 Fed. 560, 16 Am. Bankr. Rep. 202; *Horner-Gaylord Co. v. Miller*, (N. D. W. Va. 1906) 147 Fed. 295, 17 Am. Bankr. Rep. 257; *Bowman v.*

*Alpha Farms*, (N. D. N. Y. 1907) 153 Fed. 380, 18 Am. Bankr. Rep. 700; *Lynch v. Bronson*, (D. C. Conn. 1908) 160 Fed. 139, 20 Am. Bankr. Rep. 409; *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673; *Kraver v. Abrahams*, (E. D. Pa. 1913) 203 Fed. 782; *Off v. Hakes*, (C. C. A. 7th Cir. 1905) 15 Am. Bankr. Rep. 700. And see the cases cited to this effect under sections 60b and 67e.

*By the amendment of 1910*, section 70e was included; so that proceedings thereunder, for the recovery of property transferred in fraud of creditors, may now be had in the Bankruptcy Court, concurrently with the state court, without the consent of the adverse party. The amendment of 1903, however, did not specifically mention recovery under section 70e, and there was a conflict of authority as to whether recoveries under that section could be had in the Bankruptcy Court without the consent of the adverse party. The following cases sustain the view that consent was unnecessary: *Johnston v. Forsyth Mercantile Co.*, (S. D. Ga. 1904) 127 Fed. 845, 11 Am. Bankr. Rep. 669; *Hurley v. Devlin*, (D. C. Kan. 1906) 149 Fed. 268, 17 Am. Bankr. Rep. 793; *Parker v. Sherman*, (D. C. Vt. 1912) 195 Fed. 648. And see the annotation to this effect under section 70e.

But in many cases it was held that the amendment of 1903, because of the fact that section 70e was not specified therein, did not permit a recovery thereunder in the Bankruptcy Court without consent. *Gregory v. Atkinson*, (E. D. Mo. 1904) 127 Fed. 183, 185; *Skewis v. Barthell*, (N. D. Ia. 1907) 152 Fed. 534; *Hull v. Burr*, (5th Cir. 1907) 153 Fed. 945, 948, 950, 83 C. C. A. 61; *Palmer v. Roginsky*, (S. D. N. Y. 1910) 175 Fed. 883; *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913. See also the annotation under section 70e.

**Pleading and practice.**—A proceeding by a trustee in bankruptcy to set aside fraudulent conveyances or illegal preferences is not a proceeding in bankruptcy, but while ancillary to such proceedings and authorized by the Bankruptcy Act to be instituted in either the federal District Court or in a state court of competent jurisdiction, it must be governed, so far as pleading and practice are concerned, by the laws and rules of the court wherein it is instituted, and, where that is a federal court, such suits are in equity and are governed by the rules of pleading and practice in equity which obtain in such court independently of the state court. *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673.

**Appellate jurisdiction of Supreme Court.**—As to finality of decisions of the Circuit

Court of Appeals in suits by the trustee, so far as such suits can properly be termed "cases arising under the Bankruptcy Act," see Act of Jan. 28, 1915, § 4, *infra*, p. 833, following section 25a (3.)

#### V. SUMMARY AND PLENARY JURISDICTION.

**General principles controlling jurisdiction.**—There are two classes of cases arising under the Act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class a plenary suit must be brought, either in law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated. In the latter class it is not necessary to bring a plenary suit but the Bankruptcy Court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation. *In re Cantelo Mfg. Co.*, (D. C. Me. 1912) 201 Fed. 158.

And discussing the principles underlying jurisdiction, in the case of *In re Iron Clad Mfg. Co.*, (E. D. N. Y. 1912) 194 Fed. 906, the court said: "The whole line of cases seems to depend upon three principles. First, the property of a bankrupt, held by an agent or bailee without claim of title, can be administered by the court in the bankruptcy proceeding; second, if the property of a bankrupt has been fraudulently transferred to some other person, and can be traced into the hands of that other person, then in a summary proceeding, if the jurisdiction be consented to, or in spite of objection if the fraud be indisputable upon the record presented by the parties, the Bankruptcy Court may proceed to deal with the property as to which title did not pass by such fraudulent transfer; and, third, if upon the admitted situation of the parties it appears in a summary proceeding that an independent corporation or agent has property to which no title is claimed or which seems to fall within the class just defined, a restraining order, or, if necessary, a receivership with respect to that property may be ordered by the Bankruptcy Court to prevent irreparable injury, until the property over which the Bankruptcy Court does have jurisdiction can be located and disposed of."

**Necessity of plenary action.**—The rights of adverse claimants cannot be determined by summary proceedings; and

where it appears that such a claimant has lawfully obtained possession of property prior to the bankruptcy proceeding, or where his claim otherwise appears to be founded in good faith, and not merely frivolous or fictitious, and the property is not in possession of the Bankruptcy Court, either actually or constructively, it is well settled that a plenary suit is necessary in order to litigate such claimant's right. *In re Knickerbocker*, (W. D. N. Y. 1903) 121 Fed. 1004, 10 Am. Bankr. Rep. 381; *In re Teschmacher*, (E. D. Pa. 1904) 127 Fed. 728, 11 Am. Bankr. Rep. 547; *In re Scherber*, (D. C. Mass. 1904) 131 Fed. 121, 12 Am. Bankr. Rep. 616; *In re Kane*, (N. D. N. Y. 1904) 131 Fed. 386, 12 Am. Bankr. Rep. 444; *In re New York Car Wheel Works*, (W. D. N. Y. 1904) 132 Fed. 203, 13 Am. Bankr. Rep. 61; *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Mundle*, (S. D. N. Y. 1905) 139 Fed. 691, 14 Am. Bankr. Rep. 680; *In re Davis Tailoring Co.*, (D. C. N. J. 1906) 144 Fed. 285, 16 Am. Bankr. Rep. 486; *In re Bailey*, (E. D. N. Y. 1907) 156 Fed. 691, 19 Am. Bankr. Rep. 470; *In re Edwards*, (S. D. Ala. 1907) 156 Fed. 794, 19 Am. Bankr. Rep. 632; *In re Haley*, (C. C. A. 8th Cir. 1908) 158 Fed. 74, 19 Am. Bankr. Rep. 313; *In re Driggs*, (S. D. N. Y. 1909) 171 Fed. 897, 22 Am. Bankr. Rep. 621; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 998, 22 Am. Bankr. Rep. 863; *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 882, 23 Am. Bankr. Rep. 242; *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851; *In re Lineberry*, (N. D. Ala. 1910) 183 Fed. 338; *In re Pickens*, (N. D. Ga. 1911) 184 Fed. 954; *In re Glenn*, (E. D. Pa. 1911) 185 Fed. 554; *In re Tarbox*, (D. C. Mass. 1910) 185 Fed. 985; *In re Mimms*, (W. D. Ky. 1911) 193 Fed. 276; *In re Spalding Cotton Mills*, (N. D. Ga. 1912) 193 Fed. 554; *Johnston v. Spencer*, (C. C. A. 8th Cir. 1912) 195 Fed. 215; *In re Bacon*, (W. D. N. Y. 1912) 196 Fed. 986; *Bear Gulch Placer Mining Co. v. Walsh*, (D. C. Mont. 1912) 198 Fed. 351; *In re Carlile*, (D. C. N. C. 1912) 199 Fed. 612; *In re Boston-Cerrillos Mines Corporation*, (D. C. N. M. 1913) 206 Fed. 794; *Shea v. Lewis*, (C. C. A. 8th Cir. 1913) 206 Fed. 877; *In re Green*, (E. D. Pa. 1913) 207 Fed. 693; *In re Cotton*, (N. D. Cal. 1913) 209 Fed. 124.

*The mere fact that a person has been adjudged a bankrupt does not deprive other persons, owning or claiming purely legal rights to property claimed by the trustee, of having such rights adjudicated in the courts and by the procedure guaranteed to them by the Constitution.* *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851.

**Property in possession of bankrupt as agent.**—Where property in possession of a bankrupt, which passed into the hands of his receiver, is claimed by a third person, who alleges title by virtue of a bill of



sale, and that the bankrupt was in possession as his agent, both of which allegations are denied by the receiver, the court will not determine such issues of fact summarily on affidavits, but will retain the property in the hands of its receiver until the claimant has established his right in a plenary suit. *In re Mundle*, (S. D. N. Y. 1905) 139 Fed. 691, 14 Am. Bankr. Rep. 680.

So likewise, where a party in possession sets out in his answer facts, which if true, would constitute an adverse title, the court may not in a summary proceeding, and against his protest, dispose of his rights in the property. *In re Blum*, (C. C. A. 7th Cir. 1913) 202 Fed. 883.

*Suit against stockholder.*—A suit by the trustee of a bankrupt corporation to compel a stockholder to pay corporate debts because of her alleged participation in a fraudulent overvaluation of the corporation's assets in payment for stock, is not a case of a preferential or fraudulent transfer, but is a suit of a plenary nature, of which the Bankruptcy Court has no jurisdiction except by defendant's consent. *In re Haley*, (C. C. A. 8th Cir. 1908) 158 Fed. 74, 19 Am. Bankr. Rep. 313.

*Determination of title to land.*—The provisions of the Bankruptcy Law give no jurisdiction for the determination of a dispute as to a question of title to land on affidavits in the bankruptcy proceeding, unless the court in bankruptcy considers the transaction to have been so clearly the occasion of such fraudulent or dishonest action upon the part of the claimant, or his grantor, that no title could have passed or been acquired. *In re Bailey*, (E. D. N. Y. 1907) 156 Fed. 691, 19 Am. Bankr. Rep. 470.

*Nonresidents.*—The statute confers no power on a court of bankruptcy to summon before it, by a rule to show cause, third persons who are not parties to the record and who reside without the district and state, and are there served with the order; and under the general rules of law governing the federal courts, in the absence of express authority, such service is ineffectual to confer jurisdiction *in personam*. *In re Waukesha Water Co.*, (E. D. Wis. 1902) 116 Fed. 1009, 8 Am. Bankr. Rep. 715.

*Summary jurisdiction.*—Where an adverse claim is made and it has been determined to be without merit, or where the property claimed is in the actual possession of the court, the claim may be disposed of by summary proceedings. *Babbitt v. Dutcher*, (1910) 216 U. S. 102, 30 S. Ct. 372, 54 U. S. (L. ed.) 402, 17 Ann. Cas. 969; *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285; *In re Muncie Pulp Co.*, (C. C. A. 2d Cir. 1905) 139 Fed. 546, 14 Am. Bankr. Rep. 70; *In re Walsh*, (N. D. Ia. 1908) 163 Fed. 352, 21 Am. Bankr. Rep. 14; *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed.

385; *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913; *Shea v. Lewis*, (C. C. A. 8th Cir. 1913) 206 Fed. 877; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148.

Thus, it has been held that the District Court, sitting in bankruptcy, has jurisdiction to determine by summary proceedings, after a reasonable notice to claimants to present their claims to it, controversies between the trustee and adverse claimants over liens upon, and the title and possession of, (1) property in the possession of the bankrupt when the petition in bankruptcy is filed, (2) property held by third parties for him, (3) property lawfully seized by an officer, as the bankrupt's, under clause 3 of section 2 of the Bankruptcy Law, and (4) property claimed by the trustee which has been lawfully reduced to actual possession by the officers of the court. Such controversies are controversies in proceedings in bankruptcy under section 2; and they are not controversies at law or in equity as distinguished from proceedings in bankruptcy within the meaning of section 23. *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385.

And in *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285, it was said that the collection and distribution of the assets of the bankrupt estate in a sense involves the administration of a trust. The court to which the administration is confided has the inherent power, apart from the special jurisdiction conferred by the Bankrupt Law, if need be, on its own motion, to punish mere intermeddlers by summary process. It can make no difference that the jurisdiction is invoked by the trustee, the receiver, or the bankrupt himself, so long as the person against whom the power of the court is invoked is a mere intermeddler, or one who claims to hold or take possession under a claim which in law is purely colorable. Such proceedings are not "suits" in the ordinary meaning of the term, nor in the sense in which the word is used in subdivision b of section 23. They come, rather, under subdivision 15 of section 2, which empowers the court to make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the Act. Each case of this kind, of course, must depend upon its own facts.

*Test of summary jurisdiction.*—Under the decisions of the Circuit Courts of Appeal and the Supreme Court of the United States, the test of jurisdiction to proceed in a summary way or by a summary proceeding to determine controversies in regard to real or personal property is possession of such property in or by the bankrupt at the time of the filing of the petition and adjudication. Of course, mere possession is not enough. The finding must be and the facts must warrant the

finding that the bankrupt was the true owner, and that he held as owner. *In re Logan*, (N. D. N. Y. 1912) 106 Fed. 678.

Where the claimant has acquired possession of the property prior to the bankruptcy, and claims the right to hold it as against the bankrupt or the trustee, then the authority of the referee, and of the court of bankruptcy in summary proceedings, is limited to determining whether the claim made is colorable merely, or is in fact adverse to the bankrupt, and according as it determines that question will it deny or retain jurisdiction of the controversy. *In re Walsh*, (N. D. Ia. 1908) 163 Fed. 352, 21 Am. Bankr. Rep. 14, relying on *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *Louisville Trust Co. v. Cominger*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413.

But where the evidence shows without conflict that the sale and delivery of goods upon which claim is founded occurred after the filing of the bankruptcy proceeding, and that at the time of filing the possession of the goods was with the bankrupt through his bailee, a summary petition in bankruptcy for an order to restore the property or proceeds thereof to the trustee is the appropriate proceeding. *In re Denson*, (N. D. Ala. 1912) 195 Fed. 854.

And likewise where a bankrupt pays a debt with money taken from his assets, after the filing of the petition in bankruptcy, the court is not only justified in dealing with it in a summary proceeding, but in order that the estate may be speedily and economically settled, it should do so. *In re R. & W. Skirt Co.*, (C. C. A. 2d Cir. 1915) 222 Fed. 256.

Where title to property rests on statement of law.—While there is no power in the court by summary order to divest a third party of any title (even a fraudulent one) asserted by him against the bankrupt or his trustee, nevertheless this does not prevent the entry of a summary order where the only title set up rests not upon any matter of fact, but upon a statement of law, as where a party seeks to retain property in possession, not because he has title thereto but on the ground of a counterclaim or set-off. *In re Michaelis*, (S. D. N. Y. 1912) 196 Fed. 718.

But in the case of *In re Boston-Cerrillos Mines Corporation*, (D. C. N. M. 1913) 206 Fed. 794, wherein it appeared that a bank held money belonging to the bankrupt and it was being held by the bank upon a claim of set-off, apparently *bona fide*, proceeding upon the claim by the bank that the bankrupt had converted to its own use, certain property of which the bank was the real owner and it was therefore entitled to a set-off to the extent of the value of such property, and where this contention by the bank was revealed by the plaintiff's own pleading, the court held that it presented a case of an adverse claim and consequently a matter which

could not be reached by summary order, but must be prosecuted by a plenary suit in the court of proper jurisdiction.

Summary proceeding by way of injunction—*Garnishee judgment*.—The District Court has jurisdiction, by way of injunction, to enjoin the collection of a garnishee judgment against a debtor of the bankrupt. The rights of a garnishing creditor are no greater than those of an attaching creditor, and as the rights of the latter are voided by a bankruptcy proceeding, the same must be true of those of the former. *In re Ransford*, (C. C. A. 8th Cir. 1912) 194 Fed. 658.

Practice.—The court may adjudicate controversies arising in bankruptcy proceedings summarily, without subpoena, summons, pleadings or evidence, according to the principles, rules and practice in actions at law and suits in equity. *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913.

Appellate jurisdiction of Supreme Court.—As to finality of decisions of the Circuit Court of Appeals "in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceedings," see Act of Jan. 28, 1915, § 4. *infra*, p. 833, following section 25a (3).

#### VI. JURISDICTION OF STATE COURTS.

Jurisdiction of state courts.—In all controversies between the trustee of the bankrupt's estate, and a stranger or third parties, as to the title and ownership of property alleged to belong to the estate of the bankrupt, the jurisdiction of the state courts is expressly preserved; and the trustee is relegated to such courts for the determination of his rights when the bankrupt himself should or could have litigated them therein, excepting as to proceedings under sections 606, 67e, and 70e, unless the consent of the defendant has been obtained as required by the statute. *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175; *Heath v. Shaffer*, (N. D. Ia. 1899) 93 Fed. 647, 2 Am. Bankr. Rep. 98; *Robinson v. White*, (D. C. Ind. 1899) 97 Fed. 33, 3 Am. Bankr. Rep. 88; *Cox v. Wall*, (1900) 99 Fed. 546; *In re Nixon*, (D. C. Mont. 1901) 110 Fed. 633, 6 Am. Bankr. Rep. 693; *Pond v. New York Nat. Exch. Bank*, (S. D. N. Y. 1903) 124 Fed. 992, 10 Am. Bankr. Rep. 343; *Lawrence v. Lowrie*, (M. D. Pa. 1903) 133 Fed. 995, 13 Am. Bankr. Rep. 297; *French v. R. P. Smith, etc., Co.*, (Minn. 1900) 4 Am. Bankr. Rep. 785; *Lyon v. Clark*, (1900) 124 Mich. 100, 82 N. W. 1058, 83 N. W. 694; *Sheldon v. Parker*, (1902) 11 Am. Bankr. Rep. 152, 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015; *Bindseil v. Cashion*, (1900) 60 N. J. Eq. 116, 45 Atl. 697; *Jones v. Schermerhorn*, (1900) 53 App. Div. 494, 65 N. Y. S. 999; *Small v. Muller*, (1901) 67 App. Div. 143, 73 N. Y. S. 667; *Nye v. Hart*, (1901) 12 Ohio Cir. Dec. 419; *Breckons v. Snyder*, (1905) 15 Am.

Bankr. Rep. 112, 211 Pa. St. 176, 60 Atl. 575. And see the annotation under section 11a, as to stay of suits pending in state courts.

**Property in lawful possession of state court.**—If the property claimed was in the lawful possession of the state court at the time the petition in bankruptcy was filed, and its possession has not been affected by the provisions of sections 60b, 67c, or 70c, pertaining to preferential and fraudulent transfers, such possession will draw to the state court jurisdiction over the *res*. *Frank v. Vollkommer*, (1907) 205 U. S. 521, 27 S. Ct. 596, 51 U. S. (L. ed.) 911, 17 Am. Bankr. Rep. 806; *In re Heckman*, (9th Cir. 1905) 140 Fed. 859, 72 C. C. A. 8, 15 Am. Bankr. Rep. 500; *In re Kane*, (E. D. Pa. 1907) 152 Fed. 587, 18 Am. Bankr. Rep. 654; *In re Rathman*, (C. C. A. 8th Cir. 1910) 183 Fed. 913. See also *Southern Loan, etc., Co. v. Benbow*, (D. C. W. D. N. C. 1899) 96 Fed. 514.

**Conflict of jurisdiction.**—In *Hooks v. Aldridge*, (C. C. A. 5th Cir. 1906) 145 Fed. 865, 16 Am. Bankr. Rep. 658, it was said that while it is unquestionable that the federal courts are the final arbiters to settle questions arising under the bankruptcy laws, there are questions relating to comity and procedure, in the event of conflict of opinion between the state courts and the bankruptcy courts as to the possession of the bankrupt's assets, which remain unsettled by decision of the Supreme Court. Whether the Bankruptcy Court should make such orders as will preserve the estate, and await the final result of the litigation in the state court, or should act on its own opinion of the want of jurisdiction of the state court, and enforce its order to secure the possession of the property, is one of the questions left unsettled. At a proper time the federal courts, of course, may decree the enforcement of the supremacy of the Constitution and laws of the United States, for it is an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. (*Ex p. Siebold*, (1879) 100 U. S. 371, 395, 25 U. S. (L. ed.) 717.) But it is, without doubt, the duty of both the state and federal courts to exercise the greatest caution

to avoid this necessity where it is possible.

**Enjoining proceedings in state courts.**—Courts of bankruptcy will not, by either summary or plenary process, stop the proceedings of a state court in a suit in which it had, before the institution of bankruptcy proceedings, obtained possession of the subject matter and jurisdiction of the parties. *In re Seebold*, (C. C. A. 1901) 105 Fed. 914. See also *In re Gerdes*, (1900) 102 Fed. 318; *In re Shoemaker*, (1902) 112 Fed. 648; *In re Lesser*, (1900) 100 Fed. 433; *Frazier v. Southern L. & T. Co.*, (C. C. A. 1900) 99 Fed. 707; *Heath v. Shaffer*, (1899) 93 Fed. 647; *In re Price*, (1899) 92 Fed. 987.

**Formal proceedings necessary to oust possession of officer of state court.**—A court of the United States will not dispossess the receiver or other officers of a state court by any summary order or process, or otherwise than by formal proceedings taken by its own receiver or trustee for that purpose. *Ross-Meehan Foundry Co. v. Southern Car, etc., Co.*, (W. D. Tenn. 1903) 124 Fed. 403, 10 Am. Bankr. Rep. 624.

**Trustee should apply to state court for order.**—Where property belonging to the estate of a bankrupt is in the custody and possession of a receiver appointed by a state court, the trustee in bankruptcy should apply to the state court for an order directing the receiver to turn over the property to him. *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 758.

**An action by a trustee to recover funds formerly belonging to the bankrupt**, which is brought, not as a suit to avoid a transfer by the bankrupt of his property but as a suit against wrongdoers who have appropriated it without the bankrupt's assent, is not within this section. *Park v. Cameron*, (1915) 237 U. S. 616, 35 S. Ct. 719, 59 U. S. (L. ed.) 1147.

**Suit against trustee to enforce homestead exemption.**—The Bankruptcy Court has no jurisdiction over a suit against the trustee by the wife of a bankrupt for a homestead right in her husband's property; except by consent, such a suit can be prosecuted only in the state court. *In re Tollett*, (1900) 105 Fed. 425.

As to the jurisdiction of suits against the trustee, see annotations to section 23a.

**c [Concurrent jurisdiction.]** The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act. [(1898) 30 Stat. L. 553.]

As to offenses generally, see the several subdivisions of section 29.

The Circuit Court was abolished by section 289 of the Judicial Code (in title JUDICIARY), which became effective Jan. 1, 1912. See the annotation under section 23a; and see the title JUDICIARY.

**Not applicable to civil actions.**—Section 23c has no application to civil actions; the words "offenses enumerated" meaning the crimes described in section 29. *Goodier v. Barnes*, (N. D. N. Y. 1899) 94 Fed. 798, 2 Am. Bankr. Rep. 328.

**SEC. 24. JURISDICTION OF APPELLATE COURTS.—a [Supreme court — circuit courts of appeals — territorial courts.]** The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia. [(1898) 30 Stat. L. 553.]

The provisions of this subdivision, as far as they relate to the Supreme Court, are re-enacted in Judicial Code, section 252, title JUDICIARY, and the provisions as far as they relate to the Circuit Court of Appeals are recognized and confirmed in Judicial Code, section 130, title JUDICIARY.

**Jurisdiction of Supreme Court.**—Decisions of Circuit Courts of Appeals in controversies arising in bankruptcy proceedings are not reviewable on appeal or writ of error by the Supreme Court. Act of Jan. 28, 1915, ch. 22, § 4, *infra*, p. 833, following section 25a (3).

- I. Relation of section 24a to Circuit Court of Appeals Act and other provisions, 774.
- II. Controversies arising in bankruptcy proceedings, 776.
- III. Review by United States Supreme Court direct from United States District Court, 785.
- IV. Review by United States Supreme Court of decisions of Circuit Courts of Appeals, 788.
- V. Bankruptcy Courts not within organized circuit, 790.

**I. RELATION OF SECTION 24a TO CIRCUIT COURT OF APPEALS ACT AND OTHER PROVISIONS.**

The fact of paramount importance in respect of section 24a is that the appellate jurisdiction of the Circuit Court of Appeals and of the United States Supreme Court in "controversies arising," etc., in the District Courts of the United States in the several states, as distinguished from "proceedings" in bankruptcy mentioned in sections 23a, 24b, 25a and 25b (when the latter was in force), is the same as in the cases under the Circuit Court of Appeals Act of 1891, which prescribes in section 5 the appellate jurisdiction of the Supreme Court direct from the District Courts, and in section 6 the appellate jurisdiction of the Circuit Court of Appeals from the District Courts and of the Supreme Court from the Circuit Court of Appeals. 3 R. C. L. 347; *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412, 54 U. S. (L. ed.) 610. To the same point see *Houghton v. Burden*, (1913) 228 U. S. 161, 33 S. Ct. 491, 57 U. S. (L. ed.) 780, and cases cited in division IV of this note. Section 5 of the Circuit Court of Appeals Act is now Judicial Code, sec. 238; and section 6 of that act is now, as far as

important here, Judicial Code, sec. 128. For the entire Judicial Code, see title JUDICIARY in this work.

"The appellate jurisdiction is under or is the same as that under the Court of Appeals Act." *Thomas v. Sugarman*, (1910) 218 U. S. 129, 30 S. Ct. 650, 54 U. S. (L. ed.) 967, 29 L. R. A. (N. S.) 250.

Thus, "the Circuit Courts of Appeals are invested by section 24a of the Bankruptcy Act, with the same appellate jurisdiction that they possess in other cases under the Judicial Code, sec. 128." *Moody v. Century Sav. Bank*, (1915) 239 U. S. 374, 36 S. Ct. 111.

"*Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986, is an illustration of a controversy arising in bankruptcy proceedings (section 24a) wherein the appeal is under section 6 of the Act of March 3, 1891 [the Circuit Court of Appeals Act] . . . This court, speaking through the Chief Justice, held that the case presented a controversy arising in bankruptcy proceedings appealable to the courts of appeal as other cases under section 6 of the Act of March 3, 1891 [the Circuit Court of Appeals Act]." *Per Mr. Justice Day in Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008.

"Our jurisdiction of this appeal depends on the Act of March 3, 1891," etc. *Denver First Nat. Bank v. Klug*, (1902) 180 U. S. 202, 22 S. Ct. 899, 46 U. S. (L. ed.) 1127.

"Section 24a gives, if the grant be necessary in view of section 6 of the Act of March 3, 1891, c. 517, 26 Stat. L. 828 [Circuit Court of Appeals Act] this court appellate jurisdiction of controversies at law and in equity between trustees and adverse claimants, to be invoked by writ of

error or by appeal, as may be appropriate." *In re Friend*, (1905) 134 Fed. 778, 87 C. C. A. 500.

In *Dodge v. Norlin*, (1904 8th Cir.) 133 Fed. 363, 66 C. C. A. 425, the court said: "The purpose of Congress in the enactment of the Judiciary Act of 1891 [Circuit Court of Appeals Act], and the effect accomplished by that law, were to provide an opportunity for a review either in the Supreme Court or in the Circuit Court of Appeals of the final decisions by the Circuit Courts and by the District Courts of all the controversies which they might determine. It was not, in our opinion, the purpose of Congress to strike down any portion of this grant or to impair in any way the appellate jurisdiction thus given by the enactment of the Bankruptcy Law. On the other hand, the provisions of the Bankrupt Act clearly show that it intended thereby to preserve this jurisdiction over the controversies to which it had already attached in other cases, and to supplement it with the grant of authority to review the decisions of controversies which had not theretofore been within that jurisdiction. Before the passage of the Bankrupt Act the Courts of Appeals had appellate jurisdiction of controversies arising in the federal courts over the title to and liens upon the property of insolvents who might become bankrupts. Congress provided by section 24a that the Courts of Appeals should still have jurisdiction over those controversies when they arose in bankruptcy proceedings. By section 25a it granted to the Courts of Appeals additional jurisdiction which before the enactment of the Bankrupt Law they could not exercise, and provided a different time within which this jurisdiction might be invoked, to the end that the proceedings in bankruptcy might not be unduly delayed. But there is nothing in the provisions of section 25a which excludes, revokes, or diminishes the general appellate jurisdiction granted by the previous section over controversies within the jurisdiction of the Courts of Appeals before the Bankruptcy Law was passed. The extent of its effect is to grant some additional jurisdiction, and to restrict to ten days the time within which the jurisdiction of the Court of Appeals may be invoked in the three classes of cases there specified. Nor is there anything in the grant by section 24b of the power to revise and superintend in matter of law the proceedings of the inferior courts of bankruptcy which in any way affects or limits the general appellate jurisdiction vested by the sections of the law which have been considered. The Act of 1898 does not grant the appellate and the revisory jurisdiction in the alternative. It does not give to disappointed litigants the right of appeal or the right of revision in matter of law. It grants

the right of appeal and the right of superintendence and revision in matter of law only. It gives both rights freely and without limitation. The two grants are not inconsistent, and on familiar principles both must stand, and in a proper case either may be invoked. \* \* \* The late decision of the Supreme Court in *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 691, 48 U. S. (L. ed.) 986, as we understand it, is an adjudication of this question in accord with these views."

One important consequence of the fact above stated is that the appellate procedure in appeals under section 24a from the District Court to the Circuit Court of Appeals or Supreme Court — in respect of time for appeal, the record on appeal, etc. — is the same as that which governs appeals under the Circuit Court of Appeals Act, above mentioned, and not the procedure under sections 25a and 25b (while the latter was in force). *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591; *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008; *Martin v. Globe Bank, etc., Co. of Paducah*, (1912) 201 Fed. 31, 119 C. C. A. 363, decree affirmed (1915) 236 U. S. 288, 35 S. Ct. 377, 59 U. S. (L. ed.) 583.

*Interlocutory decree awarding or dissolving injunction.*—Questions of appellate jurisdiction under section 24a usually involve the provisions only of sections 5 and 6 of the Circuit Court of Appeals Act, above mentioned, but under section 7 of the latter act, prior to its amendment in 1906 — it was finally superseded by Judicial Code, sec. 129 — it was held that an interlocutory decree of the District Court, exercising jurisdiction as a Bankruptcy Court, awarding an injunction, was appealable to the Circuit Court of Appeals if this court would have jurisdiction of an appeal taken from a final decree in the cause, even though the jurisdiction of the District Court was involved; but that if the injunction was allowed in a case of a character subject only to review in matters of law under section 24b of the Bankruptcy Act, the only remedy was by petition for review seasonably filed. *O'Dell v. Boyden*, (1906) 150 Fed. 731, 80 C. C. A. 397, 10 Ann. Cas. 239. Whether the altered reading of section 7 in Judicial Code, sec. 129, would in any way affect the ruling in that case is doubtful; for in *Bothwell v. Fitzgerald*, (1915) 219 Fed. 408, it was held that an order dissolving an interlocutory injunction restraining parties from maintaining proceedings in a state court for the appointment of a receiver, with authority to reconstruct a portion of the bankrupt's irrigation system, in order to afford water

to the complainants' premises, was a controversy appealable under section 24a of the Bankruptcy Act and section 129 of the Judicial Code, and not reviewable on petition for revision under section 24b.

In *Mitchell Store Bldg. Co. v. Carroll*, (1914) 232 U. S. 379, 34 S. Ct. 410, 58 U. S. (L. ed.) 650, a case arising since the enactment of Judicial Code, § 129, above cited, an appeal was taken to the Circuit Court of Appeals from a decree of the District Court in bankruptcy granting a temporary injunction, upon the petition of the trustee restraining a party from prosecuting in a state court a suit affecting the bankrupt estate. It was held that a decree of affirmance by the Circuit Court of Appeals was not appealable to the Supreme Court, since no provision is made in Judicial Code, § 129, or in any other place, for a further appeal concerning such interlocutory orders.

"A like jurisdiction," etc., which the federal Supreme Court is authorized to exercise in the last sentence of section 24a means not only appellate jurisdiction in respect of "controversies arising," etc., as distinguished from "proceedings" in bankruptcy (*Tefft v. Munsuri*, (1911) 222 U. S. 114, 32 S. Ct. 67, 56 U. S. (L. ed.) 118), but from courts from which it has "appellate jurisdiction in other cases," as expressed in the preceding part of the section; and since the provision in section 5 of the Circuit Court of Appeals Act, re-enacted in Judicial Code, sec. 238 (in title JUDICIARY), for appeals on the sole question of jurisdiction, did not extend to the District Court of the United States for Porto Rico, the federal Supreme Court could not exercise that character of appellate jurisdiction over the said court in Porto Rico. This seems to have been the ruling in *Munsuri v. Fricker*, (1911) 222 U. S. 121, 32 S. Ct. 70, 56 U. S. (L. ed.) 121. Since that decision was rendered section 238 of the Judicial Code (in title JUDICIARY) has been amended so as to include the United States District Court for Porto Rico by the Act of Jan. 28, 1915, ch. 22, sec. 2, 38 Stat. L. 804.

**Courts within organized circuit.**—*Alaska* is in the 9th judicial circuit. See Judicial Code, sec. 134, in title JUDICIARY.

As to appellate jurisdiction of the Circuit Court of Appeals for the 9th circuit over the District Court for the district of Alaska, see Judicial Code, secs. 134, 135, in title JUDICIARY.

As to appellate jurisdiction of the United States Supreme Court over the District Court for the district of Alaska see Judicial Code, sec. 247, in title JUDICIARY.

*Hawaii* is in the 9th judicial circuit. See Judicial Code, sec. 116, in title JUDICIARY. See also Judicial Code, sec. 128, in title JUDICIARY.

As to appellate jurisdiction of the United States Supreme Court from the United States District Court for Hawaii see Judicial Code, sec. 238, in title JUDICIARY; and as to its appellate jurisdiction from the Supreme Court of Hawaii see Judicial Code, sec. 246, in title JUDICIARY; and as to its appellate jurisdiction from the Supreme Court of Porto Rico, see Act of Jan. 28, 1915, secs. 2, 3, 38 Stat. L. 804, amending Judicial Code, sec. 246, title JUDICIARY, and repealing Judicial Code, sec. 244, title JUDICIARY.

**Courts not within organized circuit**, see division V, *infra*, this note.

## II. CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS.

**In general.**—"This section has been the subject of adjudication in this court in a number of cases, and it is held that controversies in bankruptcy proceedings, as the terms are therein used, do not mean mere steps in proceedings in bankruptcy, but embrace controversies which are not of that inherent character, although arising in the course of proceedings in bankruptcy." *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986; *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008; *Tefft v. Munsuri*, (1911) 222 U. S. 114, 32 S. Ct. 67, 56 U. S. (L. ed.) 118." *James v. Stone*, (1913) 227 U. S. 410, 33 S. Ct. 351, 57 U. S. (L. ed.) 573.

This section "relates to controversies arising in bankruptcy proceedings in the exercise by the Bankruptcy Courts of the jurisdiction vested in them at law and in equity by section 2, to settle the estates of bankrupts, and to determine controversies in relation thereto." *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179." *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986.

There is a clear line of demarcation between "proceedings in bankruptcy" and "a controversy arising in the course of bankruptcy proceedings." In the former class jurisdiction to review attaches under section 24b or 25a as might be appropriate to the particular proceeding in bankruptcy; in the latter class jurisdiction can be invoked only under section 24a. In *re Breyer Printing Co.*, (C. C. A. 7th Cir. 1914) 216 Fed. 878, wherein the court made the distinction as follows: "'Proceedings in bankruptcy' cover questions between the alleged bankrupt or the receiver or trustee of the bankrupt estate, on the one hand, and the general creditors, as such, on the other, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointment of receivers and trustees,

as well as examinations, exemptions, allowance and disallowance of claims, and the like, all of which naturally occur in the settlement of the estate. 'Controversies at law and in equity arising in the course of bankruptcy proceedings' involve questions between the receiver or trustee representing the bankrupt and his general creditors, as such, on the one hand, and adverse claimants on the other, concerning property in the possession of the receiver or trustee or of the claimants, to be litigated in appropriate plenary suits, and not affecting directly administrative orders and judgments, but only the extent of the estate to be distributed ultimately among general creditors."

Where a "controversy" is of such a character that, if it had arisen in a federal court when it was not sitting in bankruptcy, the final decision of it would have been reviewable in the Circuit Court of Appeals, by writ of error or appeal, it is consequently reviewable on appeal or writ of error under section 24a. *Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363.

Appealable "controversies," etc., under section 24a "by judicial definition are limited to cases of the class referred to in section 23." *Thompson v. Mauzy*, (C. C. A. 4th Cir. 1909) 174 Fed. 611, 614.

The phrase "controversy in bankruptcy," as used in the Bankruptcy Act, must be limited to cases where third parties claim not in and under the administration of the bankrupt's estate in bankruptcy, but on the contrary assert some right hostile to the title of the trustee or going to the right of the court to administer the particular estate in the bankruptcy case. *Snow v. Dalton*, (C. C. A. 4th Cir. 1913) 203 Fed. 843.

Where the order and judgment complained of results from a consideration of disputed facts and depends upon the findings made thereon the proper remedy is an appeal under this section and not a petition to revise under section 24b. *Wells v. Sharp*, (C. C. A. 8th Cir. 1913) 208 Fed. 399.

Under this section the Circuit Court of Appeals has appellate jurisdiction over the District Courts, sitting in bankruptcy, wherever there is a controversy of a character justiciable in other courts; and where the subject matter involved in a decision was not in any way peculiar to bankruptcy, and is governed entirely by the principles of the common law and the rules of equity, an appeal is allowable. *Burleigh v. Foreman*, (1st Cir. 1903) 125 Fed. 217, 60 C. C. A. 109; *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 690.

**Exclusiveness of section 24a.**—Decisions reviewable on petition to revise under section 24b or on appeal under sections 25a or 25b (while the latter was in force), are regarded as made in "pro-

ceedings" in bankruptcy, and are not "controversies" reviewable under section 24a. *Lazarus v. Prentice*, (1914) 234 U. S. 263, 34 S. Ct. 851, 58 U. S. (L. ed.) 1305; *James v. Stone*, (1913) 227 U. S. 410, 33 S. Ct. 351, 57 U. S. (L. ed.) 573; *In re Loving*, (1912) 224 U. S. 183, 32 S. Ct. 446, 56 U. S. (L. ed.) 725; *Tefft v. Munsuri*, (1911) 222 U. S. 114, 32 S. Ct. 67, 56 U. S. (L. ed.) 118; *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008; *In re Mueller*, (1905) 135 Fed. 711, 68 C. C. A. 349; *Bothwell v. Fitzgerald*, (1915, 9th Cir.) 219 Fed. 408, 135 C. C. A. 212.

See also the first paragraphs in the note to section 24b, and in the first note to section 25a preceding clause (1).

Thus, each of the three classes of appealable judgments specified in sections 25a and 25b (while the latter was in force) is a judgment in a proceeding in bankruptcy as distinguished from a judgment in a controversy arising in bankruptcy proceedings. *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008, where the court said: "Section 25 of the Act provides for appeals in bankruptcy proceedings . . . in three classes of cases." And in the same case the court recognizes and accentuates "a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings."

*The mere allowance or disallowance of a claim in bankruptcy* is a proceeding in bankruptcy and not a controversy arising in bankruptcy within the intentment of the section. *Tefft v. Munsuri*, (1911) 222 U. S. 114, 32 S. Ct. 67, 56 U. S. (L. ed.) 118, followed in *Munsuri v. Fricker*, (1911) 222 U. S. 121, 32 S. Ct. 70, 56 U. S. (L. ed.) 121.

**Sections 24b and 24a contrasted.**—The distinction between "proceedings in bankruptcy" reviewable under section 24b and the "controversies arising in bankruptcy proceedings," appealable under section 24a, is clearly defined; the former including "administrative orders and decrees in the ordinary course of bankruptcy between the filing of the petition and the final settlement of the estate," and the latter including "those independent or plenary suits which concern the bankrupt's estate, and arise by intervention or otherwise between the trustees representing the bankrupt's estate and claimants representing some right or interest adverse to the bankrupt or his general creditors." The remedies afforded by the two subsections referred to are mutually exclusive. *Barnes v. Pampel*, (C. C. A. 6th Cir. 1912) 192 Fed. 525.

*The mode of appeal in a given case* depends upon the character of the proceeding. And the question to be solved in such cases is, Does the case present a

proceeding in a bankruptcy or is it a controversy arising in bankruptcy proceedings?" *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008.

**Judgment erroneous but not void.**—A judgment on an appeal determining in favor of the appeal "that somewhat cloudy question" whether a petition for revision is or is not the sole appellate remedy, is not void even though it be erroneous, and it cannot be vacated as a nullity at a subsequent term of court. *Loeser v. Savings Deposit Bank, etc., Co.*, (C. C. A. 6th Cir. 1908) 163 Fed. 212.

**Decisions held appealable.**—In *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008, it was said: "Questions of the jurisdiction in bankruptcy particularly of the appellate courts, have given rise to numerous and not altogether reconcilable decisions."

In the following cases decisions were expressly or impliedly held to be appealable to the Circuit Court of Appeals under section 24a:

A contest over the distribution of a fund in the hands of a trustee resulting from a lien preserved for the estate. *Globe Bank, etc., Co. of Paducah v. Martin*, (1915) 236 U. S. 288, 35 S. Ct. 377, 59 U. S. (L. ed.) 583.

Injunction proceedings by a trustee in bankruptcy to restrain a landlord of the bankrupt from prosecuting a suit for rent in a state court. *Mitchell Store Bldg. Co. v. Carroll*, (1914) 232 U. S. 379, 34 S. Ct. 410, 58 U. S. (L. ed.) 650.

A decree in favor of an intervening claimant of property in the hands of the trustee, upon the ground that the property had been lawfully pledged to the intervener by the bankrupt. *Taney v. Penn. Nat. Bank*, (1914) 232 U. S. 174, 34 S. Ct. 288, 58 U. S. (L. ed.) 558.

A decree on a petition for leave to remove certain property on the premises of the bankrupt, holding invalid as against the trustee in bankruptcy the lien of a conditional vendor under an unregistered contract of sale. *Holt v. Henley*, (1914) 232 U. S. 637, 34 S. Ct. 459, 58 U. S. (L. ed.) 767.

A decree in favor of the claim of an assignee of the bankrupt's accounts, to have paid over to him the proceeds of such accounts collected by the trustee. *Greer v. Dockendorff*, (1913) 231 U. S. 513, 34 S. Ct. 166, 58 U. S. (L. ed.) 339, holding the contention that the decree was not appealable "to be answered sufficiently by *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412, 54 U. S. (L. ed.) 610."

A decree dismissing a petition of the trustee in bankruptcy to prevent the enforcement in a state court of a lien for labor and materials. *Hobbs v. Head, etc.*,

*Co.*, (1914) 231 U. S. 692, 34 S. Ct. 253, 58 U. S. (L. ed.) 440, *affirming* (1911) 184 Fed. 409, 106 C. C. A. 519, (1911) 185 Fed. 1006, 107 C. C. A. 663.

A decree against a claimant of certain shares of stock found in the possession of the bankrupt firm of stock brokers, and holding that the same were assets of the bankrupt estate. *Gorman v. Littlefield*, (1913) 229 U. S. 19, 33 S. Ct. 690, 57 U. S. (L. ed.) 1047.

A decree dismissing a petition in intervention in bankruptcy proceedings of a secured creditor for the purpose of asserting a title or claim to property in the possession of the bankrupt's trustee. *Houghton v. Burden*, (1913) 228 U. S. 161, 33 S. Ct. 491, 57 U. S. (L. ed.) 780, holding that the Circuit Court of Appeals had jurisdiction of the appeal, and that the law and the facts thereon were open for reconsideration.

A decree enjoining a party from prosecuting a suit against the trustee in a state court. *Hebert v. Crawford*, (1913) 228 U. S. 204, 33 S. Ct. 484, 57 U. S. (L. ed.) 800.

A decree on a bill in equity by a trustee in bankruptcy to set aside a fraudulent conveyance by the bankrupt. *Thomas v. Sugarman*, (1910) 218 U. S. 129, 30 S. Ct. 650, 54 U. S. (L. ed.) 967, 29 L. R. A. (N. S.) 250.

A decree denying the right invoked by a petition in intervention to have the lien of a chattel mortgage established as the first claim on the property of a bankrupt and satisfied out of the proceeds of a proposed sale by the trustee in bankruptcy. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412, 54 U. S. (L. ed.) 610.

A decision upholding the right of an intervener, as a conditional vendor of the bankrupt, to certain goods and proceeds of other goods in the hands of the trustee in bankruptcy. *Bryant v. Swofford Bros. Dry Goods Co.*, (1909) 214 U. S. 279, 29 S. Ct. 614, 53 U. S. (L. ed.) 997.

An intervention in the bankruptcy proceedings for the purpose of asserting an independent and superior title to the property held by the trustees, claiming the right to recover the property and to remove it from the jurisdiction of the Bankruptcy Court as a part of the estate to be administered. Such "was the case in *Hewit v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986; *York Mfg. Co. v. Cassell*, (1906) 201 U. S. 344, 26 S. Ct. 481, 50 U. S. (L. ed.) 782; *Security Warehousing Co. v. Hand*, (1907) 206 U. S. 415, 27 S. Ct. 720, 51 U. S. (L. ed.) 1117, 11 Ann. Cas. 789." *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 777, 16 Ann. Cas. 1008, distinguishing the foregoing cases.



A decree dismissing the petition of certain lessors of a bankrupt to forfeit the lease in the event of a sale by the trustee in bankruptcy under the court's order. *Gazlay v. Williams*, (1908) 210 U. S. 41, 28 S. Ct. 687, 52 U. S. (L. ed.) 950, *affirming* (1906) 147 Fed. 678, 77 C. C. A. 662, 14 L. R. A. (N. S.) 1199.

A person's assertion of title to property in possession of the trustee in bankruptcy by an intervention raising a distinct and separable issue. *Hewit v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986; *Manson v. Williams*, (1909) 213 U. S. 453, 29 S. Ct. 519, 53 U. S. (L. ed.) 869; *Rode v. Phipps*, (C. C. A. 6th Cir. 1912) 195 Fed. 414.

An order dissolving an interlocutory injunction restraining parties from maintaining proceedings in a state court for the appointment of a receiver, with authority to reconstruct a portion of the bankrupt's irrigation system, in order to afford water to the complainant's premises. *Bothwell v. Fitzgerald*, (1915 9th Cir.) 219 Fed. 408, 135 C. C. A. 212 (appealable in connection with Judicial Code, § 129, title JUDICIARY).

A decree determining the priority of liens in a plenary, independent controversy in which the trustees have no real interest. *In re Hartzell*, (C. C. A. 8th Cir. 1913) 209 Fed. 775.

A decree in a suit brought by the trustee against an adverse claimant by plenary proceedings in equity. *Kirkpatrick v. Harnesberger*, (C. C. A. 5th Cir. 1912) 199 Fed. 886.

A judgment that a chattel mortgage upon the alleged property of the bankrupt is voidable by his trustee, and that it entitled the mortgagee to no lien upon the property and no preference in payment out of its proceeds. *Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363, where the court said: "The late decision of the Supreme Court in *Hewit v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986, as we understand it, is an adjudication of this question in accord with these views."

In the course of proceedings to marshal assets in the hands of a trustee, as between partnership and individual creditors, if a distinct and separable issue is raised between parties intervening, involving substantial rights, and which might arise at common law or in equity, an order made therein is appealable. *Burleigh v. Foreman*, (C. C. A. 1st Cir. 1903) 135 Fed. 217.

A decision on the petition of an adverse claimant to reclaim property taken possession of by the trustee in bankruptcy. *Franklin v. Stoughton Wagon Co.*, (C. C. A. 8th Cir. 1909) 168 Fed. 857.

A decree adverse to a petitioner who alleged that he was the owner of property which, prior to the adjudication, had been in the possession of the bankrupt, but was since held by the trustee, and praying that the latter be ordered to surrender possession. *Smith v. Means*, (C. C. A. 7th Cir. 1906) 148 Fed. 89.

An order on a petitioner's prayer to have turned over to him as mortgagee the proceeds of the sale of the mortgaged property. *Liddon v. Smith*, (C. C. A. 5th Cir. 1905) 135 Fed. 43.

A decree on a petition in the nature of a bill in equity to establish the right of the petitioner to the possession of certain property also claimed by the trustee in bankruptcy and to enjoin the latter from interfering with such possession. *Security Warehousing Co. v. Hand*, (C. C. A. 7th Cir. 1906) 143 Fed. 32, *affirmed* in (1907) 206 U. S. 415, 27 S. Ct. 720, 51 U. S. (L. ed.) 1117, 11 Ann. Cas. 789.

A decree in a suit by a trustee in bankruptcy to cancel a conveyance of real estate of the bankrupt and quiet the trustee's title to it. *McCarty v. Coffin*, (C. C. A. 5th Cir. 1907) 150 Fed. 307.

A decision on the petition of an adverse claimant to reclaim property taken possession of by the trustee in bankruptcy. *Franklin v. Stoughton Wagon Co.*, (C. C. A. 8th Cir. 1909) 168 Fed. 857.

A decree in a proceeding instituted by petition of the trustee in bankruptcy to have certain adverse claims and liens upon property belonging to the estate declared void and for a sale of the property free and clear of the same. *Thomas v. Woods*, (C. C. A. 8th Cir. 1909) 173 Fed. 585.

A decree summarily adjudicating the right to property in the possession of the trustee in bankruptcy and an adverse claimant. *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 882.

A judgment determining the priority of certain liens upon lands belonging to the bankrupt's estate and involving questions of fact. *Hendricks v. Webster*, (C. C. A. 8th Cir. 1908) 159 Fed. 927.

A decree dismissing the petition of lessors of a bankrupt to forfeit the lease in the event of a sale by the trustee in bankruptcy under the court's order. *Gazlay v. Williams*, (1908) 210 U. S. 41, 28 S. Ct. 687, 52 U. S. (L. ed.) 950.

A judgment by the Circuit Court of Appeals holding that an intervening conditional vendor of property sold to the bankrupt had no lien thereon as against a general creditor, because of a failure to file the contract of sale. *York Mfg. Co. v. Cassell*, (1906) 201 U. S. 344, 26 S. Ct. 481, 50 U. S. (L. ed.) 782.

A dispute between a receiver in bankruptcy and an outside person as to

whether a contract was made between them for the sale and purchase of property of the estate, brought before the Bankruptcy Court for determination. *In re Jungmann*, (C. C. A. 2d Cir. 1911) 186 Fed. 302.

An order disallowing a mortgage lien on the ground that it was given and accepted in fraud of the Bankrupt Act. *In re Canton First Nat. Bank*, (C. C. A. 6th Cir. 1905) 135 Fed. 62.

On a creditor's answer to the trustee's petition to sell certain chattels and claiming chattel mortgage liens thereon, an order holding the chattel mortgages void. *Knapp v. Milwaukee Trust Co.*, (C. C. A. 7th Cir. 1908) 162 Fed. 675, *affirming* (1910) 216 U. S. 545, 30 S. Ct. 412, 54 U. S. (L. ed.) 610.

A judgment determining the claim of a chattel mortgagee to assets in the hands of a trustee in bankruptcy. *Loeser v. Savings Deposit Bank, etc., Co.*, (C. C. A. 6th Cir. 1908) 163 Fed. 212.

A judgment that a chattel mortgage upon the alleged property of the bankrupt is voidable by his trustee, that it entitled the mortgagee to no lien upon the property and to no preference in payment out of its proceeds. *Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363.

An order directing the receiver in bankruptcy to pay to the trustee in bankruptcy the proceeds of a sale of the bankrupt's assets under an order of the court. *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 699.

An order allowing a debt but disallowing the creditor's claim of priority by reason of a mortgage to secure the debt. *In re Doran*, (C. C. A. 6th Cir. 1907) 154 Fed. 467.

*Earlier cases.*—In *In re Whitener*, (C. C. A. 1900) 105 Fed. 187, Pardee, J., "inclined to the opinion" that in matters of administration in the Bankruptcy Court no judgments were appealable outside of those specified in section 25a. To the same effect see *Fisher v. Cushman*, (C. C. A. 1900) 103 Fed. 861; *In re Russell*, (C. C. A. 1900) 101 Fed. 240; *In re Abraham*, (C. C. A. 1899) 93 Fed. 787. On the other hand, in *Steele v. Buel*, (C. C. A. 1900) 104 Fed. 968, where the court entertained an appeal from an order denying the bankrupt's claim to exemption of an insurance policy, Caldwell, C. J., said that the appeal was authorized by "section 24, which gives the right of appeal in absolute terms." And in *In re Columbia Real Estate Co.*, (C. C. A. 1902) 112 Fed. 643, it was held that judgments not enumerated in section 25a may be reviewed on appeal or error if they are within the provisions of section 6 of the act creating the Circuit Court of Appeals which confers appellate jurisdiction

"to review by appeal or by writ of error final decisions in the District Courts" in all cases other than those which are reviewable by the Supreme Court pursuant to section 5 of the same act. To the same point see *Scott v. Wilson*, (C. C. A. 1902) 115 Fed. 284; *In re Rusch*, (C. C. A. 1902) 116 Fed. 270; *Stelling v. G. W. Jones Lumber Co.*, (C. C. A. 1902) 116 Fed. 261; *Boonville Nat. Bank v. Blakey*, (C. C. A. 1901) 107 Fed. 891; *In re Jacobs*, (C. C. A. 1900) 99 Fed. 539.

Accordingly, on one or the other of the grounds above indicated appeals have been entertained from the following judgments:

A judgment denying a motion to expunge a creditor's claim unless he should surrender an alleged preference. *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 1902) 117 Fed. 1; *Swarts v. Siegel*, (C. C. A. 1902) 117 Fed. 13.

A judgment denying the bankrupt's claim to an exemption. *Steele v. Buel*, (C. C. A. 1900) 104 Fed. 968; *Huenergardt v. John S. Brittain Dry Goods Co.*, (C. C. A. 1902) 116 Fed. 31.

A judgment allowing an exemption. *McGahan v. Anderson*, (C. C. A. 1902) 113 Fed. 115.

A judgment requiring the bankrupt to surrender certain money to the trustee, the latter appealing on the ground that the court should have fixed a greater amount. *Boyd v. Glucklich*, (C. C. A. 1902) 116 Fed. 131.

A judgment dismissing the trustee's petition that the bankrupt be directed to surrender a life insurance policy to the trustee. *In re Welling*, (C. C. A. 1902) 113 Fed. 189.

A judgment awarding a fund to an equitable lien claimant. *McDonald v. Daskam*, (C. C. A. 1902) 116 Fed. 276.

A judgment in a suit in the nature of an equitable replevin brought in the District Court by the trustee against an adverse claimant, the latter consenting to the jurisdiction of that court. *Stelling v. G. W. Jones Lumber Co.*, (C. C. A. 1902) 116 Fed. 261.

A judgment allowing substituted proof of a claim to be filed after the expiration of one year, the original proof having failed on account of informality. *Hutchinson v. Otis*, (C. C. A. 1902) 115 Fed. 937.

A judgment dismissing the petition of an intervening claimant to a fund. *In re American Brewing Co.*, (C. C. A. 1902) 112 Fed. 752.

A judgment dismissing a creditor's petition for an order to compel a witness in examination proceedings to answer certain questions propounded to him. *People's Bank v. Brown*, (C. C. A. 1902) 112 Fed. 652.

A judgment confirming a composition (it seems). *Ross v. Saunders*, (C. C. A.

1901) 105 Fed. 918. See also *U. S. v. Hammond*, (C. C. A. 1900) 104 Fed. 862.

A judgment refusing to confirm a composition. *Adler v. Jones*, (C. C. A. 1901) 109 Fed. 967. See also *U. S. v. Hammond*, (C. C. A. 1900) 104 Fed. 862. But compare *Ross v. Saunders*, (C. C. A. 1901) 105 Fed. 915.

A judgment disallowing a lien claimed by a mortgagee. *City Nat. Bank v. Bruce*, (C. C. A. 1901) 109 Fed. 69; *In re Soudan Mfg. Co.*, (C. C. A. 1902) 113 Fed. 804.

A judgment determining the effect of a certain bid made by the appellant for goods which the trustee proposed to sell. *Owens v. Bruce*, (C. C. A. 1901) 109 Fed. 72.

A judgment declaring the appellant's mortgage an illegal preference. *In re Steininger Mercantile Co.*, (C. C. A. 1901) 107 Fed. 689.

A judgment dismissing a bill by the bankrupt for relief against certain proceedings in a state court. *Pickens v. Dent*, (C. C. A. 1901) 106 Fed. 653.

A judgment approving the ruling of a referee in respect of the election of a trustee. *In re McGill*, (C. C. A. 1901) 106 Fed. 57.

A judgment allowing a mortgage creditor a stipulated attorney's fee as in foreclosure. *In re Roche*, (C. C. A. 1900) 101 Fed. 956.

A judgment staying an action in a state court to foreclose a subcontractor's lien on a house built by the bankrupt contractors. *In re Emslie*, (C. C. A. 1900) 102 Fed. 291.

*Controversy instituted by trustee.*—In *Thomas v. Woods*, (1909 8th Cir.) 173 Fed. 585, 97 C. C. A. 535, 19 Ann. Cas. 1080, 26 L. R. A. (N. S.) 1180, affirming an appeal from a decision held to present a "controversy" within the meaning of section 24a, *Amidon, J.*, said: "The present appeal, however, would have been proper under any interpretation of section 24 of the Bankruptcy Act. This proceeding was instituted by the trustee to have certain adverse claims and liens upon property belonging to the estate declared void and for a sale of the property free and clear of the same. It involves every attribute of familiar suit in equity. It can be distinguished from such suit only by the fact that it was instituted by petition instead of bill, and the adverse parties were brought before the court by citation instead of subpoena. There are some cases which suggest that if such a proceeding is instituted by a petition, filed by the adverse claimant for the enforcement of his right, and the trustee is cited to answer such a petition, this constitutes 'a controversy in a bankruptcy proceeding,' which may be reviewed by appeal: but if the parties be reversed, and the trustee files a petition charging

that the adverse claim or lien is void, and asking that the property be sold free and clear of it, and the adverse claimant is cited in to answer such a petition, this constitutes not a 'controversy,' but a 'proceeding in bankruptcy proper,' and can be reviewed as to matters of law only under section 24b. *Morgan v. Mannington First Nat. Bank*, (1906) 145 Fed. 466, 76 C. C. A. 236; *In re McMahon*, (1906) 147 Fed. 684, 77 C. C. A. 668. In our judgment such a distinction is wholly untenable. If enforced, it would deny to parties having adverse liens or claims upon property belonging to the estate the right to review the decision of the court of bankruptcy as to any matter of fact. The consequence of such a holding would be serious. Whether there would be any right of review on questions of fact would depend wholly upon whether the proceeding was instituted by the trustee or by the adverse claimant. In either case the right involved would be the same, and the issue tried would be the same. The only distinction would be that the parties would be reversed upon the record. Surely what constitutes a 'controversy,' within the meaning of section 24a, must be determined by the nature of the right involved and the issue tried, and not by the accidental circumstance as to which party is actor and which defendant. Sound reason can be given why as to the purely administrative steps in a bankruptcy proceeding the decision of the trial court on questions of fact should be final. *In re Friend*, (1905) 134 Fed. 778, 67 C. C. A. 500. But no sound reason can be given why, in a controversy possessing every attribute of a suit in equity, an aggrieved party should not have the right of review as to questions of equity. It ought not to be possible for the trustee to defeat such a right by being first to file a petition."

In *Whitney v. Wenman*, (1905) 198 U. S. 539, 25 S. Ct. 778, 49 U. S. (L. ed.) 1157, the court sustained an appeal from a decision on a petition by a trustee to determine the rights of adverse claimants to property in the custody of the court. See also *Manson v. Williams*, (1909) 213 U. S. 453, 29 S. Ct. 519, 53 U. S. (L. ed.) 869, and *Moody v. Century Savings Bank*, cited in the following paragraph.

A decree in a proceeding by the trustee in bankruptcy which "has every attribute of a suit in equity for the marshaling of assets, the sale of the encumbered property, and the application of the proceeds to the liens in the order and mode ultimately fixed by the decree." *Moody v. Century Savings Bank*, (1915) 239 U. S. 374, 36 S. Ct. 111, 60 U. S. (L. ed.) —, where the court said: "True it was begun by the trustees and not by an adverse claimant, but this is immaterial,

for the mortgagees, who claimed adversely to the trustees, not only appeared in response to notice of the trustee's petition, but asserted their mortgage liens and sought to have them enforced against the proceeds of the property conformably to the contentions before stated. This was the equivalent of an affirmative intervention and, when taken in connection with the trustees' petition, brought into the bankruptcy proceedings a controversy which was quite apart from the ordinary steps in such proceedings and well within the letter and spirit of section 24a. *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986; *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 553, 30 S. Ct. 412, 54 U. S. (L. ed.) 610; *Tefft v. Munsuri*, (1911) 222 U. S. 114, 32 S. Ct. 67, 56 U. S. (L. ed.) 118; *Houghton v. Burden*, (1913) 228 U. S. 161, 33 S. Ct. 491, 57 U. S. (L. ed.) 780; *Globe Bank, etc., Co. v. Paducah v. Martin*, (1915) 236 U. S. 288, 295, 35 S. Ct. 377, 59 U. S. (L. ed.) 553."

*Appeal on question of jurisdiction.* See cases cited under division III in this note.

The Circuit Court of Appeals has jurisdiction to review the decision of a District Court exercising ancillary jurisdiction in bankruptcy that it has no jurisdiction to determine whether the proceeds of goods it seizes and sells as the property of the bankrupt are the property of the bankrupt estate or the property of adverse claimants. *Fidelity Trust Co. v. Gaskell*, (C. C. A. 8th Cir. 1912) 195 Fed. 865, wherein the court said: "The cases cited illustrate, and the opinions in them establish, the rule that it is only when the jurisdiction of the trial court as a federal court is in question that its decision is reviewable in the Supreme Court under the first clause of section 5 of the act creating the Circuit Courts of Appeals [now Judicial Code, sec. 238, title JUDICIARY]. When the issue regarding the jurisdiction of the trial court is conditioned, not by its power as a court of the United States, but by its general authority as a judicial tribunal, or by the general principles of jurisprudence and the established rules of practice regarding the disposition of the claims of interveners and other parties to equity and ancillary proceedings, or by the principles and rules which govern the proceedings of courts of concurrent jurisdiction between themselves, its decision is reviewable in the Circuit Court of Appeals. The question of the jurisdiction of the court below in the case at bar was of the latter class. It was conditioned, not by the power of that court as a federal court, but by the general rules and principles governing the action of courts of concurrent jurisdiction in their relations to each other and by the principles of equity and rules of practice which control

the disposition of the claims of interveners and other parties to original and ancillary suits in equity. It involved the simple question whether or not a court of equity which in ancillary proceedings in bankruptcy has seized and has in its control the property of a stranger to the original and the ancillary proceedings has jurisdiction to restore it to him or to his creditor who has been prevented by the act of the court from lawfully applying it to the payment of his claim. This court has ample jurisdiction to review the dismissal of the intervening petition challenged by the appeal."

*Decisions held not appealable.*—Where a party in effect presents to the trustee in bankruptcy a claim upon certain notes joined with a statement that he has security upon the estate which it is his purpose to maintain and upon which he is entitled to priority in the distribution of the assets, but recognizing the title and possession of the trustee, he thus institutes a proceeding in bankruptcy as distinguished from a controversy arising in bankruptcy proceedings, and the appropriate appellate jurisdiction is to be determined by the provisions of the Bankruptcy Act governing bankruptcy proceedings—that is, sections 24b, 25a, and 25b—and not by the provisions in section 24a. *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008.

A decree of a District Court exercising ancillary jurisdiction by the seizure of property in the hands of those holding it for the bankrupt, dismissing a petition in intervention under alleged assignments of the property, made after the filing of the petition in bankruptcy proceedings in the original case—is a mere summary proceeding in bankruptcy and not appealable. *Lazarus v. Prentice*, (1914) 234 U. S. 263, 34 S. Ct. 851, 58 U. S. (L. ed.) 1305.

"Nothing as it seems to us can be regarded as a controversy 'arising in bankruptcy proceedings' within the purview of subdivision a, section 24, where the subject matter and object of the proceedings are within the power to make a summary order. Certainly this is true where plenary action is not sought. . . . In determining the question of remedy, then, as between review or appeal under the Bankruptcy Act, we are not to be governed by our ideas of whether the power invoked can be rightly exercised or not in the given instance, but by the object and character of the proceeding." *In re Farrell*, (C. C. A. 6th Cir. 1910) 176 Fed. 505, 509, citing *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772.

A receiver in bankruptcy having turned over to the petitioning creditor certain of the bankrupt's property on the creditor's claim that the bankrupt was a bailee

thereof only, a special commissioner recommended that the receiver's action be not approved, which recommendation was affirmed by an order of the District Court. Another order was thereafter made, referring to the same commissioner the duty to ascertain the value of the property, and the sum the creditor should pay to the bankrupt's trustee, and, on the commissioner's finding being filed, an order was entered confirming his report and directing payment to the trustee or clerk of the court. It was held that none of such orders was appealable or reviewable otherwise than by a petition to revise. *In re Strobel*, (C. C. A. 2d Cir. 1908) 160 Fed. 916.

An order made in a proceeding between the trustee in bankruptcy and a prior assignee to determine the right to property in the custody of the court or its proceeds is not appealable. *O'Dell v. Boyden*, (6th Cir. 1906) 150 Fed. 731, 10 Ann. Cas. 239, 80 C. C. A. 397.

The following were held not to be appealable: An order dismissing a petition to revoke a discharge, *Thompson v. Mauzy*, (C. C. A. 4th Cir. 1909) 174 Fed. 611; an order directing the turning over of property or money by a third person to the trustee in bankruptcy, *In re Rose Shoe Mfg. Co.*, (C. C. A. 2d Cir. 1909) 168 Fed. 39; a decree relating to the distribution of the proceeds of a sale of real estate made by the trustee in bankruptcy, *In re Grotzinger*, (C. C. A. 3d Cir. 1903) 127 Fed. 124, holding that the remedy is by petition to revise; a decree reversing a referee's judgment requiring a trustee to account to the creditors in specific sums as the rental value of the property of which he permitted the bankrupt to retain use and possession. *Clinton Bank v. Kondert*, (C. C. A. 5th Cir. 1908) 159 Fed. 703.

*Decrees in proceedings in bankruptcy*, as distinguished from "controversies arising in bankruptcy proceedings," and not enumerated in section 25a, are not appealable to the Circuit Court of Appeals, but are reviewable only on petition to superintend and revise. See the note to section 24b.

*Administrative orders*.—"The 'controversies arising in bankruptcy proceedings' referred to in this section [section 24a], as has been heretofore held by this court, are 'those independent or plenary suits which concern the bankrupt's estate, and arise by intervention or otherwise between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt, or his general creditors,' and do not include 'administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate,' which, under section 24b of the Bankrupt Act, are subject to revision by this court in matter of

law upon petition for review." *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, citing the following cases: *In re Mueller*, (6th Cir. 1905) 135 Fed. 712, 68 C. C. A. 349; *Dickas v. Barnes*, (6th Cir. 1905) 140 Fed. 849, 72 C. C. A. 261; *Davidson v. Friedman*, (6th Cir. 1906) 140 Fed. 853, 72 C. C. A. 553; *In re McMahon*, (6th Cir. 1906) 147 Fed. 684, 77 C. C. A. 668; *O'Dell v. Boyden*, (6th Cir. 1906) 150 Fed. 731, 80 C. C. A. 397.

Orders made by the Bankruptcy Court requiring members of a bankrupt partnership, who have not been individually adjudged bankrupt, to schedule and surrender their individual property are not appealable under section 24a. *Dickas v. Barnes*, (6th Cir. 1905) 140 Fed. 849, 72 C. C. A. 261, where the court said: "It is not necessary for us now to determine what the final disposition to be made by the District Court of the individual assets of these appellants should be."

"No appeal lies from an order rejecting a petition for rehearing under the Bankrupt Law. Sections 24 and 25 of the Bankruptcy Act prescribe in what cases appeals may be had, and these sections manifestly do not cover such a case as this." *Morgan v. Benedum*, (C. C. A. 4th Cir. 1907) 157 Fed. 232. See also *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128.

*Interlocutory judgments or decrees are not appealable*.—*Goodman v. Brenner*, (C. C. A. 1901) 109 Fed. 481, dismissing an appeal from an order refusing to compel the bankrupt to produce his books on his examination before the referee. *In re Columbia Real Estate Co.*, (C. C. A. 1902) 112 Fed. 643, holding that an order dismissing the appellant's petition of intervention to set aside an adjudication of involuntary bankruptcy theretofore entered was not appealable where it appeared that relief upon the intervenor's claim was not foreclosed by the order; and in the same case the court took occasion to say that an order denying a rehearing in bankruptcy proceedings would not be appealable. *In re Russell*, (C. C. A. 1900) 101 Fed. 248, holding that an order enjoining prosecution of a replevin suit in a state court against the trustee and referring the plaintiff's claim to the referee in bankruptcy was not a final decision.

Where an adverse claimant of property in the hands of a bankruptcy receiver instituted a proceeding in the District Court in the nature of an equitable replevin against the receiver, a judgment merely confirming the referee's report in favor of the receiver was held not final and appealable by the claimant. *Scott v. Wilson*, (C. C. A. 1902) 115 Fed. 284.

*Interlocutory decree awarding or dissolving an injunction*. See that italicized

heading in division I of this note to section 24a.

**Writ of error.**—A judgment in an action at law brought in the District Court by the trustee to recover the value of property alleged to have been fraudulently transferred to the defendant by the bankrupt is reviewable on a writ of error, as in other cases at law. See *Mackel v. Rochester*, (C. C. A. 1900) 102 Fed. 314. And as to writ of error instead of appeal being the proper remedy in proceedings at law, see the note to section 25a (1).

**Time limit for appeal.**—Appeals to the Circuit Court of Appeals from decisions of the District Court in "controversies arising," etc., under section 24a must be taken "within six months after the entry of the order, judgment, or decree sought to be reviewed," as provided in section 11 of the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. L. 829, title JUDICIARY herein. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 579. See also *Boonville Nat. Bank v. Blakey*, (C. C. A. 1901) 107 Fed. 891; *Steele v. Buel*, (C. C. A. 1900) 104 Fed. 968.

**Time for appeal on certified question of jurisdiction**, see division III in this note.

**Parties to appeal.**—"Where an appeal lies from any judgment or decree, the same may be taken by any party or person injured or affected by the decree or judgment." *Per Maxey, D. J.*, in *In re Roche*, (C. C. A. 1900) 101 Fed. 958.

"All the parties interested in the proceedings must be made parties to the appeal and must be given notice of its pendency and hearing." *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71.

Parties jointly interested in, and aggrieved by, a final decision, may jointly appeal therefrom. *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71.

Where a single order or judgment is made by a District Court in a bankruptcy proceeding which determines a question affecting alike different claimants, they may unite in an appeal therefrom, although their interests are several and distinct. *Crim v. Woodford*, (C. C. A. 4th Cir. 1905) 136 Fed. 34, sustaining a joint appeal from an order fixing certain priorities and liens.

**"The practice and requirements upon appeals in bankruptcy cases are substantially the same as in other cases."** *Cook Inlet Coal Fields Co. v. Caldwell*, (C. C. A. 4th Cir. 1906) 147 Fed. 475, 478. See also *Bothwell v. Fitzgerald*, (C. C. A. 9th Cir. 1915) 219 Fed. 408, wherein the court held that the appeal takes the course prescribed in the act establishing the Circuit Court of Appeals, Act March 3, 1891, ch. 517, 26 Stat. 826, title JUDICIARY herein. See also for various matters of appellate procedure, the first note to section 25a.

An appeal was dismissed where citation was not issued nor the assignment of errors filed until after a term of the Circuit Court of Appeals had intervened, and the transcript was not filed until after a second term had passed, and no showing was made in excuse of the delay. *Nazima Trading Co. v. Martin*, (C. C. A. 9th Cir. 1908) 164 Fed. 838.

**Presentation and reservation in lower court of ground of objection.**—Where an order was made on the trustee's petition to sell chattels, if the trustee's official capacity was not challenged in the court below, it cannot be questioned on a creditor's appeal from the order. *Knapp v. Milwaukee Trust Co.*, (C. C. A. 7th Cir. 1908) 162 Fed. 675, *affirmed* (1910) 216 U. S. 545, 30 S. Ct. 412, 54 U. S. (L. ed.) 610.

Where a petition was filed by a married woman against her husband and his trustee in bankruptcy to enforce a resulting trust of certain land standing in his name, an objection that a judgment in her favor was erroneous because she, being a married woman, had no power to sue without the intervention of a trustee or a next friend, and that no decree *pro confesso* was taken against her husband on his failure to answer, could not be made for the first time on appeal. *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584.

**Assignment of errors.**—Where, on appeal from an order confirming a master's report as to the amount of rents a bankrupt's wife was entitled to under a decree enforcing a resulting trust of land held by the bankrupt, none of the errors assigned raised any question as to the correctness of the decree in favor of the wife for rents and profits, but all of them related to the question of amount, the wife's right to recover rents could not be reviewed. *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584.

**Failure to incorporate evidence in the record**, where there is nothing to show any evidence was taken, is not ground for dismissing the appeal. *C. C. Taft Co. v. Century Sav. Bank*, (C. C. A. 8th Cir. 1905) 141 Fed. 369.

**Review in general.**—"Upon an appeal from a final decision in equity, all the anterior rulings in the progress of the cause are reviewable." *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, 73.

Where each party has laid the merits before the appellate court, regardless of the pleadings, the court may not feel called upon to depart from the issues actually shown by the proofs, or to raise any question of variance. *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 699, 704.

**Review of facts.**—On appeal the facts as well as the law are open to review. See the first note to section 25a.

"When the court has considered conflicting evidence and made a finding or decree, it is presumptively correct, and

unless some obvious error of law has intervened or some serious mistake of fact has been made the finding or decree must be permitted to stand." *Coder v. Arta*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 946, *affirmed* (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772.

As a rule the Supreme Court will not disturb concurrent findings of fact by two courts below, and this rule will be adhered to unless the lower courts clearly erred in their conception of the weight of the evidence. *Page v. Rogers*, (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332; *Manson v. Williams*, (1909) 213 U. S. 453, 29 S. Ct. 519, 53 U. S. (L. ed.) 869, where the court said: "We do not say that we necessarily should have come to this conclusion if the case had been tried before us in the first instance, but, upon a pure question of fact, the error, if there was one, is not so plain as to call upon us to depart from our usual rule."

Upon reversing an order of the District Court, which reversed an order of the referee, it was observed that "the referee had the opportunity of seeing and hearing the witnesses, and he was therefore in a better position to judge of their credibility than are courts, which have before them nothing but the printed record." *Southern Pine Co. v. Savannah Trust Co.*, (C. C. A. 5th Cir. 1905) 141 Fed. 802. To the same point see numerous cases cited in *Moore on Facts*, sections 992, 1278, 1276.

**Remand.**—The rule that an appellate court will remand a cause with instructions to dismiss whenever it appears from the record that there was no jurisdiction in the court below has no application except where such want of jurisdiction affirmatively appears upon the face of the record, in a case otherwise properly before the appellate court; and the appellate court has no jurisdiction to so remand where the alleged want of jurisdiction of the court below is predicated upon an issue of fact adjudicated in the court below in favor of the jurisdiction, and where the order or judgment in which such adjudication was involved is not properly brought before the appellate court for review. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576.

**Scope and exigency of mandate.**—Where an order made by a District Court, sustaining a claim of privilege of a witness examined by creditors in a bankruptcy proceeding, was reversed by the Circuit Court of Appeals, which remanded the cause for further proceedings, the court below properly vacated an order previously made by the referee discharging the trustee, and required the witness to appear again for further examination. *Brown v. Persons*, (C. C. A. 3d Cir. 1903) 122 Fed. 212.

**Costs on appeal or error**, see the first note to section 25a.

1 F. S. A.—50

### III. REVIEW BY UNITED STATES SUPREME COURT DIRECT FROM UNITED STATES DISTRICT COURT.

#### "Appellate jurisdiction in other cases."

So far as this phrase in section 24a refers to the appellate jurisdiction of the Supreme Court direct from federal District Courts, it imports the jurisdiction conferred by section 5 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 827, which section is now embodied in Judicial Code, sec. 238, title JUDICIARY. See division I of this note to section 24a. It is to be observed, however, that if the decision in a federal Supreme Court case presently to be cited has not been overruled in subsequent decisions in that court, cases not "controversies arising in bankruptcy proceedings" within the meaning which that phrase in section 24a of the Bankruptcy Act has acquired in bankruptcy cases are nevertheless appealable direct to the Supreme Court if they are of the character described in section 5 of the Circuit Court of Appeals Act of 1891 (now Judicial Code, sec. 238) above mentioned. Thus a judgment adjudging a defendant a bankrupt is enumerated in section 25a of the Bankruptcy Act among the judgments appealable to the Circuit Court of Appeals. Nevertheless, if the jurisdiction of the District Court was in issue in the case the judgment is appealable on that issue direct to the Supreme Court, as in the case of *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591. In other words, appeals under section 5 above mentioned, now Judicial Code, sec. 238, although in bankruptcy cases, are taken independently of section 24a of the Bankruptcy Act. See *infra*, this note, *Time for appeal and error*. It is impossible to reconcile the decision in *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, *supra*, this paragraph, with the ruling in the later case of *Tefft v. Munsuri*, (1911) 222 U. S. 114, 32 S. Ct. 67, 56 U. S. (L. ed.) 118, *followed* in *Munsuri v. Fricker*, (1911) 222 U. S. 121, 32 S. Ct. 70, 56 U. S. (L. ed.) 121. See also the first paragraphs in the note to section 24b. In *Denver First Nat. Bank v. Klug*, (1902) 186 U. S. 203, 22 S. Ct. 899, 46 U. S. (L. ed.) 1127, however, it seems to have been assumed that an appeal would lie direct to the Supreme Court from a judgment refusing an adjudication of bankruptcy if the jurisdiction of the Bankruptcy Court were involved in a legal sense.

#### Jurisdiction of District Court in issue.

—Cases taken on appeal or error direct to the Supreme Court from the District Court in bankruptcy cases are usually those in which the jurisdiction of the court was in issue (or claimed to have been in issue) under the first specification in section 5 of the Circuit Court of Appeals Act of 1891, now Judicial Code, sec. 238,

title JUDICIARY. In fact, all of the Supreme Court cases cited in this division III of this note were brought up under that section.

Section 5 of the Circuit Court of Appeals Act, above referred to, is copiously annotated under Judicial Code, sec. 238, in title JUDICIARY, by citation of a multitude of cases not in bankruptcy, but covering all the topics indicated by the black-letter headings following in this division III of this note.

In the following bankruptcy cases the Supreme Court determined questions of jurisdiction certified by the District Court on appeal or error: *Harris v. Mt. Pleasant First Nat. Bank*, (1910) 216 U. S. 382, 30 S. Ct. 296, 54 U. S. (L. ed.) 528, as to jurisdiction to entertain a suit brought by a trustee in bankruptcy against a bank to require it to surrender notes pledged by the bankrupt as collateral security; *Babbitt v. Dutcher*, (1910) 216 U. S. 102, 30 S. Ct. 372, 54 U. S. (L. ed.) 402, as to ancillary jurisdiction to entertain a summary proceeding by a trustee in bankruptcy appointed in a bankruptcy proceeding in another district to compel officers of the bankrupt corporation to deliver to such trustee the documents in their possession relating to the business of the bankrupt; *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591, as to jurisdiction to adjudicate bankruptcy in an involuntary proceeding by a creditor on a claim for unliquidated damages, the judgment appealed from being an adjudication of bankruptcy; *Whitney v. Wenman*, (1905) 198 U. S. 539, 25 S. Ct. 778, 49 U. S. (L. ed.) 1157, as to jurisdiction of a plenary suit in equity to determine the extent and character of liens upon, rights in, and disposition of property which became subject to the jurisdiction of the Bankruptcy Court as that of the bankrupt, whether held by him or for him; *Jaquith v. Rowley*, (1903) 188 U. S. 620, 23 S. Ct. 369, 47 U. S. (L. ed.) 620, as to jurisdiction of a summary application by a trustee in bankruptcy to grant an order the result of which would be to take immediately from the bankrupt's surety on a bail bond in a state court moneys which had been deposited with him before the commencement of the proceedings in bankruptcy, as indemnity against liability, and thus compel him to come into the Bankruptcy Court for the litigation of questions as to his right to retain the money obtained by him; *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175, as to jurisdiction of a suit in equity by a trustee in bankruptcy to set aside an alleged fraudulent conveyance of goods by the bankrupt and to compel defendants to

account for the goods or their proceeds; *Mitchell v. McClure*, (1900) 178 U. S. 539, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1182, as to jurisdiction of an action of replevin by a trustee in bankruptcy to recover goods alleged to have been conveyed by the bankrupt in fraud of the Bankruptcy Act and of creditors; also in the two cases cited in the next two paragraphs, *infra*.

When property of the bankrupt has come into possession of the trustee in bankruptcy, and the bankrupt has asserted in the federal District Court in bankruptcy a claim to be entitled to a part or the whole of such property, as exempt property, the Bankruptcy Court necessarily is vested with jurisdiction to determine, upon the facts before it, the validity of the claimed exemption. In such a case, therefore, an erroneous decision against an exemption, and a consequently erroneous holding that the property forms assets of the estate in bankruptcy, to be administered under the direction of the court, while subject to correction on a petition for revision, does not create a question of jurisdiction proper to be passed upon by the Supreme Court on direct appeal from the District Court, even though a plea denying jurisdiction was filed in that court and its decree expressly asserted jurisdiction to hear and determine the matter. *Lucius v. Cawthon-Coleman Co.*, (1905) 198 U. S. 149, 25 S. Ct. 214, 49 U. S. (L. ed.) 425, dismissing the appeal. See also *In re Riggs*, (1909) 214 U. S. 9, 29 S. Ct. 598, 53 U. S. (L. ed.) 887.

A judgment dismissing a petition in involuntary bankruptcy on the ground that the respondent is not in fact, as alleged, a person who may be lawfully adjudged an involuntary bankrupt does not raise the question of jurisdiction. *Denver First Nat. Bank v. Klug*, (1902) 186 U. S. 203, 22 S. Ct. 899, 46 U. S. (L. ed.) 1127, where an appeal was dismissed, the court saying: "The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the court had jurisdiction to so determine, and its jurisdiction over the subject-matter was not and could not be questioned."

Following the case last above cited, it was held in *Columbia Ironworks v. National Lead Co.*, (C. C. A. 6th Cir. 1904) 127 Fed. 99, that no question of jurisdiction was involved in a determination by the District Court that, on the proofs adduced, a corporation was engaged principally in manufacturing and mercantile pursuits and therefore subject to an adjudication of bankruptcy; and in *Exploration Mercantile Co. v. Pacific Hardware, etc., Co.* (C. C. A. 9th Cir. 1910) 177 Fed. 825, that the question whether a petition in involuntary bankruptcy alleges



an act of bankruptcy does not go to the jurisdiction of the Bankruptcy Court.

Where the District Court's jurisdiction to enter a decree on petition of the trustee in bankruptcy was no more dependent upon the rightful appointment of the trustee than a state court's would have been over a suit by that trustee, no appealable question of jurisdiction is presented. *Knapp v. Milwaukee Trust Co.*, (C. C. A. 7th Cir. 1908) 162 Fed. 675, *affirmed* (1910) 216 U. S. 545, 30 S. Ct. 412, 54 U. S. (L. ed.) 610.

*O'Neal v. U. S.*, (1903) 190 U. S. 36, 23 S. Ct. 776, 47 U. S. (L. ed.) 945, was a writ of error to the District Court to review a judgment of imprisonment in contempt proceedings for an assault on a trustee in bankruptcy, the District Court certifying the question of jurisdiction. Dismissing the writ of error, the Supreme Court said: "The question here is asserted in the certificate to be whether the District Court had jurisdiction to try and punish the said defendant for contempt thereof, upon the facts and for the causes stated in said rule and affidavit." Jurisdiction over the person and jurisdiction over the subject-matter of contempts were not challenged. The charge was the commission of an assault on an officer of the court, for the purpose of preventing the discharge of his duties as such officer, and the contention was that on the facts no case of contempt was made out. In other words, the contention was addressed to the merits of the case, and not to the jurisdiction of the court. An erroneous conclusion in that regard can only be reviewed on appeal or error, or in such appropriate way as may be provided."

What constitutes an appealable "question of jurisdiction" has been discussed in numerous cases not arising under the Bankruptcy Act. See note to Judicial Code, sec. 238, in title JUDICIARY.

Speaking of section 5 of the Circuit Court of Appeals Act above cited in this note, the court said: "It is the settled construction of this statute that . . . the losing party in a Circuit Court or a District Court may take to the Supreme Court the question of jurisdiction, in accordance with this provision of statute, or . . . he may take the entire case, including the question of jurisdiction, to the Circuit Court of Appeals." *Burleigh v. Foreman*, (C. C. A. 1st Cir. 1903) 125 Fed. 217, 219.

**Only after final judgment.**—An appeal or writ of error in a case in which the jurisdiction of the court is in issue can be taken directly from the District Court to the Supreme Court only after final judgment. *Bardes v. Hawarden First Nat. Bank*, (1899) 175 U. S. 526, 20 S. Ct. 196, 44 U. S. (L. ed.) 261, dismissing, therefore, a certificate presenting a question of jurisdiction in order to obtain instruction for the guidance of the District Court in

a case which had not gone to judgment. But a subsequent judgment in the same case was reviewed by the Supreme Court on appeal with a certificate of the same question of jurisdiction. *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175.

Determination of a question of jurisdiction by the Circuit Court of Appeals on a petition for revision does not bar the petitioner from taking the same question direct to the Supreme Court from the District Court after final decision thereof in the latter court. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591.

**Time for appeal and error.**—The time limit for an appeal or writ of error direct to the Supreme Court from the District Court in a bankruptcy case is two years, as provided in R. S. sec. 1008, title JUDICIARY herein; such cases are not governed by the time limit of thirty days which is prescribed in general orders in bankruptcy No. 36, subd. 2. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591. The two years' limit is probably not reduced by the rulings that a certificate presenting the question of jurisdiction must be obtained during the term at which the judgment was rendered (see note to Judicial Code, sec. 238, title JUDICIARY), as bankruptcy courts have no terms. See the first note to section 2.

**Form of appellate remedy.**—Where a judgment of the District Court is based upon the verdict of a jury on a jury trial demanded as of right, the record can be brought to the Supreme Court with a certified question of jurisdiction only by means of writ of error and not by appeal. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1906) 203 U. S. 502, 27 S. Ct. 161, 51 U. S. (L. ed.) 292, dismissing an appeal. But if an appeal is dismissed for that reason, the record may be again brought up on a writ of error sued out in proper time. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 501.

A judgment dismissing a petition in involuntary bankruptcy pursuant to a directed advisory verdict that the respondent was not a person who could lawfully be adjudged an involuntary bankrupt is reviewable on appeal. Such was the case of *Denver First Nat. Bank v. Klug*, (1902) 186 U. S. 203, 22 S. Ct. 899, 46 U. S. (L. ed.) 1127, where the finding was that the respondent was "engaged chiefly in farming."

*Mandamus will not lie* from the Supreme Court to the District Court, as a substitute for an appeal or writ of error, to review an adjudication of bankruptcy for alleged want of jurisdiction, where, in making the adjudication, the court was

called upon to decide, and did decide, a question of fact or of mixed law and fact. *In re Riggs*, (1909) 214 U. S. 9, 29 S. Ct. 598, 53 U. S. (L. ed.) 887.

**Certificate of question of jurisdiction.**—

The absence of a separate certificate by the District Court of the question of jurisdiction, or the equivalent of such certificate, is fatal to the appellate jurisdiction of the Supreme Court, where the appeal is taken on the sole question of jurisdiction of the District Court. *Denver First Nat. Bank v. Klug*, (1902) 186 U. S. 203, 22 S. Ct. 899, 46 U. S. (L. ed.) 1127, dismissing an appeal.

A certificate reciting several questions is quoted in *Jaquith v. Rowley*, (1903) 188 U. S. 620, 23 S. Ct. 369, 47 U. S. (L. ed.) 620, and in *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 539, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175. For numerous other cases quoting certificates see the note to Judicial Code, sec. 238, in title JUDICIARY.

**Bill of exceptions.**—On a writ of error with a certified question of jurisdiction a bill of exceptions is not necessary if it would add nothing to what is patent on the face of the record. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591, an adjudication on a jury trial, where the record showed when and how the question of jurisdiction was raised and decided, and the elements necessary to decide it.

**Case advanced for hearing in Supreme Court.**—Supreme Court Rule 32, (1892) 56 U. S. (L. ed.) 1303, provides that cases brought to that court direct from a District Court where the jurisdiction of the latter court is the only question in issue will be advanced on motion and heard under the rules prescribed in regard to motions to dismiss writs of error and appeals.

**Cases direct from District Court not sitting in bankruptcy.**—Final judgments in suits brought in the District Court not sitting in bankruptcy, but exercising the jurisdiction conferred by sections 23a, 23b, of the Bankruptcy Act on the Circuit Court, Circuit Courts being abolished by Judicial Code, sec. 289, title JUDICIARY, are reviewable directly by the Supreme Court on appeal or error under the same conditions and regulations that govern direct review of judgments of the District Court sitting in bankruptcy, considered *supra* in this note. Thus, *Bush v. Elliott*, (1906) 202 U. S. 477, 26 S. Ct. 668, 50 U. S. (L. ed.) 1114, was a case of direct review on a writ of error, presenting the question of jurisdiction of the then Circuit Court to entertain a suit by trustees in bankruptcy to recover upon an alleged cause of action for moneys due the bankrupt at and prior to the adjudication in bankruptcy, where one of the trustees in bankruptcy is a citizen of the same state

with the defendant and the bankrupt a citizen of another state. And *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, was a case of direct review on writ of error involving the constitutionality of the Bankruptcy Act in an action against a bankrupt on a judgment recovered against him prior to his discharge in bankruptcy.

**IV. REVIEW BY UNITED STATES SUPREME COURT OF DECISIONS OF CIRCUIT COURT OF APPEALS.**

The Act of Jan. 28, 1915, ch. 22, sec. 4, 38 Stat. L. 804 1916 Supp. Fed. Stat. Annot. 137, set forth in this title following section 25a (3), clearly deprives the United States Supreme Court of jurisdiction to review by appeal or writ of error any decision of the Circuit Court of Appeals in "controversies arising in bankruptcy proceedings" mentioned in section 24a. See *Central Trust Co. of Illinois v. Lueders* (1915) 239 U. S. 11, 36 S. Ct. 1. But the cases decided prior to the enactment of the provisions above cited may still be usefully consulted in respect of various questions that may arise concerning appellate jurisdiction and procedure under other provisions of the Bankruptcy Act, and are therefore given in the following paragraphs of this note.

**Decisions Prior to Jan. 28, 1915.**—As explained in the preceding paragraph, the following cases in this division of the note were decided under provisions no longer in force.

**Source of appellate jurisdiction.**—An appeal from a final decision of a Circuit Court of Appeals in the proper exercise of its "appellate jurisdiction of controversies arising in bankruptcy proceedings" under section 24a was taken under the authority of section 6 of the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. L. 828, now embodied in sections 128, 241 of the Judicial Code, title JUDICIARY. *Mitchell Store Building Co. v. Carroll*, (1914) 232 U. S. 379, 34 S. Ct. 410, 58 U. S. (L. ed.) 650; *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986; *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772; *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412, 54 U. S. (L. ed.) 610. And see division I of this note to section 24a.

"Controversies arising in bankruptcy, in the nature of plenary suits, concerning property claimed by others than the bankrupt, do not come under the special provisions of the Bankruptcy Act governing petitions for review and appeals, but take the course of ordinary cases in equity, and are not final in the Circuit Court of Appeals where other cases of a similar

character would not be." *Lazarus v. Prentice*, (1914) 234 U. S. 263, 34 S. Ct. 851, 58 U. S. (L. ed.) 1305.

No appeal would lie from a decision of the Circuit Court of Appeals on a petition to revise under section 24b, *certiorari* being the exclusive remedy. See the last paragraph of the note to section 24b.

"This section [section 24a] has no relation to appeals from the Circuit Courts of Appeals. Aside from the express provision therein as to the relations of the Supreme Court to courts of bankruptcy not within any organized circuit, and to the Supreme Court of the District of Columbia, this section did not broaden its jurisdiction in any particular." *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 123 Fed. 14, 17. See also *Hutchinson v. Otis*, (1st Cir. 1902) 115 Fed. 937, 941, 53 C. C. A. 419, *affirmed* (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179.

**Administrative orders.**—An administrative order made by a District Court in bankruptcy proceedings and affirmed by the Circuit Court of Appeals was not reviewable by the Supreme Court. As to what is an administrative order it was held that where property of a bankrupt is seized by an ancillary receiver an order of the District Court in the jurisdiction where the seizure occurs that an intervener claiming the property under an assignment made by the bankrupt after the adjudication in bankruptcy must assert his claim in the court of original rather than ancillary jurisdiction was an administrative order. *Lazarus v. Prentice*, (1914) 234 U. S. 263, 34 S. Ct. 851, 58 U. S. (L. ed.) 1305, wherein the court said: "The contention of the appellants, and the proposition upon which they rely to sustain jurisdiction in this court, is that, by their intervention in the proceeding in the United States district court in Louisiana, they initiated a controversy in the bankruptcy proceeding which is appealable to this court from the circuit court of appeals, as are ordinary cases in equity where original jurisdiction does not rest on diverse citizenship entirely (Judicial Code, sec. 128). To maintain that proposition *Hewitt v. Berlin Mach. Works*, 194 U. S. 296, 48 U. S. (L. ed.) 986, 24 S. Ct. 690; *Coder v. Arts*, 213 U. S. 223, 53 U. S. (L. ed.) 772, 29 S. Ct. 436, 16 Ann. Cas. 1008; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 54 U. S. (L. ed.) 610, 30 S. Ct. 412; *Houghton v. Burden*, 228 U. S. 161, 57 U. S. (L. ed.) 780, 33 S. Ct. 491, and cases of that character, are cited. In those cases it was held that controversies arising in bankruptcy, in the nature of plenary suits, concerning property claimed by others than the bankrupt, do not come under the special provisions of the bankruptcy act governing petitions for review

and appeals, but take the course of ordinary cases in equity, and are not final in the Circuit Court of Appeals where other cases of a similar character would not be.

"The Bankruptcy Act provides for review under section 24b of administrative orders and decrees in the course of bankruptcy proceedings which are not made specially appealable under section 25a. And controversies arising in bankruptcy proceedings, of the character of which we have spoken, under section 24a, are appealable like other equity cases. See *Re Loving*, 224 U. S. 183, 56 U. S. (L. ed.) 725, 32 S. Ct. 446. In this case the merely ancillary jurisdiction invoked in the seizure of this property in the hands of those holding it for the bankrupts was in a mere summary proceeding in bankruptcy, and its character could not be changed or its jurisdiction enlarged, by the attempted intervention of *Lazarus, Michel, & Lazarus* under alleged assignments of the property, made after the filing of the petition in bankruptcy proceedings in the original case. We think the district court was right in holding, and the circuit court of appeals right in affirming its decision, that whatever claim *Lazarus, Michel, & Lazarus* had under the circumstances here shown must be asserted in the court of original jurisdiction. The attempted intervention in the ancillary proceeding did not give jurisdiction over a controversy in bankruptcy appealable under the Judicial Code to the court of appeals, and thence to this court. This conclusion must result in the dismissal of the attempted appeal here."

**Jurisdictional amount.**—It is to be observed that if a decision was not appealable to the Supreme Court under section 25b (in effect repealed by the Act of Jan. 28, 1915, above cited in this note), but only under section 6 of the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. L. 828, re-enacted in part in section 241 of the Judicial Code, title JUDICIARY, the matter in controversy must exceed \$1,000 besides costs. See *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 123 Fed. 14, 19, 59 C. C. A. 94; *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179.

**Time for appeal.**—Judgments or decrees of the Circuit Court of Appeals in "controversies arising in bankruptcy proceedings" were not governed by general order 36, subd. 3, limiting thirty days for appeals in certain cases, but were reviewable by the Supreme Court upon appeal taken or writ of error sued out "within one year after the entry of the order, judgment, or decree sought to be reviewed," as provided in the last paragraph of section 6 of the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. L. 828, in title JUDICIARY. *Thomas v. Sugarman*,

(1910) 218 U. S. 129, 30 S. Ct. 650, 54 U. S. (L. ed.) 967.

The appellate procedure on appeals to the Supreme Court from the Circuit Court of Appeals in "controversies arising in bankruptcy proceedings" was the same that obtained in like cases of appeals to the Supreme Court under the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. L. 826, and was not regulated by any provision in the Bankruptcy Act or the General Orders. Neither section 25b (formerly in force) of the Bankruptcy Act nor General Order No. 36 applied to such appeals. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412, 54 U. S. (L. ed.) 610.

Hence on appeals from decrees of the Circuit Court of Appeals determining "controversies," etc., under section 24a, no findings of fact and conclusions of law were required; General Order No. 36, subd. 3, applying only to appeals under section 25b, then in force. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412, 54 U. S. (L. ed.) 610.

Miscellaneous matter of appellate procedure, see first note to section 25a.

*Review on certiorari* to the Circuit Court of Appeals, see section 25d.

*Mandate and proceedings thereon.*—On determination of a case taken to the Supreme Court from the Circuit Court of Appeals, which was brought to the latter from a District Court, it is customary to issue but a single mandate; and although the mandate may be addressed to the Circuit Court of Appeals alone in point of form, the directions as to the further proceedings of the District Court are not an order to the Circuit Court of Appeals to issue an order to the District Court, but simply directions to be communicated to the District Court, which the latter is to follow on the authority of the Supreme Court, not of the Circuit Court of Appeals. Hence an application for mandamus to the District Court to compel it to conform to the mandate must be made to the Supreme Court and not to the Circuit Court of Appeals, the latter having no jurisdiction thereof. *Ex p. Chicago First Nat. Bank*, (1907) 207 U. S. 61, 28 S. Ct. 23, 52 U. S. (L. ed.) 103, reversing (7th Cir. 1906) 146 Fed. 742, 77 C. C. A. 408.

A decree of a District Court for the transfer to certain adverse claimants of a part of the proceeds of a sale of property not in possession of the trustee in bankruptcy, without prejudice to the rights of such trustee, "if this court shall so authorize," to litigate in any proper court the question of his right to recover such funds as a part of the bankrupt's general estate, is a sufficient compliance with the mandate of the Supreme Court, which had directed the remanding of the case for further proceedings in conformity with its opinion, in which it was stated that the

District Court's original decree should have been "without prejudice to the right of respondents to litigate in a proper court." *Ex p. Chicago First Nat. Bank*, (1907) 207 U. S. 61, 28 S. Ct. 23, 52 U. S. (L. ed.) 103, reversing (7th Cir. 1906) 146 Fed. 742, 77 C. C. A. 408.

Where an appeal is dismissed by the Supreme Court without opinion, and the mandate recites only that the appeal was dismissed "for the want of jurisdiction," it would be idle to speculate as to the precise grounds upon which this action was taken. *Loeser v. Savings Deposit Bank, etc., Co.*, (C. C. A. 6th Cir. 1908) 163 Fed. 212.

#### V. BANKRUPTCY COURTS NOT WITHIN ORGANIZED CIRCUIT.

*Not within organized circuit.*—*In general.*—The appellate jurisdiction of the United States Supreme Court "from courts of bankruptcy not within any organized circuit" can be exercised only in "controversies arising in bankruptcy proceedings," as distinguished from "proceedings" in bankruptcy. *Tefft v. Munsuri*, (1911) 222 U. S. 114, 32 S. Ct. 67, 56 U. S. (L. ed.) 118, dismissing for want of jurisdiction, an appeal from an order of the District Court of the United States for Porto Rico disallowing certain claims against a bankrupt's estate. See also *Munsuri v. Fricker*, (1911) 222 U. S. 121, 32 S. Ct. 70, 56 U. S. (L. ed.) 121.

"From the Supreme Court of the District of Columbia." Decisions of the Supreme Court of the District of Columbia are reviewable only by the United States Supreme Court; the Court of Appeals of the District of Columbia has no appellate jurisdiction over the Supreme Court of the District sitting as a court of bankruptcy. *Sullivan v. Goldman*, (1912) 38 App. Cas. (D. C.) 319. In *Audubon v. Shufelt*, (1901) 181 U. S. 575, 21 S. Ct. 735, 45 U. S. (L. ed.) 1009, one of the earliest cases decided by the federal Supreme Court under the present Bankruptcy Act, an appeal was entertained, without discussion, from an order of the Supreme Court of the District of Columbia sitting in bankruptcy granting a discharge. But it was declared in *James v. Stone*, (1913) 227 U. S. 410, 33 S. Ct. 351, 57 U. S. (L. ed.) 573, that "the only appeal in bankruptcy proceedings from a judgment granting or refusing a discharge is from the bankruptcy court to the circuit court of appeals." So it seems that the entertaining of jurisdiction in *Audubon v. Shufelt*, *supra*, was an inadvertence on the part of the federal Supreme Court—an occurrence not without precedent. See *Armstrong v. Fernandez*, (1908) 208 U. S. 324, 28 S. Ct. 419, 52 U. S. (L. ed.) 514, expressly overruled on the jurisdictional point in *Tefft v. Munsuri*, (1911) 222 U. S. 114, 32 S. Ct. 67,

56 U. S. (L. ed.) 118. If it should come to pass that orders in "proceedings" in bankruptcy in the Supreme Court of the District of Columbia are not reviewable on petition for revision under section 24b, since that court is not "within their jurisdiction" of any Circuit Court of Appeals, and are not reviewable on appeal by any court whatever, this unfortunate result is immaterial in the construction of the Bankruptcy Act. See *Tefft v. Mun-suri*, *supra*, this paragraph.

*Philippine Islands*.—As to appellate jurisdiction of the United States Supreme

Court over the Supreme Court of the Philippine Islands, see Judicial Code, sec. 247.

*Porto Rico*.—As to appellate jurisdiction of the United States Supreme Court over the Supreme Court of, and the United States District Court for, Porto Rico, see Judicial Code, secs. 128, 238, and 246 (in title JUDICIARY) as expressly amended by Act of Jan. 28, 1915, ch. 22, sec. 2, mentioned in the notes to the foregoing sections of the Judicial Code.

*Courts within organized circuit*.—See division I, *supra*, this note.

**b [Circuit Courts of Appeals.]** The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved. [(1898) 30 Stat. L. 553.]

The provisions in this subdivision are recognized and confirmed in Judicial Code, sec. 130, title JUDICIARY.

**Appeal or petition to revise as exclusive or optional right.**—The remedy by appeal is in all cases exclusive of the remedy by petition under section 24b; no petition under section 24b can be entertained if the petitioner has a remedy by appeal either under section 24a or 25a. "Each method of procedure for the review of orders in bankruptcy is exclusive of the other." *Pindel v. Holgate*, (1915 9th Cir.) 221 Fed. 342, 137 C. C. A. 158.

Thus in *In re Loving*, (1912) 224 U. S. 183, 32 S. Ct. 446, 56 U. S. (L. ed.) 725, holding that the Circuit Court of Appeals had no jurisdiction of a petition to revise an order establishing a claim as a lien against a bankrupt estate, the court said: "The question now propounded is: Was the trustee also entitled to a review in the Circuit Court of Appeals under section 24b by petition for review? Under that section authority, either interlocutory or final, is given to the Circuit Court of Appeals to superintend and revise in matters of law the proceedings of the inferior courts of bankruptcy within their jurisdiction. We think this subdivision was not intended to give an additional remedy to those whose rights could be protected by an appeal under section 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the Circuit Court of Appeals, and, in certain cases, in this court. The proceeding under section 24b, permitting a review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under § 24. *Coder v. Arts*, (1909) 213 U. S. 223, 233 [29 S. Ct. 436, 53 U. S. (L. ed.) 772]. Under section 24b a ques-

tion of law only is taken to the Circuit Court of Appeals: under the appeal section controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under section 25 a review by petition under section 24b. The object of section 24b is rather to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate. In our judgment the rule was well stated in *Re Mueller*, (1905) 135 Fed. 711, 68 C. C. A. 349, by Mr. Justice Lurton, then circuit judge (p. 715): "The proceedings reviewable [under section 24b] are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under 25a. This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under 24a."

"The proceeding under this section [24b] is designed to enable the Circuit Court of Appeals to review questions of law arising in bankruptcy proceedings, and is not intended as a substitute for the right of appeal upon controverted questions of fact under the right of appeal given in controversies arising in bankruptcy proceedings (section 24), or the special appeal given in certain cases under section 25." *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008.

To the point that the remedy by appeal and by petition to revise are mutually exclusive, see also the following cases, some of which were decided prior to *In re Loving*, quoted in next to last paragraph: *Lazarus v. Prentice*, (1914) 234 U. S. 263, 34 S. Ct. 851, 58 U. S. (L. ed.) 1305; *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, *reversing* (7th Cir. 1903) 125 Fed. 169, 60 C. C. A. 567, and holding that a controversy in the Bankruptcy Court between a receiver appointed by that court and an adverse claimant to property which the receiver had been authorized by the court to sell was a proceeding in bankruptcy and not reviewable by appeal; *In re Streater Metal Stamping Co.*, (C. C. A. 7th Cir. 1913) 205 Fed. 280. *Kirsner v. Taliaferro*, (C. C. A. 4th Cir. 1912) 202 Fed. 51; *Bothwell v. Fitzgerald*, (C. C. A. 9th Cir. 1915) 219 Fed. 408, holding that a petition for revision under this section and an appeal taken under section 24a of this Act are each exclusive of the other; *Kirkpatrick v. Harnesberger*, (1912 5th Cir.) 199 Fed. 886, 118 C. C. A. 334, dismissing a petition to revise a judgment appealable under section 24a; *Southern Cotton Oil Co. v. Elliott*, (C. C. A. 6th Cir. 1914) 218 Fed. 567, dismissing a petition to review an order rejecting a claim, which was appealable under section 25a (3); *Dickas v. Barnes*, (1905), 6th Cir.) 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; *Postlethwaite v. Hicks*, (C. C. A. 4th Cir. 1908) 165 Fed. 897, dismissing a petition for revision. See also *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593; *Cook Inlet Coal Fields Co. v. Caldwell*, (C. C. A. 4th Cir. 1906) 147 Fed. 475; *In re Hamilton Automobile Co.*, (C. C. A. 7th Cir. 1912) 198 Fed. 856; *U. S. v. Ruggles*, (C. C. A. 6th Cir. 1915) 221 Fed. 256, holding that a judgment recovered in an action for breach of condition upon the bond of a trustee, brought under section 50h of this act, is not a proceeding in bankruptcy, reviewable by petition to revise; *In re Martin*, (C. C. A. 6th Cir. 1912) 201 Fed. 31; *Pindel v. Holgate*, (C. C. A. 9th Cir. 1915) 221 Fed. 342, holding that an order allowing a claim of five hundred dollars or over, when standing alone, is not reviewable by a petition to revise, section 25a (3) of this act authorizing an appeal, as in equity cases, from such a judgment or allowance; *Barnes v. Pampel*, (1912 6th Cir.) 192 Fed. 525, 113 C. C. A. 81; *In re Mueller*, (C. C. A. 6th Cir. 1905) 135 Fed. 711, 712, 715, dismissing a petition to review an order allowing a claim, which was appealable under section 25a (3), Mr. Justice Lurton (then Circuit Judge) saying: "That which may come here by appeal cannot come here for review; otherwise the distinction which the act recognizes will be ignored. Neither is there any reason for

supposing that an order or judgment may be appealed when questions of fact are to be considered and reviewed upon petition if only a question of law is involved. The distinction between cases appealable and cases reviewable lies deeper, and turns upon the character of case or question. . . . The consensus of opinion and reason seems to be that this revisory jurisdiction does not include any orders or decrees which are appealable"—whether under section 24a or under section 25a—"the provisions for appeal and for petition of review being mutually exclusive"; *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 580, *citing* the following cases: *Dickas v. Barnes*, (6th Cir. 1905) 140 Fed. 849, 72 C. C. A. 261; *Davidson v. Friedman*, (6th Cir. 1906) 140 Fed. 853, 72 C. C. A. 553; *In re McMahon*, (6th Cir. 1906) 147 Fed. 684, 77 C. C. A. 668; *O'Dell v. Boyden*, (6th Cir. 1906) 150 Fed. 731, 10 Ann. Cas. 239, 80 C. C. A. 397. See also *In re Doran*, (C. C. A. 6th Cir. 1907) 154 Fed. 467 where the court said that "where an appeal has been erroneously taken it cannot be treated and sustained as a petition for review"; *In re Friend*, (C. C. A. 7th Cir. 1905) 134 Fed. 778, holding that judgment granting a discharge, being appealable under section 25a (2), is not reviewable on petition to revise, even though it involves only matter of law, the court saying: "Why should an inference be entertained that original petitions to review and appeals were intended to be interchangeable at the election of the suitor? . . . If an inferior territorial court enters one of the judgments in bankruptcy proceedings on the equity side which are specifically named in section 25a, is it conceivable that Congress designed that the aggrieved party should have his choice, not merely between methods of review, but also between forums?" *Morehouse v. Pacific Hardware, etc., Co.*, (C. C. A. 9th Cir. 1910) 177 Fed. 337; *Miles City First Nat. Bank v. State Nat. Bank*, (C. C. A. 9th Cir. 1904) 131 Fed. 430, 433; *In re Dickson*, (C. C. A. 1901) 111 Fed. 726; *In re Worcester County*, (C. C. A. 1900) 102 Fed. 811. In *In re Eggert*, (C. C. A. 1900) 102 Fed. 735; *In re Rouse*, (C. C. A. 1899) 91 Fed. 98; *In re Good*, (C. C. A. 1900) 99 Fed. 389, in the eighth circuit, holding that the bankrupt could not by petition secure a review of an order adjudicating him a bankrupt, though the petition alleged error of law apparent upon the face of the proceedings in the District Court.

In a few cases it had formerly been held, or the opinion was expressed, that a petition to revise in matter of law was a proper remedy even where the petitioner might have appealed as to both the law and facts. *Burleigh v. Foreman*, (C. C. A. 1st Cir. 1903) 125 Fed. 217 (*Compare In re Pettingill*, (C. C. A. 1st Cir. 1905) 137 Fed. 840); *In re Lee*, (C. C.

A. 8th Cir. 1910) 182 Fed. 579, 581; *In re McKenzie*, (C. C. A. 8th Cir. 1905) 142 Fed. 383; *Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363, holding that the fact that a decision may be reviewable on petition under section 24b does not alone make it nonappealable as a "controversy" under section 24a. See also *C. C. Taft Co. v. Century Sav. Bank*, (C. C. A. 8th Cir. 1905) 141 Fed. 369; *Thomas v. Woods*, (C. C. A. 8th Cir. 1909) 173 Fed. 585; *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71.

Under the *Bankruptcy Act of 1867* the supervisory control of the Circuit Court "except when provision is otherwise made" was held not to extend to judgments made appealable by the Act. *Matter of Alexander*, (1869) Chase (U. S.) 295; *York's Case*, (1870) 1 Abb. (U. S.) 503; *Smith v. Mason*, (1871) 14 Wall. 419, 20 U. S. (L. ed.) 748; *Knight v. Cheney*, 5 Nat. Bankr. Reg. 305, (1871) 14 Fed. Cas. No. 7,883. "In *Lathrop v. Drake*, (1875) 91 U. S. 516, 23 U. S. (L. ed.) 414, it was held that the appellate jurisdiction conferred on the Circuit Courts by the Act of 1867 was of two classes of cases, one to be exercised under a petition for review, the other by the ordinary appeal or writ of error. The same distinction has been recognized in construing the bankruptcy act of 1898, and it has been held that the provisions for appeal and for review on petition are mutually exclusive, and that the revisory jurisdiction does not include any orders or decrees which are appealable or reviewable on writ of error." *Morehouse v. Pacific Hardware, etc., Co.*, (1910) 177 Fed. 337, 100 C. C. A. 647.

**Proceedings of Bankruptcy Courts in territories.**—Courts of bankruptcy in the territories, see section 2.

When a territory is assigned by Congress to a federal judicial circuit the courts of the territory are thereby brought within the appellate jurisdiction of the Circuit Court of Appeals for that circuit. *Plymouth Cordage Co. v. Smith*, (1904) 194 U. S. 311, 24 S. Ct. 725, 48 U. S. (L. ed.) 992, holding that Oklahoma Territory having been assigned to the 8th circuit the Circuit Court of Appeals for that circuit had jurisdiction of a petition to revise, under section 24b, bankruptcy proceedings in a District Court of the territory. The court said: "By the Judiciary Act of March 3, 1891, that Jurisdiction embraced the review of the judgments, orders, and decrees of the Supreme Courts of the territories in cases in which the judgments of the Circuit Court of Appeals were made final by that act, but in other cases the jurisdiction remained in this court. *Shute v. Keyser*, (1893) 149 U. S. 649, 37 U. S. (L. ed.) 884, 13 S. Ct. 960. Then came the bankruptcy law making the District Courts of the territories courts of bank-

ruptcy, and providing that their proceedings as such might be revised by the Circuit Courts of Appeals within whose jurisdiction they happened to be. We think the law should be taken as it is written, and perceive no adequate reason for concluding that the real intention of Congress is not expressed in the language used. Congress may well have believed it wisest that the Circuit Courts of Appeals should deal in this summary way with questions of law arising in the progress of bankruptcy proceedings in the territorial courts, although jurisdiction by appeal or writ of error, and by appeal, as provided, was vested in the Supreme Courts of the territories. The Circuit Court of Appeals for the fifth circuit has announced the same conclusion (*In re Seebold* (1901) 45 C. C. A. 117, 105 Fed. 910, 914), as has the Supreme Court of Oklahoma (*Ex parte Stumpff*, (1900) 9 Okla. 639, 60 Pac. 96). A different view appears to have been entertained by the Circuit Court of Appeals for the eighth circuit in *Re Blair*, (1901) 45 C. C. A. 530, 106 Fed. 662, though apparently the case did not necessarily require the precise question to be passed on."

In *In re Crawford*, (1907 8th Cir.) 152 Fed. 169, 81 C. C. A. 419, the court said: "The Indian Territory has never been assigned to this circuit, as have the territories of New Mexico and Oklahoma, . . . and for that reason, as was decided in *Re Blair*, (1901) 106 Fed. 662, 664, 45 C. C. A. 530, 532, upon a review of the acts of Congress, the Court of Appeals of this circuit is without jurisdiction to entertain petitions to revise, in matters of law, the orders of the courts of original jurisdiction of the Indian Territory sitting in bankruptcy."

As to Alaska, Hawaii, Philippine Islands, and Porto Rico, see the note to section 24a.

"Subdivision b of section 24 of the Bankruptcy Law applies only to circuit courts of appeal and has no application whatever to the supreme courts of a territory. By it the circuit courts of appeal are given the right to superintend and revise in matter of law the proceedings of the several inferior courts within their respective jurisdictions, but this provision is confined to the circuit courts of appeal." *Ex p. Stumpff*, (1900) 9 Okla. 639, 60 Pac. 96.

**Appeal treated as petition to revise.**—Unquestionably where "matter of law" is sufficiently presented in the record on an appeal, the Circuit Court of Appeals is at liberty to treat the appeal as a petition to revise if appeal is decided not to be the proper remedy. *Holden v. Stratton*, (1903) 191 U. S. 115, 119, 24 S. Ct. 45, 47, 48 U. S. (L. ed.) 116, 118; *Duryea Power Co. v. Sternberg*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047.

In *In re Abraham*, (C. C. A. 5th Cir. 1899) 93 Fed. 767, 787, the court treated

an appeal as a petition for revision, the record clearly embracing a sufficient statement of the facts and action of the court thereon sought to be revised in matter of law. See the same case on certiorari *sub nom.* *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814.

In *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, an appeal presenting only a question of law was treated as a petition for revision, thereby avoiding the necessity of deciding whether the judgment complained of was one rejecting a claim and therefore appealable under section 25a (3).

Treating an appeal in an unappealable case as a petition for revision, where the appellee made no objection, and the record was fully adequate to present a matter of law, "we shall not consider our action a precedent in any case where objection is made," said the court in *In re Rose Shoe Mfg. Co.*, (C. C. A. 2d Cir. 1909) 168 Fed. 39.

If a consideration of the facts is essential to any review of the decision complained of, an appeal cannot be treated as a petition for revision. *Francis v. McNeal*, (C. C. A. 3d Cir. 1909) 170 Fed. 445; *Dickas v. Barnes*, (1905 6th Cir.) 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; *Gaudette v. Graham*, (C. C. A. 9th Cir. 1908) 164 Fed. 311, where the court said: "That is only permissible where questions of law only are involved," citing *In re Williams*, (9th Cir. 1907) 156 Fed. 934, 84 C. C. A. 434; *In re Rouse*, (7th Cir. 1899) 91 Fed. 96, 98, 33 C. C. A. 356, and *Courier Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, (6th Cir. 1900) 101 Fed. 699, 41 C. C. A. 614.

**Differences in time for appeal and for revision.**—An appeal could hardly be treated as a petition for revision if the appeal were not taken within the time required in the particular jurisdiction for filing a petition to revise. See the last part of the opinion in *Munsuri v. Fricker*, (1911) 222 U. S. 121, 32 S. Ct. 70, 56 U. S. (L. ed.) 121. See also *Postlethwaite v. Hicks*, (1908) 165 Fed. 897, 91 C. C. A. 575, cited *infra*, the next paragraph but one.

**Petition for revision treated as appeal.**—While an appeal may be treated as a petition for revision in a proper case, the converse proposition does not necessarily hold; a petition for revision opens only questions of law, and jurisdiction of the Circuit Court of Appeals thereon cannot be enlarged by treating it as an appeal opening both fact and law. *Duryea Power Co. v. Sternberg*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047.

A petition to superintend and revise could not be treated as an appeal unless it was filed within the time limited for an appeal, which would be ten days if the judgment was appealable under section

25a. So stated in *Postlethwaite v. Hicks*, (C. C. A. 4th Cir. 1908) 165 Fed. 897.

**Appeal united with petition.**—An appeal and also a petition to superintend and revise were filed in the following cases, the court usually dismissing the proceeding which it deemed inappropriate and determining the questions presented in the other proceeding, especially when the latter was declared to be the exclusive remedy. *Bothwell v. Fitzgerald*, (1915) 219 Fed. 408, 135 C. C. A. 212; *In re Moore*, (C. C. A. 5th Cir. 1909) 166 Fed. 689; *Franklin v. Stoughton Wagon Co.*, (C. C. A. 8th Cir. 1909) 168 Fed. 857; *Schuler v. Hassinger*, (C. C. A. 5th Cir. 1910) 177 Fed. 119; *In re Hecox*, (C. C. A. 8th Cir. 1908) 164 Fed. 823, "a course of practice recognized in this jurisdiction," citing *In re McKenzie*, (8th Cir. 1905) 142 Fed. 383, 73 C. C. A. 483; *In re Holmes*, (8th Cir. 1905) 142 Fed. 391, 73 C. C. A. 491; *Hendricks v. Webster*, (C. C. A. 8th Cir. 1908) 159 Fed. 927, dismissing the petition, "as we are asked to consider evidence in the record," and entertaining the appeal; *Knapp v. Milwaukee Trust Co.*, (C. C. A. 7th Cir. 1908) 162 Fed. 675; *Ingraham v. Wilson*, (C. C. A. 8th Cir. 1903) 125 Fed. 913; *In re Groetzinger*, (C. C. A. 3d Cir. 1902) 127 Fed. 124; *In re Mertens*, (C. C. A. 2d Cir. 1905) 142 Fed. 445; *Union Nat. Bank v. Neill*, (C. C. A. 5th Cir. 1906) 149 Fed. 720; *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 699; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, affirmed (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772; *In re Louisville First Nat. Bank*, (C. C. A. 6th Cir. 1907) 155 Fed. 100; *In re Louisville Nat. Banking Co.*, (C. C. A. 6th Cir. 1908) 158 Fed. 403; *In re Dickson*, (C. C. A. 1901) 111 Fed. 726; *In re Worcester County*, (C. C. A. 1900) 102 Fed. 808; *Hutchinson v. Otis*, (C. C. A. 1902) 115 Fed. 941; *Hutchinson v. Le Roy*, (C. C. A. 1902) 113 Fed. 202; *Fisher v. Cushman*, (C. C. A. 1900) 103 Fed. 860; *In re Marshall Paper Co.*, (C. C. A. 1900) 102 Fed. 872.

**Practice in revision proceedings in general.**—No rule or order has been made by the Supreme Court regulating the practice under section 24b. Since the jurisdiction to superintend and revise is "in equity," the federal Equity Rules established by the Supreme Court must be followed as nearly as may be. General Order No. 37; *In re Baker*, (C. C. A. 1900) 104 Fed. 287. The practice has been regulated by rules in the Circuit Court of Appeals for the first circuit, 34 C. C. A. iii, and for the fourth circuit, 97 Fed. iii, 37 C. C. A. iii.

**Questions and orders reviewable or not reviewable on petition.**—*Reviewability in general.*—"It is conceivable that the line of demarcation between proceedings in bankruptcy and controversies at law and in equity, arising in the course of bankruptcy proceedings, may in some cases be



obscure; but, generally speaking, the former include all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts, and orders confirming the composition. These are questions which, with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision. The latter include all controversies and questions arising between the trustee and adverse claimants of property as property of the estate, whether the property be in his possession or theirs." *Per* Gilbert, J., in *Morehouse v. Pacific Hardware, etc., Co.*, (C. C. A. 9th Cir. 1910) 177 Fed. 337, 339.

**Review confined to bankruptcy proceedings.**—The supervisory jurisdiction conferred by section 24b is much the same as, and not more extensive than, that which was vested in the Circuit Courts under the first paragraph of section 2 of the Bankrupt Act of March 2, 1867. *In re Jacobs*, (C. C. A. 1900) 99 Fed. 539. Under the last-mentioned provisions it was held that the District Court exercised a twofold jurisdiction, first as a court of bankruptcy, and secondly as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt or claims alleged to be due from or to him, *Lathrop v. Drake*, (1875) 91 U. S. 516, 23 U. S. (L. ed.) 414; and that when it exercised jurisdiction of the latter character its judgments could be reviewed only in the ordinary way by appeal or writ of error under the provisions of the Judiciary Act regulating such proceedings, *Coit v. Robinson*, (1873) 19 Wall. 274, 22 U. S. (L. ed.) 152. Substantially the same views were expressed in *Sandusky v. Indianapolis First Nat. Bank*, (1874) 23 Wall. 289, 23 U. S. (L. ed.) 155; *Morgan v. Thornhill*, (1870) 11 Wall. 65, 20 U. S. (L. ed.) 60; *Marshall v. Knox*, (1872) 16 Wall. 551, 21 U. S. (L. ed.) 481; *York's Case*, (1870) 1 Abb. (U. S.) 513. Following those authorities it was held in *In re Jacobs*, (C. C. A. 1900) 99 Fed. 539, that neither an interlocutory nor a final judgment or decree in a plenary suit by or against the trustee could be reviewed by petition under section 24b of the present Bankrupt Act. See as to the remedy by appeal, *supra*, notes to section 24a.

Jurisdiction to revise on petition the rulings of the Bankruptcy Court "extends only to some order made in the bankruptcy proceedings proper and does not embrace proceedings in suits brought

by the trustee in bankruptcy against third parties." *In re Rusch*, (C. C. A. 1902) 116 Fed. 270, dismissing a petition to review orders made in proceedings of which the Bankruptcy Court acquired jurisdiction only by consent of the defendants as provided in section 23b.

There is an intimation in *Hutchinson v. Otis*, (C. C. A. 1902) 115 Fed. 941, that proceedings on the petition of an intervening claimant to a fund in the registry of the court—"a summary intervening petition under general juridical rules and not controlled by section 57 of the Bankruptcy Act of 1898"—would be reviewable, if at all, only on appeal as in cases not in bankruptcy.

**Allowance of debt but denial of lien.**—In *Huttig Sash, etc., Co. v. Stitt*, (1914 5th Cir.) 218 Fed. 1, 133 C. C. A. 641, where the total amount of a claim was allowed as an unsecured debt, but the asserted right to a lien was denied, and the claimant filed a petition to revise under section 24b, and the propriety of this remedy was affirmed, the court, *per* Walker, J., said: "The claim presented was not rejected, so as to confer upon the claimant the right to appeal given by subdivision 3 of section 25a of the Bankruptcy Act. Only the asserted lien for a part of the amount of the claim was denied. In this respect the case was different from the one considered in the case of *Loving*, (1912) 224 U. S. 183, 32 S. Ct. 446, 56 U. S. (L. ed.) 725, in which the claim, as it was presented, was rejected, with the result of giving the claimant the right to appeal from the judgment 'rejecting a debt or claim,' etc. It is also unlike the case of *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008, in which an appeal was held proper, as the matter sought to be reviewed was a judgment allowing the claim made and the asserted claim for its security. We understand the opinion in the last-mentioned case to recognize the propriety of a resort to a petition to superintend and revise under subdivision 'b' of section 24 of the Bankruptcy Act, when the claimant complains of a supposed mistake of law made, not in the rejection of his claim, which in fact was allowed for its full amount, but in the court's exercise of its incidental right to consider and determine the validity of the lien for a part of the amount of the debt claimed asserted upon property in the hands of the bankrupt's trustee. The claimant has no right of appeal in such a case, his claim as he presented it having been allowed, and he may resort to a petition to superintend and revise the action of the court in dealing with an incident of that claim, the asserted right to a lien."

In *In re Lee*, (C. C. A. 8th Cir. 1910) 182 Fed. 579, 581, without the citation of any

Supreme Court case, it was held that "A decision of a controversy arising in bankruptcy proceedings which involves the validity of the claim of a creditor to a lien upon the property of the bankrupt, or its proceeds under administration in possession of the court, is a proceeding in bankruptcy within the meaning of section 24b of the Bankruptcy Law and reviewable in matter of law upon a petition to revise."

In *Home Bank for Savings v. Lohm*, (C. C. A. 4th Cir. 1915) 223 Fed. 633, it was held that a decree of the District Court, relating to the validity of a lien contested on a claim presented to the referee, cannot be reviewed by a petition to superintend and revise, but must be reviewed by appeal under section 25a.

An order setting aside an adjudication and dismissing the bankruptcy proceeding for want of jurisdiction was held to be reviewable in matter of law on petition of the trustee. In *re New England Breeders' Club*, (C. C. A. 1st Cir. 1909) 169 Fed. 586, regarding that point as decided in *Plymouth Cordage Co. v. Smith*, (1904) 194 U. S. 311, 24 S. Ct. 725, 48 U. S. (L. ed.) 992. But see comments on the latter case in *In re Holmes*, (1905 8th Cir.) 142 Fed. 391, 73 C. C. A. 491.

An order refusing to set aside an order of adjudication of bankruptcy was held to be reviewable on petition under this section. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, citing as in point *Plymouth Cordage Co. v. Smith*, (1904) 194 U. S. 311, 24 S. Ct. 725, 48 U. S. (L. ed.) 992, which held that the Circuit Court of Appeals had jurisdiction of a petition to revise a refusal of the Bankruptcy Court to permit certain creditors to file a motion to set aside an order dismissing a petition in involuntary bankruptcy.

A summary order in bankruptcy proceedings is reviewable by original petition under this section. In *re Goldstein*, (C. C. A. 7th Cir. 1914) 216 Fed. 887. And see *In re Petronio*, (C. C. A. 7th Cir. 1914) 194 U. S. 311, 24 S. Ct. 725, 48 U. S. (L. ed.) 992, wherein it was held that an order made in a summary proceeding in the bankruptcy matter, to determine the title to property in the trustee's possession claimed adversely by one who was neither a party nor a voluntary intervener in the bankruptcy proceedings but who was cited to appear, was reviewable by petition to revise under this section.

An order confirming the sale of a homestead is reviewable under this section, upon matter of law. *Pindel v. Holgate*, (C. C. A. 9th Cir. 1915) 221 Fed. 342.

A denial of a motion to dismiss an application of a bankrupt for a discharge on undisputed facts presents a question of law reviewable by a petition to revise

under section 24b. *Lindeke v. Converse*, (C. C. A. 8th Cir. 1912) 198 Fed. 618.

**Assumption of jurisdiction to determine adverse claim.**—Where it is sought to present to the Circuit Court of Appeals the question whether the District Court erroneously exercised jurisdiction to determine the merits of an adverse claim to property, the question of law so raised is a question in a bankruptcy proceeding, and it is reviewable by a petition to revise. *Gibbons v. Goldsmith*, (C. C. A. 9th Cir. 1915) 222 Fed. 826, wherein the court said: "If the petitioner were here seeking a reversal of the judgment on the merits, and asserting the adverse right to receive all or a portion of the funds in the hands of the court in the proceeding which was instituted therein, her remedy would clearly be by appeal."

Where the validity of a trust deed given by a bankrupt more than four months prior to the institution of bankruptcy proceedings, as against other creditors, arises in bankruptcy proceedings in determining the priority of claims, an order holding the trust deed invalid is reviewable under section 24b, and need not be taken up by appeal. *Ritchie County Bank v. McFarland*, (C. C. A. 4th Cir. 1910) 183 Fed. 715; *Moore v. Green*, (C. C. A. 4th Cir. 1906) 145 Fed. 472, "for the reasons stated by this court in the case of *Morgan v. Mannington First Nat. Bank*, (4th Cir. 1906) 145 Fed. 466, 468, 469, 76 C. C. A. 236."

**Allowance of counsel fees and expenses.**—An order passing upon the claim of a creditor for the allowance of counsel fees and expenses incurred in contesting claims and prosecuting suits on behalf of the estate, if a question of fact is not involved, is reviewable in petition. *Ohio Valley Bank Co. v. Switzer*, (C. C. A. 6th Cir. 1907) 153 Fed. 362. Likewise an order allowing expenses incurred by a bankrupt's trustee for counsel fees. *Davidson v. Friedman*, (6th Cir. 1906) 140 Fed. 853, 72 C. C. A. 553.

"Where the right to amend in bankruptcy proceedings is a valuable legal right, the action of the district judge in refusing the amendment may be revised" under section 24b. *Goodman v. Curtis*, (5th Cir. 1909) 174 Fed. 644, reversing an order denying the bankrupt the right to amend his schedule to supply an omission through mistake to claim his exemptions, and citing *In re Carley*, (3d Cir. 1902) 117 Fed. 130, 55 C. C. A. 146, which reversed, on petition, an order denying a creditor's motion to amend his specifications in opposition to a discharge.

**Orders in contempt proceedings.**—An order not made with a view to obtain possession of property of the bankrupt or to enforce a prior order of the court, but made in a criminal proceeding to punish by fine or imprisonment for contempt in

violating an injunction against the bankrupt and others, has nothing to do with the estate of the bankrupt, and is not reviewable on a petition to revise. *Morehouse v. Pacific Hardware, etc., Co.*, (C. C. A. 9th Cir. 1910) 177 Fed. 337, *distinguishing* *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405, and *In re Cole*, (1st Cir. 1906) 144 Fed. 392, 75 C. C. A. 330, (1st Cir. 1907) 163 Fed. 180, 90 C. C. A. 50, on the ground that "those were not proceedings to punish for contempt already committed, but orders, the purpose of which was to require the payment to the trustees of the money of the estate, and the commitments for contempt were alternative, and for the purpose of compelling obedience to the orders."

"It would seem" that an order to show cause in a proceeding for contempt is not reviewable on petition, for the reason that it is not an interlocutory order which determines any substantial right of the petitioners. *Morehouse v. Pacific Hardware, etc., Co.*, (C. C. A. 9th Cir. 1910) 177 Fed. 337.

An order adjudging the petitioner guilty of contempt in disobeying an order to pay over a sum of money to the trustee in bankruptcy, and ordering that he be committed to jail unless he paid the money, was reviewed on petition in *In re Graessler*, (C. C. A. 9th Cir. 1907) 154 Fed. 478.

*Review of rulings prior to adjudication.*—In *In re Oregon Bulletin Printing, etc., Co.*, (1875) 3 Sawyer. 529, 18 Fed. Cas. No. 10,560, the court said: "No case has been found where a petition for review has been acted on before a final judgment upon the petition in bankruptcy."

*Interlocutory orders.*—It is evident from the cases cited in the following paragraphs of this note that revisory jurisdiction is not confined to orders or judgments final within the tests applied for purposes of appeal. But in considering the similar provisions in the Bankrupt Act of 1867 it was said that the revisory jurisdiction "cannot be invoked before the case or question is finally decided in the lower court," and that such jurisdiction could not and ought not to be "invoked to the manifest delay of justice, at every step in the progress of a case or disposition of a question in the District Court." *In re Oregon Bulletin Printing, etc., Co.*, (1875) 3 Sawyer. (U. S.) 529, 18 Fed. Cas. No. 10,560.

*Premature petition.*—In *Sturgiss v. Corbin*, (C. C. A. 4th Cir. 1905) 141 Fed. 1, it was held that the petitioner for revision of an order setting aside a sale and directing a resale, properly followed the West Virginia practice on appeals in such cases by refraining from filing his petition until after the resale was made and confirmed.

**Orders of a miscellaneous character in**

**the last dozen years expressly or impliedly held reviewable on petition are as follows:**

A decree directing trustees in bankruptcy to turn over certificates of stock and proceeds of other certificates to certain claimants thereof. *Thomas v. Taggart*, (1908) 209 U. S. 385, 28 S. Ct. 519, 52 U. S. (L. ed.) 845.

A decree of the District Court in favor of a trustee in bankruptcy subrogating him to the rights of certain creditors and authorizing him to enforce their attachment liens with like force and effect as the attaching creditors might have done had not the bankruptcy proceedings intervened. *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967; *McHarg v. Staake*, (1906) 202 U. S. 150, 26 S. Ct. 584, 50 U. S. (L. ed.) 971.

A decree requiring payment to the trustee in bankruptcy of a sum of money as a part of the assets of the bankrupt's estate. See end of opinion in *Schweer v. Brown*, (1904) 195 U. S. 171, 25 S. Ct. 15, 49 U. S. (L. ed.) 144.

A decision that a petitioner in involuntary bankruptcy had a provable claim, denying the alleged bankrupt's motion to dismiss the petition, and directing that the claim of the petitioning creditor be liquidated at a jury trial demanded by the alleged bankrupt. *In re Frederic L. Grant Shoe Co.*, (C. C. A. 2d Cir. 1904) 130 Fed. 881, as explained in *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591.

Denial of an application by an individual creditor of a bankrupt member of a firm for an allowance of interest out of the individual estate subsequent to the allowance of his claim. *In re Chandler*, (C. C. A. 7th Cir. 1911) 184 Fed. 887.

A decision denying a summary order to compel the bankrupt's assignee for the benefit of creditors to turn over to the trustee assets alleged to belong to the bankrupt. *In re Farrell*, (C. C. A. 6th Cir. 1910) 176 Fed. 505.

An order directing the trustee in bankruptcy to pay a certain sum of money to the petitioners. *In re Brown*, (C. C. A. 2d Cir. 1909) 174 Fed. 339.

An order directing the turning over of property or money by a third person to the trustee in bankruptcy. *In re Rose Shoe Mfg. Co.*, (C. C. A. 2d Cir. 1909) 168 Fed. 39.

A decision on objections by creditors of a bankrupt to an account rendered by the trustee, which seeks to charge him with property as having come into his possession which was not accounted for, being a summary proceeding and not a plenary suit. *In re Moore*, (C. C. A. 5th Cir. 1909) 166 Fed. 689.

An order dismissing a petition in the nature of a replevin suit seeking to have

delivered to him certain property seized by the receiver in bankruptcy. *Ross v. Stroh*, (C. C. A. 3d Cir. 1908) 165 Fed. 328.

Refusal, solely on a question of law, of the trustee's petition for a summary order on a receiver appointed by a state court to deliver property to the trustee. *In re Hecox*, (C. C. A. 8th Cir. 1908) 164 Fed. 823.

An adjudication of bankruptcy against a corporation, the question being one of jurisdiction and presented in the court below and in the appellate court on an agreed statement of facts. *Hall, etc., Co. v. Friday*, (C. C. A. 3d Cir. 1907) 158 Fed. 593, *reversed* on certiorari, but *impliedly affirmed* on this point (1910) 216 U. S. 449, 30 S. Ct. 261, 54 U. S. (L. ed.) 562, 26 L. R. A. (N. S.) 475.

Denial of a creditor's application to set aside a bankrupt's discharge on the ground that, if the facts claimed by the creditor were established, they would not warrant the court in refusing a discharge. *In re Louisville Nat. Banking Co.*, (C. C. A. 6th Cir. 1908) 158 Fed. 403, the question being "one of administration."

An order setting aside an allowance of a secured claim and requiring the creditor to pay to the trustee a sum received through an unlawful preference. *In re Louisville First Nat. Bank*, (C. C. A. 6th Cir. 1907) 155 Fed. 100, dismissing an appeal united with the petition for review.

An order denying a claim to certain exemptions asserted by the wife of a bankrupt. *In re Youngstrom*, (C. C. A. 8th Cir. 1907) 153 Fed. 98.

An order made in a proceeding between the trustee in bankruptcy and a prior assignee to determine the right to property in the custody of the court or its proceeds. *O'Dell v. Boyden*, (6th Cir. 1906) 150 Fed. 731, 10 Ann. Cas. 239, 80 C. C. A. 397.

An order denying to holders of debts against a partnership the right of participation in the individual assets of the bankrupt partner until the individual creditors of the bankrupt were paid. *Euclid Nat. Bank v. Union Trust, etc., Co.*, (C. C. A. 4th Cir. 1906) 149 Fed. 975, certiorari *denied* (1907) 205 U. S. 547, 27 S. Ct. 793, 51 U. S. (L. ed.) 924.

A decree of the District Court asserting its jurisdiction, on petition by the trustee in bankruptcy for an order to sell real estate in his possession, to determine the validity of claims to it or liens against it, and ruling that if such adverse claimants did not choose to come in voluntarily and set up their claims they might be brought in by subpoena on the trustee's petition. *In re McMahon*, (6th Cir. 1906) 147 Fed. 684, 77 C. C. A. 668.

An order requiring the bankrupt to assign and turn over to his trustee certain life insurance policies as property of his

estate. *In re Mertens*, (C. C. A. 2d Cir. 1905) 142 Fed. 445, *affirmed* in (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771.

An order requiring a bankrupt to pay over to the trustee a sum of money as assets of the estate or in the alternative to be committed to jail. *Samel v. Dodd*, (C. C. A. 5th Cir. 1906) 142 Fed. 68, certiorari *denied* in (1908) 201 U. S. 646, 26 S. Ct. 761, 50 U. S. (L. ed.) 903.

Orders requiring members of a bankrupt partnership to schedule and surrender their individual property. *Dickas v. Barnes*, (6th Cir. 1905) 140 Fed. 849, 72 C. C. A. 261.

A decree relating to the distribution of the proceeds of a sale of real estate made by a trustee in bankruptcy. *In re Groetzinger*, (C. C. A. 3d Cir. 1903) 127 Fed. 124.

An order, on petition of a creditor, directing the sale of property which had previously been set apart to the bankrupt as a homestead. *Ingram v. Wilson*, (C. C. A. 8th Cir. 1903) 125 Fed. 913.

A decree denying a chattel mortgagee's right to a fund arising out of the mortgaged property, which by agreement he had turned over to the Bankruptcy Court reserving the right to pursue the fund. *In re Antigo Screen Door Co.*, (C. C. A. 7th Cir. 1903) 123 Fed. 249.

Earlier cases, not all of which are entirely trustworthy precedents in view of subsequent decisions of the Supreme Court more definitely determining the respective jurisdictions given by sections 24b, 24a, and 25a:

"The dividing line between the judgments and orders of the Bankrupt Court which can be reviewed by appeal or writ of error only and those which may be reviewed by petition for review is somewhat obscure and shadowy." *Per Caldwell, C. J.*, in *In re Blair*, (C. C. A. 1901) 106 Fed. 665. From the enactment of the Bankrupt Act in 1898 down to volume 117 of the Federal Reporter, orders and judgments were reviewed on petition in the following cases:

An order sustaining a demurrer to and dismissing a creditor's petition to vacate an adjudication in voluntary proceedings — on petition of the creditor. *In re Ives*, (C. C. A. 1902) 113 Fed. 911.

An order denying the bankrupt's application for leave to amend his schedule so as to increase his claim for exemption — on petition of the bankrupt. *Moran v. King*, (C. C. A. 1901) 111 Fed. 730.

An order overruling a demurrer to a petition to reinstate a dismissed involuntary petition for adjudication — on petition by one of the respondents to the petition in the Bankruptcy Court. *In re Jennison Mercantile Co.*, (C. C. A. 1902) 112 Fed. 966.

An order vacating an order which permitted a bankrupt to amend his schedule of creditors—on petition of the bankrupt. *In re Hawk*, (C. C. A. 1902) 114 Fed. 916.

An order confirming a referee's appointment of a trustee—on petition of creditors probably. *In re Henschel*, (C. C. A. 1902) 113 Fed. 443.

An order confirming the referee's approval of the creditors' election of a trustee. *In re McGill*, (C. C. A. 1901) 106 Fed. 57.

An order enjoining the petitioner from issuing execution on a judgment entered in a state court against the trustee in bankruptcy. *In re Neely*, (C. C. A. 1902) 113 Fed. 210.

An order restraining further prosecution of an attachment suit in a state court against the bankrupt—on petition of the attaching creditors. *Bear v. Chase*, (C. C. A. 1900) 99 Fed. 920.

An order staying proceedings in a suit in a state court brought by a creditor and pending at the time of the adjudication in bankruptcy—on petition of the creditor. *In re Lesser*, (C. C. A. 1900) 99 Fed. 913.

An order restraining prosecution of a replevin suit in a state court against the trustee and referring the claim of the plaintiff to the referee in bankruptcy—on petition of the claimant. *In re Russell*, (C. C. A. 1900) 101 Fed. 248.

An order overruling a demurrer to the trustee's petition for an injunction to restrain the prosecution of certain suits against him. *Camp v. Zellars*, (C. C. A. 1899) 94 Fed. 799.

An order denying the trustee's application to stay prosecution of a suit in a state court to enforce a lien—on petition of the trustee. *In re Horton*, (C. C. A. 1900) 102 Fed. 986.

An order refusing to enjoin prosecution of a suit brought against the bankrupt in a state court—on petition of the bankrupt. *In re Marshall Paper Co.*, (C. C. A. 1900) 102 Fed. 872.

An order granting leave to make the trustee a party to a foreclosure suit against the bankrupt in a state court, and an order denying the trustee's petition for an injunction against further prosecution of the foreclosure suit—on petition of the trustee. *In re San Gabriel Sanatorium Co.*, (C. C. A. 1900) 102 Fed. 310, (C. C. A. 1901) 111 Fed. 892.

An order directing the trustee to sell property in the lawful custody of a state court which had ordered a sale thereof by its commissioner—on petition of the commissioner. *Frazier v. Southern L. & T. Co.*, (C. C. A. 1900) 99 Fed. 707.

An order directing a sheriff to pay over to the trustee the proceeds of a sale on execution issuing from a state court against the bankrupt—on petition of the

sheriff and the execution creditor probably. *In re Kennedy*, (C. C. A. 1900) 105 Fed. 897.

An order denying the trustee's application for an order of the character last above mentioned—on petition of the trustee. *In re Seebold*, (C. C. A. 1901) 105 Fed. 910.

A summary order requiring a sheriff holding property under state process to surrender it to the trustee—on petition of the sheriff. *In re Francis-Valentine Co.*, (C. C. A. 1899) 94 Fed. 793.

A summary order requiring an agent of the bankrupt to surrender to the trustee certain alleged assets in his possession, and an order of commitment for refusing to obey—on petition of the defendant in the proceedings. *In re Nugent*, (C. C. A. 1901) 105 Fed. 581.

An order directing a bankrupt wife and her husband to transfer a liquor license to the trustee for the purpose of sale. *Fisher v. Cushman*, (C. C. A. 1900) 103 Fed. 860.

An order requiring the bankrupt to surrender assets in his possession to the trustee on pain of imprisonment for contempt. *In re Schlesinger*, (C. C. A. 1900) 102 Fed. 117.

An order committing the bankrupt for disobedience of an order to surrender certain assets to the trustee—on petition of the bankrupt. *In re Rosser*, (C. C. A. 1900) 101 Fed. 562; *In re Purvine*, (C. C. A. 1899) 96 Fed. 192.

An order dismissing the trustee's petition for an order requiring the bankrupt to surrender certain alleged assets to the trustee. *In re Wetmore*, (C. C. A. 1901) 108 Fed. 520.

A summary order requiring an adverse claimant of property to surrender it to the trustee as assets of the estate—on petition of the claimant. *Blumberg v. Bryan*, (C. C. A. 1901) 107 Fed. 673.

A summary order requiring an adverse claimant to surrender alleged assets to the trustee—on petition of the claimant. *In re Abraham*, (C. C. A. 1899) 93 Fed. 767.

An order requiring the bankrupt's general assignee for the benefit of creditors to surrender the assigned property to the trustee—on petition of the assignee. *Sinsheimer v. Simonson*, (C. C. A. 1901) 107 Fed. 898; *Smith v. Belford*, (C. C. A. 1901) 106 Fed. 658.

An order enjoining the alleged bankrupt's general assignee for the benefit of creditors from disposing of the assigned property until adjudication upon the involuntary petition—on petition of the assignee. *In re Gutwillig*, (C. C. A. 1899) 92 Fed. 337; *Davis v. Bohle*, (C. C. A. 1899) 92 Fed. 325.

An order requiring a state court receiver to surrender property to the trustee, and an order of commitment for

refusing to obey—on petition of the receiver. *Carling v. Seymour Lumber Co.*, (C. C. A. 1902) 113 Fed. 483.

An order appointing a receiver of property in possession of an adverse claimant, and an order confirming the receiver's sale of the property pursuant to an order of court—on joint petition of the adverse claimant and the bankrupt. *Beach v. Macon (Grocery Co.)*, (C. C. A. 1902) 116 Fed. 143.

An order dismissing the trustee's petition for an order directing attaching creditors to pay over to him the proceeds of the attachment sale—on petition of the trustee. *Botts v. Hammond*, (C. C. A. 1900) 99 Fed. 916.

An order overruling a demurrer to a petition by the trustee against testamentary trustees to secure trust income as assets—on petition of the testamentary trustees. *In re Baudouine*, (C. C. A. 1900) 101 Fed. 574.

An order of seizure and sequestration of the bankrupt's effects in the hands of a creditor—on petition by the creditor. *Philips v. Turner*, (C. C. A. 1902) 114 Fed. 726.

An order directing the trustee to sell the bankrupt's seat in a stock exchange. *In re Page*, (C. C. A. 1901) 107 Fed. 89.

An order discharging the bankrupt from arrest on an execution issuing from a state court—on petition of the execution creditor. *In re Marcus*, (C. C. A. 1901) 105 Fed. 907.

An order denying an application made under section 9b for an order of arrest of the bankrupt—on petition of the trustee. *In re Hassenbusch*, (C. C. A. 1901) 108 Fed. 35.

An order fining the petitioner, president of a corporation, for refusal to produce the books of the corporation in his custody for examination before the referee in bankruptcy. *In re Horgan*, (C. C. A. 1899) 98 Fed. 414.

A judgment in favor of the trustee on his bill to set aside an alleged fraudulent transfer by the bankrupt—on petition of the alleged fraudulent transferee. *Wall v. Cox*, (C. C. A. 1900) 101 Fed. 403.

An order overruling a demurrer to a bill filed by the trustee to set aside an alleged fraudulent transfer by the bankrupt—on petition of the defendant in the suit. *In re Orman*, (C. C. A. 1901) 107 Fed. 101.

An order denying the bankrupt's claim to an exemption—on petition of the bankrupt. *In re Hindman*, (C. C. A. 1900) 104 Fed. 331; *In re Carpenter*, (C. C. A. 1901) 109 Fed. 558; *Richardson v. Woodward*, (C. C. A. 1900) 104 Fed. 873; *In re Tollett*, (C. C. A. 1901) 106 Fed. 866.

An order adjudging that the bankrupt had abandoned his right to a homestead

exemption and disallowing his claim thereto—on petition of the bankrupt. *In re Mayer*, (C. C. A. 1901) 108 Fed. 599.

An order denying the bankrupt's claim to exemption of an insurance policy—on petition of the bankrupt probably. *In re Scheld*, (C. C. A. 1900) 104 Fed. 870.

An order allowing a claim to exemptions—on petition of the trustee. *In re Friedrich*, (C. C. A. 1900) 100 Fed. 284; *In re Holden*, (C. C. A. 1902) 113 Fed. 141, (C. C. A. 1902) 114 Fed. 650; *In re Falconer*, (C. C. A. 1901) 110 Fed. 111.

An order adjudging priority to a creditor's claim. *In re Worcester County*, (C. C. A. 1900) 102 Fed. 808, reviewed on petition of a trustee; *In re Rouse*, (C. C. A. 1899) 91 Fed. 96, reviewed on petition of opposing general creditors.

An order sustaining an intervener's claim to a lien and preferential payment—on petition of the trustee probably. *In re Oconee Milling Co.*, (C. C. A. 1901) 109 Fed. 866.

An order disallowing a claim to a preferential lien—on petition of the claimant. *In re Pekin Plow Co.*, (C. C. A. 1901) 112 Fed. 308.

An order adjudging that a claim of preference for labor was not a preferential claim—on petition of the claimant. *In re Laird*, (C. C. A. 1901) 109 Fed. 550.

An order awarding priority to certain laborers' claims—on petition of postponed claimants. *In re Kerby-Dennis Co.*, (C. C. A. 1899) 95 Fed. 116.

An order allowing a claim but denying the benefit of subrogation to the rights of a mortgagee—on petition of the claimant. *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, (C. C. A. 1900) 101 Fed. 699.

An order requiring a creditor to surrender an alleged preference as a condition to allowance of his claim—on petition of the creditor. *In re Abraham Steers Lumber Co.*, (C. C. A. 1901) 112 Fed. 406.

An order directing the trustee to pay to a chattel mortgagee of the bankrupt's predecessor in title the proceeds of a sale of the mortgaged property—on petition of the bankrupt and the trustee. *In re Standard Laundry Co.*, (C. C. A. 1902) 116 Fed. 476.

An order denying the claim of a chattel mortgagee of the bankrupt to the proceeds of a sale of the mortgaged property—on petition of the mortgagee. *McNair v. McIntyre*, (C. C. A. 1902) 113 Fed. 113.

An order disallowing a judgment creditor's claim to a lien on a fund in court—on petition of the creditor. *In re Richards*, (C. C. A. 1899) 96 Fed. 935.

An order in favor of the claimant to a fund in the hands of the trustee—on petition of the trustee. *In re Eggert*, (C. C. A. 1900) 102 Fed. 735.

An order of distribution denying a mortgagee's claim to priority of lien—on

petition of the mortgagee. *In re Att*, (C. C. A. 1901) 105 Fed. 754.

An order directing the trustee to pay over a fund to the claimant thereof—on petition of the trustee. *Hutchinson v. Le Roy*, (C. C. A. 1902) 113 Fed. 202.

An order allowing a claim to a fund in the court—on petition of the trustee. *In re Georgia Handle Co.*, (C. C. A. 1901) 109 Fed. 632; *In re New York Economical Printing Co.*, (C. C. A. 1901) 110 Fed. 514.

An order denying a claim to a fund in the court—on petition by the claimant. *In re Lemmon, etc., Co.*, (C. C. A. 1901) 112 Fed. 296.

An order adjudging priority to an attaching creditor against the proceeds of the attached property—on petition of the trustee probably. *In re Beaver Coal Co.*, (C. C. A. 1902) 113 Fed. 889.

An order denying an application for an order to the marshal to surrender property to the mortgagee thereof—on petition of the mortgagee. *In re Young*, (C. C. A. 1901) 111 Fed. 158.

An order directing the trustee to return certain property to the claimant thereof, the trustee claiming it as assets of the estate—on petition of the trustee, it seems. *In re Garcewich*, (C. C. A. 1902) 115 Fed. 87.

An order staying the bankrupt's application for discharge to await settlement by the court of the rights of creditors holding homestead waiver notes and establishing a lien in favor of such creditors—on petition of the bankrupt. *Woodruff v. Cheeves*, (C. C. A. 1901) 105 Fed. 601.

An order refusing to entertain specifications of objection to a discharge which were not sufficiently verified—on petition of the opposing creditors. *In re Brown*, (C. C. A. 1901) 112 Fed. 49.

An order denying leave to a creditor to amend his specification of objections to a discharge—on petition of the creditor. *In re Carley*, (C. C. A. 1902) 117 Fed. 130.

An order refusing to appoint a trustee to administer newly discovered assets, the original trustee having rendered his final accounts and been discharged—on petition of a creditor who filed his claim subsequent to the discharge. *In re Newton*, (C. C. A. 1901) 107 Fed. 429.

**Presentation and reservation in lower court of grounds of review.**—The Circuit Court of Appeals will not ordinarily take jurisdiction of propositions not brought specifically to the attention of the District Court. *In re Boston Dry Goods Co.*, (1st Cir. 1903) 125 Fed. 226, 60 C. C. A. 118; *Shoe, etc., Reporter, Petitioners*, (1st Cir. 1904) 129 Fed. 588, 64 C. C. A. 156.

An objection to specifications of objections to a bankrupt's discharge, on the ground that the jurat was insufficient, cannot be made for the first time on a petition for review. *E. H. Godshalk Co. v.*

*Sterling*, (C. C. A. 3d Cir. 1904) 129 Fed. 580.

Where it was not objected in the District Court that part of the property of a bankrupt ordered to be sold had not been inventoried in the manner required by the Bankruptcy Act, such objection would not be considered on a revisionary petition. *Shoe, etc., Reporter, Petitioners*, (C. C. A. 1st Cir. 1904) 129 Fed. 588.

Where the only jurisdictional question urged in the District Court was by way of objection to the granting of the orders sought to be reviewed, the Circuit Court of Appeals could not pass upon an objection to the jurisdiction of the whole bankruptcy proceeding. *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688.

On petition to review an order directing petitioners to pay over to a temporary receiver a certain sum of money, an objection that a copy of the testimony taken under section 21a, *supra*, was not served with the order to show cause, comes too late if not made at or before the argument in the court below. *In re Friedman*, (C. C. A. 2d Cir. 1908) 161 Fed. 260.

So an objection that petitioners were given no opportunity to cross-examine witnesses who testified against them is unavailable if no request to be allowed to cross-examine them was made. *In re Friedman*, (C. C. A. 2d Cir. 1908) 161 Fed. 260, where the court said: "The case differs fundamentally from *In re Rosser*, (8th Cir. 1900) 101 Fed. 562, 41 C. C. A. 497, where the bankrupt never had any opportunity to show cause why he should not be ordered to turn over certain money."

Likewise the record ought to show that the petitioners objected to the jurisdiction of the Bankruptcy Court to determine summarily the question whether the money was or was not the property of the bankrupt, in order to preserve such objection for consideration on the petition for revision. So suggested in *In re Friedman*, (C. C. A. 2d Cir. 1908) 161 Fed. 260.

**Time for filing petition.**—*When no rule of court prescribes time.*—The Bankruptcy Act does not prescribe a limit of time within which a petition to superintend and revise must be filed, and none has been fixed by the General Orders in bankruptcy, nor by any rule of court in most of the Circuit Courts of Appeals. "It does not, however, follow from this lack of limitation that the Courts of Appeals will entertain petitions to revise any of the proceedings of the inferior courts of bankruptcy which a disappointed litigant may seek to challenge without regard to the time which has elapsed between the date of the proceeding and the presentation of the petition. One of the main purposes of the law was to provide a speedy method whereby a bankrupt might be

finally discharged from liability to his creditors and his property might be equitably distributed among them. This object would be entirely defeated if the orders and judgments in bankruptcy were forever open, or were open for an uncertain or unknown time, to revision and reversal upon petitions under section 24b, because in that case they would never become or be known to be either final or conclusive. An uncertainty relative to the time within which such petitions may be maintained necessarily leaves the conclusiveness of the orders of the Bankruptcy Courts in doubt and thus tends to defeat one of the main purposes of the law. There ought, therefore, to be a well-known and certain limit to the time within which such judgments and orders may be challenged in matter of law by petition as well as by appeal." *Per* Sanborn, J., in *In re Holmes*, (C. C. A. 8th Cir. 1905) 142 Fed. 391. For similar sentiments see *Blanchard v. Ammons*, (C. C. A. 9th Cir. 1910) 183 Fed. 556.

The several Circuit Courts of Appeals have adopted, in their reported opinions, either a definite limitation or a limitation depending somewhat upon the circumstances of each case. By the express terms of section 24b the power there conferred is a "jurisdiction in equity," and "a petition for revision, like all proceedings in bankruptcy, is a proceeding in equity." *In re Holmes*, (C. C. A. 8th Cir. 1905) 142 Fed. 391, 394. General Order No. 37 provides that "in proceedings in equity instituted for the purpose of carrying into effect the provisions of the Act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court shall be followed as nearly as may be." By liberal construction of the order it would extend not only to what are denominated the equity rules, but to rules of practice in equity established alone by decisions of the Supreme Court. Now, it is well settled in that court that bills of review to correct errors apparent upon the face of the record may not be successfully maintained, unless they are filed within the times limited for the review by appeal of the decrees they question. Cases cited in *In re Holmes*, (C. C. A. 8th Cir. 1905) 142 Fed. 391, 393, 394. And petitions for superintendence and revision in matters of law under the Bankruptcy Act are available only to correct errors apparent upon the face of the record. Case last above cited, and cases cited, *supra*, in this note to section 24b. Hence, the reason of the limitation for bills of review being even more persuasive and compelling in the case of petitions for superintendence and revision in bankruptcy, it has been held in two circuits that such a petition cannot be maintained after expiration of the six months period for appeal to the Circuit Court of Appeals, which is prescribed in section 11 of the Circuit Court of Appeals Act of 1891, ch.

517, 26 Stat. L. 829 (title JUDICIARY). See note to last clause of section 25a (3); *In re Holmes*, (C. C. A. 8th Cir. 1905) 142 Fed. 391, dismissing a petition for revision in the case of what it regarded as an appealable order, because the six months period for appeal had elapsed three days before the petition was filed; *In re Worcester County*, (C. C. A. 1st Cir. 1900) 102 Fed. 808, sustaining a petition for revision of an order regarded as nonappealable, filed within six months, the court saying, however, "certainly," the limit of time "can be no shorter." In one of those circuits this time limit was applied to a petition to revise an order in bankruptcy by a District Court of a territory. *In re Tomlinson Co.*, (C. C. A. 8th Cir. 1907) 154 Fed. 834, dismissing a petition filed by a bankrupt more than sixteen months after an order was made in the District Court of Oklahoma territory denying his motion to quash service of the subpœna, and referring to the time limit as being six months. See also *Blanchard v. Ammons*, (C. C. A. 9th Cir. 1910) 183 Fed. 556, a case from a territory.

In another circuit it was held, in a case of a petition for review of a nonappealable order, that the petition ought ordinarily to be filed within six months, but that in the absence of a standing rule on the subject, a longer delay would be tolerated where there was a reasonable excuse for it. *In re Groetzing*, (C. C. A. 3d Cir. 1903) 127 Fed. 124, where the court denied a motion to dismiss a petition for revision, not filed within six months, of an order relating to the distribution of the proceeds of the sale of real estate made by the trustee in bankruptcy, it appearing from the certificate of the clerk of the District Court, and otherwise, that important evidence, to wit, the books of the bankrupt, without fault on the part of the petitioners, had disappeared and could not be found, and that the judge below had made two orders enlarging the time for filing the record with reference to an appeal taken simultaneously with the petition for review.

In *Blanchard v. Ammons*, (C. C. A. 9th Cir. 1910) 183 Fed. 556, where a petition for revision was dismissed because of a delay of more than three years without reasonable excuse, the court said: "An appeal from the adjudication of bankruptcy is required to be taken within ten days, and by analogy it would seem that a petition for revision of the adjudication of bankruptcy ought to be taken within a similar time, unless there are circumstances excusing delay. But the courts have generally held that a petition for revision must be presented within six months."

In *In re Good*, (C. C. A. 8th Cir. 1900) 99 Fed. 389, the court was evidently of opinion that if an adjudication of bankruptcy could be reviewed on a petition to



revise, this could only be done on a petition filed within the ten days limited for an appeal from the order. See also on that point the remarks of the court in *In re Friend*, (C. C. A. 7th Cir. 1905) 134 Fed. 778, 780; *In re Sweetser*, (C. C. Mass. 1907) 157 Fed. 567.

In *In re Youngstrom*, (C. C. A. 8th Cir. 1907) 153 Fed. 98, a motion to dismiss a petition for revision was denied, "as the order sought to be revised is not one of those made specially appealable by section 25a, and as the petition was presented within the six months generally limited for invoking the appellate jurisdiction of a Circuit Court of Appeals."

In *In re New York Economical Printing Co.*, (C. C. A. 2d Cir. 1901) 106 Fed. 339, a motion to dismiss a petition, made on the ground that the same had not been taken within ten days, was denied, the court saying, "we do not think there has been any unreasonable delay in this case," but not stating any of the circumstances nor the length of delay. Subsequently the court adopted the rule quoted *infra*, the fourth paragraph from this.

In *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, (C. C. A. 5th Cir. 1905) 136 Fed. 396, more than three months after an order was made declaring a mortgage lien invalid a petition to revise the order was filed, and the court refused to dismiss it, there being "no suggestion that pending the delay the proceeds of the property mortgaged have been distributed, or that any party's rights have suffered."

A petition presented to a judge of the Circuit Court of Appeals five days after the judgment was rendered which it sought to have reviewed was held to be in ample time. *In re Seebold*, (C. C. A. 5th Cir. 1901) 105 Fed. 910.

Where a party's appeal from an order, taken in due time, was dismissed by the Circuit Court of Appeals about a year afterward because the order was not appealable, but reviewable only on a petition for revision, the court noticed and refrained from deciding the question whether a petition for revision would then be too late. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 581.

*Under a standing rule of court.*—A limitation of ten days has been adopted by rule 38 of the Circuit Court of Appeals in the second circuit, which provides as follows: "Petitions to review orders in bankruptcy filed under the provisions of section 24b of the Bankruptcy Act must be filed and served within ten days after the entry of the order sought to be reviewed, and a transcript of the record of the proceedings in the Bankruptcy Court of the matter to be reviewed must be filed and the cause docketed within thirty days thereafter, but the judge of the Bankruptcy Court may for good cause shown enlarge the time for filing the petition or record, the order of enlargement to be made and

filed with the clerk of this court before the expiration of the times hereby limited for filing the petition and record respectively,"—in order "to conform the practice in review by petition to review by appeal," said the court in *In re Brown*, (C. C. A. 2d Cir. 1909) 174 Fed. 339.

An oral or a written stipulation of counsel extending the time, before expiration of the ten days, and with full knowledge of all existing facts, will not be recognized if the Bankruptcy Court entered no order thereon. *In re Brown*, (C. C. A. 2d Cir. 1909) 174 Fed. 339, where the court said: "It was the manifest object of the rule (38) to keep this important matter of enlargement of time to seek a review by the appellate court within the control of the court, and to prevent indefinite extension by mere agreement of counsel." And in the same case it was held that a *nunc pro tunc* order extending the time, entered after expiration of the ten days, cannot operate to enlarge the time; but the court expressly refrained from deciding what construction might or might not be given to the rule when the sudden illness of a judge or other untoward occurrence prevented a party, who had been himself careful and diligent to conform to the rule, from securing an order in time.

In the same circuit there was an unsuccessful attempt indirectly to extend the time within which to review an adjudication of bankruptcy by filing a petition for revision of an order denying a motion to vacate the order of adjudication after the time for appeal from the latter had expired. *In re Goldberg*, (C. C. A. 2d Cir. 1909) 167 Fed. 808, *affirming* the order for revision of which the petition was filed.

Doubtless the filing of a petition within the time prescribed is not a jurisdictional necessity; that is, it would be subject to waiver by the respondent. See *In re Sweetser*, (C. C. Mass. 1909) 168 Fed. 1018, 1019; *In re Strobel*, (C. C. A. 2d Cir. 1908) 160 Fed. 916. In the latter case, however, it was held that the filing of a stipulation that two petitions to review, with the certified copies transmitted by the clerk of the District Court "be printed in one appeal book" did not constitute a waiver of objection that the petitions were not filed in time.

*The Bankruptcy Act of 1867* prescribed no period of limitation for revisory proceedings. In *Matter of Alexander*, (1869) Chase 295, 1 Fed. Cas. No. 160, Chief Justice Chase said: "Unreasonable delay in invoking the superintending jurisdiction should certainly not be allowed; nor, on the other hand, should such excessive rigor be exercised that the ends of justice will probably be defeated." In *Troy First Nat. Bank v. Cooper*, (1873) 20 Wall. 171, 22 U. S. (L. ed.) 273, Mr. Justice Strong said: "Undoubtedly the application should be made within a reasonable time,

in order that the proceedings to settle the bankrupt's estate may not be delayed, but neither the Act of Congress nor any rule of this court determines what that time is. At present, therefore, it must be left to depend upon the circumstances of each case. Perhaps, generally, it should be fixed in analogy to the period designated within which appeals must be taken." *Oiting Littlefield v. Delaware, etc., Canal Co.*, (1871) 2 Cliff. (U. S.) 371, where the court said: "Until some rule is adopted upon the subject, the court will not deprive the petitioner of a hearing on that ground [delay] unless the delay is manifestly unreasonable or has operated to the prejudice of the respondent." See also *In re Casey*, (1873) 10 Blatchf. (U. S.) 376; *In re Sutherland*, (1870) 2 Biss. (U. S.) 407, where the court said the bankrupt's delay of three months in filing a petition to review an order adjudicating him a bankrupt was "a circumstance which would seem to need explanation."

**"Petition by any party aggrieved."**—This phrase in section 24b is liberally construed, and a doubt as to whether a petitioner in a given case is a party aggrieved "should be resolved in favor of the petitioner." *Clark v. Pidecock*, (C. C. A. 3d Cir. 1904) 129 Fed. 745, 749, where, after a bankrupt's estate had been closed without appointment of a trustee, for the reason that the schedule showed no assets, an assignee of a judgment creditor who alone proved his claim applied to have the estate opened on the ground that the bankrupt had assets which he had fraudulently destroyed, on which petition the court discharged a restraining order and refused an injunction to prevent a further transfer of the assets, and it was held that the petitioner was entitled to prosecute a petition for review of such order, as he "was a judgment creditor of the bankrupt, and so scheduled by him in his bankruptcy petition," and "whether he may or may not hereafter be allowed to prove his claim, he has an interest as a general creditor in the estate of the bankrupt."

In *In re Madden*, (C. C. A. 1901) 110 Fed. 348, it was held that a party to whom the bankrupt prior to adjudication had assigned a life insurance policy was not aggrieved by, and therefore could not maintain a petition to review, an order directing the bankrupt to execute an assignment of the policy to the trustee, but reserving undetermined the rights of the prior assignee; and in the same case it was held that the order was not reviewable on petition of the bankrupt, because by section 70a (1) the title to "documents relating to his property" passed to the trustee.

Where an order is granted by the Bankruptcy Court on a petition against several respondents, one or more of the latter may maintain a petition for revision without joining the others and without a sum-

mons and severance. *In re Jennison Mercantile Co.*, (C. C. A. 1902) 112 Fed. 966, holding that the proceeding for revision is not subject to the regulations affecting appeals only.

See further as to parties who may maintain a petition for revision the cases cited *supra*, this note, p. 798, under the black-letter caption *Earlier Cases*.

If an issue is not made and presented by parties who have a substantial interest in the controversy or no opportunity is given to them for that purpose, the petition for revision will be dismissed. *In re Baker*, (C. C. A. 1900) 104 Fed. 287.

Where the trustee is made a respondent to a petition, parties who asserted no rights in the court below and were content to be represented by him need not be joined as respondents. *In re Utt*, (C. C. A. 1901) 105 Fed. 754.

*Under the Bankruptcy Act of 1867*, the court, dismissing a petition for review, said: "A revisory petition can only be filed by a party aggrieved. Until adjudication there are but two parties to an involuntary petition in bankruptcy—the petitioning creditor and the debtor. The latter, and the latter only, can complain of the adjudication. In the very nature of the case, he is the only party who can be aggrieved by the adjudication. A creditor, even one who has proved his debt, cannot come in after the adjudication and seek to have it reversed, for the obvious reason that he was not a party to the proceedings of which he complains." *Alabama, etc., R. Co. v. Jones*, (1873) 7 Nat. Bankr. Rep. 145, 1 Fed. Cas. No. 127.

**Requisites of petition.**—The petition "should state specifically the question of law which was involved and was ruled upon by the court below." *In re Richards*, (C. C. A. 1899) 96 Fed. 937. To the same effect see *In re Eggert*, (C. C. A. 1900) 102 Fed. 738; *Littlefield v. Delaware, etc., Canal Co.*, (1871) 3 Cliff. (U. S.) 371; *In re Casey*, (1873) 10 Blatchf. (U. S.) 376; *In re Sutherland*, (1870) 2 Biss. (U. S.) 405. And it should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose and its determination. *In re Richards*, (C. C. A. 1899) 96 Fed. 937. See also paragraph 2 of the bankruptcy rule 36 in the Circuit Court of Appeals for the fourth circuit, 37 C. C. A. iii.

A petition for review should set out the facts or finding of facts on which the matters of law sought to be reviewed arise, and if it fails to do so, it ought to be dismissed. *Steiner v. Marshall*, (C. C. A. 4th Cir. 1905) 140 Fed. 710, the court saying: "Attorneys filing petitions under the statute where testimony has been heard, ought, in fairness to both the court asked to be reviewed and the appellate court, to give

the latter court the benefit of the testimony, or the findings of fact by the district judge."

"It is . . . an elementary rule of procedure that the petition for a review shall set out the matters of law which we are asked to review." *In re Taft*, (C. C. A. 6th Cir. 1904) 133 Fed. 511, 513.

Statements in a petition for revision wholly unsupported by any evidence in the record cannot be considered. *Chester-town Bank v. Walker*, (C. C. A. 4th Cir. 1908) 163 Fed. 510.

In *In re Baker*, (C. C. A. 1900) 104 Fed. 288, it was said that the petition should present enough of the tenor of the record in the court below to enable the appellate court to perceive the issue of law which it seeks to revise.

In *Fisher v. Cushman*, (C. C. A. 1900) 103 Fed. 863, appropriate parts of the record sent up on a simultaneous appeal were made parts of the petition by reference to them, and the court said "it would have been more prudent to have incorporated them by an express agreement therefor filed in the case."

The petition should present matter of law and nothing else. *In re Baker*, (C. C. A. 1900) 104 Fed. 287; *In re Mayer*, (C. C. A. 1901) 108 Fed. 604.

For a form of petition see *In re Loving*, (1912) 224 U. S. 183, 185-186, 32 S. Ct. 446, 56 U. S. (L. ed.) 725.

**Agreed statement of facts.**—In *In re Laird*, (C. C. A. 1901) 109 Fed. 550, an order was reviewed on petition accompanied by an agreed statement of the facts.

The petition may be amended by leave of court, to cure defective allegations. *In re Sutherland*, (1870) 2 Bias. (U. S.) 407.

**Authority of counsel to file the petition**, if questioned, is conclusively established by their statement professionally that they were duly authorized, unless some proof to the contrary is shown. *Alabama, etc., R. Co. v. Jones*, (1871) 5 Nat. Bankr. Reg. 97, 1 Fed. Cas. No. 126.

**Presentation of the petition.**—In *In re Abraham*, (C. C. A. 1899) 93 Fed. 783, in the fifth circuit, McCormick, J., said: "In analogy to the rule prescribed for allowing appeals, and to the practice in allowing writs of error in cases at law, the petition for revision may be presented to and allowed by a judge of the court of bankruptcy, or any one of the judges of this court," and in that case a formal appeal prayed for, allowed, and perfected with due notice thereof, and accompanied by a record embracing all that would be necessary in proceedings for revision, was entertained as a petition for revision, and the case was considered on its merits.

In *In re Seebold*, (C. C. A. 1901) 105 Fed. 180, in the fifth circuit, the petition for revision was presented to and allowed by a judge of the Circuit Court of Appeals,

and the proceeding was expressly sanctioned.

In *In re Whitner*, (C. C. A. 1900) 105 Fed. 180, in the fifth circuit, where an appeal was taken which presented questions involving matters of fact and no specific questions of law, the court declined to treat it as a petition for revision.

In *In re Russell*, (C. C. A. 1900) 101 Fed. 248, in the second circuit, a petition and assignment of error on which an appeal was allowed containing everything which should appear in a petition for revision, was entertained as a petition to revise, the court "not intending by doing so to make a precedent for the future."

In *In re Williams*, (1901) 105 Fed. 906, a case in the District Court in the sixth circuit, Judge Hammond declared that the petition for revision must be filed in the Circuit Court of Appeals, in the absence of an authoritative rule of court to the contrary, and he refused to entertain and act upon a petition presented to him in the District Court, citing as authority for his ruling *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, (C. C. A. 1900) 101 Fed. 699, in the Circuit Court of Appeals for the same circuit. See also *In re Hassenbusch*, (C. C. A. 1901) 108 Fed. 35, and *Smith v. Belford*, (C. C. A. 1901) 106 Fed. 660, also in the sixth circuit.

Presentation of the petition to the Circuit Court of Appeals is required by rule of that court in the first circuit, 34 C. C. A. iii, and in the fourth circuit, 27 C. C. A. iii, and this seems to be the general practice. See *In re Kerby-Dennis Co.*, (C. C. A. 1899) 95 Fed. 118, and *In re Eggert*, (C. C. A. 1900) 102 Fed. 736, in the seventh circuit; *In re Newton*, (C. C. A. 1901) 107 Fed. 429, in the eighth circuit.

**"Due notice" of petition.**—In *In re Seebold*, (C. C. A. 1901) 105 Fed. 910, where formal notice was given on Aug. 1, the order allowing the petition to be filed having been entered on the preceding June 17, and it was "not plain that immediate notice was not given to the parties," objection for want of notice was overruled.

In the first and fourth circuits, rules of court cited in the next to the last preceding paragraph regulate the time and manner of giving notice.

Under the Act of 1867, which contained no specific provision for notice, it was held that service of the petition on attorneys who represented the respondent in the court below was sufficient, and that even if the service were bad, it was cured by the appearance of the respondent and the filing of his answer to the petition. *Alabama, etc., R. Co. v. Jones*, (1871) 5 Nat. Bankr. Reg. 97, 1 Fed. Cas. No. 126.

Where an appeal was prayed for and allowed in open court, in the presence of all the parties or their attorneys, at the

very instant that the judgment was announced, the proceeding constituted sufficient notice so as to authorize the appellate court to treat the appeal as a petition for revision without further notice. *In re Abraham*, (C. C. A. 5th Cir. 1899) 93 Fed. 787.

**Stay of proceedings upon filing petition.** It was held in proceedings for review under the Act of 1867, that the petition for review did not operate to stay proceedings in the court below and that the reviewing court would not grant a stay unless it were shown that the petitioner would otherwise be prejudiced or seriously endangered in his rights. *In re Oregon Bulletin Printing, etc., Co.*, (1875) 3 Sawy. (U. S.) 529.

In *In re Orman*, (C. C. A. 1901) 107 Fed. 101, it was held that a petition for review of an order overruling a demurrer to a bill by the trustee to set aside a fraudulent conveyance did not have the effect of a writ of error or an appeal from final judgment so as to remove the case to the appellate court, and consequently the Bankruptcy Court retained jurisdiction to allow the trustee to dismiss his suit in that court.

In *In re Schlesinger*, (C. C. A. 1900) 102 Fed. 118, pending a petition for revision of an order requiring the bankrupt to surrender assets to the trustee, which order the bankrupt refused to obey, the court below suspended action under proceedings for contempt.

**Response to petition.**—Rule 39 of the Circuit Court of Appeals (150 Fed. cxix, 79 C. C. A. cxix), which provides that "the response to the petition, when the defendant elects to make a written response, shall be filed at least fifteen days before the day set for the hearing," contemplates that the defendant may take issue upon the allegations of the petition and deny or otherwise controvert the facts alleged therein, or he may admit the facts and challenge by demurrer, or in some other appropriate way, their legal sufficiency to warrant the granting of the relief prayed for. *In re Frank*, (C. C. A. 8th Cir. 1910) 182 Fed. 794, 796.

"A failure to deny or otherwise controvert the facts alleged will be deemed to be an admission that they are true." *In re Frank*, (C. C. A. 8th Cir. 1910) 182 Fed. 794.

**Pleadings by the respondent.**—In *In re Utt*, (C. C. A. 1901) 105 Fed. 754, in the seventh circuit, the Circuit Court of Appeals entered an order granting leave to file the petition and requiring the respondent to answer thereto within twenty days from service of a copy of the order.

In the first and fourth circuits the pleadings of the respondent are regulated by rules above cited in the last of the paragraphs under the black-letter caption *Presentation of the petition*.

Section 24b, provides that the power therein given is a "jurisdiction in equity"; General Orders No. 37 provides that "in proceedings in equity instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be; and demurrers and pleas to bills in equity were abolished by Rule 29 of the Equity Rules promulgated by the Supreme Court, which went into effect Feb. 1, 1913, the same rule providing how defenses shall be presented.

**Pleadings in reply.**—A rule of the Circuit Court of Appeals for the first circuit provides that "there shall be no pleadings in reply by the petitioner; but any new matter properly in reply shall be available without the same being pleaded in the petition, or otherwise." 34 C. C. A. iii.

**Record for review.**—In the Circuit Court of Appeals for the fourth circuit, rule 36, subd. 2, provides that: "The petitioner shall cause a certified transcript of the record and proceedings of the Bankruptcy Court of the matter to be reviewed to be filed in the clerk's office of this court within thirty days from the date of the filing of the said petition." This rule contemplates a transcript of the record and proceedings of the Bankruptcy Court certified by the clerk of that court and not a transcript certified by the referee. *Cook Inlet Coal Fields Co. v. Caldwell*, (C. C. A. 4th Cir. 1906) 147 Fed. 475, dismissing a petition where the record consisted largely of proceedings, orders, and decrees authenticated by the certificate of the referee and specifically excepted by the clerk in his own certificate.

A record which fails to give the filing dates of all the material orders contained in it is defective. *In re Friedman*, (C. C. A. 2d Cir. 1908) 161 Fed. 260.

The matters of law of which revision is sought should in some manner be clearly presented by the record. *In re Boston Dry Goods Co.*, (1st Cir. 1903) 125 Fed. 226, 60 C. C. A. 118; *In re O'Connell*, (C. C. A. 1st Cir. 1904) 137 Fed. 838; *Ross v. Stroh*, (C. C. A. 3d Cir. 1908) 165 Fed. 628, 630.

Statements made in the brief of counsel, which are unsupported by the record, cannot be considered as facts: "If the appeal book did not state the facts a motion should have been made to amend it." *In re Oakland Lumber Co.*, (C. C. A. 2d Cir. 1909) 174 Fed. 634.

*Landry v. San Antonio Brewing Assoc.*, (C. C. A. 5th Cir. 1907) 159 Fed. 700, was a petition for revision of an order of allowance of a secured claim, but nowhere in the transcript was there an

agreed statement of facts or a finding of facts by the judge. Denying the petition, the court said: "The referee found and formulated the facts on the evidence submitted to him, also his conclusions of law, and the whole, accompanied with the evidence, was transmitted to the district judge for review. The record shows that the judge on the hearing considered the certificate of the referee as to the questions presented and the summary of the evidence, and thereupon reversed the referee, and entered judgment accordingly, so that we cannot from the record say whether the judge decided the case upon the facts reported by the referee or upon facts found by himself on the evidence. To determine whether the judge *a quo* correctly ruled the law, we must necessarily have before us the facts upon which he acted."

In the fifth circuit there was a motion to dismiss a petition to revise, "because it was not allowed by any judge of this or the lower court; no bond has been given; the transcript of the record is not certified by the clerk of the lower court; the transcript does not contain the pleadings upon which the issues were tried, nor show who are the proper parties to this proceeding; the transcript does not contain the evidence upon which the findings of the referee were based, . . . and because no supersedeas has been granted." The court held that none of those grounds was well taken, inasmuch as there were no rules of court in that circuit referring to the formalities mentioned in the motion to dismiss. *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, (C. C. A. 5th Cir. 1905) 136 Fed. 396.

**Record on facts.**—An order reducing the amount of a creditor's claim for a collection fee contracted for in the note given by the bankrupt in a state where such a contract is valid only to the extent of a reasonable fee, cannot be reversed on a petition to revise, where there is no evidence in the record to show what would be a reasonable fee for the services which have been rendered or the amount the creditor has paid or contracted to pay for the same. *Chestertown Bank v. Walker*, (C. C. A. 4th Cir. 1908) 163 Fed. 510.

**Findings of fact.**—In order that it may appear by the record that issues raised on appeal were presented below, findings of fact which involve distinct propositions of law, or something else as a substitute therefor, are necessary. *In re Boston Dry Goods Co.*, (1st Cir. 1903) 125 Fed. 226, 80 C. C. A. 118; *In re O'Connell*, (C. C. A. 1st Cir. 1904) 137 Fed. 838.

Without either the testimony or a settlement of facts whereon an order was predicated, the record presents no question of law which can be reviewed on a petition to revise. *Hegner v. American*

*Trust, etc., Bank*, (C. C. A. 7th Cir. 1911) 187 Fed. 599.

A mere opinion of the court below not specially made a matter of record does not take the place of a finding of facts, although it may be referred to for the purpose of ascertaining what propositions of law governed the court, or for the general purpose of determining whether the case went off on facts or law. *In re Pettingill*, (1st Cir. 1905) 137 Fed. 840, 70 C. C. A. 338. See also *In re Cole*, (C. C. A. 1st Cir. 1907) 163 Fed. 180; *In re Boston Dry Goods Co.*, (C. C. A. 1st Cir. 1903) 125 Fed. 226.

But where the district judge made no separate finding of facts, but affirmed the "findings" and "decisions" of the referee, and the referee had not certified any particular facts as found by him, the Circuit Court of Appeals, by reference to other proceedings in the record, managed to discover with satisfactory clearness the conclusions of fact upon which the district judge made the order complained of. *In re Taft*, (C. C. A. 6th Cir. 1904) 133 Fed. 511.

Where the record on a petition to revise contains no findings of fact by the District Court, and the opinion of that court, although stating propositions of law, shows that they were not determinative of the matter at issue which was decided as a question of fact on the evidence, there is nothing upon which the Circuit Court of Appeals can act. *In re Pettingill*, (C. C. A. 1st Cir. 1905) 137 Fed. 840.

Where the record contains no findings of fact by the court itself, but only a decree which, in a formal manner, affirmed the action of the referee, this must be taken as affirming his findings of fact, and the appellate court cannot take cognizance of the evidence which was before the referee. *In re O'Connell*, (C. C. A. 1st Cir. 1904) 137 Fed. 838.

**Hearing on petition.**—In the fourth circuit, a rule of court regulates the hearing on petitions for revision. 37 C. C. A. iii.

"It is not satisfactory . . . for counsel to say to this court that the facts appear in the record, instead of making a succinct statement of facts, especially when they do not appear at the hearing." *Ravenswood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463, 464.

**Scope of review.**—Ordinarily a petition to revise does not authorize the court to revise the proceedings of a referee, but only those of the court. *In re Pettingill*, (1st Cir. 1905) 137 Fed. 840, 70 C. C. A. 338.

On a bankrupt's petition to review an order adjudging him in contempt for failure to obey a prior order requiring him to turn over property, the propriety of such prior order cannot be considered.

*In re* Lans, (C. C. A. 2d Cir. 1907) 158 Fed. 610.

On a petition to review an order holding that certain money claimed by the bankrupt's wife belonged to the trustee in bankruptcy, the court declined to consider an objection to the jurisdiction to make a prior order upon her to pay the money to the trustee subject to leave to prove her claim, there having been no proceeding taken to revise that prior order. *In re* Bacon, (C. C. A. 2d Cir. 1908) 159 Fed. 424.

Since a party in whose favor a decision of the Bankruptcy Court was rendered is not in a situation to ask for a review thereof, he may, as respondent in a petition for review attacking the decision, rely upon any ground that will support it, even though it be not the ground upon which that decision was made. *Davis v. Crompton*, (C. C. A. 3d Cir. 1907) 158 Fed. 735, certiorari denied (1908) 209 U. S. 548, 28 S. Ct. 759, 52 U. S. (L. ed.) 921.

If a case "involves the construction or application of the Constitution of the United States" it is appealable from the District Court direct to the Supreme Court; such question is not open for review in the Circuit Court of Appeals. *In re* Abbey Press, (C. C. A. 2d Cir. 1904) 134 Fed. 51. See, however, the note to Judicial Code, sec. 238 in title JUDICIARY.

On a petition to revise an order denying the petitioner's claim to property seized by the receiver in bankruptcy, the petitioner is not at liberty to attack collaterally the official status of the receiver or the regularity of the proceedings leading to his appointment. *Ross v. Stroh*, (C. C. A. 3d Cir. 1908) 165 Fed. 628.

**Matters res judicata on former petition.**—A petition to revise proceedings in bankruptcy on the ground of the insufficiency of the creditor's petition for adjudication was denied where the same matter was involved in a former petition for revision by the same petitioner and therein fully disposed of. *Beach v. Macon Grocery Co.*, (C. C. A. 5th Cir. 1903) 120 Fed. 736.

**"Matter of law."**—Questions of law are alone reviewable in proceedings under section 24b; if a review of questions both of law and of fact is sought, the remedy is by appeal. *Whitla v. Boyd*, (C. C. A. 9th Cir. 1914) 213 Fed. 587; *Nelson v. Heckscher*, (C. C. A. 4th Cir. 1914) 219 Fed. 682; *In re* Petronio, (C. C. A. 7th Cir. 1914) 220 Fed. 269; *Pindel v. Holgate*, (C. C. A. 9th Cir. 1915) 221 Fed. 342; *In re* Flatland, (C. C. A. 9th Cir. 1912) 196 Fed. 310; *In re* Roger Brown & Co., (C. C. A. 8th Cir. 1912) 196 Fed. 758; *In re* Charles Knosher & Co., (C. C. A. 9th Cir. 1912) 197 Fed. 136; *Johansen Bros. Shoe Co. v. Alles*, (C. C. A. 8th Cir. 1912) 197 Fed. 274; *In re* Zimmer,

(C. C. A. 7th Cir. 1912) 202 Fed. 197; *In re* Witherbee, (C. C. A. 1st Cir. 1913) 202 Fed. 896; *Stuart v. Reynolds*, (C. C. A. 5th Cir. 1913) 204 Fed. 709; *Williamson v. Richardson*, (C. C. A. 9th Cir. 1913) 205 Fed. 245; *B-R Electric & Telephone Mfg. Co. v. Aetna Life Ins. Co.*, (C. C. A. 8th Cir. 1913) 206 Fed. 885.

"In a proceeding to revise under section 24b this court is limited to a review in matter of law, and only questions of law arising out of the facts found or conceded can be considered. We cannot determine questions of fact involved in the finding or order sought to be reviewed. We call attention to the following decisions of this court and of the Supreme Court: *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, (6th Cir. 1900) 101 Fed. 699, 703, 41 C. C. A. 614; *In re* Taft, (6th Cir. 1904) 133 Fed. 511, 66 C. C. A. 385; *In re* Throckmorton, (6th Cir. 1906) 149 Fed. 149, 146, 79 C. C. A. 15; *Mueller v. Nugent*, (1902) 184 U. S. 1, 9, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 291, 292, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051." *In re* Stewart, (C. C. A. 6th Cir. 1910) 179 Fed. 222, 228.

To the same effect as the cases in the last paragraph see *In re* Graessler, (C. C. A. 9th Cir. 1907) 154 Fed. 478; *Hendricks v. Webster*, (C. C. A. 8th Cir. 1908) 159 Fed. 927; *Ross v. Stroh*, (C. C. A. 3d Cir. 1908) 165 Fed. 628; *Lesaius v. Goodman*, (C. C. A. 3d Cir. 1908) 165 Fed. 889; *Ryan v. Hendricks*, (C. C. A. 7th Cir. 1908) 166 Fed. 94; *In re* Baum, (C. C. A. 8th Cir. 1909) 169 Fed. 410; *In re* Lee, (C. C. A. 8th Cir. 1910) 182 Fed. 579; *Hutchinson v. Otis*, (C. C. A. 1902) 115 Fed. 939; *In re* Mayer, (C. C. A. 1901) 108 Fed. 604; *In re* Oconee Milling Co., (C. C. A. 1901) 109 Fed. 866; *In re* Richards, (C. C. A. 1899) 96 Fed. 937; *In re* Purvine, (C. C. A. 1899) 96 Fed. 192; *In re* Rouse, (C. C. A. 1899) 91 Fed. 97; *In re* Worcester County, (C. C. A. 1900) 102 Fed. 808; *In re* Rosser, (C. C. A. 1900) 101 Fed. 562; *In re* Whitener, (C. C. A. 1900) 105 Fed. 180. See also *Cunningham v. German Ins. Bank*, (C. C. A. 1900) 103 Fed. 935.

"The facts as they appear from the order sought to be reviewed or as stated in the opinion of the court, or in the summary of evidence certified by the referee, where it appears that the order of the referee was reviewed by the district judge only upon such summary certified to him, must be treated as settling the facts upon which the 'matter of law' arises which is sought to be reviewed." *Per* Lurton, C. J., in *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, (C. C. A. 1900) 101 Fed. 703, holding that an averment in the petition contrary to the facts thus settled must be

ignored. See also *In re Purvine*, (C. C. A. 1899) 96 Fed. 192; *In re Eggert*, (C. C. A. 1900) 102 Fed. 735, the latter case holding that a finding that a creditor had no knowledge of the fact that the debtor was insolvent and had no reasonable cause to believe that payment or security given by the debtor was intended as a preference, was a conclusion of fact, rather than one of law.

The master's findings of fact, approved by the district judge, are not brought up for review, and must be accepted as the basis of reviewable questions of law. *In re Caponigri*, (C. C. A. 2d Cir. 1910) 183 Fed. 307.

"We are not at liberty upon a petition for review to challenge the facts, or an inference of fact, found by the court below." *In re Antigio Screen Door Co.*, (C. C. A. 7th Cir. 1903) 123 Fed. 249.

"Obviously our jurisdiction is restricted to matters of law, and the legal questions we can examine are only those which arise out of the facts found or conceded." *In re Throckmorton*, (C. C. A. 6th Cir. 1906) 149 Fed. 145, citing *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 291, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, and *In re Taft*, (6th Cir. 1904) 133 Fed. 511, 66 C. C. A. 385. To the same effect see *In re Cole*, (C. C. A. 1st Cir. 1906) 144 Fed. 392.

An order of a Bankruptcy Court finding that \$100 was a reasonable attorney's fee in each of two voluntary cases could not be reviewed on a petition to revise, because the findings of the court on the facts could not be disturbed. *In re Irwin*, (C. C. A. 3d Cir. 1909) 174 Fed. 642.

"A petition to revise under section 24b can properly present for determination only questions of law and not doubtful or disputed questions of fact. But when facts are agreed upon, or are proven or admitted, that leave nothing for determination but their legal import, such a determination of them by the court of bankruptcy may be reviewed upon a petition to revise. But a review of decisions which require the consideration of conflicting evidence, or evidence though not conflicting from which different deductions or conclusions may reasonably be drawn, may not be reviewed upon a petition to revise, but upon appeal only." *In re Frank*, (C. C. A. 8th Cir. 1910) 182 Fed. 794, 797.

A "matter of law" in the broad sense of the expression arises when an agreed statement of fact is filed and an order entered thereon. *In re J. B. Judkins Co.*, (C. C. A. 1st Cir. 1913) 205 Fed. 892.

*In re Lee*, (C. C. A. 8th Cir. 1910) 182 Fed. 579, revision was had on agreed facts which were not contradictory, doubtful, or incomplete, and the only question presented was as to their legal import.

*Hall, etc., Co. v. Friday*, (C. C. A. 3d Cir. 1907) 158 Fed. 593, was a case of review on an agreed statement of facts.

To determine as an ultimate proposition that a sale was "unfair, illegal, and void," as alleged in a petition for revision, "would require, in the absence of an agreed statement of facts or finding of facts by the referee or court, a consideration of all the evidence in the record entirely beyond the inquiries this court can make on a petition for revision." *Schuler v. Hassinger*, (C. C. A. 5th Cir. 1910) 177 Fed. 119, denying a petition.

In a controversy between the bankrupt and the trustee over land claimed by the former as a homestead the referee found that he was guilty of fraud and certified the evidence to the court, which reversed the decision of the referee and negatived the existence of fraud. On a petition to revise, all the evidence not being brought up, it could not be inferred that the referee and the court merely drew different legal deductions from undisputed facts. "The record not showing to the contrary, there may have been a conflict in the evidence on the issue of fraud, and in that event a review could not be secured by petition to revise." *In re Letson*, (C. C. A. 8th Cir. 1907) 157 Fed. 78.

But if a finding of fact is so wholly unjustified on the proofs that the Circuit Court of Appeals would be required, on a writ of error, to set aside a verdict of a jury for want of any evidence whatever to sustain it, or for some other reason kindred thereto, it may be reversed on a petition to revise. *In re Cole*, (C. C. A. 1st Cir. 1907) 163 Fed. 180, (C. C. A. 1st Cir. 1906) 144 Fed. 392.

And where the Circuit Court of Appeals has under review an order adjudging the bankrupt guilty of contempt for failure to deliver property or proceeds thereof to his trustee, the evidence claimed to establish his possession thereof will be examined to the extent of ascertaining whether the court below could properly find the fact proved beyond reasonable doubt as the rule requires in such contempt cases. *In re Levy*, (C. C. A. 2d Cir. 1905) 142 Fed. 442, where it was held that the order affirming the referee's ruling would not be reversed except upon clear proof of error.

**Disputed questions of fact.**—An order confirming or setting aside a referee's order requiring the bankrupt to turn over property to the trustee, involving disputed questions of fact, is not reviewable on petition. *Ellis v. Krulewitch*, (C. C. A. 8th Cir. 1905) 141 Fed. 954.

Whether the lien claimed by a creditor under a trust deed constituted a valid preference, so far as the question depended on the correct determination of the facts relating to the particular transaction, was not reviewable on a petition to revise.

*Kenova L. & T. Co. v. Graham*, (C. C. A. 4th Cir. 1905) 135 Fed. 717.

It seems that an order transferring a case to another court of bankruptcy under section 32 of the Bankruptcy Act is not reviewable on petition, since it determines a mixed question of law and fact. *Kyle Lumber Co. v. Bush*, (C. C. A. 5th Cir. 1905) 133 Fed. 688.

The question whether the court erred in ordering a sale of property free from incumbrances, on the ground that it was covered by a mortgage which left no equity of redemption of value to the estate, cannot be reviewed on petition where it involves questions of fact as well as of law. *In re Union Trust Co.*, (C. C. A. 1st Cir. 1903) 122 Fed. 937.

An order allowing a claim as a general debt, but disallowing in part a claim of the creditor to priority as a lienholder, where it depends on controverted facts, is not reviewable on petition. *Gaudette v. Graham*, (C. C. A. 9th Cir. 1908) 164 Fed. 311.

A finding by a court of bankruptcy on competent evidence that money deposited by a bankrupt in a bank in his own name as attorney, giving the bank where he opened the account a power of attorney from his wife to draw against it, was not his money and did not pass to his trustee is one of fact, which cannot be reviewed on a petition to revise. *In re Donnelly*, (C. C. A. 2d Cir. 1911) 187 Fed. 121.

**Discretionary orders.**—Orders which were in the discretion of the court will not be reviewed unless an abuse of discretion is shown. *Schuler v. Hassinger*, (C. C. A. 5th Cir. 1910) 177 Fed. 119.

Exercise of discretion to determine whether a suit pending in a state court should be stayed or not is subject to review, but will not be interfered with unless it appears to have been abused. *New River Coal Land Co. v. Ruffner*, (C. C. A. 4th Cir. 1908) 165 Fed. 881, 886.

While it is the duty of the Bankruptcy Court to see that examinations of third persons for the discovery of assets are not permitted to transcend the limit of a legitimate investigation, this is a duty which involves the exercise of wide discretion which will not be interfered with by the appellate court except when it has been manifestly abused. *In re Horgan*, (C. C. A. 2d Cir. 1899) 98 Fed. 414, affirming an order upon the bankrupt to produce the books in his custody as president of a corporation and submit them for examination.

The Bankruptcy Court's exercise of discretionary power to dismiss an involuntary petition for want of prosecution will not be reviewed where it does not appear that the discretion was abused. *In re Levi*, (C. C. A. 2d Cir. 1905) 142 Fed.

962, certiorari denied (1906) 203 U. S. 596, 27 S. Ct. 784, 51 U. S. (L. ed.) 333.

On the same ground in *In re Brown*, (C. C. A. 1901) 112 Fed. 49, on petition to revise the refusal of the court to entertain specifications of objection to a discharge unless they should be verified positively by the objectors, the court said that if section 18c is to be regarded as directory only it is "discretionary with the judge to require compliance with the statute, and his ruling requiring a verification is not subject to review."

But where there was a clear abuse of discretion in denying leave to a creditor to amend his specifications of objection to a discharge it was held that the ruling involved a question of legal right and was reviewable on petition. *In re Carley*, (C. C. A. 1902) 117 Fed. 130.

In *In re Lesser*, (C. C. A. 1900) 99 Fed. 913, the court entertained a petition to review a discretionary order granted under authority conferred by the last clause of section 11a, and affirmed the order as a proper exercise of discretion under the circumstances.

In *Ross v. Saunders*, (C. C. A. 1901) 105 Fed. 915, holding that an order refusing confirmation of a composition where no creditor appeared in opposition was not appealable by the bankrupt, the court said: "The discretion to be exercised by the District Court in matters of composition is judicial; and if any irregularities occur in reference thereto which raise a question of law, it is not improbable that the bankrupt is entitled to apply in that behalf to the revisory powers of the Circuit Court of Appeals on a summary petition."

In *In re Marsh*, 6 Law Rep. 67, (1843) 16 Fed. Cas. No. 9,108, the court regarded it as doubtful whether the Bankrupt Act of 1841, under which the case arose, authorized a review of discretionary orders. As to the practice under the Bankrupt Act of 1867, see *In re Adler*, (1874) 2 Woods (U. S.) 571; *Ex p. Perkins*, (1873) 5 Biss. (U. S.) 254.

Refusal of the judge of the Bankruptcy Court to sanction an arrangement between the bankrupts and certain creditors and persons who had received preferential transfers of the bankrupt's property does not present a "matter of law" reviewable on petition, as there is "no rule of law or of equity by which the propriety of that refusal is determinable." *Mulford v. Fourth St. Nat. Bank*, (C. C. A. 3d Cir. 1907) 157 Fed. 897, holding, however, that there was no abuse of discretion.

**Questions "peculiarly administrative."**—On a revisory proceeding under the Bankruptcy Act of 1867 the court said: "Any question of removing assignees or appointing trustees is so peculiarly an



administrative one, and involves so thorough a knowledge of the condition of the estate being administered, that an appellate tribunal ought not to interfere in regard thereto unless a sharp question of law is raised, or the demand for revision is very peremptory." *In re Sweetser*, (C. C. A. Mass. 1907) 167 Fed. 567.

The court sometimes exercises liberality with reference to the practice on petitions to revise and makes "due allowance" for lack of experience alike of the bench and the bar, and, where the petition involves substantial interests, endeavors to sift out from the record the issues of law, if it presents any; even in cases which could be said to relate to the mere administration by the District Court of the bankruptcy statute. *In re Boston Dry Goods Co.*, (C. C. A. 1st Cir. 1903) 125 Fed. 226, 229.

But where there was no suggestion of any practical detriment that would come to the estate from the determination of the District Court, even if, strictly speaking, that determination should have been otherwise than what it was, the court said: "It would be detrimental to the authority of the District Court, injurious to its administration of the bankruptcy statutes, and involve the numerous and useless delays which those statutes evidently have been framed to avoid, if, in administrative matters where no substantial interests are concerned, we became meddlesome beyond what the law requires of us." *In re Boston Dry Goods Co.*, (C. C. A. 1st Cir. 1903) 125 Fed. 226, where the main question related to the powers of the Bankruptcy Court in canvassing votes for a trustee alleged to have been procured or solicited by the bankrupt, and how far it should exercise them, and according to what rules.

And in *Shoe, etc.*, Reporter, Petitioners, (C. C. A. 1st Cir. 1904) 129 Fed. 588, where the order under review was one fixing a minimum bid for the sale of the assets of the bankrupt, and providing that five-sixths of the purchase price might be paid in bonds secured by mortgage assets, the objection to the order was "disposed of by the general rule in equity which applies to these summary petitions, to the effect that equity does not concern itself with mere trivialities, nor unless, on the whole case, the proponent satisfies the court that he has a substantial interest, which is in danger."

Unless convinced that manifest error has been committed the appellate court will refrain from meddling with the administration of the estate by the officers of the Bankruptcy Court who are familiar with the local environment and the character and conduct of the parties. In *In re Schulman*, (C. C. A. 2d Cir. 1910) 177 Fed. 191, affirming an order adjudging the bankrupt in contempt of court for

refusing to answer questions concerning his property and for concealing from his creditors all material facts relating thereto, the bankrupt's testimony having been certified to the court by the referee, Judge Cox said: "The questions of fact presented by this appeal are peculiarly within the province of the referee and district judge. The law cannot be promptly and efficiently administered if the collection and division of the bankrupt's property is to be suspended and delayed pending appeals from the orders of the court and referee having in view the discovery of the bankrupt's property, and the prevention of its fraudulent concealment and conversion. . . . In the case at bar we know nothing of the bankrupt Schulman, except as he is portrayed in the printed record. The referee, on the contrary, had an opportunity to see and hear the bankrupt and observe his manner while testifying, which is an inestimable advantage in cases of this character. The testimony of a witness may sound plausible when read afterwards from a printed book, and yet his conduct on the stand may have been such that no one who heard him testify believed that he was telling the truth. The referee certifies that after having taken the oath the bankrupt refused to be examined according to law and deliberately withheld facts within his knowledge as to the disposition of the property of the bankrupt's firm. Again, he certifies that the bankrupt withheld from the trustee and the court, with the deliberate intention of concealing his condition, the true facts relating to the conduct of his business, his dealings with his creditors and the amount and whereabouts of his property. The referee says: 'The manner of the bankrupt, his recollection when he desired to exercise it, convinced me as I watched him that where he desired to give the facts he could do so.' Disingenuous and evasive as his testimony appears when read, it is obvious that the opportunity to 'watch' the bankrupt gave the referee a very marked advantage in determining whether he was acting honestly. . . . An appellate court may be unable to detect, under such conditions, the false from the true, the honest from the fraudulent, but any intelligent person, after observing the witness for hours on the stand, could not be deceived as to his purpose."

**Nonprejudicial error.**—Whether or not an order permitting the amendment *nunc pro tunc* of a petition in involuntary bankruptcy after the sustaining of a demurrer to the original petition was erroneous, is immaterial where the original petition sufficiently charged an act of bankruptcy and the demurrer was erroneously sustained. *In re Riggs Restaurant Co.*, (C. C. A. 2d Cir. 1904) 130 Fed. 691.

**Determination and disposition of matter.**

— Where the Bankruptcy Court erred in dismissing a claim for the return of personal property delivered to a bankrupt corporation, the Circuit Court of Appeals, upon reversing the order, entered its own order requiring the bankrupt's trustee or receiver to surrender the property. *Sprague Canning Machinery Co. v. Fuller*, (C. C. A. 5th Cir. 1908) 158 Fed. 588.

Where, on a petition to revise, there were no sufficient specifications of legal error presenting the questions sought to be reviewed, but the evidence was such as to raise a doubt as to the merits of petitioner's claim, his petition was dismissed without prejudice to such further proceedings as the District Court might consider proper. *Ross v. Stroh*, (C. C. A. 3d Cir. 1908) 165 Fed. 628.

**Dismissal of petition—moot question.**

— Pending a petition to review an order overruling a demurrer to the trustee's bill in the Bankruptcy Court to set aside an alleged fraudulent conveyance by the bankrupt, the trustee dismissed the suit in the court below. It was held that the petition for revision must be dismissed and that the trustee, respondent therein, must pay the costs. *In re Orman*, (C. C. A. 1901) 107 Fed. 101.

**Proceeding after reversal and remand.**

— Where an order of the District Court is annulled by reversal thereof on petition for revision, the District Court cannot amend the order on mere petition therefor so as to make it the basis of another petition for revision. *In re Lesaius*, (C. C. A. 3d Cir. 1910) 181 Fed. 690.

**Costs.**— See cases under the black-letter heading *Costs* at the end of the first note to section 25a.

*In re Ravenswood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463,

dismissing a petition for revision filed by creditors who had opposed an application for discharge, they were charged with the costs in the appellate court, "and it is suggested that the District Court tax the contesting creditors with all 'wholly immaterial matters, captious objections, remarks of counsel, reiteration of the same questions and demands' included in the depositions taken before the referee or special master and all unnecessary costs incurred at their instance."

**Review by Supreme Court of decrees of Circuit Courts of Appeals.**— By construction of the Bankruptcy Act of 1867 it was settled that appeals to the Supreme Court did not lie from decisions of the Circuit Courts in the exercise of supervisory jurisdiction in matter of law conferred on them by that Act. *Morgan v. Thornhill*, (1870) 11 Wall. 65, 20 U. S. (L. ed.) 60; *Conro v. Crane*, (1876) 94 U. S. 441, 24 U. S. (L. ed.) 145.

Hence the revision contemplated by section 24b of the Bankruptcy Act of 1898 being substantially of the same character as that in the Act of 1867, a decree of the Circuit Court of Appeals in the exercise of its supervisory power is not appealable to the Supreme Court. *Mitchell Store Building Co. v. Carroll*, (1914) 232 U. S. 379, 34 S. Ct. 410, 58 U. S. (L. ed.) 650; *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116 (dismissing the appeal), *reaffirmed* in *Hewit v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986, and *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047. Such a decree is reviewable only on certiorari. See III. *Writs of certiorari* in note to section 25d. See also *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 123 Fed. 14.

**SEC. 25. APPEALS AND WRITS OF ERROR.—a [Appeals.]** That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, [(1898) 30 Stat. L. 553.]

The provisions in section 25a, as far as they relate to the Circuit Court of Appeals, and in "all laws amendatory thereof," are recognized and confirmed in Judicial Code, sec. 130, title JUDICIARY.

**Necessity of this provision.**— "There is an appeal provided in section 25, with reference to the specific matters named therein. This was needed if an appeal was to be allowed, as the matters to which it relates could arise in bankruptcy only." *Burleigh v. Foreman*, (C. C. A. 1st Cir. 1903) 125 Fed. 217.

"By section 25a it [Congress] granted to the Courts of Appeals additional jurisdiction which before the enactment of the Bankrupt Law they could not exercise."

*Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363, 367.

**Exclusiveness with respect to section 24b.**— See the first paragraph of the note to section 24b.

**Exclusiveness with respect to section 24a.**— To the point that a judgment appealable under section 25a (1), (2), or (3), cannot be appealable as a "controversy" under section 24a, see *Thompson v. Mauzy*, (C. C. A. 4th Cir. 1909) 174 Fed. 611; *In re Streator Metal Stamping*

Co., (C. C. A. 7th Cir. 1913) 205 Fed. 280; *Rison v. Parkham*, (C. C. A. 4th Cir. 1915) 219 Fed. 176; *Sterne v. Merchants' Nat. Bank*, (C. C. A. 8th Cir. 1914) 216 Fed. 862; *In re Gold*, (C. C. A. 7th Cir. 1913) 210 Fed. 410, and cases cited in division II of the note to section 24a under the black-letter caption *Exclusiveness of section 24a*.

A "bankruptcy proceeding" includes a proceeding before a referee to have a claim against the estate as previously allowed, reconsidered and a substantial portion disallowed. *Kiskadden v. Steinle*, (C. C. A. 6th Cir. 1913) 203 Fed. 375, *followed in Cooper v. Miller*, (C. C. A. 6th Cir. 1913) 203 Fed. 383.

**Appealability of nonenumerated judgments.**—As to appeals from judgments not specified in the three clauses of this section, see notes to section 24a.

**Review on writ of error.**—As to the method of review in cases where there was a jury trial, see notes to section 25a (1).

A simultaneous appeal and petition for revision of the same order or judgment do not neutralize each other; the proceeding held appropriate will be retained and the other dismissed. See cases cited in note to section 24b under the black-letter caption *Appeal united with petition*.

**Cross appeal when necessary.**—An appeal will not be dismissed on motion of the appellee for want of jurisdiction of the appeal, if no cross appeal was taken. *McGahan v. Anderson*, (C. C. A. 1902) 113 Fed. 115.

No appeal lies under this section from the District Court of the United States for Porto Rico to the United States Supreme Court, to review an order disallowing claims in bankruptcy proceedings. *Tefft v. Munsuri*, (1911) 222 U. S. 114, 32 S. Ct. 67, 56 U. S. (L. ed.) 118, wherein the court said: "This express provision for the exercise of appellate jurisdiction by the courts therein named over the case here presented by necessary implication must be held to exclude the right of this court to exercise appellate jurisdiction over a subject not delegated unless some other provision of the statute compels to a contrary view. But instead of tending to so do, the context of the statute adds cogency to and makes irresistible the implication arising from the provision of section 25a. . . . This result flows from the careful provision otherwise made by the statute for the exercise of appellate jurisdiction by this court over proceedings in courts of bankruptcy or the orders, judgment and decrees rendered by such courts, none of which embrace the character of case here presented. Indeed, when the context of the statute is considered and the distribution of appellate jurisdiction for which it provides is taken into view, it becomes certain that to ex-

tend by remote implication, based upon conceptions of inconvenience, the reviewing power of this court to a subject like the one now in question would destroy the symmetry of the law and would render necessary limitations on the power of this court to review as to important subjects concerning which the power would otherwise obtain."

General Order 36 provides that appeals under section 25a "shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated except as otherwise provided in the Act, by the rules governing appeals in equity in the courts of the United States."

**Parties to appeal.**—A trustee may appeal from an order denying his motion to expunge a claim allowed, unless further preferences were surrendered, and directing a return of a preference previously surrendered by the creditor. *Livingstone v. Heineman*, (C. C. A. 6th Cir. 1903) 120 Fed. 786.

On appeal by a creditor of a bankrupt from an order approving a composition under which a majority of the creditors have received the amounts to which they were entitled, the assenting creditors are necessary parties. *Field v. Wolf, etc.*, *Dry Goods Co.*, (C. C. A. 8th Cir. 1903) 120 Fed. 815.

On an appeal by a trustee in bankruptcy from a judgment of the Bankruptcy Court allowing claims for expenses and costs of administration, the question whether the judgment shall stand or be reversed is of such direct interest to those whose claims are sustained by it that no determination thereof can be had without affording them an opportunity to be heard in defense of the judgment. On such an appeal the trustee represents the general creditors of the estate, and not those the allowance of whose claims is challenged by him. *Gray v. Grand Forks Mercantile Co.*, (C. C. A. 8th Cir. 1905) 138 Fed. 344.

"The cases cited present somewhat divergent views as to whether a creditor may as of right appeal from the allowance of a debt which affects him, but a concurrence in the matter of allowing an appeal upon good cause shown by such creditors when the trustee refuses to appeal himself." *Ohio Valley Bank Co. v. Mack*, (C. C. A. 6th Cir. 1906) 163 Fed. 155, where the appeal was by a creditor who was, upon application, allowed to appeal, the trustee refusing to appeal; but *Lurton, J.*, said "the better practice would be to order the trustee to appeal, or to allow the dissatisfied creditor to appeal in his name, being indemnified in either case against costs by such creditors."

**Effect of appeal.**—The taking of an appeal deprives the court of bankruptcy of jurisdiction to further consider matters involved in the appeal. For example,

pending an appeal from a judgment rejecting a debt or claim, the court has no power to grant a rehearing upon the ground of alleged newly discovered evidence. *Miles City First Nat. Bank v. Miles City State Nat. Bank*, (C. C. A. 9th Cir. 1904) 131 Fed. 430.

Without a supersedeas, however, an appeal never suspends the execution of an order nor stops its enforcement, and, pending the bankrupt's appeal, without supersedeas, from an order adjudicating him a bankrupt, the court may, on motion of creditors, compel him to file his schedules. *In re Brady*, (D. C. Ky. 1908) 169 Fed. 152.

An appeal, with a supersedeas bond, from a judgment denying a discharge is in the nature of a cost bond, and does not supersede the judgment so as to prevent creditors from obtaining a second adjudication of bankruptcy on account of later acts of bankruptcy. *In re Barton*, (W. D. Ark. 1906) 144 Fed. 540. As to supersedeas on appeals, or writs of error in federal courts, see R. S. secs. 1007, 1012, and the Circuit Court of Appeals Act of March 3, 1891, ch. 517, § 11, all in title JUDICIARY.

**Assignment of errors**—*Circuit Court of Appeals Rule 11*, 91 Fed. vi, 32 C. C. A. lxxxviii (which is the same in all the circuits), makes the filing of an assignment of errors an essential condition to the granting of a writ of error or the allowance of an appeal, and concludes as follows: "Errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

**Total neglect to comply with the rule** usually results in an affirmance of the order or decree appealed from or dismissal of the appeal. *Lockman v. Lang*, (C. C. A. 8th Cir. 1903) 128 Fed. 279, where the appeal was dismissed; *In re Dunning*, (C. C. A. 9th Cir. 1899) 94 Fed. 709, where the court said: "We place our judgment of affirmance wholly upon the ground indicated, in the hope that attention may be drawn to the necessity of compliance with the rule. It may be added that upon the hearing of the cause not only was no 'plain error not assigned' suggested, but, on the contrary, the court was convinced that upon the merits the decision of the District Court was not erroneous." *In Burleigh v. Foreman*, (C. C. A. 1st Cir. 1904) 130 Fed. 13, "there were other questions below, but we have only to deal with such questions as are raised by the assignment of errors," said the court.

**Time for filing**.—When an appeal is prayed and allowed in open court, the prayer for reversal and the citation may be waived, but the assignment of errors is indispensable to the perfection of the appeal, and it must be filed before or at

the time of the allowance of the appeal. But if an appeal is allowed upon condition of filing an appeal bond, and the bond and assignment of errors are thereafter filed within the time required for appeal, the assignment of errors is not too late. *Lockman v. Lang*, (C. C. A. 8th Cir. 1904) 132 Fed. 1.

If an assignment of errors is not made and filed in the court below when an appeal is allowed, a subsequent assignment in the appellate court, without leave, will be disregarded. *Lloyd v. Chapman*, (C. C. A. 9th Cir. 1899) 93 Fed. 599.

**If a party proceeds both by writ of error and by appeal** to review the same rulings or adjudications, and the errors alleged are the same in each proceeding, a single assignment of errors duly filed is sufficient notwithstanding dismissal of the particular appellate proceeding with which the assignment was filed. *Lockman v. Lang*, (C. C. A. 8th Cir. 1904) 132 Fed. 1.

**Amendment of defective assignment**.—If an assignment of errors is filed, but it does not sufficiently indicate the particular error complained of to entitle it to be considered on the appeal, the appellate court is not deprived of jurisdiction because of the generality of the assignment, and amendment thereof may be allowed on motion of the appellant, when the special circumstances justify it, and the motion is promptly made upon discovery of the defect. *Flickinger v. Vandalia First Nat. Bank*, (C. C. A. 6th Cir. 1906) 145 Fed. 162, certiorari denied (1906) 203 U. S. 595, 27 S. Ct. 783, 51 U. S. (L. ed.) 332, where appellant was allowed to file more specific assignments upon his showing that in making the formal assignment he relied upon and followed a precedent contained in an approved book of forms.

**Finding of facts**.—In equity cases in federal courts it is not the practice to make findings of fact and conclusions of law. *Whitney v. Whitney Elevator, etc., Co.*, (W. D. N. Y. 1910) 180 Fed. 187. On appeal from a Bankruptcy Court to the Circuit Court of Appeals a finding of facts is not required by the Bankruptcy Act nor is it desirable. *In re Meyers*, (S. D. N. Y. 1900) 105 Fed. 353, where the referee's report in favor of the bankrupt's discharge was confirmed, and opposing creditors submitted certain statements of fact and asked the court to find them for the purposes of a hearing on appeal. The court declined to do so and said: "It would impose additional burdens upon the court, and is not ordinarily essential; since in cases of reasonable doubt, the grounds of the decision usually appear sufficiently either in the report of the referee or in the opinion or memorandum of the judge thereon." But for the accommodation of the party the court proceeded to

state more fully than appeared in its former opinion filed in the same case the grounds for granting the discharge.

**Appeal bond.**—Before an appeal can be allowed or perfected an appeal bond must be given and approved, the court fixing the amount, and the bond should be filed and made a part of the record in the case, and the record, in order to be perfect, should recite that such bond has been given, approved, and filed. *In re Miller*, (1904) 13 Okla. 557, 75 Pac. 1128. If the record is silent upon that point, but the bond was actually given, the proper remedy of the appellant is to suggest a diminution of the record and have the clerk of the court below certify the record showing the fact. *In re Miller*, (1904) 13 Okla. 557, 75 Pac. 1128, in which case, however, a motion to dismiss the appeal having been filed, the court said: "If the appeal should be dismissed without having been heard upon the merits, possibly a new citation might be had and the appeal perfected, and for that reason alone we pass this proposition without further comment, to deal with one including more of the merits of the case."

On appeal by the bankrupt from an adjudication of bankruptcy in an involuntary proceeding the appeal bond is sufficient if it runs only to the original petitioners for the adjudication, although other creditors filed an intervening petition having the same object. *Flickinger v. Vandalia First Nat. Bank*, (C. C. A. 6th Cir. 1906) 145 Fed. 162 (certiorari denied) (1906) 203 U. S. 595, 27 S. Ct. 783, 51 U. S. (L. ed.) 332, where the court said: "As all the petitioners make common cause and not separate controversies, and the benefits of the bond will practically come to all, it would seem to be sufficient. The motion to dismiss the appeal is therefore denied."

**Citation.**—In proceedings in error the citation signed by the judge of the court to which the writ is addressed or any judge or justice of the appellate court is the notice required by R. S. sec. 998, title JUDICIARY. *Exploration Mercantile Co. v. Pacific Hardware, etc., Co.* (C. C. A. 9th Cir. 1910) 177 Fed. 825, holding that service of a citation signed by the district judge was sufficient.

Where a citation is not issued nor an assignment of errors filed, on appeal to the Circuit Court of Appeals, until an entire term of the appellate court has intervened, the appeal becomes inoperative. *Nazima Trading Co. v. Martin*, (C. C. A. 9th Cir. 1908) 164 Fed. 838, dismissing an appeal.

Where an appeal is seasonably taken and seasonably docketed the appellate court has power to direct the issuance of an alias citation to omitted but necessary parties if application therefor is made before the expiration of the first term at which the case could have been heard. *Per Van*

*Devanter, J., in Gray v. Grand Forks Mercantile Co.*, (C. C. A. 8th Cir. 1905) 138 Fed. 344, citing *Lockman v. Lang*, (8th Cir. 1904) 132 Fed. 1, 65 C. C. A. 621. If such application is not made within that time, the necessity therefor having been brought to the attention of appellant's counsel in ample time, the appeal becomes inoperative in so far as it challenges the claims of those who have not thus been brought into the appellate court. *Gray v. Grand Forks Mercantile Co.*, (C. C. A. 8th Cir. 1905) 138 Fed. 344.

In *In re Quality Shop Co.*, (C. C. A. 7th Cir. 1912) 202 Fed. 196, where a bond was not approved and filed and citation was not served within ten days on an appeal from a decree rejecting a claim, but were filed afterward, and the court refused to dismiss the appeal on that ground, the court said: "In the *T. E. Hill Co. Case*, (1906) 148 Fed. 832, 78 C. C. A. 522, we held that appeals under section 25a are governed by the rules in equity appeals, except as to the time within which such appeals shall be taken, and therefore held that citation and bond are not jurisdictional requisites."

**Bill of exceptions.**—On appeals in bankruptcy cases a bill of exceptions has no function and is entirely irregular as a means of bringing before the appellate court the evidence or other proceedings of the court below or the referee. *Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363, where the court said: "An appeal makes the entire record available to counsel for the appellant, and imposes upon him and upon the clerk of the lower court the duty of inserting in the transcript of the record sent to the appellate court everything material to the hearing of the questions to be presented there. *Teller v. U. S.*, (8th Cir. 1901) 111 Fed. 119, 49 C. C. A. 263. The bill of exceptions must therefore be disregarded. It appears, however, that this bill of exceptions was presented by the appellant to the court below, that it bears the written approval of counsel for the appellee, and that it was filed in the case by the order of the District Court. In view of these facts, we have concluded, with some hesitation, that the paper called a 'bill of exceptions' may be deemed a written stipulation of the parties to the effect that it correctly portrays the evidence and the proceedings below, and upon this basis we proceed to consider the case it presents."

On appeal from a judgment of the Bankruptcy Court pursuant to the advisory verdict of a jury a bill of exceptions taken upon the jury trial is out of place and of no value except upon a motion for a new trial, made to the court below. *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160, an appeal from adjudication of bankruptcy in an involuntary proceeding, the appellant having waived

the statutory right to a jury and issues having been submitted to the jury in the exercise of the court's discretion.

**Record on appeal.**—Rule 14 in all the Circuit Courts of Appeals specifies what shall constitute the record on appeal or error. By virtue of provisions in section 11 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 829, title JUDICIARY, the sections of the Revised Statutes relating to transcripts on appeals, viz., sections 698, 750, title JUDICIARY, are in full force and apply to bankruptcy cases. *In re A. L. Robertshaw Mfg. Co.*, (E. D. Pa. 1905) 135 Fed. 220, 222.

The language used in the law and rules of court in regard to the record on appeal is so general that in every case it is necessary for some one to specify what part of the record, in the particular case, comes within the general designations. *In re A. L. Robertshaw Mfg. Co.*, (E. D. Pa. 1905) 135 Fed. 222, *per Holland, J.*

In one of the Pennsylvania districts, it is said the practice has there long prevailed of counsel's agreeing, by stipulation filed, as to what the record shall contain; that when counsel disagree and it is necessary to specify the record, the best practice is to require the appellant to file a *præcipe* with the clerk, pointing out specifically what records, in his judgment, are necessary to be certified on the appeal; and that if the appellee is of opinion that these are not sufficient, he can suggest a diminution of the record and ask for a certiorari, and the question as to the necessity of additional matter will properly be determined by the appellate court, and that the judge of the Bankruptcy Court will not, on petition of an appellant, designate what records shall be certified to the appellate court. *Per Holland, J.*, in *In re A. L. Robertshaw Mfg. Co.*, (E. D. Pa. 1905) 135 Fed. 220, where the court also said: "The petition of the [appellants] . . . sets forth such parts of the record as they regard sufficient for a full and complete understanding of the case in the appellate court, and we are of opinion that their judgment is right in this respect; but we know of no law which authorizes the court from which an appeal is taken to designate what records in the court below shall be certified upon which the appellate court shall determine the appeal. In fact, the judge of the court from which the appeal is taken ought not in the least to interfere in the discretion allowed by the general terms used in the Acts of Congress and rules of court in designating the record to be certified in cases of appeal, as his judgment is to be reviewed, and his opinion of the importance and relevancy of matters contained in the record might, in the estimation of counsel for one side or the other, be as faulty as it is claimed his judgment is from which an appeal is taken; and if an order of the court from which the appeal is taken could have the

effect of restricting the record in all cases where such a decree had been made there would be the possibility of a feeling upon the one side or the other that they had not secured a fair hearing on a full record. . . . Holding this view as to the authority of this court and the practice to be adopted, we conclude that the counsel for the appellant must assume the responsibility of designating what records shall be entitled by the clerk, and present to him a *præcipe* stating specifically which of the papers on file in the case he desires him to certify to the appellate court."

"In *Union Pac. Co. v. Stewart*, (1877) 95 U. S. 234, 24 U. S. (L. ed.) 431, it is made the duty of appellant to see that the record is properly presented to the appellate court." *Per Simonton, J.*, in *Williams v. Savage*, (C. C. A. 4th Cir. 1903) 120 Fed. 497, 498.

In his certificate to the transcript of the record it is customary for the clerk of the court below to state, if it be the fact, that the transcript contains only such papers as the attorney for the appellant designated. See *Herman Keck Mfg. Co. v. Lorsch*, (C. C. A. 6th Cir. 1910) 179 Fed. 485.

Neither the counsel for the appellant nor the clerk of the court below can conclusively determine what parts of the record are necessary on the hearing of the appeal. *Cunningham v. German Ins. Bank*, (C. C. A. 6th Cir. 1900) 103 Fed. 932, *per Lurton, J.*

An appeal may be dismissed on motion where the transcript is incomplete in respect of essential jurisdictional information, and verbal explanations made by appellant's counsel at the bar cannot be treated as part of the record. *Williams v. Savage*, (C. C. A. 4th Cir. 1903) 120 Fed. 497, dismissing an appeal from a judgment granting a discharge where the record made up, as the clerk certified, under the instructions of appellant's counsel, failed to show whether any of the steps to perfect the appeal were taken in proper time, or indeed when they were taken; or to show when the petition for appeal was presented, or when the order granting its prayer was granted or filed, or whether they were filed at all; "there is nothing in the record which can inform the court when this appeal was taken."

If a transcript is defective by omission of matters necessary to a proper understanding of the evidence the appropriate remedy for the appellee is not a motion to strike the transcript from the files, but a suggestion to the appellate court of the defect complained of and application for a certiorari to send up the missing matter. *Flickner v. Vandalia First Nat. Bank*, (C. C. A. 6th Cir. 1906) 145 Fed. 162 (certiorari denied (1906) 203 U. S. 595, 27 S. Ct. 183, 51 U. S. (L. ed.) 332), where a motion to strike was denied, the only ground therefor being that

the transcript was not submitted to counsel for the appellees, and that none of said counsel had notice of the filing thereof, and that the record was imperfect because it did not contain all the evidence on which the cause was decided, and that what was given was stated in a narrative form, without giving the questions put to the witnesses.

When the clerk's certificate does not show that the record is a full and complete record of the entire proceedings, it ought to appear, by stipulation or otherwise, that it does include all that is necessary to a determination of the matters involved by the appeal; and if the appellee is not content with the transcript as filed, he should seasonably move the court to require the appellant to complete the record by filing a transcript of such other papers and evidence as he deems necessary and points out. *Cunningham v. German Ins. Bank*, (C. C. A. 6th Cir. 1900) 103 Fed. 932.

On appeal from an adjudication of bankruptcy the appellee's motion that several matters and things, not included in the transcript, be brought up, as necessary to a satisfactory examination of the questions raised, was granted, with a reservation as to the costs, although the appellant insisted that the record was sufficient. *Herman Keck Mfg. Co. v. Lorsch*, (C. C. A. 6th Cir. 1910) 179 Fed. 485, where the court said: "That motion we are disposed to allow, with the reservation of power in this court to ultimately determine where the costs of that additional matter of the transcript should be placed, determinable upon the question whether or not it is necessary to be brought, in order to have a proper understanding. With this reservation, the motion will be granted; but for special reasons, which we do not care to dwell upon, we further order that the charges incident to the supplying of this additional matter be paid by the appellees, and so of the cost of printing it, the ultimate liability for which is also to be determined hereafter."

On a bankrupt's appeal from an adjudication of bankruptcy the appellee's motion for an order requiring that the original books and records in the business of the bankrupt be sent up, it being claimed that there was something about them which could not be adequately transcribed, was denied. *Herman Keck Mfg. Co. v. Lorsch*, (C. C. A. 6th Cir. 1910) 179 Fed. 485, where the court said: "There is a rule which we have taken from the Supreme Court rules, so far as this branch of it is concerned, that where there are exhibits in the record in the court below, such as cannot be transcribed or brought here by proper representation, as, for instance, models and the like, which have been made part of the evidence in that court, they may be ordered by the judge of the court below to be sent here as part of the return

to the appeal. The rule applies generally to such matters as cannot be transcribed so as to be exhibited to this court as they were exhibited to the court below. The application for an order to send up the original books and records is not within the scope of that provision. It is not shown that transcription, or representation by photographic copies, if necessary, cannot be made. Therefore no ground is made which would bring the case within the scope of the rule."

The presumptions are in favor of the correctness of the action of the court below, and a reversal thereof cannot be had unless the transcript of the record affirmatively shows the ground upon which the action complained of was taken. *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584.

The record ought to show that the appeal and the steps to perfect the same were taken in proper time. *Williams v. Savage*, (C. C. A. 4th Cir. 1903) 120 Fed. 497.

On appeal from a judgment allowing a claim an assignment of error because the claim was not proved within one year after adjudication of bankruptcy is not available if the date of adjudication nowhere appears in the transcript of the record. *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584, where the defect was called to the attention of the appellant in the brief filed by the appellee, and no step was taken to supplement the transcript by supplying the date, although appellant had ample time to do so.

An order of the Bankruptcy Court restraining a referee in petition proceedings in a state court from paying over the fund in his hands is not reviewable if neither the order nor the papers upon which it was granted appear in the record on appeal. *In re Lynan*, (C. C. A. 2d Cir. 1903) 127 Fed. 123.

If the record on appeal suggests material facts, but does not set them forth as clearly as is necessary for the decision of the question, the cause may be remanded with instructions to the court below to have the essential facts ascertained and reported and to pass upon the same. *Devries v. Shanahan*, (C. C. A. 4th Cir. 1903) 122 Fed. 629.

Where the referee, pursuant to the petition of a party desiring review of an order, has certified to the judge the question presented, with a summary of the evidence relating thereto and the finding and order of the referee thereon, and such certificate and summary appear in the record on appeal, it will be presumed, in the absence of some order of the court below, that the hearing therein was upon the summary of the evidence certified by the referee, and that the original evidence before the referee constituted no part of the record in the court below; especially where nothing indicates that any effort

was made, either before the referee or judge, to supplement the summary of evidence certified. *Cunningham v. German Ins. Bank*, (C. C. A. 6th Cir. 1900) 103 Fed. 932, where appellee's motion for a rule upon the appellant to file a more complete transcript was denied, although "it was entirely within the competency of the judge at request of either party to have directed the filing of all or any part of the original documents or proofs which were on file with the referee."

The transcript from the records of the lower court imports absolute verity, and it is not competent to contradict, explain, or extend the recital of the record by evidence *dehors* the record. *Per Lurton, J.*, in *In re McCall*, (C. C. A. 6th Cir. 1906) 145 Fed. 898, 902.

A certified record purporting to contain an entry on the journal of the court below on a stated date controls a different date of an indorsement upon the entry of a direction to enter the same; such indorsement having no proper place upon the journal, its date will be treated as a clerical mistake. *In re McCall*, (C. C. A. 6th Cir. 1906) 145 Fed. 898, 903.

**Questions considered and determined in general.**—An appeal from a judgment adjudicating the appellant a bankrupt "brings up the whole case and cannot be made to turn upon errors in rulings made upon the trial of a feigned issue." *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160.

Errors assigned upon instructions given or refused, or other rulings made, on a jury trial demanded by the alleged bankrupt as of right can be considered only upon a writ of error and not upon appeal from an adjudication of bankruptcy. *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160.

While a general appeal opens up all prior decrees of an interlocutory character, questions reviewable on appeal from a final decree may be limited by the terms in which the appeal was prayed for and allowed. *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584, where, for the reason stated, on appeal from a decree allowing a claim on confirmation of a master's report, the court was inclined to regard the appeal as limited to the question of the amount allowed and not extending to the question of the right to recover at all.

If an appeal is taken from an order allowing a claim under section 25a (3), only the validity of the claim allowed can be considered, and it seems that complaint of interlocutory orders affecting the appellant would be excluded. *Schuler v. Hasinger*, (C. C. A. 5th Cir. 1910) 177 Fed. 119.

A decree found correct upon any ground established in the case will be affirmed, though a wrong reason was given for it in the court below. *Naylon v. Christian-*

*sen Harness Mfg. Co.*, (C. C. A. 6th Cir. 1908) 158 Fed. 290, 293.

On appeal from a judgment denying a discharge where the referee's report adverse to the bankrupt shows that he passed upon only one of several specifications of objections, that specification alone is brought before the appellate court. *Vehon v. Ullman*, (C. C. A. 7th Cir. 1906) 147 Fed. 694.

Where a party's appeal from the disallowance of his debt concerns the amount of the claim, he may also present any question relating to the security or rank of the debt, as an incident thereof, though the question of lien or priority, if alone involved, could be reviewed only on a petition for revision. *In re Cosmopolitan Power Co.*, (C. C. A. 7th Cir. 1905) 137 Fed. 858, where the court said: "If the case of *In re Worcester County*, (1st Cir. 1900) 102 Fed. 808, 42 C. C. A. 637, is to be construed as requiring us to split the case and dismiss the portion that affects priority, we are not disposed, as now advised, to follow it."

**Presumptions on appeal.**—On appeal the presumptions are in favor of the correctness of the action of the court below. *Kentucky Nat. Bank v. Carley*, (C. C. A. 3d Cir. 1904) 127 Fed. 686; *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584.

The presumption of correctness of findings of fact on a given point is conclusive if the record does not show that it contains all the evidence on that point. *In re French*, (1904) 13 Okla. 549, 75 Pac. 278, where the court presumed there was sufficient evidence to warrant the finding that certain payments constituted preferences and that at the time they were made the bankrupt was insolvent.

Where the clerk's certificate appended to the record on an appeal from an order denying a bankrupt's discharge, recited that the record was a true transcript of so much of the record and proceedings of the court as was requested by counsel for appellant, it was presumed, in the absence of anything showing to the contrary, that there was a sufficient appearance by the objecting creditors on the day they were required to show cause against a discharge, as required by general order No. 32, 1 Fed. Stat. Annot. 611. *Shaffer v. Koblegard Co.*, (C. C. A. 4th Cir. 1910) 183 Fed. 71.

**Presentation and reservation in lower court of ground of review.**—An objection to the consideration of specifications of objection to a bankrupt's discharge, not urged in the trial court, is unavailable on appeal. *Shaffer v. Koblegard Co.*, (C. C. A. 4th Cir. 1910) 183 Fed. 71, where, for that reason, it was presumed that such appearance as is required by general order No. 32, was duly and properly entered.



Although a sworn proof of claim has probative force and is *prima facie* evidence of its allegations even when objected to (*Whitney v. Dresser*, (1906) 200 U. S. 532, 535, 26 S. Ct. 316, 317, 50 U. S. (L. ed.) 584), it cannot be regarded as self-proving on the claimant's appeal from a judgment disallowing it unless he relied upon it in the Bankruptcy Court. *In re McIntyre*, (C. C. A. 2d Cir. 1909) 174 Fed. 627, where the claimant did not stand upon his proof of claim before the referee and insist that the objectors should go forward, but attempted, by insufficient evidence, to establish the allegations in his proof of claim; and it was held that he could not be permitted to use those very allegations to supply the deficiencies in his evidence.

**Review as dependent on state of record.**—Where, out of abundant caution, review is sought by appeal and also by petition to revise, both cases may, by agreement of the parties, be considered upon the same record, as in *Franklin v. Stoughten Wagon Co.*, (C. C. A. 8th Cir. 1909) 168 Fed. 857.

On appeal from an adjudication of bankruptcy if the evidence heard below is not brought up, the appellate court is limited to a consideration of the case made by the pleadings when these alone are found in the record. *Corwith First State Bank v. Haswell*, (C. C. A. 8th Cir. 1909) 174 Fed. 209, where the court said: "The issue of fact presented by the bank's answer to the effect that the debtor was a wage-earner, and, therefore, not subject to the provisions of the Bankruptcy Act, cannot be considered by us. The trial court by its decree of adjudication necessarily found that issue against the bank, and as no evidence is preserved in the record we are unable to review its finding."

The record must in some form show that it includes the entire evidence, or at least the entire evidence on a given proposition, which the appellate court is asked to consider; if this is not shown in some form, the appellate court will not presume that the entire evidence is included in the record, and will not reverse a case because a finding of fact is not, seemingly, supported by the evidence. *In re French*, (1904) 13 Okla. 549, 75 Pac. 278, affirming a judgment disallowing a claim.

If the referee failed to take and preserve the testimony which he excluded, and it is not presented to the appellate court, his rulings excluding it are not reviewable. *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 852, where the court said: "The established practice in the federal courts in equity is that examiners, masters, and the Circuit Courts must, under rule No. 67 in equity, take, record, and, in

case of an appeal, return to the appellate court all the evidence offered by either party, that which was held to be incompetent or immaterial as well as that which they deemed competent and relevant, to the end that if the appellate court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the excluded evidence. If evidence is objected to and ruled out, it must nevertheless be written down and preserved in the record subject to the objections, or the ruling cannot be considered in the appellate court. From the general rule that all evidence offered must be taken and preserved, the evidence of a privileged witness, evidence plainly privileged and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or power of the court to compel its production or to permit its introduction, are excepted. . . . When the rejected testimony is made a part of the record and returned to an appellate court, and then only, can such a court consider and decide the legality of the rulings which excluded it, and after determining that question it will proceed to decide whether or not all the admissible evidence presented to it sustains the decree below, and to render a final decree accordingly." The foregoing statement is substantially a repetition of what was said by the same court in *Missouri-American Electric Co. v. Hamilton-Brown Shoe Co.*, (C. C. A. 8th Cir. 1908) 165 Fed. 283, where an adjudication of bankruptcy was reversed for insufficiency of the evidence.

Under the rule that every presumption must be indulged in favor of the correctness of a judgment rendered by a court of competent jurisdiction until the contrary appears, and the rule that after a judgment has been rendered it will be presumed, in the absence of a contrary showing, that the facts necessary to support it were proved, and the complaint will be treated as amended to conform to the proofs, it will be presumed on appeal from an adjudication of involuntary bankruptcy that a defect in the petition was supplied by the proof, where the latter is not brought up for the consideration of the appellate court. *Corwith First State Bank v. Haswell*, (C. C. A. 8th Cir. 1909) 174 Fed. 209, affirming a decree of adjudication, even though it were conceded that the petition failed to describe sufficiently the land charged to have been unlawfully conveyed, by not specifying the county or state in which it was located; especially "because the record does not disclose that the alleged defect was ever called to the attention of the trial court,

and because the facts of the case are not brought here for our consideration."

**Harmless or prejudicial error.**—"When it can be seen that no harm resulted to appellant, this court will not reverse a decree on account of an immaterial departure from technical rules of proceeding." *Oil Well Supply Co. v. Hall*, (C. C. A. 4th Cir. 1904) 128 Fed. 875.

A creditor's appeal from a judgment granting a discharge, upon the contention that the court erroneously referred the application for a discharge to the referee, is without merit where no prejudice whatever has resulted to the appellant through such reference. *In re McDuff*, (C. C. A. 5th Cir. 1900) 101 Fed. 241.

The decisive issue is not whether there was an error in the admission or exclusion of evidence, but whether or not all the competent and relevant evidence presented to the appellate court sustains the decree. *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 852, following the rule announced in *Blease v. Garlington*, (1875) 92 U. S. 1, 23 U. S. (L. ed.) 521.

Admission of incompetent evidence by a referee is not ground for reversal of an order pursuant to his finding where the latter was not based upon the incompetent testimony and the court below apparently acted only upon the competent evidence. *Smith v. Means*, (C. C. A. 7th Cir. 1906) 148 Fed. 89.

A judgment refusing an adjudication of bankruptcy on the advisory verdict of a jury will not be reversed for mere informalities in the proceedings, where the merits of the question involved were passed upon by the trial judge and substantial justice was effected. *Oil Well Supply Co. v. Hall*, (C. C. A. 4th Cir. 1904) 128 Fed. 875.

An order granting a discharge will be affirmed on appeal if the appellate court is satisfied that it was correct, regardless of the question whether it was made by the court below without investigation of the merits. *Kentucky Nat. Bank v. Carley*, (C. C. A. 3d Cir. 1904) 127 Fed. 686.

An order of adjudication will not be reversed on the ground that certain alleged acts of bankruptcy were not properly pleaded and proved if enough was alleged and proved to warrant the adjudication. *In re Lynan*, (C. C. A. 2d Cir. 1903) 127 Fed. 123.

Although the record may conclusively show that a party against whom a decree is rendered has suffered no prejudice from a refusal to take and hear cumulative evidence on his behalf, yet when a court of bankruptcy refuses to take and consider evidence which the losing party desires to offer before that evidence has been presented to it so that it can determine the question of its admissibility, the presumption that error produces prejudice

necessarily prevails. *Missouri-American Electric Co. v. Hamilton-Brown Shoe Co.*, (C. C. A. 8th Cir. 1908) 165 Fed. 283, reversing an adjudication of bankruptcy for the reason above stated.

**Discretion of lower court.**—Where the allowance of a claim by the Bankruptcy Court is discretionary the appellate court strongly inclines to affirm the action of the court below in that behalf unless it appears that clear wrong was done. *Gold v. South Side Trust Co.*, (C. C. A. 3d Cir. 1910) 179 Fed. 210, affirming disallowance by the court below and the referee of a claim by a broker to a commission for sale of the bankrupt's real estate, the claimant having no contract therefor with the trustee. It was considered to be "an administrative matter" and the court said: "If abuses threaten to creep into bankruptcy procedure those charged with local administration are in better position to prevent such abuses than are appellate tribunals."

Allowance or refusal of amendments to a petition in bankruptcy being entirely within the judicial discretion of the Bankruptcy Court, is not ground for reversal where the record discloses no abuse of discretion. *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.*, (C. C. A. 3d Cir. 1907) 154 Fed. 662, where the court affirmed a refusal to allow amendment of a petition in involuntary bankruptcy by inserting additional alleged acts of bankruptcy, inspection of the proposed amendments showing that they lacked the specific particularity requisite to the statement of an act of bankruptcy, or to sufficiently distinguish them from acts not in violation of the Bankrupt Law.

The Circuit Court of Appeals is loath to interfere with the amount allowed as an attorney's fee for services rendered to petitioning creditors in involuntary cases unless fully persuaded that the judgment of the court below was founded in misconception of the ground upon which the allowance should be based, or, if proceeding upon correct grounds, that the amount allowed was largely excessive or greatly inadequate. *Per Jenkins, J.*, in *In re Curtis*, (C. C. A. 7th Cir. 1900) 100 Fed. 784. But a judgment for a clearly inordinate allowance may be reversed with directions to reduce the allowance to a stated amount. This was done in *In re Curtis*, (C. C. A. 7th Cir. 1900) 100 Fed. 784.

**Questions of fact—In general.**—"A proceeding in bankruptcy is a proceeding in equity, and on an appeal to this court, or to the Supreme Court, the decisive issue is not whether there was an error in the admission or exclusion of evidence, but whether or not all the competent and relevant evidence presented to the appellate court sustains the decree." *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 852.

On an appeal the facts as well as the law are before the appellate court for review, *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, (C. C. A. 6th Cir. 1900) 101 Fed. 699; and the evidence is therefore re-examined in that court, *Simonson v. Sinsheimer*, (C. C. A. 6th Cir. 1900) 100 Fed. 426, where the court also said: "An appeal as in equity cases necessarily involves the idea of re-examination by the appellate court of both the facts and the law of the case." To the same point see *In re Worcester County*, (C. C. A. 1900) 102 Fed. 808; *In re Rouse*, (C. C. A. 1899) 91 Fed. 98; *In re Richards*, (C. C. A. 1899) 96 Fed. 935.

On appeal from an order refusing a discharge, if any one of the several specifications of objections to the discharge is sustained by sufficient evidence the order will be affirmed. *Seigel v. Cartel*, (C. C. A. 8th Cir. 1908) 164 Fed. 691.

Where an error of the referee calls for reversal of the order confirming his report, unless the court is satisfied by the evidence in the record that his ultimate conclusion was right, the court will not weigh the testimony on the mere printed record if the questions of fact seem doubtful, but will reverse and remand in order that further evidence may be taken. *In re Straschnow*, (C. C. A. 2d Cir. 1910) 181 Fed. 337.

*Findings of referee or master.*—As to the weight to be attached to a finding of fact by a bankruptcy referee alone, it has been said that no arbitrary rule can be laid down for determining it; that his position and duties are analogous to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's findings of fact must be substantially that applicable to a master's report; that much in both cases must depend upon the character of the finding; that if it be a deduction from established fact, the finding will not carry any great weight, for a reviewing court having the same facts may as well draw inferences or deduce a conclusion as the referee; but that if the finding is based upon conflicting evidence involving questions of credibility and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion. *Per Lurton, J.*, in *Ohio Valley Bank Co. v. Mack*, (C. C. A. 6th Cir. 1906) 163 Fed. 155, 158.

In *In re Howard*, (C. C. A. 2d Cir. 1910) 180 Fed. 399, where an order denying a discharge was reversed, the court said: "In our opinion the evidence was insufficient to warrant a finding that the failure to keep more complete records arose from any intention upon the part of the bankrupt to conceal his financial condition. Certainly we think the evidence would not warrant such a finding in the face of the report of the special master

who saw the bankrupt upon the stand and heard his testimony at length."

An order of the Bankruptcy Court disregarding a referee's findings that are amply supported by the testimony will be reversed: *Boyd v. Arnold*, (C. C. A. 5th Cir. 1906) 149 Fed. 187 (certiorari denied (1907) 207 U. S. 593, 28 S. Ct. 259, 52 U. S. (L. ed.) 355), reversing a judgment denying a discharge contrary to the recommendation of the referee.

Findings of fact dependent upon conflicting testimony have every reasonable presumption in their favor, and will not be set aside or modified by an appellate court unless it clearly appears that there was error or mistake, though the court below disagreed with such findings. *Southern Pine Co. v. Savannah Trust Co.*, (5th Cir. 1905) 141 Fed. 802, 73 C. C. A. 60, reversing an order which set aside the report of a referee in favor of a claimant of proceeds of property sold by a trustee in bankruptcy, the court saying: "Upon the trial of the issues before him the referee had the opportunity of seeing and hearing the witnesses, and he was therefore in a better position to judge of their credibility than are courts which have nothing before them but the printed record,—on which point see also *Moore on Facts*, § 1276.

Judgment allowing a claim was reversed in *Rush v. Lake*, (C. C. A. 9th Cir. 1903) 122 Fed. 561 (certiorari denied (1903) 191 U. S. 571, 24 S. Ct. 843, 48 U. S. (L. ed.) 307), where the appellate court found, contrary to the opinion of the court below, that there was sufficient evidence to justify the referee's finding that the creditor was a silent partner of the bankrupt.

*Concurrent findings of referee or jury and court below.*—Appeals from judgments of the Bankruptcy Court are taken "as in equity cases" to a Circuit Court of Appeals or to the Supreme Court of a territory, and consequently the proceeding thereunder should conform itself, as far as may be consistent with justice, to the ordinary course of equity procedure. *In re Noyes*, (C. C. A. 1st Cir. 1903) 127 Fed. 286, *per Aldrich, J.* Hence findings of fact made by a referee or master and confirmed by the judge are to be accepted by the appellate court, unless clear error in them is shown. *Ellsworth v. Lyons*, (C. C. A. 6th Cir. 1910) 181 Fed. 55, finding that the bankrupt corporation was solvent at the date of a transaction involved. *Carroll v. Stern*, (C. C. A. 6th Cir. 1915) 223 Fed. 723; *Lumpkin v. Foley*, (C. C. A. 5th Cir. 1913) 204 Fed. 372; *Canner v. Webster Tapper Co.*, (C. C. A. 1st Cir. 1909) 168 Fed. 519, affirming an adjudication of bankruptcy; *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 852, affirming an order that a claim be expunged unless the creditor surrendered

security which the court below and the referee held on conflicting evidence to have been obtained with reasonable cause to believe that it was intended as a preference; *Seigel v. Cartel*, (C. C. A. 8th Cir. 1908) 164 Fed. 691, affirming an order refusing a discharge, and holding that the credibility and reasonableness of the bankrupt's story of his loss of money being addressed to the judicial discretion of the court below, "as there was, in our judgment, reasonable ground for discrediting his explanation, we will not review the exercise of that discretion;" *Ohio Valley Bank Co. v. Mack*, (C. C. A. 6th Cir. 1906) 163 Fed. 155, affirming a judgment allowing a claim, which was assailed mainly upon the ground of relationship, and because it did not appear from the books of either the creditor or the debtor, the court saying that "in this case the conclusions of the referee necessarily involved the credibility of the witnesses who testified to the *bona fides* of the claim preferred by Charles Mack, Sr.; the conclusion he reached in favor of the validity of his debt has also passed the scrutiny of the district judge; under such circumstances this court is not warranted in overturning the conclusions of two courts upon anything less than a demonstration of plain mistake;" *Naylor v. Christiansen Harness Mfg. Co.*, (C. C. A. 6th Cir. 1908) 158 Fed. 290, where, on appeal from an adjudication in involuntary bankruptcy, the appellate court, concurring with the court below, declined to believe that the officers of the bankrupt corporation "could be and continue so utterly ignorant of the financial condition of their company as the general terms in which their testimony was given would seem to indicate;" *Stephens v. Merchants' Nat. Bank*, (C. C. A. 7th Cir. 1907) 154 Fed. 341, affirming an adjudication of bankruptcy where the evidence left it uncertain whether or not the alleged bankrupt was chiefly engaged in farming; *Smith v. Means*, (C. C. A. 7th Cir. 1906) 148 Fed. 89, affirming an order denying the petition of an adverse claimant for the surrender of property to him by the trustees in bankruptcy, since "the master was in the best position to judge of the weight and credibility of the testimony, which was given orally before him," as to the title and right of possession of the claimant; *In re Lawrence*, (C. C. A. 2d Cir. 1904) 134 Fed. 843, affirming an order, findings not to be disturbed "unless they are manifestly unsupported by the evidence;" *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584, affirming a judgment allowing a claim as to the amount thereof, which "this court will not reverse or modify unless a very plain mistake is definitely pointed out;" *In re Noyes*, (C. C. A. 1st Cir. 1903) 127 Fed. 286, affirming a judgment allowing a debt,

the court saying: "Some cases go so far as to hold that a chancellor's findings will not be reversed where the appellate court cannot see that the decree is right, and where the evidence raises some doubt as to its correctness. But it is not necessary to go to that extreme in this case, for, while the evidence presented by the record is meagre, there is nothing in the case to lead us to doubt the correctness of the finding below."

Conclusions of the trial judge, according with those of a jury in an advisory verdict, are entitled to the same weight as the concurrent findings of a referee and the judge. See *In re Neasmith*, (C. C. A. 6th Cir. 1906) 147 Fed. 160, affirming an adjudication of bankruptcy, the court seeing "no sufficient reason for disagreeing with the conclusions."

Findings of a referee affirmed by the court may not be adopted by the appellate court where they appear to be clearly against the weight of testimony, or where they proceed upon an erroneous theory of the principles of law upon which the case was to be tried and determined, or where the appellate court finds that there are no substantial contradictions in the testimony which the court below thought had developed. *West v. McLaughlin*, (C. C. A. 6th Cir. 1908) 162 Fed. 124, where a judgment rejecting a claim was reversed because it depended upon an erroneous assumption that the burden of proof on one of the issues involved rested on the creditor.

In *In re Sweeney*, (C. C. A. 6th Cir. 1909) 168 Fed. 612, where the dismissal of an intervening claimant of property sold to the bankrupt was affirmed, the referee's report and finding, concurred in by the court below, was that the intervenor had ample evidence, on a stated date, to put him on notice of the bankrupt's failing condition. "To justify us in a contrary conclusion," said the Circuit Court of Appeals, "it should plainly appear that the finding or conclusion was based upon some error of law or plain mistake of fact."

*Finding of judge.*—A judgment denying a discharge on an issue of fraud, the court below having seen the witnesses and heard their testimony, will not be disturbed unless the appellate court can clearly see that it is opposed to the weight of evidence. *Osborne v. Perkins*, (C. C. A. 1st Cir. 1901) 112 Fed. 127, *per Aldrich, J.*, "or, as otherwise stated, unless plain and manifest error appears," he continued.

While the presumption is that all facts necessary to a decree were found by the court below, in the absence of circumstances showing the contrary, the appellate court is not aided in consideration of the case by the weight which ordinarily attaches to findings of the court below if

there are no express findings stated in such a way as to make it clear that they were distinct findings upon questions of fact. *Burleigh v. Foreman*, (C. C. A. 1st Cir. 1904) 130 Fed. 13, reversing a decree adjudging that certain property constituted assets of the bankrupt's estate, it appearing that the conclusions of the court below were reached "upon general reasoning in respect to law and fact."

An appeal will be dismissed by the court of its own motion if it appears that the order or judgment was not one from which an appeal would lie. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 579; *Ohio Valley Bank Co. v. Switzer*, (C. C. A. 6th Cir. 1907) 153 Fed. 362.

The Circuit Court of Appeals will dismiss an appeal, if it has no jurisdiction thereof, though no objection be taken by counsel for either party. *In re Columbia Real Estate Co.*, (C. C. A. 1902) 112 Fed. 645.

Where an appeal is taken to the Circuit Court of Appeals from an order which is not appealable, but subject to review only on petition to revise, the appeal should be dismissed. *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1151. But see cases under black-letter caption *Appeal treated as petition to revise*, in note to section 24b.

Where the record on appeal from an order allowing a claim was not filed within the time allowed by law, and no motion to extend the time had been made within that period, the appeal was dismissed on motion. *In re Alden Electric Co.*, (C. C. A. 7th Cir. 1903) 123 Fed. 415.

"Appeals will not be entertained to argue moot questions only." *In re Berkeley*, (C. C. A. 2d Cir. 1906) 144 Fed. 577, dismissing an appeal for that reason.

Where, pending an appeal from an order dismissing a petition in involuntary bankruptcy, the defendants were adjudicated bankrupts in another district, the appeal will be dismissed, since under general order No. 8, following sec. 30 herein, the court making the first adjudication has exclusive jurisdiction, and the questions involved in the appeal have therefore become academic; and especially where such questions relate to an alleged preferential transfer of property, charged as an act of bankruptcy, which may again come before the court in a suit by the trustee against the transferee. *In re Sears*, (C. C. A. 2d Cir. 1904) 128 Fed. 275.

Where, on a former appeal, it was determined that if the alleged bankrupt committed the acts of bankruptcy in question while insane the adjudication was wrong, but if the acts were committed while sane it was proper to continue the case, though the bankrupt subsequently

became insane, and the case was remanded to give the petitioning creditors an opportunity to rebut the presumption of insanity arising from the inquisition, and on such hearing a number of witnesses testified that he was sane when the acts of bankruptcy were committed, and no evidence to the contrary was offered by the bankrupt's committee, a further appeal by such committee, raising the same question previously determined, was dismissed as frivolous and taken for delay. *In re Kehler*, (C. C. A. 2d Cir. 1908) 162 Fed. 674.

*Appeal taken on erroneous theory.*—An appeal taken on the erroneous supposition that the order was appealable under section 25a (3) will not be dismissed if the order was appealable as a "controversy" under section 24a. *Liddon v. Smith*, (C. C. A. 5th Cir. 1905) 135 Fed. 43.

*Reversal and remand.*—Where an order denying a discharge was reversed on appeal the court below was instructed to sustain the bankrupt's exceptions to the master's report against his petition for discharge, and to grant the discharge; this course being deemed more equitable, under all the circumstances, than to leave the question of discharge open to a new inquiry. *Vehon v. Ullman*, (C. C. A. 7th Cir. 1906) 147 Fed. 694.

*Mandate and proceedings thereon.*—The District Court is a mere instrument to make effectual the mandate sent down by the Circuit Court of Appeals, which must be carried into effect without any limitation whatever. *In re Hudson River Electric Co.*, (N. D. N. Y. 1911) 184 Fed. 970, where the Circuit Court of Appeals having affirmed an order dismissing a petition in involuntary bankruptcy, the petitioner moved in the District Court to insert in the order entered on the mandate a provision that it should not be prejudicial to his right to apply to the Supreme Court for a writ of certiorari to review the order; the motion was denied.

*Costs.*—Appeals are not now allowed *in forma pauperis*, much less ought the court to allow a bankrupt's appeal to be financed by means to be supplied out of a fund which it may ultimately be held ought to go to the benefit of creditors. Hence, where the bankrupt appealed from an involuntary adjudication, he was not entitled to an order requiring a receiver of his property to pay the costs of the transcript and the printing of the record out of the proceeds of the estate in his hands because the appellant was without the means required for that purpose. *Herman Keck Mfg. Co. v. Lorsch*, (C. C. A. 6th Cir. 1910) 179 Fed. 485.

The rules of the Circuit Court of Appeals regulating its general practice provide that "the practice shall be the same

as in the Supreme Court of the United States, as far as the same shall be applicable." Circuit Court of Appeals Rule 8, 90 Fed. cxlv. Supreme Court Rule 24 regulates the subject of costs on dismissals, and provides that in cases of affirmance or reversal costs shall be allowed to the prevailing party "unless otherwise ordered by the court." In the exercise of its discretion, both on appeals and writs of error and on petitions for revision, the Circuit Court of Appeals usually awards costs to the prevailing party. See *In re Standard Laundry Co.*, (C. C. A. 1902) 116 Fed. 476; *Beach v. Macon Grocery Co.*, (C. C. A. 1902) 116 Fed. 143; *Hutchinson v. Otis*, (C. C. A. 1902) 115 Fed. 937; *In re Garcewich*, (C. C. A. 1902) 115 Fed. 87; *In re Gaylord*, (C. C. A. 1901) 112 Fed. 668; *Stern v. Louisville Trust Co.*, (C. C. A. 1901) 112 Fed. 501; *In re Swift*, (C. C. A. 1901) 112 Fed. 315; *In re Young*, (C. C. A. 1901) 111 Fed. 158; *Smith v. Keegan*, (C. C. A. 1901) 111 Fed. 157; *Boyce v. U. S. Fidelity, etc., Co.*, (C. C. A. 1901) 111 Fed. 138; *In re Laird*, (C. C. A. 1901) 109 Fed. 550; *Foreman v. Burleigh*, (C. C. A. 1901) 109 Fed. 313; *Lott v. Young*, (C. C. A. 1901) 109 Fed. 798; *In re Bloch*, (C. C. A. 1901) 109 Fed. 790; *In re Tollett*, (C. C. A. 1901) 106 Fed. 866; *In re Marcus*, (C. C. A. 1901) 105 Fed. 907; *Woodruff v. Cheeves*, (C. C. A. 1901) 105 Fed. 601; *Ablowich v. Stursberg*, (C. C. A. 1901) 105 Fed. 751; *In re Marshall Paper Co.*, (C. C. A. 1900) 102 Fed. 872; *In re Worcester County*, (C. C. A. 1900) 102 Fed. 808; *Wall v. Cox*, (C. C. A. 1900) 101 Fed. 403; *In re Russell*, (C. C. A. 1900) 101 Fed. 248; *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, (C. C. A. 1900) 101 Fed. 699; *In re Meyer*, (C. C. A. 1899) 98 Fed. 976; *In re Empire Metallic Bedstead Co.*, (C. C. A. 1893) 98 Fed. 981; *Parmenter Mfg. Co. v. Stoevers*, (C. C. A. 1899) 97 Fed. 330; *In re Gutwillig*, (C. C. A. 1899) 92 Fed. 337; *Scheuer v. Smith, etc., Book, etc., Co.*, (C. C. A. 1901) 112 Fed. 407, in which case upon reversal of an order refusing to adjudicate the appellee as bankrupt the

costs of the appeal were adjudged against him "to be paid in due course of administration."

In *In re Wilcox*, (C. C. A. 1900) 109 Fed. 628, a judgment denying a discharge was reversed on appeal by the bankrupt, but, under the circumstances, without costs. And in *In re West*, (C. C. A. 1901) 108 Fed. 941, an adjudication of bankruptcy in involuntary proceedings was reversed on appeal by an opposing creditor without costs.

Costs against the trustee as appellee are to be paid out of the bankrupt's estate. *In re Laird*, (C. C. A. 1901) 109 Fed. 550; *In re Tollett*, (C. C. A. 1901) 106 Fed. 866.

Where an order of the Bankruptcy Court was reversed on petition for revision but neither party to revision proceedings was responsible for the error costs were not awarded to either party. *In re Utt*, (C. C. A. 1901) 105 Fed. 754. In *In re Emslie*, (C. C. A. 1900) 102 Fed. 291, an order was affirmed on appeal, without costs.

In *In re Marshall Paper Co.*, (C. C. A. 1900) 102 Fed. 872, where a petition for revision of an order and an appeal from another order were heard together, and the order appealed from was reversed with costs to the appellant, which made it unnecessary, under the circumstances, to decide the question raised on the petition, the latter was dismissed without costs.

Where an appeal is dismissed for want of jurisdiction no costs are allowed to either party if there was no formal motion to dismiss. *Hutchinson v. Le Roy*, (C. C. A. 1902) 113 Fed. 209; *Ross v. Saunders*, (C. C. A. 1901) 105 Fed. 915; *In re Dickson*, (C. C. A. 1901) 111 Fed. 726, in which latter case the court said that "costs incident to a motion to dismiss for want of jurisdiction are allowed when dismissal follows."

*Mandate relating to costs.*—A mandate from the Circuit Court of Appeals directing costs and disbursements to be taxed against a party on a petition for revision is conclusive on the court below and cannot be modified therein. *In re Henschel*, (1902) 114 Fed. 968.

(1) [From judgment granting or denying adjudication.] from a judgment adjudging or refusing to adjudge the defendant a bankrupt; [(1898) 30 Stat. L. 553.]

An order dismissing a petition in involuntary bankruptcy is a judgment refusing to make an adjudication and appealable under this clause. *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, where the court said: "A decision which finally determines the rights of parties to secure in that suit the relief they seek is a 'final

decision' within the meaning of that term in the act creating the Circuit Courts of Appeals, although it is not a decision of the merits of the case and does not bar another suit or proceeding for the same cause. It is a final adjudication of the particular case, and that is sufficient to vest in the defeated parties the right of review" by appeal.

**Refusal to set aside adjudication.**—An order or judgment overruling a motion to set aside a judgment of adjudication of bankruptcy is not appealable. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576; *B-R Electric & Telephone Mfg. Co. v. Etna Life Ins. Co.*, (C. C. A. 8th Cir. 1913) 206 Fed. 885; *In re Ives*, (1902 6th Cir.) 113 Fed. 911, 51 C. C. A. 541.

**Who may appeal.**—An intervening creditor, or the bankrupt's assignee under a general assignment who is allowed to contest a petition in involuntary bankruptcy, may appeal from the adjudication. *In re Meyer*, (C. C. A. 1899) 98 Fed. 978.

**Time for appeal**, see the paragraph following section 25a (3) and note thereto.

**The appeal from an adjudication should not be taken to the Supreme Court**, but only to the Circuit Court of Appeals, if it does not involve a question of jurisdiction of the District Court within the cases cited in division III of note to section 24a. *Exploration Mercantile Co. v. Pacific Hardware, etc., Co.*, (C. C. A. 9th Cir. 1910) 177 Fed. 825; *Columbia Iron-works v. National Lead Co.*, (6th Cir. 1904) 127 Fed. 99, 62 C. C. A. 99.

**Where question of jurisdiction of the District Court** is claimed to be in issue, see division III of note to section 24a.

**Writ of error or appeal.**—The distinction between a writ of error which brings up matter of law only, and an appeal, which, unless expressly restricted, brings up both law and fact, has always been observed by the federal Supreme Court, and been recognized by the legislation of Congress from the foundation of the government. *Elliott v. Toepfner*, (1902) 187 U. S. 327, 23 S. Ct. 133, 136, 47 U. S. (L. ed.) 200, *per* Chief Justice Fuller. And the Constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." Seventh Amendment to Constitution. Hence a judgment that a defendant is or is not a bankrupt, entered by a federal District Court pursuant to a verdict of a jury on a trial under section 19 is not appealable to the Circuit Court of Appeals, and can be reviewed for alleged errors of the court on the trial only by a writ of error accompanied by a bill of exception. *Elliott v. Toepfner*, (1902) 187 U. S. 327, 23 S. Ct. 133, 47 U. S. (L. ed.) 200; *Duncan v. Landis*, (C. C. A. 3d Cir. 1901) 106 Fed. 839; *In re Neasmith*, (6th Cir. 1906) 147 Fed. 160, 77 C. C. A. 402; *Lennox v. Allen-Lane Co.*, (C. C. A. 1st Cir. 1908) 167 Fed. 114; *Exploration Mercantile Co. v. Pacific Hardware, etc., Co.*, (C. C. A. 9th Cir. 1910) 177 Fed. 825 (writ of error to review a judgment of adjudication on a jury trial).

**Rulings on a jury trial** under section

19a were reviewed on a writ of error in *In re Bloch*, (C. C. A. 1901) 109 Fed. 790.

The provision in section 25a (1), authorizing an appeal "from a judgment adjudging or refusing to adjudge the defendant a bankrupt," applies only to judgments when trial by jury is not demanded and the court of bankruptcy proceeds on its own findings of fact. *Elliott v. Toepfner*, (1902) 187 U. S. 327, 23 S. Ct. 133, 47 U. S. (L. ed.) 200.

A writ of error to review the judgment just mentioned is of adjudication after a jury trial demanded as of right, authorized by the Circuit Court of Appeals Act of March 3, 1891, ch. 517, § 6, (now embodied in Judicial Code, § 128, title JUDICIARY), in connection with section 24a of the Bankruptcy Act. *Duncan v. Landis*, (C. C. A. 3d Cir. 1901) 106 Fed. 839.

**Under the Bankruptcy Act of 1867** it was also held that a writ of error is the proper remedy in such a case. *Knickerbocker Ins. Co. v. Comstock*, (1872) 16 Wall. 258, 21 U. S. (L. ed.) 493; *In re Oregon Bulletin Printing, etc., Co.*, (1875) 3 Sawy. (U. S.) 529.

**An adjudication of bankruptcy without a jury trial** is reviewable only by appeal and not by a writ of error. *Lockman v. Lang*, (C. C. A. 6th Cir. 1903) 128 Fed. 279. See also *Lockman v. Lang*, (C. C. A. 8th Cir. 1904) 132 Fed. 1.

**Appeal and not a writ of error is the proper remedy** for appellate review by a bankrupt of an order of adjudication upon the advisory verdict of a jury upon issues submitted in the exercise of the court's discretion. *In re Neasmith*, (6th Cir. 1906) 147 Fed. 160, 77 C. C. A. 402; *Oil Well Supply Co. v. Hall*, (C. C. A. 4th Cir. 1904) 128 Fed. 875.

**"The practice of taking an appeal and a writ of error to review the same adjudications** is not only permissible, but commendable, in cases in which counsel have just reason to doubt which is the proper proceeding to give jurisdiction to the appellate court. In such cases the reviewing court will consider both proceedings, will dismiss that one which is ineffective, and will review the rulings of the court below in accordance with the rules of the method applicable to the nature of the case before it." *Lockman v. Lang*, (C. C. A. 8th Cir. 1904) 132 Fed. 1.

Both an appeal and a writ of error were taken from an adjudication which followed the verdict of a jury in *Lennox v. Allen-Lane Co.*, (C. C. A. 7th Cir. 1908) 167 Fed. 114, the court dismissing the appeal.

**Other matters of appellate procedure**, see the first note to section 25a, preceding clause (1).

(2) [From grant or denial of discharge.] from a judgment granting or denying a discharge; and [(1898) 30 Stat. L. 553.]

The only appeal in bankruptcy proceedings from a judgment granting or refusing a discharge is from the Bankruptcy Court to the Circuit Court of Appeals or to the Supreme Court of the territories. *James v. Stone*, (1913) 227 U. S. 410, 33 S. Ct. 351, 57 U. S. (L. ed.) 573, holding that a further appeal cannot be taken from the Circuit Court of Appeals to the Supreme Court.

**Judgment on composition.**—A judgment confirming a composition is appealable as a judgment granting a discharge. *In re Friend*, (C. C. A. 7th Cir. 1905) 134 Fed. 778; *U. S. v. Hammond*, (C. C. A. 6th Cir. 1900) 104 Fed. 862; *In re Bay State Milling Co.*, (C. C. A. 2d Cir. 1915) 223 Fed. 778, wherein the court said: "This section apparently has not been amended, but stands as it did when the Bankruptcy Act was passed. It allows appeals from a judgment 'granting or denying a discharge.' Section 14c provides that the confirmation of a composition shall discharge the bankrupt from his debts. Such judgment, therefore, is the legal equivalent of a judgment 'granting a discharge,' and it seems to us that under section 25 it may be revised by appeal."

The bankrupt has an equal right to appeal from a judgment refusing confirmation. *U. S. v. Hammond*, (C. C. A. 6th Cir. 1900) 104 Fed. 862; *Adler v. Jones*, (C. C. A. 6th Cir. 1901) 109 Fed. 967. *Contra*, an order refusing to confirm a composition on the ground that the judge is not satisfied that it is for the best interests of the creditors is not a bar to a subsequent discharge and therefore is not a final order denying a discharge and appealable under this section. *In re McVoy Hardware Co.*, (C. C. A. 7th Cir. 1912) 200 Fed. 949; *Ross v. Saunders*, (C. C. A. 1st Cir. 1901) 105 Fed. 915, holding that where no creditor formally appears in opposition to confirmation of a composition the bankrupt cannot appeal from an order refusing confirmation. In *U. S. v. Hammond*, (C. C. A. 1900) 104 Fed. 862, allowing man-

damus to compel the appeal denied in *In re Adler*, (1900) 103 Fed. 444, it was held that an appeal lies in favor of a bankrupt from an order refusing confirmation of a composition. In that case, however, there were objecting creditors, and an issue made, and so proper parties to an appeal.

A judgment overruling objections to the application of a bankrupt for a discharge is not one granting or refusing a discharge and is not appealable. *Ragan, Malone & Co. v. Cotton & Preston*, (C. C. A. 5th Cir. 1912) 195 Fed. 69.

An order dismissing an application for discharge for want of prosecution, after so long a time had elapsed that the application could not be reviewed, is appealable as a judgment denying a discharge. *In re Kuffler*, (C. C. A. 2d Cir. 1903) 127 Fed. 125.

Whether an order dismissing a petition to revoke a discharge is appealable as an order granting a discharge was expressly left undecided, the court finding no authorities on the point, in *Thompson v. Mauzy*, (C. C. A. 4th Cir. 1909) 174 Fed. 611.

**Entry of order.**—An honest bankrupt's right to a discharge is to be jealously protected, and where petitioners were adjudicated bankrupt Sept. 9, 1904, and applied for their discharge June 7th following, which application was dismissed for a technical error Sept. 13, 1905, but no order was entered on the judge's memorandum, and new proceedings were instituted, in which the former denial was pleaded as *res adjudicata*, the bankrupts were still entitled to have an order entered on the prior decision and to appeal therefrom under section 25a (2). *In re Elkind*, (C. C. A. 2d Cir. 1909) 175 Fed. 64.

**Time for appeal.**—See paragraph following section 25a (3) and note thereto.

Various matters of appellate procedure see the first note to section 25a preceding clause (1).

(3) [From allowance or rejection of claim.] from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. [(1898) 30 Stat. L. 553.]

**Exclusiveness of remedy by appeal.**—A judgment specified in this clause is reviewable only on appeal as here provided; it cannot be reviewed by petition under section 24b. *Adams v. Dickers Valley Lumber Co.*, (C. C. A. 4th Cir. 1912) 202 Fed. 48. See also numerous cases as to exclusiveness of remedies in note to section 24b.

For matters of appellate procedure see the first note to section 25a preceding clause (1).

The mere allowing or disallowing a claim is a proceeding in bankruptcy and not a controversy arising in bankruptcy within the meaning of section 24a. *Tefft v. Munsuri*, (1911) 222 U. S. 114, 32 S. Ct. 67, 56 U. S. (L. ed.) 118, *reaffirmed*



in *J. W. Calnan Co. v. Doherty*, (1912) 224 U. S. 145, 32 S. Ct. 460, 56 U. S. (L. ed.) 702.

What constitutes a "debt or claim."—Section 25a (3) "is probably applicable alone to a debt or claim against the bankrupt when presented for proof in due course." *In re Columbia Real Estate Co.*, (C. C. A. 1902) 112 Fed. 645. But see *In re Curtis*, (C. C. A. 1900) 100 Fed. 784, holding that a judgment allowing a counsel fee for services rendered to the petitioning creditors in involuntary proceedings, was a judgment on a "claim" and appealable under the clause above cited; and in *In re Eggert*, (C. C. A. 1900) 102 Fed. 735, the court appears to have thought that an appeal would lie from an order denying a claim to a fund by a creditor to whom the bankrupt had assigned it prior to the bankruptcy proceedings.

"That 'claim,' as used here, means a 'debt' is settled by *Holden v. Stratton*, (1903) 191 U. S. 115, 118, 24 S. Ct. 46, 48 U. S. (L. ed.) 116, where it was said by Chief Justice Fuller that 'while the word "claim" is used in its signification of the demand or assertion of a right in subdivision 11 of section 2, in respect of all claims of bankrupts to their exemptions, it is also used in many parts of the act, and, as we think, in section 25, as referring to debts . . . presented for proof against estates in bankruptcy.'" *In re Mueller*, (C. C. A. 6th Cir. 1905) 135 Fed. 711, 714.

A judgment in favor of an intervening claimant and ordering the trustee to restore to him the property claimed is not a judgment allowing a claim within the meaning of section 25a (3). *In re Whitener*, (C. C. A. 1900) 105 Fed. 180. And see cases cited in division II of the note to section 24a.

An order that certain creditors were entitled to an entire fund derived from the recovery and sale of real estate, the conveyance of which had been made by the bankrupt in fraud of the creditors, was held to present a "controversy" appealable under section 24a, and not to be a judgment appealable under section 25a (3). *In re Martin*, (C. C. A. 6th Cir. 1912) 201 Fed. 31.

Where a creditor asserts both a debt and a lien to secure the same, the procedure as to the debt or claim governs, with incidental right to determine the validity and priority of the lien asserted, and a judgment in his favor is appealable by the trustee under section 25a (3), although the latter makes no objection to the amount found due, and only seeks by his appeal to further contest the right to the security asserted. *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772; *Home Bank for Savings v. Lohm*, (C. C. A. 4th Cir. 1915) 223 Fed. 633.

Where a creditor asserts both a debt and a lien to secure the same, a judgment denying him the right to submit proof of the validity and priority of the lien is appealable under section 25a (3) and may not be reviewed upon petition to revise under section 24b. *In re Lane Lumber Co.*, (C. C. A. 9th Cir. 1914) 217 Fed. 546.

*In New Hampshire Savings Bank v. Varner*, (C. C. A. 8th Cir. 1915) 216 Fed. 721, the court held that the character of a remedy, whether by petition to revise in matter of law under section 24b, or by appeal under section 25a (3) must be determined by the nature of the claim set up against the bankrupt estate and that an appeal under this section is the proper remedy to question the validity of a lien asserted as security for a debt of more than \$500.

**Disallowing priority.**—Where a claim of debt is allowed, an order disallowing priority to it is not appealable. *In re Doran*, (C. C. A. 6th Cir. 1907) 154 Fed. 467.

And an order allowing a claim as a general debt, but disallowing in part a claim of the creditor to priority as a lien holder, is not appealable. *Gaudette v. Graham*, (C. C. A. 9th Cir. 1908) 164 Fed. 311.

"But where the appeal is from a judgment allowing or disallowing a debt, any question of lien or priority of the debt, if allowed, may be considered upon the appeal as an incident of the debt." *In re Mueller*, (C. C. A. 6th Cir. 1905) 135 Fed. 711, 714.

Where a claim alleged to be secured by a lien upon the bankrupt's estate is filed against a bankrupt for allowance, an appeal is given as from a judgment allowing or rejecting a claim of \$500 or over. *In re Loving*, (1912) 224 U. S. 183, 32 S. Ct. 446, 56 U. S. (L. ed.) 725.

A ruling made in the course of the determination of an issue as to alleged bankruptcy upon a subordinate issue as to whether or not the petitioning creditors held "provable" claims is not a judgment allowing or rejecting a debt or claim within the meaning of the section. *J. W. Calnan Co. v. Doherty*, (1912) 224 U. S. 145, 32 S. Ct. 460, 56 U. S. (L. ed.) 702.

An order disallowing a claim for voting purposes in the selection of a trustee in bankruptcy, "without prejudice to the claimant's right to present the claim hereafter," is not appealable, and is reviewable only on a petition for revision under section 24b. *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047.

**Claim for franchise tax.**—Where a state filed a claim against a bankrupt corporation for an alleged franchise tax, and more than \$500 of such claim was disallowed, the state was entitled to appeal from such disallowance under section 25a (3). *In re Cosmopolitan Power Co.*,

(7th Cir. 1905) 137 Fed. 858, 70 C. C. A. 388, *reversed* on the merits, *sub nom.* *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284.

**Denial of business homestead exemption.**—Where, in a proceeding to determine a bankrupt's homestead exemption, the creditor secured by a deed of trust of property, claimed by the bankrupt as a business homestead, intervened, on the ground that the bankrupt was not entitled to a business homestead exemption, and prayed that all the property covered by the deed of trust be adjudged subject thereto and be ordered sold to satisfy the debt, which exceeded \$2,000, a judgment of the district judge reversing a referee's decision and holding that the bankrupt was not entitled to a business homestead, and directing that the property covered by the deed should be applied to its satisfaction, was appealable under section 25a (3). *Burow v. Grand Lodge, etc.*, (C. C. A. 5th Cir. 1905) 133 Fed. 708, *distinguishing In re Whitener*, (5th Cir. 1900) 105 Fed. 180, 44 C. C. A. 434.

**An order allowing expenses incurred by a bankrupt's trustee for counsel fees** is not appealable. *Davidson v. Friedman*, (C. C. A. 6th Cir. 1906) 140 Fed. 853.

**An order passing upon a creditor's claim for the allowance of counsel fees** and expenses incurred in contesting claims and prosecuting suits on behalf of the estate is not appealable. *Ohio Valley Bank Co. v. Switzer*, (C. C. A. 6th Cir. 1907) 153 Fed. 362.

**Orders of miscellaneous character.**—A judgment is appealable as one rejecting a claim where a referee's order disallowing a claim "as the proof now stands" was approved and affirmed by the Bankruptcy Court. *Hiscock v. Varick Bank*, (1907) 206 U. S. 28, 27 S. Ct. 681, 51 U. S. (L. ed.) 945, *affirming* (2d Cir. 1906) 144 Fed. 818, 75 C. C. A. 548, which *reversed* (N. D. N. Y. 1905) 134 Fed. 101.

Where the creditor of a bankrupt, after the filing of the petition, sold securities which it held, credited the proceeds on its debt, and filed a claim for the balance due, an order disallowing such claim and directing a resale of the securities at public auction was one rejecting the claim and appealable. *In re Mertens*, (2d Cir. 1906) 144 Fed. 818, 75 C. C. A. 548, *affirmed* (1907) 206 U. S. 28, 27 S. Ct. 681, 51 U. S. (L. ed.) 945.

Where a creditor holding a note given by a bankrupt firm and signed as surety by a member of the firm, also bankrupt, proved the debt against the firm estate and also filed it as an individual debt against the estate of the surety, the only question determined by an order allowing such claim was that it was a provable debt against the individual estate, and the

order was appealable, the amount allowed being over \$500. *In re Mueller*, (C. C. A. 6th Cir. 1905) 135 Fed. 711.

An order denying to a creditor of a partnership the right of participation in the individual assets of a bankrupt partner until the individual creditors were first paid is not a rejection of the debt claimed and is not appealable. *Euclid Nat. Bank v. Union Trust, etc., Co.*, (C. C. A. 4th Cir. 1906) 149 Fed. 975, *certiorari denied* (1906) 205 U. S. 547, 27 S. Ct. 793, 51 U. S. (L. ed.) 924.

Where an order of sale recognized and adjudicated the validity and amount due on mortgages as incidental to the necessary sale of the property free and clear of all incumbrances, "it is doubtful if such recognition was such an allowance of a claim as would entitle any party not adversely affected to appeal therefrom." *Schuler v. Hassinger*, (C. C. A. 5th Cir. 1910) 177 Fed. 119.

**An order denying a petition for rehearing** is not appealable. *Morgan v. Benedict*, (C. C. A. 4th Cir. 1907) 157 Fed. 232. See also *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128.

**Limitation as to amount.**—"The purpose of the Congress in restricting the right of appeal was evidently to avoid inconvenience, delay, and expense to claimants and bankrupt estates which would be disproportionate to the amount in controversy. When read with due regard to this purpose, the restriction plainly has reference, not to the amount of the original claim, but to the amount of the allowance or rejection; that is, to the amount which will be put in controversy by the appeal." *Per Van Devanter, J.*, in *Gray v. Grand Forks Mercantile Co.*, (C. C. A. 8th Cir. 1905) 138 Fed. 344, stating, however, that where the trustee in bankruptcy is given or refused credit for different payments aggregating \$500 or over, claimed to have been actually made by him in the due administration of the estate, he would be the creditor or claimant, the different payments would be only items of a single debt or claim, and the order of allowance or rejection would be appealable.

*If the claim is for less than \$500* an appeal will not lie. *Ex p. Stumpf*, (1900) 9 Okla. 639, 60 Pac. 96.

**Who may appeal from allowance.**—Appeals from judgments allowing claims are usually taken by the trustee, and in *Chatfield v. O'Dwyer*, (C. C. A. 1900) 101 Fed. 797, *followed* in *Foreman v. Burleigh*, (C. C. A. 1901) 109 Fed. 313, it was held that a creditor cannot appeal from the allowance of another creditor's claim. But a contrary view was taken in *In re Roche*, (C. C. A. 1900) 101 Fed. 956, and appeals by creditors in such cases were entertained in *In re Lorillard*, (C. C. A. 1901) 107 Fed. 677, and *Cunningham v. German Ins*

Bank, (C. C. A. 1900) 101 Fed. 977. At any rate, the creditor desiring a review of the judgment of allowance may apply to the Bankruptcy Court and obtain an order permitting him to prosecute an appeal in the trustee's name when the trustee unreasonably declines to appeal. *Chatfield v. O'Dwyer*, (C. C. A. 1900) 101 Fed. 797; *McDaniel v. Stroud*, (C. C. A. 1901) 106 Fed. 486, holding that where there was not sufficient time to apply for an order allowing the use of the trustee's name, an appeal by the creditor in his own name would be entertained if the circumstances were such that the court would have compelled the trustee to consent to the use of his name.

In *Ohio Valley Bank v. Mack*, (1906, 6th Cir.) 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184, a creditor was, upon application, allowed to appeal, the trustee refusing to appeal, though requested to do so. *Lurton, J.*, said: "This practice seems admissible in the sound discretion of the district judge when the trustee refuses to appeal, though the better practice would be to order the trustee to appeal or to allow the dissatisfied creditor to appeal in his name, being indemnified in either case against costs by such creditors. . . . The cases cited present somewhat divergent views as to whether a creditor may as of right appeal from the allowance of a debt which affects him,

but a concurrence in the matter of allowing an appeal upon good cause shown by such creditors when the trustee refuses to appeal himself."

Under the Bankrupt Act of 1867 it was well settled that a creditor could not appeal from the allowance of a claim because the right of appeal was given to the assignee, as the representative of creditors, and was not in terms conferred on creditors. *In re Troy Woolen Co.*, (1871) 9 Blatchf. (U. S.) 191; *In re Joseph*, (1857) 2 Woods (U. S.) 390; *In re Place*, (1871) 8 Blatchf. (U. S.) 302. See also *In re Randall*, (1870) 1 Sawy. (U. S.) 56.

**Time for appeal.**—See the paragraph of the statute following this clause (3).

**Various matters of appellate procedure** see the first note to section 25a, preceding clause (1.)

**Scope of review.**—"The appeal from a judgment allowing or rejecting a debt or claim includes as an incident any question as to the rank or lien of such debt or claim in the distribution of the bankrupt's estate." *Cunningham v. German Ins. Bank*, (C. C. A. 1900) 103 Fed. 932. To the same point see *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, (C. C. A. 1900) 101 Fed. 702; *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008.

**[Time for taking appeal — hearing.]** Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be. [(1898) 30 Stat. L. 553.]

The time limit in this paragraph applies only to the three judgments specifically mentioned in the preceding part of the section, and the time limit for appeal from other judgments is six months, as provided in the Circuit Court of Appeals Act of 1891, ch. 517, § 11, 26 Stat. L. 829, in title JUDICIARY herein. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 579. And see as to appeals to which the time limit of ten days does not apply, notes to section 24a.

If an order dismissing a petition to revoke a discharge is appealable under section 25a (2), the appeal must be dismissed for want of jurisdiction unless it is taken within ten days. *Thompson v. Mauzy*, (C. C. A. 4th Cir. 1909) 174 Fed. 611.

Where a creditor's claim was disallowed, and the question of its preference also decided against him, it was held that his appeal was governed by the ten days limitation, and not by the limitation of six months applicable to appeals by adverse claimants in "controversies arising in bankruptcy proceedings." *Kenova L. & T. Co. v. Graham*, (C. C. A. 4th Cir. 1906) 135 Fed. 717.

To the point that in so far as an appeal seeks a reversal of an order disallowing a general claim, as distinct from the denial of a lien, it is appealable only under the ten-day limitation, see *Massachusetts Bonding, etc., Co. v. Kemper*, (C. C. A. 6th Cir. 1915) 220 Fed. 847.

**Nonenumerated judgments "in bankruptcy proceedings."**—If there be any appealable orders or decrees of the District Court "in bankruptcy proceedings" that are not "controversies arising in bankruptcy proceedings" under section 24a, nor enumerated as appealable under section 25a, an appeal therefrom will not be controlled by the limitation of ten days for appeals from enumerated judgments, but may be taken within the same period as other appeals to the Circuit Court of Appeals from that court; that is to say, "within six months after the entry of the order, judgment, or decree sought to be received," as provided in the Circuit Court of Appeals Act of March 3, 1891, ch. 517, § 11, 26 Stat. L. 829, in title JUDICIARY. *Per Sanford, J.*, in *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 579; *per Caldwell, J.*, in *Steele*

*v. Buel*, (C. C. A. 8th Cir. 1900) 104 Fed. 968, sustaining a bankrupt's appeal, within six months, from an order denying his claim to exemption of certain insurance policies and their cash value.

**Allowance of an appeal after expiration of the time limited** has no efficacy to prevent dismissal of the appeal on motion. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 578.

**Waiver of objections.**—It was intimated in *Stroud v. McDaniel*, (C. C. A. 1901) 106 Fed. 494, that if an appeal be not taken strictly within the statutory limitation of ten days, but there is no motion to dismiss, the court would not as a matter of course dismiss the appeal on its own motion.

**Under the Act of 1867** appeals not taken within the prescribed ten days were invariably dismissed for want of jurisdiction. *Wood v. Bailey*, (1874) 21 Wall. 640, 22 U. S. (L. ed.) 689; *York's Case*, (1870) 1 Abb. (U. S.) 503; *In re Coleman*, (1870) 7 Blatchf. (U. S.) 192; *In re Place*, (1872) 9 Blatchf. (U. S.) 369.

**Judgment "rendered."**—Statutes limiting a stated period for appeal after a judgment has been "rendered" are usually construed as meaning from the date of the decision by the court, and not from the date of its subsequent entry in the journal, or signing by the judge; and if the time for appeal is suspended during the pendency of a petition for rehearing (see *infra*, this note), it will begin to run when a decision denying the petition is rendered, although the decision be actually entered at a later date. *In re McCall*, (C. C. A. 6th Cir. 1906) 145 Fed. 898, 902.

Presumptively, however, an unannounced judgment is not "rendered" when the judge signs it under a given date, but only until it is handed to the clerk and filed by him. *Peterson v. Nash*, (C. C. A. 8th Cir. 1901) 112 Fed. 311, in which case there was an interval of two days between the date of an appealable order and the date of filing, the appeal having been taken within ten days of the latter date but more than ten days from the former. The record failed to disclose where the signed order was during the two days. The court presumed it was in the judge's possession "unannounced and unpublished and still subject to his consideration and determination," and "in the absence of a showing to the contrary" denied a motion to dismiss the appeal.

Where the judge filed an opinion, the time for appeal did not begin to run until his conclusion was placed in the form of a judgment and entered as such. *Rush v. Lake*, (C. C. A. 9th Cir. 1903) 122 Fed. 561, certiorari denied (1903) 191 U. S. 571, 24 S. Ct. 843, 48 U. S. (L. ed.) 307. See also *In re Elkind*, (C. C. A. 2d Cir. 1909) 175 Fed. 64.

If, in a given case, an order denying a motion to set aside a judgment would be appealable, the time for appeal would begin to run from the entry of the order and not from the entry of the original judgment. *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, 579.

**Effect of proceedings for rehearing.**—This topic is here considered in connection also with cases where the same question arose under section 25b, (prior to its repeal in the following paragraph of the text) as it is evident that the same principles must apply in proceedings under both subdivisions.

If a party subject to the limitation of thirty days for appeals to the Supreme Court from a Circuit Court of Appeals (see p. 835, note to section 25b) or to the limitation of ten days in section 25a suffered the time to elapse without filing a petition for rehearing, his right of appeal expired and could not be resuscitated by merely filing a petition for rehearing. *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128; *Rode v. Phipps*, (C. C. A. 6th Cir. 1912) 195 Fed. 414; especially if the petition is afterward denied, *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128; *Morgan v. Benedum*, (C. C. A. 4th Cir. 1907) 157 Fed. 232; even though the term of court had not expired and by its rules of practice petitions for rehearing might be presented at any time during the term, *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128, dismissing an appeal from the Circuit Court of Appeals for the Second Circuit.

Whether the Circuit Court of Appeals had power to grant a rehearing after the lapse of thirty days from an appealable judgment, in view of the terms and spirit of the Bankruptcy Act, even though the term of the court had not expired, and the effect of granting it in restoring the right to appeal were questions expressly left undecided by the Supreme Court. *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128.

But after the decision in the Supreme Court case last above cited, as well as before, it had been expressly held in other federal courts that the Bankruptcy Court has sufficient control of any order so that, in the exercise of a sound judicial discretion, it may set aside the order even after the expiration of the time for appeal, whereupon the right of appeal is revived. *Per Evans, J.*, in *West v. McLaughlin*, (C. C. A. 6th Cir. 1908) 162 Fed. 124, 126, citing *In re Ives*, (6th Cir. 1902) 113 Fed. 911, 51 C. C. A. 541, as "so decided upon a kindred proposition." *Per contra*, in *Brady v. Bernard*, (C. C. A. 6th Cir. 1909) 170 Fed. 576, where a

petition to set aside an adjudication of bankruptcy was filed more than ten days after the adjudication was entered, and the petition was afterward denied, an appeal from the original judgment of adjudication was dismissed. So in *In re Berkeley*, (C. C. A. 2d Cir. 1906) 144 Fed. 577, where an adjudication of bankruptcy was entered, and a few days thereafter an alias adjudication to precisely the same effect and without vacating the prior adjudication, it was held that this subsequent entry did not extend the time for appeal from the original adjudication. And in *In re Brown*, (C. C. A. 2d Cir. 1909) 174 Fed. 339, the court said *arguendo*: "It is well settled that this statutory limitation [of ten days] cannot be enlarged either by the bankruptcy or by the appellate court."

It has also been held that the right of appeal is revived where a rehearing is granted upon petition filed after the time for appeal has expired, but not for the mere purpose of evading the statutory limitation, and the court adheres to its first determination. *West v. McLaughlin*, (C. C. A. 6th Cir. 1908) 162 Fed. 124, a case of an appeal from the disallowance of a claim, where Evans, J., said: "The learned judge of the District Court not only re-examined the questions involved, but more elaborately stated his views thereon. The fact that he again arrived at the same conclusion did not neutralize his power to grant the rehearing, though some concession to the supposed hardship of the case may have had weight with him." In *In re Brady*, (W. D. Ky. 1908) 169 Fed. 152, the point was expressly left undecided.

Some courts have held that while the Bankruptcy Court will not grant a rehearing upon the pretense of reconsidering the merits of the case, but really to revive the petitioner's right of appeal (*In re Girard Glazed Kid Co.*, (E. D. Pa. 1904) 129 Fed. 841), because that "would be the employment of an unworthy fiction" (*In re Wright*, (D. C. Mass. 1899) 96 Fed. 820), the court has a right to grant a rehearing upon a petition filed avowedly for the purpose of regaining by that means a right of appeal lost by expiration of time. *In re Worcester County*, (C. C. A. 1st Cir. 1900) 102 Fed. 808, where it was "apparent that the purpose was to revive the right of appeal;" *In re Wright*, (D. C. Mass. 1899) 96 Fed. 820, where the court said "the record should show the true purpose for which the rehearing was sought and granted;" *In re Girard Glazed Kid Co.*, (E. D. Pa. 1904) 129 Fed. 841, stating that the petition should set forth the reasons for the failure to appeal in due season. In such cases as the last cited perhaps the petition must be filed during the same term, as in *In re Worcester County*, (C. C. A. 1st Cir. 1900) 102 Fed. 808, where the court said: "We have no

occasion to consider whether or not the organization of the District Court, sitting in bankruptcy, is, by the statute, of a continuous nature, so that according to the expressions in *Sandusky v. Indianapolis First Nat. Bank*, (1874) 23 Wall. 289, 292, 293, 23 U. S. (L. ed.) 155, and in *Stickney v. Wilt*, (1874) 23 Wall. 150, 164, 23 U. S. (L. ed.) 50, its proceedings are not subject to the ordinary rule that rehearings must be asked for at the term at which the judgment is entered."

Courts holding that they have power to grant a rehearing after the time for appeal has expired, and in order to revive the right to appeal, declare that they may properly do so when satisfied that the failure to appeal was not due to the culpable neglect of the party or his counsel (*In re Wright*, (D. C. Mass. 1899) 96 Fed. 820), but that the court "must exercise a very guarded discretion in granting" such a rehearing, and "should never do this unless the facts in the case clearly warrant it." *In re Hudson Clothing Co.*, (D. C. Me. 1905) 140 Fed. 49, 51, where the judge denied a petition for rehearing because he thought the parties had "acted advisedly in failing to preserve the record and to apply for an appeal," and because, he said, "if I should grant this rehearing for this purpose, it might fairly be used as a precedent for such action in almost any case where a party had not taken an appeal from an adverse decree within the ten days allowed by the bankruptcy statute."

For a contrary view as to the propriety of granting a rehearing to restore a party's right of appeal, see *West v. McLaughlin*, (C. C. A. 6th Cir. 1908) 162 Fed. 124, where the judge who entered an order, having at once left upon a vacation trip, was not, for over ten days, within the reach of appellant's counsel, who desired to take steps for an appeal, but no reason was disclosed by the record for not taking other available steps for that purpose. Evans, J., in the case cited, said: "One purpose which runs through the Act is to require the prompt and expeditious winding up of estates, and the provision just quoted [limiting ten days for appeal] was intended to promote that end. Notwithstanding some judicial expressions which possibly favor it we cannot accept as accurate or sustainable the contention that it would not be an abuse of the discretion of the court to set aside an order disallowing a claim for the sole purpose of extending the time for taking an appeal. We conceive that such a course would practically nullify the wise provision of the statute, and go beyond the bounds of a proper discretion."

Where a petition for rehearing is filed before the time for appeal has expired, the finality of the order or judgment

sought to be reviewed is thereby suspended, and the period of limitation for appeal does not begin to run until the court disposes of the petition. *Mills v. Fisher*, (C. C. A. 6th Cir. 1908) 159 Fed. 897 (*distinguishing* *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128); *In re McCall*, (C. C. A. 6th Cir. 1906) 145 Fed. 898.

**When appeal is "taken"—bond and citation.**—When a citation is needful, by way of notice to the parties, in any appeal in bankruptcy, may not be clear under the authorities. *Per* *Seaman, J.*, in *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1906) 148 Fed. 832, where it was also said: "The general rule is established, as stated by this court in *McNulta v. West Chicago Park Com'r's*, (7th Cir. 1900) 99 Fed. 328, 39 C. C. A. 545, that no citation is required 'when an appeal is allowed in open court at the same term when the decree was rendered.' In appeals in bankruptcy, however, this rule may not be applicable, for the reason that there are no stated terms of the Bankruptcy Court, as such, but the jurisdiction is exercised by the District Courts throughout the proceedings [citing Bankruptcy Act, sec. 2] 'in vacation in chambers and during their respective terms.' Thus each 'proceeding in bankruptcy, from its commencement to its close upon the final settlement, is but one suit.' *Wiswall v. Campbell*, (1876) 93 U. S. 347, 348, 23 U. S. (L. ed.) 923."

And the cases are not harmonious in reference to citation or bond as requisites to confer jurisdiction of an appeal. *Per* *Seaman, J.*, in *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1906) 148 Fed. 832, continuing as follows: "In *Jacobs v. George*, (1893) 150 U. S. 415, 416, 14 S. Ct. 159, 37 U. S. (L. ed.) 1127, and *Mattingly v. Northwestern Virginia R. Co.*, (1895) 158 U. S. 53, 56, 15 S. Ct. 725, 39 U. S. (L. ed.) 894, however, the general doctrine is established for appeals in equity that 'neither signing nor service of the citation is jurisdictional, its only office being to give notice to the appellees,' and that failure or defects therein may be cured after the time limited for appeal. Like rule is applied to perfect the bond for appeal. *Edmonson v. Bloomshire*, (1868) 7 Wall. 306, 311, 19 U. S. (L. ed.) 91; *Peugh v. Davis*, (1884) 110 U. S. 227, 228, 4 S. Ct. 17, 23 U. S. (L. ed.) 127."

It has been held that an appeal is not "taken" within the meaning of the statute until the petition and allowance of appeal (if there be such petition and allowance) and the appeal bond and the citation are presented to and filed in the court which made the decree appealed from; and that the filing of a bond is only one step towards perfecting the appeal, and the presumption that might arise from its filing and approval does not obtain when the record affirmatively dis-

closes that there was a prayer for the appeal, and its allowance and a citation, none of which was filed in the court until after the expiration of the time for appeal. *Norcross v. Nave, etc.*, *Mercantile Co.*, (C. C. A. 8th Cir. 1900) 101 Fed. 796, dismissing an appeal although the bond was filed and approved in time, *Caldwell, J.*, saying: "The case of *Credit Co. v. Arkansas Cent. R. Co.*, (1888) 128 U. S. 258, 9 S. Ct. 107, 32 U. S. (L. ed.) 448, is directly in point, and concludes the question; and to the same effect are *Fowler v. Hamill*, (1891) 139 U. S. 549, 11 S. Ct. 663, 35 U. S. (L. ed.) 266; *Farrar v. Churchill*, (1890) 135 U. S. 609, 10 S. Ct. 771, 34 U. S. (L. ed.) 246.

It has also been held that an appeal must be dismissed where there is no evidence in the record that the bond was filed in time nor the time when the petition for appeal was presented, or filed, or granted, or whether it was filed at all. *Williams v. Savage*, (C. C. A. 4th Cir. 1903) 120 Fed. 497.

On the other hand, a motion to dismiss an appeal was denied where the petition and allowance of the appeal were in due time, but citation was not issued to the appellee moving to dismiss the appeal, and the bond, although filed in due time, ran to the other appellee alone. *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1906) 148 Fed. 832, *certiorari denied* (1907) 207 U. S. 589, 28 S. Ct. 256, 52 U. S. (L. ed.) 354. See also *Gray v. Grand Forks Mercantile Co.*, (C. C. A. 8th Cir. 1905) 138 Fed. 344.

A motion to dismiss was also denied where the appeal was allowed and bond approved in time, but a citation was not issued until several days after the time for appeal had expired, *Lockman v. Lang*, (C. C. A. 8th Cir. 1904) 132 Fed. 1; and where the filing of the bond and the service of the citation were done before motion to dismiss the appeal was made, but not within the time limited for appeal, *Columbia Ironworks v. National Lead Co.*, (C. C. A. 6th Cir. 1904) 127 Fed. 99, the court saying: "The delay was for a few days only, and we do not think the interests of the opposite party were to any appreciable extent impaired thereby."

And an appeal "not taken strictly within the statutory limitation" was entertained where there was no motion to dismiss. *Stroud v. McDaniel*, (C. C. A. 4th Cir. 1901) 106 Fed. 493, the report not otherwise showing what was the omission, and Judge Purnell quoting as follows from Justice Brewer's opinion in *Mutual L. Ins. Co. v. Phinney*, (1900) 178 U. S. 327, 20 S. Ct. 909, 44 U. S. (L. ed.) 1093: "While we have always been careful to see that the required order of procedure has been complied with before any case shall be considered as transferred from a lower to a higher court, that a party seeking a review must act in time,

and must make a substantial compliance with all that the statute prescribes, at the same time we have been equally careful to hold that no mere technical omission which

did not prejudice the rights of the defendant in error should be made available to oust the appellate court of jurisdiction."

**b [Appeal to Supreme Court.]** [*Superseded by the Act following.*]

*An Act To amend an Act entitled "An Act to codify, revise and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.*

[Act of Jan. 28, 1915, ch. 22, 38 Stat. L. 803.]

**SEC. 4. [Finality of judgments of Circuit Court of Appeals — Cases arising under Bankruptcy Act.]** That the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the bankruptcy Act and in all controversies arising in such proceedings and cases shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such proceeding, case, or controversy unless the petition therefor is presented to the Supreme Court within three months from the date of such judgment or decree. [38 Stat. L. 804.]

Section 1 of the above Act of Jan. 28, 1915, amends Judicial Code, sec. 116, subd. 1. For the latter section as amended see title JUDICIARY.

Section 2 of the same Act amends Judicial Codes, secs. 128, 238 and 246. For these three sections as amended see title JUDICIARY.

Section 3 repeals Judicial Code, sec. 244, which relates to writs of error and appeals from the Supreme Court of and United States District Court for Porto Rico; provision being made for such appeals and writs of error in the several amendments made by section 2 above noticed.

Section 5 deprives federal courts of jurisdiction of actions by or against any railroad company on the ground that the latter was incorporated under an Act of Congress. For this section see title JUDICIARY.

Section 6 (the last section of the Act) provides that "this Act shall not affect cases now pending in the Supreme Court of the United States or cases in which writs of error or appeals have been allowed at the date of its approval," and also provides that nothing in the Act shall repeal, amend, or modify the provisions "of an Act entitled 'An Act providing for writs of error in certain instances in criminal cases' approved March second, nineteen hundred and seven," for which latter Act see title JUDICIARY.

The effect of the section set forth in the text is to repeal section 25b of the Bankruptcy Act *in toto*, as shown, together with its effect on other sections of the Bankruptcy Act, in the following note.

- I. Effect of Act of Jan. 28, 1915, 833.
- II. Former section 25b and decisions thereon, 834.
- III. Certiorari, 838.

**I. EFFECT OF ACT OF JAN. 28, 1915.**

**Section 25b repealed.**—The section given in the text operates to repeal section 25b of the Bankruptcy Act, quoted in division II of this note, and Judicial Code, sec. 252, title JUDICIARY, so far as the latter section re-enacted section 25b of the Bankruptcy Act; for a decision allowing or rejecting a claim is unquestionably a "proceeding in bankruptcy" (*Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.)

772, 16 Ann. Cas. 1008; *In re Breyer Printing Co.*, (C. C. A. 7th Cir. 1914) 216 Fed. 878), and the text section of the Act of 1915 makes final the decisions of the Circuit Court of Appeals "in all proceedings . . . arising under the Bankruptcy Act."

The case of *Central Trust Co. of Illinois v. Lueders*, 239 U. S. 11, 36 S. Ct. 1, decided Oct. 25, 1915, was an appeal by general creditors from a decree of the Circuit Court of Appeals for the Sixth Circuit (rendered March 2, 1915) to review a decree which affirmed a decree of the District Court for the Eastern District of Kentucky allowing certain claims

as prior lien claims against a bankrupt estate. The appellants did not contest the amount of the claim in the court below, but only the priority of lien therefor. In such a case they had a right to appeal under section 25b prior to the enactment of the provision in the text. See *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772; *Home Bank for Savings v. Lohm*, (C. C. A. 4th Cir. 1915) 223 Fed. 633. The appeal was dismissed, Mr. Justice McReynolds writing a memorandum opinion, by direction of the court, as follows: "The I. Rheinstrom & Sons Company was adjudged a bankrupt in April, 1912. Liens upon its property were claimed by appellees under a Kentucky statute which appellants (general creditors) maintained contravened the Fourteenth Amendment to the Constitution of the United States. Overruling the referee, the District Court allowed the liens (207 Fed. 119), and this action was approved by the Circuit Court of Appeals, March 2, 1915, in an opinion which expressly upheld the validity of the statute (221 Fed. Rep. 829). Appellees have moved to dismiss the present appeal." The section of the Act of Jan. 28, 1915, as above given in the text, is then quoted in full, and the opinion continues as follows: "Manifestly, the words of the quoted section include the decree below and inhibit an appeal therefrom. It is argued, however, that they should be so construed as to exclude causes requiring interpretation of state statutes and application of the Federal Constitution and thereby limited in effect to the supposed purpose of Congress to relieve this court only from the necessity of reviewing bankruptcy cases which 'involve complicated questions of fact rather than of law.' We see no reason to doubt that the plain language of the enactment aptly expresses the legislative intent. The appeal is accordingly dismissed for want of jurisdiction."

**Appeal to Supreme Court.**—The introductory paragraph of section 25b read as follows: "From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:" [(1898) 30 Stat. L. 553.]

This paragraph was re-enacted in Judicial Code, sec. 252, title JUDICIARY.

*That this provision was to be strictly construed* is indicated by the following quotation from *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116: "The allowance or rejection of a debt or claim is a part of the bankruptcy proceedings, and not an independent suit, and under the Act of 1867 it was held that this court had no jurisdiction to review judgments of the Circuit Courts dealing with the action of the District Courts in such allowance or rejection, because they were not final. Wis-

**Effect on section 24a.**—The text section of the Act of 1915 makes final the decisions of the Circuit Court of Appeals "in all controversies arising in such proceedings and cases," thereby manifestly inhibiting appellate jurisdiction of the Supreme Court over the Circuit Court of Appeals in the "controversies arising in bankruptcy proceedings" mentioned in section 24a re-enacted in part in Judicial Code, sec. 252, title JUDICIARY. And see *Central Trust Co. of Illinois v. Lueders*, (1915) 239 U. S. 11, 36 S. Ct. 1, quoted in the preceding paragraph.

**Effect on sections 23a and 23b.**—The text section of the Act of 1915 has the effect of amending the last clause of Judicial Code, sec. 128, title JUDICIARY, by adding to the enumerated "cases" made final in that clause not only "cases arising under the Bankruptcy Act," but also "all proceedings . . . arising" under the Act, and "all controversies arising in such proceedings and cases." To what extent this comprehensive phraseology cuts off appellate jurisdiction of the Supreme Court over decisions of the Circuit Court of Appeals in suits authorized by sections 23a and 23b—especially where such suits are brought in the District Court not sitting in bankruptcy, but in the exercise of its general jurisdiction—is a matter for future determination.

## II. FORMER SECTION 25B AND DECISIONS THEREON.

As above stated in this note, this section 25b is extinguished by the section of the Act of 1915 set forth in the text. Most of the decisions rendered under section 25b remain instructive, however, especially upon questions of appellate procedure under other sections of the Bankruptcy Act, as well as upon questions of federal appellate procedure in general. Those decisions are therefore set forth in the following note.

*wall v. Campbell*, (1876) 93 U. S. 347, 23 U. S. (L. ed.) 923; *Leggett v. Allen*, (1884) 110 U. S. 741, 4 S. Ct. 195, 28 U. S. (L. ed.) 313. The jurisdiction now given is carefully restricted, and cannot be expanded beyond the letter of the grant. It is an exception to the general rule as to appeals and writs of error obtaining from the foundation of our judicial system. *McLish v. Roff*, (1891) 141 U. S. 661, 12 S. Ct. 118, 35 U. S. (L. ed.) 893."

*The provision in this section was exclusive with reference to the subject matter.*



so that if a final decision allowing or rejecting a claim failed to meet the requirements of this section and was therefore not appealable under it, an appeal could not be taken to the Supreme Court under section 24a. *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 123 Fed. 14. See also note to section 24a.

*No appeal lies from orders denying petitions for rehearing*, which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors. *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128. See also *Morgan v. Benedum*, (C. C. A. 4th Cir. 1907) 157 Fed. 232.

*What constitutes decision "allowing or rejecting a claim."*—The appeal here authorized was from a decision of the Circuit Court of Appeals in a case carried to that court by appeal under section 25a (3) "from a judgment allowing or rejecting a debt or claim." *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047; *J. W. Calnan Co. v. Doherty*, (1912) 224 U. S. 145, 32 S. Ct. 460, 56 U. S. (L. ed.) 702. Hence, see also cases cited in note to section 25a (3), especially as the jurisdiction of the Circuit Court of Appeals in the instant case is open for consideration on the appeal to the Supreme Court. *Hiscock v. Varick Bank*, (1907) 206 U. S. 28, 27 S. Ct. 681, 51 U. S. (L. ed.) 945; *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008.

A decision of a Circuit Court of Appeals reversing a Bankruptcy Court's disallowances constituted an appealable decision allowing a claim. *Hiscock v. Varick Bank*, (1907) 206 U. S. 28, 27 S. Ct. 681, 51 U. S. (L. ed.) 945.

An order allowing a claim as a general debt but disallowing it as preferred was appealable. *National Bank of Commerce v. Downie*, (1910) 218 U. S. 345, 31 S. Ct. 80, 54 U. S. (L. ed.) 1065, *affirming* (C. C. A. 2d Cir. 1910) 180 Fed. 979.

In *Sexton v. Dreyfus*, (1911) 219 U. S. 339, 31 S. Ct. 256, 55 U. S. (L. ed.) 244, an appeal was entertained from a decision permitting secured creditors to apply the proceeds of the sale of the securities first to interest accrued since the filing of the petition, then to the principal debt, and to prove for the balance.

A judgment which reversed an order of the District Court allowing a claim against a bankrupt's estate and held that the creditor must first surrender a certain alleged preference was treated as appealable in *New York County Nat. Bank v. Massey*, (1904) 192 U. S. 138, 24 S. Ct. 199, 48 U. S. (L. ed.) 380.

A judgment of a Circuit Court of Appeals denying a state's claim to preferential payment of taxes was treated as

appealable in *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284.

A decision of the Circuit Court of Appeals on petition for revision of an order allowing an exemption was not a decision "allowing or rejecting a claim," and was not appealable, but reviewable only on certiorari, under section 25d. *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116.

A decree denying the right invoked by a petition in intervention to have the lien of a chattel mortgage established as the first claim on the property of a bankrupt, and satisfied out of the proceeds of a proposed sale by the trustee in bankruptcy, was not a decision "rejecting a claim," but was the determination of a "controversy" under section 24a. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412, 54 U. S. (L. ed.) 610.

*Questions purely administrative*, concerning as they do the carrying out of an order of distribution which settled a controversy as to whether a certain claim should be allowed, were not the subject of review by the Supreme Court. *Wynkoop, Hallenbeck, Crawford Co. v. Gaines*, (1913) 227 U. S. 4, 33 S. Ct. 214, 57 U. S. (L. ed.) 391.

*Time for appeal.*—Appeals under this paragraph were to be taken within thirty days after the judgment or decree, as required in General Order 36, par. 2. This limitation is "in harmony with the policy of the Bankruptcy Act, requiring prompt action and the avoidance of delay," and "has the same effect as if written in the statute." *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128.

The allowance of an appeal by the Circuit Court of Appeals and the granting of a certificate by a justice of the Supreme Court under section 25b, subd. 2, could not operate as an adjudication that it was taken in time. *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128, where such appeal on certificate was dismissed because not taken in time, thereby indicating that the italicized clause in the following quotation from the opinion of the court in *Coder v. Arts*, (1909) 213 U. S. 223, 237, 16 Ann. Cas. 1008, 29 S. Ct. 436, 444, 53 U. S. (L. ed.) 772, "must have been an inadvertence and did not support an implication that any other time than thirty days was limited for appeal even if there were a certificate: *'As there is no such certificate the question is, was the appeal taken within the time prescribed by the rules of this court,' viz., thirty days?*"

Nor could a party whose time for appeal had expired derive any benefit from the subsequent filing *nunc pro tunc* by the Circuit Court of Appeals, as though filed

at the time of the entry of the judgment or decree, of findings of fact and conclusions of law, as required by General Order No. 36, par. 3. *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128.

*Effect of proceedings for rehearing* as extending the time, see note to last clause of section 25a following section 25a (3).

*Findings of fact and conclusions of law* were necessary pursuant to the requirements of General Order No. 36, subd. 3, or the appeal would not be entertained. *J. W. Calnan Co. v. Doherty*, (1912) 224 U. S. 145, 32 S. Ct. 460, 56 U. S. (L. ed.) 702.

If the court failed to make those findings, the omission could not be supplied in the Supreme Court by reference to the opinion of the court below. *Chapman v. Bowen*, (1907) 207 U. S. 89, 28 S. Ct. 32, 52 U. S. (L. ed.) 116.

"But if the case was not appealable the appeal must be dismissed, even though clause 3 [of General Order No. 36] had been complied with." *Chapman v. Bowen*, (1907) 207 U. S. 89, 28 S. Ct. 32, 52 U. S. (L. ed.) 116.

Where an appeal was allowed within thirty days of the entry of the judgment, and afterward, but still within the thirty days, an order was made which recited that the court had made certain findings of fact and conclusions of law, and the same was entered *nunc pro tunc* as of the date of the judgment, it was held that this was a compliance with the requirement that the findings be made at or before the time of entering the judgment or decree. *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008, where the court said: "We think that the court must be presumed to have acted within its authority to correct the record by this order, made within the time allowed for an appeal, to make it show the findings at or before the time of entering the judgment."

In *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047, where an appeal was dismissed, it was apparently deemed worthy of remark that the court below "filed no finding of facts at or before the

time of entering its decree, as required by the general orders, but did so only two months after the decree had been entered, and a month after an appeal had been taken and allowed by a justice of this court."

*Necessity of request for findings.*—General Order No. 36, subd. 3, provision above cited, "does not require such findings to be made without request, but is intended to give the party a right to such findings, to be conceded if he demands it, which we think he should do, either before the opinion of the court is given, or, if thereafter, before the judgment is entered." *Crucible Steel Co. v. Holt*, (C. C. A. 6th Cir. 1909) 174 Fed. 127. See also *Knapp v. Milwaukee Trust Co.*, (C. C. A. 7th Cir. 1908) 162 Fed. 675, *affirmed* (1910) 216 U. S. 545, 30 S. Ct. 412, 54 U. S. (L. ed.) 610; *Lumpkin v. Foley*, (1913, 5th Cir.) 204 Fed. 372, 122 C. C. A. 542.

*There is set forth in full a finding of facts and conclusions of law in* *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008, and *Bryant v. Swofford Bros. Dry Goods Co.*, (1909) 214 U. S. 279, 29 S. Ct. 614, 53 U. S. (L. ed.) 997, and a finding of facts in *Western Tie, etc., Co. v. Brown*, (1905) 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571.

*The Supreme Court could look only at the facts found by the Court of Appeals*, *Coder v. Arts*, (1909) 213 U. S. 223, 16 Ann. Cas. 1008, 29 S. Ct. 436, 442, 53 U. S. (L. ed.) 772.

*Record on appeal.*—General Order No. 36, subd. 3, limited and defined what should constitute the record on appeal under section 25b, and a general appeal bringing up the entire record was not a correct proceeding in that class of appeals. *Chapman v. Bowen*, (1907) 207 U. S. 89, 29 S. Ct. 32, 52 U. S. (L. ed.) 116.

*If the Circuit Court of Appeals had no appellate jurisdiction in the case wherein it rendered the decision, its decision must, of course, be reversed by the Supreme Court for that reason.* See *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008, where, however, it was held that the Circuit Court of Appeals had jurisdiction.

**Jurisdictional amount—question involved.**—Clause 1 of section 25b read as follows:

"Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or" [(1898) 30 Stat. L. 553.]

This clause was made a part of Judicial Code, sec. 252, title JUDICIARY.

*In order to be appealable under this subdivision*—that is, in the absence of a certificate provided for in the next succeeding subdivision—the decision of the Circuit Court of Appeals must involve a

federal question as the latter is defined in R. S. sec. 709, title JUDICIARY, which is the provision to which this subdivision alluded. *Western Tie, etc., Co. v. Brown*, (1905) 196 U. S. 502, 25 S. Ct. 239, 49

U. S. (L. ed.) 571; *Coder v. Arts*, (1909) 213 U. S. 223, 238, 29 S. Ct. 436, 442, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008.

Cases discussing and determining the appealability of the Revised Statutes section above mentioned of judgments in actions in state courts by trustees in bankruptcy in their official capacity may be usefully consulted in regard to the appealability of a particular decision under section 25b 1. For such cases see the last paragraphs of this note to section 25b (1). And see *Zavelo v. Reeves*, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676, Ann. Cas. 1914D 664, an action by a creditor against a discharged bankrupt. And for other cases involving questions of bankruptcy law, see *Williams v. United States Fidelity, etc., Co.*, (1915) 236 U. S. 549, 35 S. Ct. 289, 59 U. S. (L. ed.) 713; *Lehman v. Gumbel*, (1915) 236 U. S. 448, 35 S. Ct. 307, 59 U. S. (L. ed.) 666; *Lesser v. Gray*, (1915) 236 U. S. 70, 35 S. Ct. 227, 59 U. S. (L. ed.) 471; *Cumberland Glass Mfg. Co. v. De Witt*, (1915) 237 U. S. 447, 35 S. Ct. 636, 59 U. S. (L. ed.) 1042; *Kreitlein v. Feger*, (1915) 238 U. S. 21, 35 S. Ct. 685, 59 U. S. (L. ed.) 1184; *Kener v. La Grange Mills*, (1913) 231 U. S. 215, 34 S. Ct. 83, 58 U. S. (L. ed.) 189; *Yazoo, etc., R. Co., v. Brewer*, (1913) 231 U. S. 245, 34 S. Ct. 90, 58 U. S. (L. ed.) 204; *Miller v. Guasti*, (1912) 226 U. S. 170, 33 S. Ct. 49, 57 U. S. (L. ed.) 173; *Ensign v. Pennsylvania*, (1913) 227 U. S. 592, 33 S. Ct. 321, 57 U. S. (L. ed.) 658; *Robertson v. Howard*, (1913) 229 U. S. 254, 33 S. Ct. 854, 57 U. S. (L. ed.) 1174; *Chicago, etc., R. Co. v. Hall*, (1913) 229 U. S. 511, 33 S. Ct. 885, 57 U. S. (L. ed.) 1306; *Acme Harvester Co. v. Beekman Lumber Co.*, (1911) 222 U. S. 300, 32 S. Ct. 96, 56 U. S. (L. ed.) 208; *Johnson v. Collier*, (1912) 222 U. S. 538, 32 S. Ct. 104, 56 U. S. (L. ed.) 306.

A federal question is not involved in a decision which proceeds on well-settled principles of general law broad enough to sustain it without reference to provisions of the Bankruptcy Act. *Chapman v. Bowen*, (1907) 207 U. S. 89, 28 S. Ct. 32, 52 U. S. (L. ed.) 116, where, for that reason, the court dismissed an appeal from the allowance of the claim of a creditor against the bankrupt estate of an individual partner as well as against the estate of the bankrupt partnership; *Blake v. Openhym*, (1910) 216 U. S. 322, 30 S. Ct. 309, 54 U. S. (L. ed.) 498, dismissing, for want of jurisdiction, an appeal from a decree reversing the disallowance of a certain claim as entitled to be preferred.

A trustee's bare denial of a creditor's claim allowed him by the Circuit Court of Appeals is not the assertion of a right under federal law, but a denial of such right, and the decision allowing the claim was not appealable. *Chapman v. Bowen*,

(1907) 207 U. S. 89, 28 S. Ct. 32, 52 U. S. (L. ed.) 116.

A decision allowing a claim and declaring the validity of a mortgage lien to secure it was held to be appealable where a construction of the Bankruptcy Act insisted upon by the trustee would defeat the lien and a construction contended for the creditor would give the law validity. *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008.

Following *Coder v. Arts*, last above cited, an appeal was entertained from a decree sustaining an equitable charge asserted by an intervener as a preferential claim against assets of the bankrupt in the hands of the trustee. *Hurley v. Atchison, etc., R. Co.*, (1909) 213 U. S. 126, 29 S. Ct. 466, 53 U. S. (L. ed.) 729.

Where a decision rejecting a claim was based upon the denial of the creditor's right to a set-off asserted under the provisions of section 68 of the Bankruptcy Act, the construction of those provisions was involved so that a claim of federal right is presented and the decision was appealable. *Western Tie, etc., Co. v. Brown*, (1900) 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571, reversing decree in (C. C. A. 8th Cir. 1904) 129 Fed. 728.

An appeal was entertained from a decision which affirmed a judgment disallowing a claim except upon a surrender of an alleged preference. *Wild v. Provident L. & T. Co.*, (1909) 214 U. S. 292, 29 S. Ct. 619, 53 U. S. (L. ed.) 1003, reversing (3d Cir. 1907) 153 Fed. 562, 82 C. C. A. 516, and holding that the transaction involved did not constitute a preference.

An action in a state court by a trustee in bankruptcy seeking to recover what is asserted to be an asset of the bankrupt estate under the Bankruptcy Act presents a federal question, so that a judgment denying the asserted right is a denial of a right or title specially claimed under a law of the United States and appealable under R. S., sec. 709, cited near the beginning of this note. *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 26 S. Ct. 289, 50 U. S. (L. ed.) 527.

The question whether a bankrupt's conveyance of property was in fact made with intent to defraud creditors, when passed upon in the state court, is not one of a federal nature. *Thompson v. Fairbanks*, (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577.

A judgment recovered by a trustee in bankruptcy in his suit to avoid an alleged unlawful preference, the state court having answered some of the contentions of the defendant by the construction it gave to the Bankruptcy Act, is appealable to the federal Supreme Court. *Eau Claire Nat. Bank v. Jackman*, (1907) 204 U. S. 522, 27 S. Ct. 391, 51 U. S. (L. ed.) 596.

While a certificate made by the state

court of last resort and filed by it as part of the record cannot import a federal question into a record where otherwise such question does not arise, such certificate may serve to elucidate the determination whether a federal question exists. *Rector v. City Deposit Bank Co.*, (1906) 200 U.

S. 405, 26 S. Ct. 289, 50 U. S. (L. ed.) 527, holding that the certificate in the case at bar made clear the fact, if it were otherwise doubtful, that rights under the Bankruptcy Act were relied upon and passed upon below.

**Certification of question by Supreme Court justice.**— Clause 2 of section 25b read as follows:

"Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States." [(1898) 30 Stat. L. 553.]

This clause was re-enacted in Judicial Code, sec. 252, title JUDICIARY.

For cases brought up with a certificate under this provision see *Jaquith v. Alden*, (1903) 189 U. S. 78, 23 S. Ct. 649, 47 U. S. (L. ed.) 717; *Conboy v. Jersey City First Nat. Bank*, (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128; *National Bank of Commerce v. Downie*, (1910) 218 U. S. 345, 31 S. Ct. 89, 54 U. S. (L. ed.) 1065, 20 Ann. Cas. 1116; *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047.

**Certificate indispensable.**— On appeal from a decision of a Circuit Court of Appeals allowing or rejecting a claim, the

court would not determine the question involved solely on the ground that such determination was essential to a uniform construction of the Bankruptcy Act, if the appeal was not accompanied by a certificate of a justice of the Supreme Court. *Chapman v. Bowen*, (1907) 207 U. S. 89, 28 S. Ct. 32, 52 U. S. (L. ed.) 116; *Blake v. Openhym*, (1910) 216 U. S. 322, 30 S. Ct. 309, 54 U. S. (L. ed.) 498.

### III. CERTIORARI.

As to writs of certiorari, see also section 25d and note thereto.

c [Bond on appeal by trustees.] Trustees shall not be required to give bond when they take appeals or sue out writs of error. [(1898) 30 Stat. L. 553.]

d [Certification to Supreme Court by other courts — Writs of certiorari.] Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted. [(1898) 30 Stat. L. 553.]

This provision is re-enacted without change in Judicial Code, sec. 252, title JUDICIARY.

See also Act of Jan. 28, 1915, *supra*, p. 833.

I. In general, 838.

II. Questions certified, 839.

III. Writs of certiorari, 840.

#### I. IN GENERAL.

"The provisions of the United States laws" referred to in this section are the provisions in section 6 of the Circuit Court of Appeals Act of March 3, 1891, 26 Stat. L. 828, as reproduced in sections 239 and 240 of the Judicial Code, title JUDICIARY. This section 25d of the Bankruptcy Act is also re-enacted without change in section 252 of the Judicial Code, set forth in title JUDICIARY.

In *Denver First Nat. Bank v. Klug*, (1902) 186 U. S. 203, 22 S. Ct. 899, 46 U. S. (L. ed.) 1127, Chief Justice Fuller said: "The certification referred to is that provided in sections 5 and 6 of the Act of March 3, 1891 [Circuit Court of Ap-

peals Act]." His reference to section 5 was probably an inadvertence, since the certificate under that section, unlike a certificate under section 6, is not an independent proceeding, but always and necessarily an incident to an appeal or a writ of error. See Judicial Code, sec. 238 (in title JUDICIARY), which is a re-enactment of section 5 of the Circuit Court of Appeals Act.

"The construction which the *Denver First Nat. Bank v. Klug*, (1902) 186 U. S. 203, 22 S. Ct. 899, 46 U. S. (L. ed.) 1127, suggests may be put on section 25d with reference to certification and writs of certiorari, as between the Supreme Court and the Circuit Court of Appeals, makes it applicable to bankruptcy proceedings, no matter in what way they get into the Circuit Courts of Appeals, and whether they come up under section 24 or section

25 . . . and this is clearly a just construction of that section." *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 123 Fed. 14, 19.

## II. QUESTIONS CERTIFIED.

The leading provision for certification of questions to the Supreme Court by the Circuit Court of Appeals is in section 6 of the Circuit Court of Appeals Act of March 3, 1891, which provision is now Judicial Code, sec. 239, title JUDICIARY. See the notes thereto.

Despite the comprehensive phrase "other courts" the provision in section 25d refers only to certificates from the Circuit Court of Appeals. See *Bardes v. Hawarden First Nat. Bank*, (1899) 175 U. S. 526, 20 S. Ct. 196, 44 U. S. (L. ed.) 261, holding that a certificate under that provision cannot be employed to bring a question of jurisdiction direct from the District Court to the Supreme Court. As to certification of questions of jurisdiction in connection with direct appeals or writs of error, see section 5 of the Circuit Court of Appeals Act of 1891, now Judicial Code, sec. 238, title JUDICIARY, and notes thereto.

**Cases in Circuit Court of Appeals on appeal.**—In *Citizens Banking Co. v. Ravenna Nat. Bank*, (1914) 234 U. S. 360, 34 S. Ct. 806, 58 U. S. (L. ed.) 1352, and *Toxaway Hotel Co. v. Smathers*, (1910) 216 U. S. 439, 30 S. Ct. 263, 54 U. S. (L. ed.) 558, questions were certified in bankruptcy cases pending in the Circuit Court of Appeals on appeal.

**In proceedings to revise in matter of law.**—Certification of questions from the Circuit Court of Appeals is not only authorized in bankruptcy cases pending in that court on appeal or writ of error, but also in bankruptcy cases pending on petition to superintend and revise in matter of law; certificates in the latter class of cases constitute a large proportion of the bankruptcy cases presented to the Supreme Court on certificate. The following were certified cases of that description: *White v. Schloeb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183; *Wall v. Cox*, (1901) 181 U. S. 244, 21 S. Ct. 642, 45 U. S. (L. ed.) 845; *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122; *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061; *Plymouth Cordage Co. v. Smith*, (1904) 194 U. S. 311, 24 S. Ct. 725, 48 U. S. (L. ed.) 992; *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046; *Elkus, Petitioner*, (1910) 216 U. S. 115, 30 S. Ct. 377, 54 U. S. (L. ed.) 407; *Matter of Harris*, (1911) 221 U. S. 274, 31 S. Ct. 557, 55 U. S. (L. ed.) 732; *Hull v. Dicks*, (1915) 235 U. S. 584, 35 S. Ct. 152, 59 U. S. (L. ed.) 372; *In re Loving*, (1912) 224 U. S. 183, 32 S. Ct. 446, 56 U. S. (L. ed.) 725.

**At what stage of the case.**—Section 6 of the Circuit Court of Appeals Act of March 3, 1891, re-enacted in Judicial Code, sec. 239, title JUDICIARY, provides for the certification of questions or propositions of law concerning which the Circuit Court of Appeals "desires the instruction" of the Supreme Court "for its proper decision," clearly implying that a question cannot be certified after the Circuit Court of Appeals has decided it. But the court may grant a rehearing after deciding a case or question, and then certify the question to the Supreme Court, as was done in *Wall v. Cox*, (1901) 181 U. S. 244, 21 S. Ct. 642, 45 U. S. (L. ed.) 845, where, prior to granting a rehearing, the Circuit Court of Appeals had affirmed a decision of the District Court on a petition for revision.

**Motion for certificate.**—In *Andrews v. National Foundry, etc., Works*, (C. C. A. 7th Cir. 1897) 77 Fed. 774, 778, not a bankruptcy case, the court said questions are certified "only upon our own motion."

**Frame and contents of certificate.**—See cases cited in note to Judicial Code, sec. 239, title JUDICIARY. Supreme Court Rule 37, par. 1, 210 U. S. appendix 501, 20 S. Ct. xxii, requires that a certificate shall contain "a proper statement of the facts" on which the certified question or proposition of law arises. Facts implied in a question certified may, perhaps, aid the statement of facts. See remark of Justice White in *Keppel v. Tiffin Sav. Bank*, (1905) 197 U. S. 356, 25 S. Ct. 443, 49 U. S. (L. ed.) 790.

Following a concise chronological statement of the fundamental facts the questions arising thereon are propounded, each in a numbered paragraph. See certificates used in bankruptcy cases and quoted in full in *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147; *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122; *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165; *Elkus, Petitioner*, (1910) 216 U. S. 115, 30 S. Ct. 377, 54 U. S. (L. ed.) 407.

The questions should be numbered so that the Supreme Court, in its reported opinion, may refer to one as "the second question," for instance, as is commonly done, without quoting it again.

Captions distinguishing the "statement of facts" from the "questions certified" appear in the certificate copied in *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, and appear in other cases not in bankruptcy.

The Supreme Court will take judicial notice of the public statutes of every state in the Union and of every territory. See *ante*, this volume, p. 20. But if the construction or effect of a state or territorial statute is necessarily involved in a certified question, good practice will suggest

that the statute be not only accurately cited in the certificate, but copied therein. See, for example, the certificate in *Evans v. Nellis*, (1902) 187 U. S. 271, 23 S. Ct. 74, 47 U. S. (L. ed.) 173, not a bankruptcy case.

An essential point not clearly expressed in a question may sufficiently appear in the accompanying statement of facts, as in *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183.

**Consideration and disposition of questions certified.**—In disposing of the questions certified, the Supreme Court is confined to the facts stated in the certificate, and cannot consider allegations of other facts that are made in the briefs. *Wall v. Cox*, (1901) 181 U. S. 244, 21 S. Ct. 642, 45 U. S. (L. ed.) 845.

A question may be regarded as too comprehensive and indefinite to be answered at all. Thus in *Wall v. Cox*, (1901) 181 U. S. 244, 21 S. Ct. 642, 45 U. S. (L. ed.) 845, a trustee in involuntary bankruptcy filed a plenary bill in equity in the federal District Court where he was appointed, to set aside an alleged fraudulent sale by the bankrupt and praying for an injunction and receiver. The court granted an injunction and appointed a temporary receiver. A petition for revision was thereupon filed in the Circuit Court of Appeals, which certified a question as follows: "Said District Court having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a receiver to hold the estate thus conveyed, had it, in said proceedings or in ancillary proceedings, instituted either by the original petitioners, the receiver of the court, the bankrupt's trustee, or of the court's own motion, jurisdiction to bring in the alleged fraudulent transferee of the property thus in the court's possession, and do full and complete justice in one litigation?" The Supreme Court declined to answer that question, and said: "It speaks generally of the District Court having appointed a receiver, but does not state, nor does the certificate show, that the receiver was appointed before the election of the trustee in bankruptcy. Beyond this, the question comprehends what the District Court may do, not merely on this bill by the trustee, but on proceedings, original or ancillary, by the petitioning creditors or by the receiver, or on the court's own motion."

If the certificate is entertained by the Supreme Court, and the questions therein propounded are considered, the court gives categorical answers, as in *Elkus*, Petitioner, (1910) 216 U. S. 115, 30 S. Ct. 377, 54 U. S. (L. ed.) 407, and *Matter of Harris*, (1911) 221 U. S. 274, 31 S. Ct. 557, 55 U. S. (L. ed.) 732, or gives its response in a formal statement, if the latter appears desirable, as in *White v.*

*Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183. But it is not disposed to volunteer instruction not expressly sought. "Not going beyond what the decision of the case before us requires, we are of opinion that," etc., was the response of the court in *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183.

In some cases answers to one or more questions obviously dispense with the necessity of answering the remaining questions, as in *Keppel v. Tiffin Sav. Bank*, (1905) 197 U. S. 366, 25 S. Ct. 443, 49 U. S. (L. ed.) 790; *Yaple v. Dahl-Millikan Grocery Co.*, (1904) 193 U. S. 526, 24 S. Ct. 552, 48 U. S. (L. ed.) 776; *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122; *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147.

The certificate will be "dismissed" if the case, or the stage of the case, was one where a certificate for instruction was not authorized by law, as in *Bardes v. Hawarden First Nat. Bank*, (1899) 175 U. S. 526, 20 S. Ct. 196, 44 U. S. (L. ed.) 261.

The mandate of the Supreme Court on the disposition of the certificate is sent down and filed in the Circuit Court of Appeals, and in subsequent proceedings that court adopts the advice received. See *Toxaway Hotel Co. v. Smathers*, (C. C. A. 4th Cir. 1910) 178 Fed. 1005.

**Certiorari to bring up entire record.**—See also *infra*, this note, III. *Writs of Certiorari*, and section 6 of the Circuit Court of Appeals Act of 1891, now Judicial Code, section 239, title JUDICIARY.

When questions are certified to the Supreme Court, which thereupon requires that the whole record and cause be sent up for its consideration, as it is authorized to do by section 6 of the Circuit Court of Appeals Act of 1891, now Judicial Code, sec. 239, title JUDICIARY, it issues a writ of certiorari for that purpose. *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061. The certified questions then become *functus officio*, the Supreme Court decides the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal, and remands the case to the proper District Court for further proceedings. See, for example, the conclusion of the opinion in *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061.

### III. WRITS OF CERTIORARI.

"Provisions of the United States laws" to which the text section refers are in Judicial Code, secs. 239, 240, title JUDICIARY. See also text, *supra*, p. 833.

Cases in Circuit Court of Appeals on appeal or error.—Decisions in cases non-appellable to the Supreme Court are

reviewable by the Supreme Court on certiorari. *Richardson v. Shaw*, (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835, to review a judgment which affirmed a judgment of the District Court on a directed verdict for defendants in a suit by a trustee in bankruptcy to recover alleged preferences; *J. B. Orcutt Co. v. Green*, (1907) 204 U. S. 96, 27 S. Ct. 195, 51 U. S. (L. ed.) 390, to review an order which reversed an order of the District Court directing certain claims to be filed as of the date when delivered to the trustee in bankruptcy; *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, to review a decree which reversed on appeal a decree of the District Court and sustained the jurisdiction of the latter over a summary proceeding by the receiver in bankruptcy.

**Cases in Circuit Court of Appeals "to superintend and revise."**—A decision made by the Circuit Court of Appeals in a case of that class is reviewable on certiorari. *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047; *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116. The following were cases of that description: *Francis v. McNeal*, (1913) 228 U. S. 695, 33 S. Ct. 701, 57 U. S. (L. ed.) 1029; *Andrews v. Partridge*, (1913) 228 U. S. 479, 37 S. Ct. 570, 57 U. S. (L. ed.) 929; *Everett v. Judson*, (1913) 228 U. S. 474, 33 S. Ct. 568, 57 U. S. (L. ed.) 927; *Henderson v. Mayer*, (1912) 225 U. S. 631, 32 S. Ct. 699, 56 U. S. (L. ed.) 1233; *Friday v. Hall, etc., Co.*, (1910) 216 U. S. 449, 30 S. Ct. 261, 54 U. S. (L. ed.) 562, 26 L. R. A. (N. S.) 475, to review a decree which reversed a decree adjudicating a corporation a bankrupt in involuntary proceedings; *Thomas v. Taggart*, (1908) 209 U. S. 385, 28 S. Ct. 519, 52 U. S. (L. ed.) 845, to review a judgment which affirmed a judgment of the District Court directing trustees in bankruptcy to turn over certain certificates of stock and proceeds of the certificates to divers claimants; *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771, to review a judgment which reversed a decision of the District Court that certain life insurance policies of the bankrupt had no cash surrender value and ordering him to assign them to the trustee in bankruptcy, there being a conflict of opinion in lower federal courts as to the construction of the Bankruptcy Act, and a question of construction of a prior opinion of the Supreme Court; *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967, and *McHarg v. Staake*, (1906) 202 U. S. 150, 26 S. Ct. 584, 50 U. S. (L. ed.) 971, to review an order affirming a decree of the District Court in favor of a trustee

in bankruptcy subrogating him to the rights of certain creditors, and authorizing him to enforce their attachment liens as they might have done had not the bankruptcy proceedings intervened, there being a division of opinion in the Circuit Court of Appeals; *Holden v. Stratton*, (1905) 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018, to review a judgment which reversed an order of the District Court requiring a bankrupt to pay to the trustee in bankruptcy the cash surrender value of certain life insurance policies as a condition precedent to the exemption of the policies; *Clarke v. Larremore*, (1903) 188 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 555, to review a judgment which affirmed an order of the District Court restraining a sheriff from paying an execution creditor the money derived from a sale on the execution, and directing the sheriff to pay the money to the trustee in bankruptcy of the execution debtor; *Louisville Trust Co. v. Comingor*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413, to review a decree which reversed for want of jurisdiction a decree of the District Court ordering a bankrupt's general assignee for the benefit of creditors to pay to the trustee in bankruptcy certain moneys disbursed by the assignee and certain moneys retained by him; *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405, to review a decree which reversed a decree of the District Court directing a person's imprisonment until he should pay over certain money to a trustee in bankruptcy as he had been ordered to do; *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, to review a decision which reversed a decree of the District Court ordering the marshal to hold property that he had taken from the possession of a claimant, the Circuit Court of Appeals directing, by a divided court, that he be ordered to restore it to the claimant.

A case which was in the Circuit Court of Appeals on an appeal, but there treated as on a petition for revision, may be reviewed on certiorari. *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116; *Bryan v. Bernheimer*, (1901) 181 U. S. 182, 193, 21 S. Ct. 557, 45 U. S. (L. ed.) 815, 816; *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047.

**Certiorari is the exclusive remedy** where the case was not in the Circuit Court of Appeals on an appeal or writ of error. *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047, and *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116, where, for that reason, appeals to the Supreme Court were dismissed.

**Before or after final judgment.**—In no

reported bankruptcy case has the Supreme Court been asked to grant a writ of certiorari prior to final judgment in the Circuit Court of Appeals. While it has power to issue the writ before final judgment, "it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise." *Per* Justice Brewer, in *Forsyth v. Hammond*, (1897) 166 U. S. 506, 514, 17 S. Ct. 665, 41 U. S. (L. ed.) 1095. See also *The Conqueror*, (1897) 166 U. S. 114, 17 S. Ct. 510, 41 U. S. (L. ed.) 937; *The Three Friends*, (1907) 166 U. S. 1, 17 S. Ct. 495, 41 U. S. (L. ed.) 897; *American Constr. Co. v. Jacksonville, etc., R. Co.*, (1893) 148 U. S. 384, 13 S. Ct. 758, 37 U. S. (L. ed.) 486.

**Amount in controversy.**—Nowhere do the federal statutes prescribe any jurisdictional amount as a condition for the issuance of a writ of certiorari; and see *Whitney v. Dick*, (1906) 202 U. S. 132, 26 S. Ct. 584, 50 U. S. (L. ed.) 963.

**When an appeal is dismissed for want of jurisdiction** because certiorari is the exclusive remedy in the particular case, the question on the merits may not be deemed of sufficient importance to justify the granting of a writ of certiorari (even though a justice of the court had given the appellant a certificate under section 25b, subd. 2, of the Bankruptcy Act). *Duryea Power Co. v. Sternbergh*, (1910) 218 U. S. 299, 31 S. Ct. 25, 54 U. S. (L. ed.) 1047, where the writ was denied. On the other hand, it may, after such a dismissal of an appeal, grant a writ of certiorari if application therefor is made in time, as was done in *Holden v. Stratton*, (1903) 191 U. S. 115, 24 S. Ct. 45, 48 U. S. (L. ed.) 116, (1904) 193 U. S. 672, 24 S. Ct. 854, 48 U. S. (L. ed.) 841, (1905) 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018.

**The proper petitioner for the writ of certiorari** is the party who would be entitled to appeal or sue out a writ of error if the decision of the Circuit Court of Appeals were reviewable on appeal or error; for example, the petitioning creditors in involuntary bankruptcy, as in *Friday v. Hall, etc., Co.*, (1910) 216 U. S. 449, 30 S. Ct. 261, 54 U. S. (L. ed.) 562, 26 L. R. A. (N. S.) 475; the trustee or trustees in bankruptcy, as in the following cases: *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *Louisville Trust Co. v. Cominger*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413; *Hiscock v. Merrens*, (1907) 205 U. S. 202, 27 S. Ct. 488,

51 U. S. (L. ed.) 771; *Richardson v. Shaw*, (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835; *Thomas v. Taggart*, (1908) 209 U. S. 385, 28 S. Ct. 519, 52 U. S. (L. ed.) 845; attachment or execution creditors, as in *Clarke v. Larremore*, (1903) 188 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 555; *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967; *McHarg v. Staake*, (1906) 202 U. S. 150, 26 S. Ct. 584, 50 U. S. (L. ed.) 971; creditor claimants, as in *J. B. Orcutt Co. v. Green*, (1907) 204 U. S. 96, 27 S. Ct. 195, 51 U. S. (L. ed.) 390; of adverse claimants of property, as in *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051—according to the circumstances of the particular case.

In *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, where a marshal, who, in behalf of petitioning creditors, had seized property in the hands of a claimant and had been ordered by the Circuit Court of Appeals to restore it to the claimant, the marshal, in behalf of those creditors, obtained the writ of certiorari.

**Form of petition.**—A petition for a writ of certiorari is quoted, substantially in full, in *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, where the writ was granted.

**Miscellaneous matters of practice** relating to certiorari, see the note to Judicial Code, sec. 240, in title JUDICIARY.

A certified copy of the entire record of the case in the Circuit Court of Appeals must be furnished to the Supreme Court by the applicant for a writ of certiorari, as a part of the application. Supreme Court rule 37, subd. 3, 210 U. S. appendix 501, 29 S. Ct. xxii. See generally "Instructions by clerk of Supreme Court as to applications for writs of certiorari under Act of March 3, 1911," which follow rule 39 in current publications of Supreme Court rules, and are printed in 210 U. S. appendix 503, 29 S. Ct. xxiii.

An agreed statement of acts was used in *Friday v. Hall, etc., Co.*, (1910) 216 U. S. 449, 30 S. Ct. 261, 54 U. S. (L. ed.) 562, 26 L. R. A. (N. S.) 475.

A motion to quash the writ was filed in one case, after the writ had been granted, on the ground that the petitioner's remedy in the particular case was by appeal or writ of error instead of certiorari. *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, where consideration of the motion was postponed to the hearing on the merits, when the motion was denied.



**Determination and remand.**—See the last paragraph of II. *Questions Certified*, *supra*, this note; *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 288, 25 S. Ct. 693, 697, 49

U. S. (L. ed.) 1051; *Ex p. Chicago First Nat. Bank*, (1907) 207 U. S. 61, 28 S. Ct. 23, 52 U. S. (L. ed.) 103, *reversing Ex p. Chicago Title, etc., Co.*, (C. C. A. 7th Cir. 1906) 146 Fed. 742.

**SEC. 26. ARBITRATION OF CONTROVERSIES.**—*a* [Trustees may submit.] The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate. [(1898) 30 Stat. L. 553.]

*b* [Selection of arbitrators.] Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator. [(1898) 30 Stat. L. 553.]

**Selection of arbitrators.**—It is an irregularity if one of the arbitrators is selected by the trustee, one by the other party, and the third agreed upon by the

two contending parties. *In re McLam*, (D. C. Vt. 1899) 97 Fed. 922, 3 Am. Bankr. Rep. 245.

*c* [Findings.] The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury. [(1898) 30 Stat. L. 553.]

The finding of arbitrators is subject to be set aside or adjudged upon by the court in like manner as a verdict would

be. *In re McLam*, (D. C. Vt. 1899) 97 Fed. 922, 3 Am. Bankr. Rep. 245.

**SEC. 27. COMPROMISES.**—*a* [When allowed.] The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate. [(1898) 30 Stat. L. 553.]

**Compromise to be made through trustee.**—“No compromise with the debtor, and no release to him, can possibly be effected except through the trustee. Notwithstanding any previous vote by creditors, the compromise must still be carried out and executed by the trustee; . . . and must therefore have the ‘approval of the court.’” *In re Heyman*, (1901) 108 Fed. 207.

**When compromise will be approved.**—Where litigation would result in probable and almost inevitable defeat, and both the trustee and his attorney, as well as the learned referee and a very large majority of the creditors, have united in virtually declaring the defense of a suit not wise or beneficial to the estate, the acceptance of a proposed compromise and settlement would seem to be proper. *In re Kearney*, (N. D. N. Y. 1910) 184 Fed. 190.

**Compromise to be submitted to creditors.**—Sections 27, 58 (7), and 56a, so far as the latter affects settlements of claims or controversies between the trustee and others, are to be construed together, and any compromise proposed by the trustee under section 27 should be

submitted to the creditors in accordance with section 58 (7), and the action of the creditors thereon under section 56 is not absolutely conclusive, but may for good cause be disallowed by the court under section 27; and a compromise in like manner proposed to creditors by the debtor is equally subject to the judgment of the court under section 27. *In re Heyman*, (1901) 108 Fed. 207.

**Compromise must be for best interests of estate.**—Section 27 does not authorize the Bankruptcy Court to confirm a proposed plan for the reorganization of a bankrupt corporation, not amounting to a composition, by which dissenting creditors will be compelled to accept stock in the new corporation to be placed in a voting trust for a term of years in exchange for their claims on the money and assets of the bankrupts, consenting, in addition to the creation and priority of a large mortgage, to provide a working capital for the new corporation. A construction which would justify such action on the part of the court would be an undue enlargement of the section. *In re Northampton Portland Cement Co.*, (E. D. Pa.

1911) 185 Fed. 542. See also *In re Geiselhart*, (W. D. Pa. 1910) 181 Fed. 622.

**Lienors and creditors protected.**—*In re Adamo*, (E. D. N. Y. 1907) 151 Fed. 716, 18 Am. Bankr. Rep. 181, it was said that "inasmuch as the attorney for the bankrupt, who has prosecuted the mechanic's lien action, has an attorney's lien for services therein, and inasmuch as the rights in that action cannot be adjudicated in the bankruptcy proceedings, except as the matter is brought into the Bankruptcy Court by consent, it is im-

possible to approve the compromise and direct that the trustee be allowed to carry it out, unless all the parties interested waive any particular right to litigate their claims in the state court."

**Right of bankrupt to enjoin compromise.**—Where a bankrupt's title to property, in the hands of his wife, passes by the adjudication to his trustee, he has no capacity to sue, in a state court, to restrain the trustee from carrying out a proposed compromise of the claim against the wife. *In re Kranich*, (E. D. Pa. 1909) 174 Fed. 908, 23 Am. Bankr. Rep. 550.

**SEC. 28. DESIGNATION OF NEWSPAPERS.**—*a* [To publish notices.] Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published. [(1898) 30 Stat. L. 554.]

**SEC. 29. OFFENSES.**—*a* [Misappropriating property — secreting or destroying documents.] A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee. [(1898) 30 Stat. L. 554.]

As to commission of offense as an objection to discharge, see section 14b (1):

**Suspicious circumstances** are not enough to show such a fraudulent transfer as is meant by this section. *In re Howard*, (C. C. A. 2d Cir. 1910) 180 Fed. 399.

**Defendant may refuse to answer incriminating questions.**—A trustee in bankruptcy, who has been arrested under section 29a, charged with a misappropriation of the funds of the estate, on an examination before the referee, pending such charge, with reference to the bankrupt estate, has the constitutional right to refuse to answer a question asked him, on the ground that his answer may tend to incriminate him. *In re Smith*, (S. D. N. Y.

1902) 112 Fed. 509, 7 Am. Bankr. Rep. 213.

**Release on habeas corpus.**—A bankrupt arrested and held on a capias in an action to recover from him the value of property which it is alleged he embezzled and fraudulently converted to his own use, is entitled to release on a writ of habeas corpus, where no facts are pleaded which show such embezzlement to have been committed while he was acting in a fiduciary capacity, so as to prevent a discharge in bankruptcy from being a release of the debt under section 17a (4). *Barrett v. Prince*, (C. C. A. 7th Cir. 1906) 143 Fed. 302, 16 Am. Bankr. Rep. 64.

**b [Punishment.]** A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently [(1898) 30 Stat. L. 554.]

(1) [Concealing property.] concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or [(1898) 30 Stat. L. 554.]

As to a refusal to grant a discharge on account of the concealment of assets, see section 14b.

**Concealment of assets.**—One who, while a bankrupt, or after his discharge, knowingly or fraudulently conceals from

his trustee any of the property belonging to his estate in bankruptcy is guilty of an offense under section 29b (1). *In re Ablo- wick*, (S. D. N. Y. 1900) 99 Fed. 81; *In re Welch*, (S. D. Ohio 1899) 100 Fed. 65; *In re Mendelsohn*, (S. D. N. Y. 1900) 102 Fed. 119; *In re Quackenbush*, (N. D. N. Y. 1900) 102 Fed. 282; *Fellows v. Freudenthal*, (C. C. A. 1900) 102 Fed. 731; *In re Hoffmann*, (S. D. N. Y. 1900) 102 Fed. 797; *In re Bemis*, (N. D. N. Y. 1900) 104 Fed. 672; *U. S. v. Lake*, (E. D. Ark. 1904) 129 Fed. 499, 12 Am. Bankr. Rep. 270; *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755; *In re Taplin*, (N. D. Ia. 1905) 135 Fed. 861, 14 Am. Bankr. Rep. 360; *Field v. U. S.*, (C. C. A. 8th Cir. 1905) 137 Fed. 6, 14 Am. Bankr. Rep. 507; *U. S. v. Cohn*, (S. D. N. Y. 1906) 142 Fed. 983, 15 Am. Bankr. Rep. 357; *In re Jacobs*, (D. C. Ore. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470; *Cohen v. U. S.*, (C. C. A. 2d Cir. 1907) 157 Fed. 651, 19 Am. Bankr. Rep. 8, *distinguishing* *Field v. U. S.*, (8th Cir. 1905) 137 Fed. 6, 69 C. C. A. 568; *Johnson v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 30, 20 Am. Bankr. Rep. 724; *Alkon v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 810, 22 Am. Bankr. Rep. 489; *Kern v. U. S.*, (C. C. A. 6th Cir. 1909) 169 Fed. 617, 22 Am. Bankr. Rep. 223; *U. S. v. Young, etc., Co.*, (D. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484; *Kerreh v. U. S.*, (C. C. A. 1st Cir. 1909) 171 Fed. 366, 22 Am. Bankr. Rep. 544; *U. S. v. Freed*, (S. D. N. Y. 1910) 179 Fed. 236; *U. S. v. Stern*, (E. D. Pa. 1911) 186 Fed. 854; *Stern v. U. S.*, (C. C. A. 3d Cir. 1912) 193 Fed. 888; *In re Bacon*, (W. D. N. Y. 1913) 206 Fed. 545; *U. S. v. Levinson*, (D. C. S. C. 1904) 13 Am. Bankr. Rep. 29; *U. S. v. Comstock*, (C. C. Mass. 1908) 20 Am. Bankr. Rep. 520.

**Effect of disclosure after arrest.**—The offense of concealment of assets by a bankrupt, when once committed, cannot be retrieved by the bankrupt's atonement, after extradition, by disclosing to the trustee the assets concealed. *Kern v. U. S.*, (C. C. A. 6th Cir. 1909) 169 Fed. 617, 22 Am. Bankr. Rep. 223.

**Merely omission of property from schedule insufficient.**—The offense of concealing property by a bankrupt from his trustee consists of a continuous concealment of the property from the trustee during the whole course of the bankruptcy proceedings, or beyond, and is therefore not necessarily consummated by an omission of the property from the schedules. *In re Hirsch*, (1899) 96 Fed. 468; *In re Morrow*, (1899) 97 Fed. 374; *Johnson v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 30, 20 Am. Bankr. Rep. 724; *In re Hennebry*, (N. D. Ia. 1913) 207 Fed. 882; *U. S. v. Levinson*, (D. C. S. C. 1904) 13 Am. Bankr. Rep. 29.

**The word "concealed."**—"Secrete" is synonymous with "conceal" and legally

identical and equivalent within the meaning of this section; subdivision 22 of section 1 of this act declaring that "conceal" shall include "secrete," "falsify" and "mutilate." *U. S. v. Phillips*, (S. D. N. Y. 1912) 196 Fed. 574.

**Conveyance of property by bankrupt.**—If the bankrupt has conveyed property, no matter how fraudulently, so that he has lost all right, title and interest therein, it is not a concealment under the provision of this section. Where he has parted with all dominion over the property and the title has gone out of him beyond recall, it is not his property and therefore is not "property belonging to his estate in bankruptcy." *In re Hammerstein*, (C. C. A. 2d Cir. 1911) 189 Fed. 37.

**Who may commit offense.**—*In general.*—As the statute provides for concealment "while a bankrupt, or after his discharge," it has been held that the concealment must have actually taken place, or continued, while there is a person in bankruptcy. *Wayne Knitting Mills v. Nugent*, (D. C. Ky. 1900) 104 Fed. 530, 4 Am. Bankr. Rep. 747; *Field v. U. S.*, (C. C. A. 8th Cir. 1905) 137 Fed. 6, 14 Am. Bankr. Rep. 507; *In re Gilroy*, (S. D. N. Y. 1905) 140 Fed. 733, 14 Am. Bankr. Rep. 627; *In re Jacobs*, (D. C. Ore. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470; *U. S. v. Grodson*, (N. D. Ill. 1908) 164 Fed. 157, 21 Am. Bankr. Rep. 68; *Gilbertson v. U. S.*, (C. C. A. 7th Cir. 1909) 168 Fed. 672, 22 Am. Bankr. Rep. 32; *U. S. v. Young, etc., Co.*, (D. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484; *In re Adams*, (N. D. N. Y. 1909) 171 Fed. 599, 22 Am. Bankr. Rep. 613.

**Actual bankruptcy essential.**—The present or past bankruptcy of the person accused is an indispensable element of the offense denounced by the statute. *Field v. U. S.*, (C. C. A. 8th Cir. 1905) 137 Fed. 6, 14 Am. Bankr. Rep. 507. And see also *U. S. v. Rabinowich*, (1915) 238 U. S. 78, 35 S. Ct. 682, 59 U. S. (L. ed.) 1211, wherein the court said: "It is at least doubtful whether the crime of concealing property belonging to the bankrupt estate from the trustee, as defined in section 29b (1) of the Bankruptcy Act, can be perpetrated by any other than a bankrupt or one who has received a discharge as such."

**Trustee must be entitled to concealed property.**—It is necessary to show that the concealment was of property to which the trustee is entitled, and it must have been made knowingly and fraudulently by the bankrupts while such; that is, after they were adjudicated bankrupts. *In re Jacobs*, (D. C. Ore. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470.

**Must have been an adjudication.**—A charge against a bankrupt of concealing from his trustee property belonging to the estate cannot be sustained without a bankruptcy adjudication, even though the proof establishes a flagrant concealment of the

property from the trustee *de facto*. *Gilbertson v. U. S.*, (C. C. A. 7th Cir. 1909) 168 Fed. 672, 22 Am. Bankr. Rep. 32.

**Necessity of appointment of trustee.**—In *In re Adams*, (N. D. N. Y. 1909) 171 Fed. 599, 22 Am. Bankr. Rep. 613, it was held that a person cannot be convicted of an offense, and imprisoned, for fraudulently concealing, while a bankrupt, property "from his estate in bankruptcy." Before this offense can be committed there must be a trustee.

But see *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755, wherein it was held that the concealment of property by a voluntary bankrupt after his adjudication, although before the appointment of a trustee, is a concealment from the trustee, which, if knowingly and fraudulently done, constitutes a criminal offense.

**Knowledge of trustee's appointment immaterial.**—The offense of concealment of goods may be completed by a physical act, intended or calculated to prevent a trustee when appointed from securing the goods, and the character of the offense is in no way dependent upon knowledge that a particular person is clothed with legal authority. *U. S. v. Comstock*, (C. C. R. I. 1908) 161 Fed. 644, 20 Am. Bankr. Rep. 520.

**Continuing concealments.**—It is not necessary, in order to constitute the offense of unlawfully concealing assets, that the original concealment actually occur during bankruptcy, providing that it continue thereafter; and it has been held that the concealment will be none the less criminal where, although it was effected prior to bankruptcy, the property or its proceeds are concealed by the bankrupt from his trustee after his appointment. *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755; *U. S. v. Cohn*, (S. D. N. Y. 1906) 142 Fed. 983, 15 Am. Bankr. Rep. 357; *Johnson v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 30, 20 Am. Bankr. Rep. 724; *U. S. v. Young, etc., Co.*, (D. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484; *U. S. v. Stern*, (E. D. Pa. 1911) 186 Fed. 854; *Kaufman v. U. S.*, (C. C. A. 2d Cir. 1914) 212 Fed. 613.

The word "concealed," employed in this connection, is sufficiently elastic in its signification to comprise a "continuing concealment." Thus, if a bankrupt has disposed of property belonging to him, prior to the adjudication, and has the proceeds thereof in his possession or within his authority to use and appropriate subsequently, there is a continuing concealment for which he is amenable to the law, although the fact of concealment, by intent and purpose, took place while he was not a bankrupt. *In re Jacobs*, (D. C. Ore. 1906) 147 Fed. 797, 17 Am. Bankr. Rep. 470.

**Concealment by corporation.**—A bankrupt corporation may be guilty of concealing assets, and an officer thereof may be

indicted therefor if he participated therein. *U. S. v. Freed*, (S. D. N. Y. 1910) 179 Fed. 236; *Kaufman v. U. S.*, (C. C. A. 2d Cir. 1914) 212 Fed. 613.

**Conspiracy to conceal corporation assets.**—Individuals may be guilty of a conspiracy which includes in its purpose a fraudulent concealment of the assets of a bankrupt corporation, even if the corporation could not be charged as a conspirator. *U. S. v. Young, etc., Co.*, (D. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484; *Roukous v. U. S.*, (C. C. A. 1st Cir. 1912) 195 Fed. 353; *Kaufman v. U. S.*, (C. C. A. 2d Cir. 1914) 212 Fed. 613. And see to the same effect *Cohen v. U. S.*, (C. C. A. 2d Cir. 1907) 157 Fed. 651, *distinguishing* *Field v. U. S.*, (8th Cir. 1905) 137 Fed. 6, 69 C. C. A. 568.

But it has also been held that section 29b (1) must be strictly construed, and that, so construed, it does not include concealments by the officers of a corporation which has been declared bankrupt. *U. S. v. Lake*, (E. D. Ark. 1904) 129 Fed. 499, 12 Am. Bankr. Rep. 270; *Field v. U. S.*, (8th Cir. 1905) 137 Fed. 6, 69 C. C. A. 568, 14 Am. Bankr. Rep. 507.

So also it has been held that since the Act does not make it a criminal offense for a person not a bankrupt to conceal the bankrupt's property from the trustee, an indictment charging that defendants, who were in no manner officially connected either as directors or stockholders with a bankrupt corporation, conspired to conceal assets of the corporation from the trustee in bankruptcy, and in pursuance of such conspiracy they removed the corporation's stock of goods from its place of business and caused the same to be sold and concealed the proceeds, did not state an offense. *U. S. v. Waldman*, (S. D. N. Y. 1911) 188 Fed. 524.

**Concealment of firm assets.**—It has been held that in individual proceedings, a concealment of firm assets would not fall within section 29, because firm assets do not belong to the individual estate. *In re Meyers*, (1899) 96 Fed. 408.

**Conspiracy to conceal.**—An indictment will lie under section 37 of the Penal Laws, Fed. Stat. Annot., making it an offense to conspire to commit any offense against the United States, for conspiracy to conceal from a trustee in bankruptcy property belonging to the estate, in violation of section 29b (1). *U. S. v. Cohn*, (S. D. N. Y. 1906) 142 Fed. 983, 15 Am. Bankr. Rep. 357, *affirmed* (C. C. A. 2d Cir. 1907) 157 Fed. 651, 19 Am. Bankr. Rep. 8; *U. S. v. Young, etc., Co.*, (C. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484; *U. S. v. Stern*, (E. D. Pa. 1911) 186 Fed. 854; *Radin v. U. S.*, (C. C. A. 2d Cir. 1911) 189 Fed. 568; *U. S. v. Rosenstein*, (E. D. N. Y. 1914) 211 Fed. 738.

And such conspiracy may be entered into prior to the bankruptcy, in contemplation thereof; and defendants may be convicted

although it is not alleged nor proved that a trustee was actually appointed, where the evidence warrants a finding that the conspiracy was so successfully carried out that, when the bankruptcy proceedings were instituted, the bankrupt's property had all been removed beyond the jurisdiction of the court, so that the appointment of a trustee would have been a useless formality. *Radin v. U. S.*, (C. C. A. 2d Cir. 1911) 189 Fed. 568.

**Conspiracy prior to bankruptcy as continuing concealment.**—While the Bankruptcy Act does not make any act of the bankrupt before the bankruptcy criminal, if he, before the bankruptcy, has concealed his property, and, after his trustee is appointed continues to conceal it from his trustee, he is criminally liable under the statute, and if indicted for such crime, evidence of his acts of concealment before the bankruptcy, as well as those subsequent thereto, would be admissible as part of the *res gestæ*. *U. S. v. Rhodes*, (S. D. Ala. 1913) 212 Fed. 513.

A conspiracy by bankrupts to conceal their property from their trustee, formed within thirty days of the filing of the petition in bankruptcy and followed by actual concealment of the property, is an offense which continues to the date of the refusal to turn over the property to the trustee on his election; and an indictment for conspiracy under section 37 of the Penal Laws properly charges the commission of the offense as of such date. *U. S. v. Stern*, (E. D. Pa. 1911) 186 Fed. 854.

**Persons other than a bankrupt** may commit an offense by conspiring with him that he shall conceal his goods and an indictment will lie under section 37, Penal Laws, making it a crime to conspire to commit any offense against the United States, for conspiracy to conceal from a trustee in bankruptcy property belonging to the estate in violation of section 29b (1). *Tapack v. U. S.*, (C. C. A. 3d Cir. 1915) 220 Fed. 445.

**Criminal intent.**—In order to constitute an offense under section 29b (1), the concealment must have been knowingly and fraudulently made; therefore it has been held that there can be no conviction of such offense where the concealment complained of was made in good faith, unintentionally, or because of ignorance or mistake. *In re Adams*, (N. D. N. Y. 1900) 104 Fed. 72, 4 Am. Bankr. Rep. 696; *U. S. v. Lowenstein*, (E. D. Pa. 1904) 126 Fed. 884, 11 Am. Bankr. Rep. 134; *In re Reed*, (W. D. Okla. 1911) 191 Fed. 920; *U. S. v. Rhodes*, (S. D. Ala. 1913) 212 Fed. 513; *U. S. v. Levinson*, (D. C. S. C. 1904) 13 Am. Bankr. Rep. 29.

**Omission to schedule property.**—The mere omission, through ignorance or otherwise, to turn over property, or to put it in the schedule, is not a criminal offense; for it may happen that bankrupts may innocently omit from their schedules

property in which they may have an interest, the character of which is so indefinite that they do not consider it necessary to mention it, or through sheer neglect they may fail to turn over property which they have overlooked. The essence of the criminal offense is that it should be committed knowingly and fraudulently, and the jury must be satisfied beyond a reasonable doubt that any property alleged to have been concealed was knowingly and fraudulently concealed. *In re Hirsch*, (1899) 96 Fed. 468; *In re Morrow*, (1899) 97 Fed. 574; *Johnson v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 30, 20 Am. Bankr. Rep. 724; *U. S. v. Levinson*, (D. C. S. C. 1904) 13 Am. Bankr. Rep. 29.

**But where a bankrupt's schedule is indefinite**, and the bankrupt, by active endeavor, keeps valuable assets in hiding, the fact that the title to all of his property passes to the trustee by operation of law is no defense to a prosecution for concealing assets, since the schedules point out to the trustee only such assets as the bankrupt actually discovered to him, or as the trustee would be likely to discover. *Kern v. U. S.*, (C. C. A. 6th Cir. 1909) 169 Fed. 617, 22 Am. Bankr. Rep. 223.

**Use of concealed property to pay debts.**—The fact that a bankrupt used a part of the proceeds of property concealed from his trustee in the payment of debts does not negative a fraudulent intent in such concealment. *Corenman v. U. S.*, (C. C. A. 2d Cir. 1911) 188 Fed. 424.

**Advice of counsel** is ineffective as a defense when it does not go so far as to cover the actual concealment; thus it has been held, on the prosecution of a bankrupt for concealing money from his trustee, that testimony offered to show that the bankrupt's attorney advised him to continue his business until the usual time for closing on the day when the petition was filed and the adjudication made is immaterial, since, if true, and the business was continued in good faith and without criminal intent, and the money was received for goods sold during that time, such facts would give the defendant no right to withhold it from his trustee. *McNiel v. U. S.*, (C. C. A. 5th Cir. 1907) 150 Fed. 92, 18 Am. Bankr. Rep. 19.

**Disappearance of assets.**—When a large shrinkage or disappearance of assets within a short period preceding failure cannot be explained in any rational or intelligible manner, the inference is justifiable of a fraudulent withdrawal and concealment of assets. *In re Meyers*, (1899) 96 Fed. 408.

**Commitment until trustee paid.**—In the case of *In re Greenberg*, (1901) 106 Fed. 496, wherein it appeared that the bankrupts concealed a large part of their assets, they were ordered committed until they paid the trustee a sum equal to the value of the assets concealed.

**Evidence — Burden of proof on opposition to discharge.**—When the offense denounced by this section is alleged in order to defeat a discharge, it must be proved beyond a reasonable doubt, that is, by evidence which would be sufficient to convict the bankrupt of the offense if he were indicted and put upon trial therefor. *In re Hennebry*, (N. D. Ia. 1913) 207 Fed. 882. See also *In re Phillips*, (1900) 98 Fed. 844; *In re Wood*, (1900) 98 Fed. 972; *In re Wetmore*, (1900) 99 Fed. 703; *In re Becker*, (1901) 106 Fed. 54.

**Burden of proof on prosecution.**—In a prosecution for concealing assets the burden of proof is on the government to establish the guilt of the defendant beyond a reasonable doubt. *Chodkowski v. U. S.*, (C. C. A. 7th Cir. 1912) 194 Fed. 858.

**Schedules not admissible.**—In the prosecution of a bankrupt for concealing property from his trustee, the schedules filed by him were held inadmissible in evidence against him, being within the provision of R. S. sec. 860 (since repealed), that no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding, shall be given in evidence in any criminal proceeding. *Johnson v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 30, 20 Am. Bankr. Rep. 724; *Cohen v. U. S.*, (C. C. A. 4th Cir. 1909) 170 Fed. 715, 22 Am. Bankr. Rep. 333.

But it was also held that R. S. sec. 860 (since repealed), applied only to prosecutions in the federal courts, and that in a prosecution under a state statute the bankrupt's schedule is competent evidence as an admission. *Com. v. Ensign*, (1909) 22 Am. Bankr. Rep. 797, 40 Pa. Super. Ct. 157.

**Examination under section 7a (9).**—On the trial of a bankrupt for a criminal offense, it was held to be error to permit the prosecuting attorney, on the cross-examination of defendant as a witness, to read from a copy of his examination before the referee in the bankruptcy proceedings, under section 7a (9), and to interrogate him thereon for the purpose of impeachment. *Jacobs v. U. S.*, (C. C. A. 1st Cir. 1908) 161 Fed. 694, 20 Am. Bankr. Rep. 550. And see the annotation under section 7a (9).

**Bankrupt's books of account.**—On the trial of an involuntary bankrupt for conspiracy to conceal property from his trustee, it was held not to be error to admit in evidence, over defendant's objection and claim of privilege, his books of account which had been taken possession of by a receiver appointed by the Bankruptcy Court. *Kerrch v. U. S.*, (C. C. A. 1st Cir. 1909) 171 Fed. 366, 22 Am. Bankr. Rep. 544. And see the annotation to this effect under section 7a (4).

**Proof of concealment of any part of property sufficient.**—The government, to warrant a conviction, need not prove the

concealment of every article of property, or of every cent of the cash, but proof of the concealment of any part of the property or the cash warrants a conviction. *U. S. v. Stern*, (E. D. Pa. 1911) 186 Fed. 854.

**Value of stock before and after filing petition.**—On the trial of a bankrupt, who was a dealer in jewelry, and was charged with the concealment of a portion thereof from his trustee, it was held not to be error to admit evidence of the amount and value of defendant's stock in trade a few days prior to the filing of the petition in bankruptcy, and also a short time afterward, where the jury were properly instructed and cautioned in reference to such testimony. *Jacobs v. U. S.*, (C. C. A. 1st Cir. 1908) 161 Fed. 694, 20 Am. Bankr. Rep. 550.

**Failure to give trustee information as to property.**—On the trial of a bankrupt charged with concealment of property from his trustee, testimony of the trustee is admissible to show that he was not informed by the defendant that property belonging to him was stored in places where that which was charged to have been concealed was found by the trustee. *Johnson v. U. S.*, (C. C. A. 1st Cir. 1909) 170 Fed. 581, 22 Am. Bankr. Rep. 359, explaining *Jacobs v. U. S.*, (1st Cir. 1908) 161 Fed. 694, 88 C. C. A. 554, and *Johnson v. U. S.*, (1st Cir. 1908) 163 Fed. 30, 89 C. C. A. 508.

**In order to prove a continuous concealment of property by a bankrupt from his trustee, it is not necessary to take up each moment of the bankrupt's life while the proceedings lasted, and prove what he did, as a means of proving what he did not; it being sufficient to introduce secondary evidence of the property disclosed by the bankrupt, he being entitled at his election to introduce his schedules to show that the property claimed to have been omitted was in fact included, as a matter of defense.** *Johnson v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 30, 20 Am. Bankr. Rep. 724.

**Circumstantial evidence is competent as in other cases; and where such evidence warrants the jury in finding beyond a reasonable doubt that the accused was guilty, a judgment on the verdict should not be arrested.** *U. S. v. Stern*, (E. D. Pa. 1911) 186 Fed. 854.

**Presumptions.**—In a prosecution of a bankrupt for concealing assets, where it is shown that the defendant conveyed property by a warranty deed, the jury should be instructed that the law presumes that in so doing the defendant acted legally and in good faith, and that they should give him the benefit of that presumption. *Chodkowski v. United States*, (C. C. A. 7th Cir. 1912) 194 Fed. 853.

**Indictment — Alleging that property concealed was part of estate.**—It has been held that an indictment which charges

that a bankrupt unlawfully, knowingly, wilfully, and fraudulently concealed from his trustee certain property belonging to his estate in bankruptcy, carries with it a sufficient averment of his knowledge that such property belonged to his estate. *McNiell v. U. S.*, (C. C. A. 5th Cir. 1907) 150 Fed. 82, 18 Am. Bankr. Rep. 19. See also *U. S. v. Comstock*, (C. C. R. I. 1908) 161 Fed. 644, 20 Am. Bankr. Rep. 520. And an indictment which charges that the defendants "corruptly and wickedly" conspired to bring about the concealment "in order to defraud the creditors" sufficiently charges that the concealment was made "knowingly and fraudulently" within the meaning of the statute. *Tapack v. U. S.*, (C. C. A. 3d Cir. 1915) 220 Fed. 445.

*The mode of the alleged concealment* is entirely immaterial, and need not be set forth in the indictment. *U. S. v. Comstock*, (C. C. R. I. 1908) 161 Fed. 644, 20 Am. Bankr. Rep. 520.

*Alleging appointment of trustee.*—In an indictment against a bankrupt and others for conspiracy to conceal assets from the trustee in bankruptcy, an averment that a person named was "duly" appointed trustee is sufficient; the matter of appointment being an incidental matter only, and not a vital element of the crime. *Kerch v. U. S.*, (C. C. A. 1st Cir. 1909) 171 Fed. 366, 22 Am. Bankr. Rep. 544.

*Knowledge of trustee's appointment.*—An indictment under section 29b need not charge that the defendant bankrupt, at the time of the alleged concealment of his property, knew that a trustee had been appointed, or knew the name of the trustee. *U. S. v. Comstock*, (C. C. R. I. 1908) 161 Fed. 644, 20 Am. Bankr. Rep. 520.

*A demand on the defendant by the trustee, or receiver, or any other persons* need not be alleged in the indictment. *Meyer v. U. S.*, (C. C. A. 5th Cir. 1915) 220 Fed. 822.

*Time of commission of offense in continuing concealments.*—A concealment by a bankrupt from a trustee after his appointment of any property or cash which the bankrupt has in his possession, and a failure to deliver it over to him on demand, is an offense as of any date the concealment continues; and an indictment charging the offense properly charges its commission as of the date of the refusal to turn over the property to the trustee. *U. S. v. Stern*, (E. D. Pa. 1911) 186 Fed. 854.

*An indictment for conspiracy* that one of the conspirators should purchase goods and afterwards go into bankruptcy, and that the goods should be concealed by the other, in violation of section 29b (1), is

not insufficient because it avers that the conspiracy was formed and the goods were to be concealed prior to the bankruptcy, where it also avers that it was the intention to continue the concealment thereafter. *Alkon v. U. S.*, (C. C. A. 1st Cir. 1908) 163 Fed. 810, 22 Am. Bankr. Rep. 489.

*An indictment for conspiracy to conceal assets of a corporation in contemplation of bankruptcy* is not objectionable because there was no existing bankruptcy when the conspiracy was originated. *U. S. v. Young, etc., Co.*, (C. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484.

But an indictment against a bankrupt and others, charging a conspiracy to conceal property of the bankrupt from his trustee in violation of the Bankruptcy Act, does not charge an offense under R. S. sec. 5440 (now PENAL LAWS, sec. 37), where it shows that the conspiracy was formed and the property removed and concealed by the defendants prior to the bankruptcy, but does not aver that such concealment was in contemplation of bankruptcy, or that any overt act was committed after the bankruptcy, although it charges a further conspiracy thereafter to continue the concealment. *U. S. v. Grodson*, (N. D. Ill. 1908) 164 Fed. 157, 21 Am. Bankr. Rep. 68.

And where an indictment for conspiracy to conceal the assets of a bankrupt corporation from its trustees alleged, as the overt act, that defendants removed and sold the bankrupt's stock of goods and concealed the proceeds from the bankrupt's receiver and trustee, but did not allege any of the circumstances under which the goods were removed, so as to show that such removal was illegal, and not under legal process, it was held to be insufficient. *U. S. v. Waldman*, (S. D. N. Y. 1911) 188 Fed. 524.

*Superfluous allegation.*—An unnecessary averment that the bankrupt concealed property from the receiver will not impair an indictment which sufficiently alleges every fact necessary to be proved to constitute the offense denounced by the statute. *Meyer v. U. S.*, (C. C. A. 5th Cir. 1915) 220 Fed. 822.

Under the Bankruptcy Act of 1867 criminal offenses were somewhat similarly provided for. See *In re Shoemaker*, (1868) 4 Biss. 245, 21 Fed. Cas. No. 12,799; *U. S. v. Bayer*, (1876) 4 Dill 407, 24 Fed. Cas. No. 14,547 (a case of conspiracy to violate the Bankruptcy Act); *U. S. v. Block*, (1877) 4 Sawy. 211, 24 Fed. Cas. No. 14,609; *U. S. v. Jackson*, (1880) 2 Fed. 502.

(2) [False oaths or accounts.] made a false oath or account in, or in relation to, any proceeding in bankruptcy; [(1898) 30 Stat. L. 554.]

As to refusal of a discharge on account of the making of false oaths, see section 14b.

**False oath.**—Knowingly and fraudulently making a false oath or account in, or in relation to, any proceeding in bankruptcy, constitutes a punishable offense under section 29b (2). *Kentucky Nat. Bank v. Carley*, (C. C. A. 3d Cir. 1904) 127 Fed. 686, 12 Am. Bankr. Rep. 119; *In re Conroy*, (E. D. Pa. 1905) 134 Fed. 764, 14 Am. Bankr. Rep. 249; *Edelstein v. U. S.*, (C. C. A. 8th Cir. 1906) 149 Fed. 636, 17 Am. Bankr. Rep. 649; *Troeder v. Lorsch*, (C. C. A. 1st Cir. 1906) 150 Fed. 710, 17 Am. Bankr. Rep. 723; *U. S. v. Liberman*, (E. D. N. Y. 1910) 176 Fed. 161, 23 Am. Bankr. Rep. 734; *U. S. v. Freed*, (S. D. N. Y. 1910) 179 Fed. 236; *Kovoloff v. U. S.*, (C. C. A. 7th Cir. 1912) 202 Fed. 475.

The term "false oath" is not limited to proceedings under section 7a (9), nor to false swearing in connection with the bankrupt's schedules, but is related to any proceeding in bankruptcy, including the examination of the bankrupt before a referee on an investigation of specifications filed against his discharge. *Edelstein v. U. S.*, (C. C. A. 8th Cir. 1906) 149 Fed. 636, 17 Am. Bankr. Rep. 649; *In re Sheinberg*, (S. D. N. Y. 1915) 223 Fed. 218.

**False testimony** given by a bankrupt on his examination in respect to his ownership of, or interest in, property conveyed to his wife some years before the bankruptcy proceedings, constitutes the making of a false oath in relation to a proceeding in bankruptcy. *In re Conroy*, (E. D. Pa. 1905) 134 Fed. 764, 14 Am. Bankr. Rep. 249.

**Oath must be corruptly false.**—The term "false oath" means a corruptly false oath, such as would subject the affiant to a prosecution for perjury. *In re Gilpin*, (E. D. Pa. 1908) 160 Fed. 171, 20 Am. Bankr. Rep. 374.

**Objection that examination was unauthorized is unavailable.**—If the bankrupt or a creditor appears prior to the first meeting of creditors, and at an examination before a special referee, special commissioner, or special master, consents to be sworn, and does not refuse to testify, he cannot then object to the authority of the court in requiring his examination. *U. S. v. Liberman*, (E. D. N. Y. 1910) 176 Fed. 161, 23 Am. Bankr. Rep. 734.

**Intent.**—Intent is a material element. The false oath must have been knowingly and fraudulently made, and an oath may be considered to have been so made when made by a person who states matters which he does not believe to be true, willfully and contrary to his oath. *In re Hale*, (D. C. N. M. 1913) 206 Fed. 856. See also *Smith v. Keegan*, (C. C. A. 1st Cir. 1901) 111 Fed. 157.

**Materiality.**—The materiality of a false oath is not the test of whether it does or does not bar a bankrupt's discharge. Any false oath made in the course of an examination under the statute, and in regard to a relevant subject of inquiry, is the kind of false oath the Congress intended should bar a discharge. *In re Sheinberg*, (S. D. N. Y. 1915) 223 Fed. 218.

**Omission from schedule.**—The omission from the schedule of property which ought to have been scheduled must have been knowingly and fraudulently made in order to render the verification in the making of a false oath. *In re Eaton*, (D. C. N. D. N. Y. 1901) 110 Fed. 731. See also as to the effect of filing an amended schedule upon the question of intent, *In re Eaton*, (D. C. N. Y. 1901) 110 Fed. 731; *Smith v. Keegan*, (C. C. A. 1901) 111 Fed. 157, affirming judgment of the District Court.

The omission knowingly of property from the schedules and the verification thereof constitutes a false oath within this section. Although the burden is generally upon the creditors to prove their objections, it has been held that when a material omission is shown, it is incumbent upon the bankrupt to explain the transaction. *In re Wood*, (1900) 98 Fed. 972; *In re Becker*, (1901) 106 Fed. 54.

The testimony alleged to be false should be specifically pointed out, together with the facts which are relied upon to prove its falsity, so that the bankrupt may be informed of the accusation against him. *In re Goodale*, (1901) 109 Fed. 783.

**Indictment—Alleging false oath to schedules.**—Where an indictment against the president of a bankrupt corporation, for making a false oath to its schedules, alleged that the corporation was adjudged a bankrupt; that defendant, as its president, in compliance with the Bankruptcy Law, did file in the bankruptcy proceeding with the referee the schedules required by law, subscribed and sworn to by him as president, etc.; that defendant stated on his oath that such schedules contained a true and complete statement of all the corporation's property; and that the statement that the bankrupt corporation had then on hand only a certain sum, which was all the money the corporation then and there had, was false, it was held that such indictment followed the strict language of the statute, and sufficiently showed the materiality of the false statement, without an express averment thereof. *U. S. v. Lake*, (E. D. Ark. 1904) 129 Fed. 499, 12 Am. Bankr. Rep. 270.

In an indictment against the president of a bankrupt corporation for making a false oath to its schedules, a description of the assets charged to have been fraudulently and knowingly omitted from such schedules as "one hundred and fifty thousand dollars in lawful money of the United



States" was held to be sufficiently specific. *U. S. v. Lake*, (E. D. Ark. 1904) 129 Fed. 499, 12 Am. Bankr. Rep. 270.

But an indictment charging the accused with having committed perjury by falsely omitting assets from his sworn schedule in bankruptcy, which alleges that he knew his schedule was false, and that he knew he was the owner of a specified sum of money in addition to what was mentioned in his schedule, is fatally defective, unless it also charges directly that he had other property than that described in his schedule. *Bartlett v. U. S.*, (C. C. A. 9th Cir. 1901) 106 Fed. 884, 5 Am. Bankr. Rep. 678.

*An indictment charging conspiracy to give false oaths* in a bankruptcy proceeding, which failed to allege what false oaths were to be given, or what the subject of the oaths was, with such reasonable particularity as would advise defendant of the charge against him, was held to be insufficient. *U. S. v. Waldman*, (S. D. N. Y. 1911) 188 Fed. 524.

*Alleging false testimony.*—It is sufficient that an indictment for perjury allege that defendant's testimony was false, and that he believed it to be false, without alleging the actual facts. *U. S. v. Freed*, (S. D. N. Y. 1910) 179 Fed. 236.

*Evidence—Testimony given under section 7a (9) admissible.*—The immunity provided by section 7a (9) does not protect the bankrupt from the use of testimony, given in pursuance thereof, upon the trial of an indictment for perjury

committed by the making of a false oath in, and in relation to, the bankruptcy proceedings. *U. S. v. Brod*, (N. D. Ga. 1910) 23 Am. Bankr. Rep. 740, *following* *Edelstein v. U. S.*, (8th Cir. 1906) 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236, 17 Am. Bankr. Rep. 649; *Wechsler v. U. S.*, (2d Cir. 1907) 158 Fed. 579, 86 C. C. A. 37, 19 Am. Bankr. Rep. 1.

But see *U. S. v. Simon*, (W. D. Wash. 1906) 146 Fed. 89, 17 Am. Bankr. Rep. 41, wherein it was held that the provisions of section 7a (9) prevented a prosecution for perjury for false swearing, in an examination thereunder in support of a claim against the estate.

*Burden of proof.*—The offense denounced by this section is not of equal gravity with perjury and is therefore not within the rule of the burden of proof in perjury cases. The rule in various jurisdictions seems to be hardly more than the common-law rule that the defendant must be proved guilty beyond a reasonable doubt. *Kahn v. U. S.*, (C. C. A. 2d Cir. 1914) 214 Fed. 54.

*Cumulative punishment.*—Where in a prosecution for perjury on an indictment drawn in the language of this section, the defendant was convicted under three counts charging him with making the same false statement on three different occasions, it was held that he was guilty of one offense only and could not be sentenced successively on each conviction. *Ulmer v. U. S.*, (C. C. A. 6th Cir. 1915) 219 Fed. 641.

(3) [**False claims.**] presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or [(1898) 30 Stat. L. 554.]

(4) [**Receiving property from bankrupt.**] received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or [(1898) 30 Stat. L. 554.]

*Receiving property with intent to defeat the Bankruptcy Act.*—It is an offense under the Bankruptcy Law, punishable by imprisonment for a period not exceeding two years, knowingly and fraudulently to receive any material amount of property from a bankrupt, after the filing of a petition, with intent to defeat the Act. *Knapp, etc., Co. v. Drew*, (C. C. A. 8th Cir. 1908) 160 Fed. 413, 20 Am. Bankr. Rep. 355; *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385.

*Participants in forbidden acts.*—Section 29b (4) is to be read and construed in

connection with section 1a (19), in which it is distinctly provided that the word "persons" "when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts." The use of the word "forbidden" makes this phraseology peculiarly applicable to such criminal provisions as are embraced in section 29b (4). *Matter of Luftig*, (D. C. Mass. 1905) 15 Am. Bankr. Rep. 773. See also *U. S. v. Young, etc., Co.*, (C. C. R. I. 1909) 170 Fed. 110, 22 Am. Bankr. Rep. 484.

(5) [**Extorting money or property.**] extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings. [(1898) 30 Stat. L. 554.]

**Extorting money or property.**—This section is not violated by a promise which the bankrupt made with a creditor after the petition was filed but before his discharge, which was in effect that if the creditor could lend him a certain sum of money for use in paying the consideration of a composition with his creditors, he, when the composition was confirmed, would pay the creditor the balance of his debt after deducting therefrom his share

of the consideration of such composition. *Zavelo v. Reeves*, (1913) 227 U. S. 627, 33 S. Ct. 365, 57 U. S. (L. ed.) 676, Ann. Cas. 1914D 684.

A prosecution for concealing property is not maintainable where more before the indictment the bankrupt concealed the property to the knowledge of the trustee. *U. S. v. Phillips*, (S. D. N. Y. 1912) 196 Fed. 574.

**c [Punishment.]** A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly

(1) **[Acting as referee when interested.]** acted as a referee in a case in which he is directly or indirectly interested; or

(2) **[Purchasing property.]** purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or

(3) **[Refusal to permit inspection of accounts and papers.]** refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do. [(1898) 30 Stat. L. 554.]

**d [Limitation.]** A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense. [(1898) 30 Stat. L. 554.]

**Limitation does not apply to prosecution, for conspiracy to commit offense.**—The limitation of one year imposed by section 29d, for the finding of an indictment for offenses under section 29 generally, does not apply to an indictment under R. S. sec. 5440 (now PENAL LAWS, sec. 37), for a conspiracy to commit an offense thereunder. *U. S. v. Comstock*, (C. C. R. I. 1908) 102 Fed. 416, 20 Am. Bankr. Rep. 525; *U. S. v. Rabinowich*, (1915) 238

U. S. 78, 35 S. Ct. 682, 59 U. S. (L. ed.) 1211, reversing (C. C. A. 2d Cir. 1915) 222 Fed. 846.

**Offense of concealing assets.**—Each case must depend on the facts showing the act or series of acts constituting the alleged offense. For facts held sufficient to show that prosecution of the offense of concealing assets was barred by this section, see *Warren v. U. S.*, (C. C. A. 5th Cir. 1912) 199 Fed. 753.

**SEC. 30. RULES, FORMS, AND ORDERS.—a [Made by Supreme Court.]** All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States. [(1898) 30 Stat. L. 554.]

**The power to prescribe necessary rules, forms, and orders, as to procedure and for the purpose of carrying the Bankruptcy Act into force and effect, is vested in the Supreme Court of the United States.** *J. B. Orcutt Co. v. Green*, (1907) 204 U. S. 96, 27 S. Ct. 195, 51 U. S. (L. ed.) 390, 17 Am. Bankr. Rep. 72.

**Force and effect.**—The rules, forms, and orders prescribed by the Supreme Court are intended to provide for the enforcement of the Bankruptcy Law, and not to enlarge, take from, or vary its provisions;

and, within this purpose and limitation, they are of binding force and effect on the courts. *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463; *J. B. Orcutt Co. v. Green*, (1907) 204 U. S. 96, 27 S. Ct. 195, 51 U. S. (L. ed.) 390, 17 Am. Bankr. Rep. 72; *In re Scott*, (E. D. N. C. 1900) 99 Fed. 404, 3 Am. Bankr. Rep. 625; *Mahoney v. Ward*, (E. D. N. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770; *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696; *Burke*

*v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1905) 134 Fed. 562, 14 Am. Bankr. Rep. 31; *In re Nathanson*, (E. D. N. Y. 1907) 152 Fed. 585, 19 Am. Bankr. Rep. 56; *In re Johnson*, (W. D. Ark. 1908) 158 Fed. 342, 19 Am. Bankr. Rep. 814; *In re Nevada-Utah Mines, etc., Corp.*, (C. C. A. 2d Cir. 1913) 202 Fed. 126; *In re Farthing*, (D. C. E. D. N. C. 1913) 202 Fed. 557; *Matter of McClintock*, (N. D. Ohio 1904) 13 Am. Bankr. Rep. 606; *Weidenfeld v. Tillinghast*, (1907) 18 Am. Bankr. Rep. 531, 54 Misc. 90, 104 N. Y. S. 712.

*Force and effect of law.*—It has been held that the rules and forms prescribed by the Supreme Court, under and by virtue of the Bankruptcy Act, and for its administration, have the force and effect of law. *In re Gerber*, (C. C. A. 9th Cir. 1911) 186 Fed. 693. It is the same principle that makes departmental regulations prescribed by authority of an Act of Congress have the force of law. See article on "Statutes and Statutory Construction," *ante*, this volume, p. 21.

Of course this is subject to the limitation that the rules and forms prescribed are in harmony with the language of the statute—if the two conflict the court would be controlled by the statute. *Burke v. Guarantee Title, etc., Co.*, (C. L. A. 3d Cir. 1905) 134 Fed. 562, 14 Am. Bankr. Rep. 31.

A rule of court in conflict with one of the official Forms is void. *In re Johnson*, (W. D. Ark. 1908) 158 Fed. 342, 19 Am. Bankr. Rep. 814.

*Equivalent to interpretation.*—The rules, forms, and orders adopted by the Supreme Court amount to an interpretation or construction of the law in that respect. *Matter of McClintock*, (N. D. Ohio 1904) 13 Am. Bankr. Rep. 606.

A general order framed by the Supreme

Court as authorized by the Bankruptcy Act of 1867 made provision for notice to a nonconsenting partner of a petition by his copartners for adjudication of bankruptcy, and this was declared to be a judicial construction by the highest tribunal having authority to adjudicate upon the question, that the provision in the Act for notice to a debtor in the case of a petition against him entitled a nonconsenting partner to the same notice. *Isett v. Stuart*, (1875) 80 Ill. 404, 22 Am. Rep. 194, 198. See also *Robertson v. Howard*, (1913) 229 U. S. 254, 33 S. Ct. 854, 57 U. S. (L. ed.) 1174.

Declarations found in the forms prescribed by the Supreme Court are sometimes referred to by that court as indicating the construction it has adopted of provisions in the Bankruptcy Act to which those forms relate. *Zavelo v. Révees*, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676.

*Forms prescribed should be followed.*—The simple forms of bankruptcy practice found in the general orders and forms prescribed by the Supreme Court should be followed, and there should be no unnecessary departures by falling into a habit of using the more costly, prolix, and less suitable forms of special pleadings and procedure used in chancery cases. *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696.

*Necessary alterations allowable.*—The bankruptcy forms were not designed to effect any change in the law. They are "forms" and nothing more, and they are to be observed and used with such alterations as may be necessary to suit the circumstances of any particular case. *Burke v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1905) 134 Fed. 562, 14 Am. Bankr. Rep. 31. And see General Order No. 38.

## GENERAL ORDERS AND FORMS IN BANKRUPTCY.

Supreme Court of the United States, October Term, 1898.

*As Amended, October Term, 1905.*

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the Act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders

established by this court under the Bankrupt Act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the Bankrupt Act of 1898 and the general orders of this court.

### I.

#### DOCKET.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of

the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

## II.

### FILING OF PAPERS.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

## III.

### PROCESS.

All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

## IV.

### CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the Circuit or District Court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

## V.

### FRAME OF PETITIONS.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

## VI.

### PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of

bankruptcy committed at an earlier date than the first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

## VII.

### PRIORITY OF PETITIONS.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

## VIII.

### PROCEEDINGS IN PARTNERSHIP CASES.

Any member of a partnership, who refuses to join in a petition to have the

partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

## IX.

## SCHEDULE IN INVOLUNTARY BANKRUPTCY.

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

## X.

## INDEMNITY FOR EXPENSES.

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

## XI.

## AMENDMENTS.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner

shall state the cause of the error in the paper originally filed.

## XII.

## DUTIES OF REFEREE.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

## XIII.

## APPOINTMENT AND REMOVAL OF TRUSTEE.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

## XIV.

## NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

## XV.

## TRUSTEE NOT APPOINTED IN CERTAIN CASES.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

## XVI.

## NOTICE TO TRUSTEE OF HIS APPOINTMENT.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

## XVII.

## DUTIES OF TRUSTEE.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

## XVIII.

## SALE OF PROPERTY.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and loca-

tion of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

## XIX.

## ACCOUNTS OF MARSHAL.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

## XX.

## PAPERS FILED AFTER REFERENCE.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

## XXI.

## PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

## XXII.

### TAKING OF TESTIMONY.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and

the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

## XXIII.

### ORDERS OF REFEREE.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

## XXIV.

### TRANSMISSION OF PROVED CLAIMS TO CLERK.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

## XXV.

### SPECIAL MEETING OF CREDITORS.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

## XXVI.

### ACCOUNTS OF REFEREE.

Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

## XXVII.

### REVIEW BY JUDGE.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained

of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

#### XXVIII.

##### REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

#### XXIX.

##### PAYMENT OF MONEYS DEPOSITED.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

#### XXX.

##### IMPRISONED DEBTOR.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailer or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like

application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the District Court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

#### XXXI.

##### PETITION FOR DISCHARGE.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

#### XXXII.

##### OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

#### XXXIII.

##### ARBITRATION.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

#### XXXIV.

##### COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.



## XXXV.

## COMPENSATION OF CLERKS, REFEREES AND TRUSTEES.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in travelling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. He may also, pending such proceedings both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned. [The last sentence of this paragraph was added by order of the Supreme Court promulgated at the October Term, 1905, Dec. 11, 1905.]

## XXXVI.

## APPEALS.

1. Appeals from a court of bankruptcy to a Circuit Court of Appeals, or to the

Supreme Court of a territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court or the United States from a Circuit Court of Appeals, or from the Supreme Court of a territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

## XXXVII.

## GENERAL PROVISIONS.

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

## XXXVIII.

## FORMS.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

## FORMS IN BANKRUPTCY.

[FORM No. 1.]

## DEBTOR'S PETITION.

To the Honorable \_\_\_\_\_,

Judge of the District Court of the United States

for the \_\_\_\_\_ District of \_\_\_\_\_:

The petition of \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_, and district and state of \_\_\_\_\_, [state occupation], respectfully represents:

That he has had his principal place of business [or has resided, or has had his domicile] for the greater portion of six months next immediately preceding the filing of this petition at \_\_\_\_\_, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

\_\_\_\_\_, Attorney.

United States of America, District of \_\_\_\_\_, ss:

I, \_\_\_\_\_, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

\_\_\_\_\_, Petitioner.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_  
(Official character.)







SCHEDULE B. (2)

Personal property.

a.—Cash on hand.....		\$	c.
b.—Bills of exchange, promissory notes, or securities of any description (each to be set out separately).....			
c.—Stock in trade, in — business of —, at —, of the value of —.....			
d.—Household goods and furniture, household stores, wearing apparel and ornaments of the person, vis..			
e.—Books, prints, and pictures, vis.....			
f.—Horses, cows, sheep, and other animals (with number of each), vis.....			
g.—Carriages and other vehicles, vis.....			
h.—Farming stock and implements of husbandry, vis....			
i.—Shipping, and shares in vessels, vis.....			
k.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, vis..			
l.—Patents, copyrights, and trade-marks, vis.....			
m.—Goods or personal property of any other description, with the place where each is situated, vis.....			
Total.....			

\_\_\_\_\_, Petitioner.

SCHEDULE B. (3)

Things in action.

		Dollars.	Cents.
a.—Debts due petitioner on open account.....			
b.—Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds.....			
c.—Policies of insurance.....			
d.—Unliquidated claims of every nature, with their estimated value.....			
e.—Deposits of money in banking institutions and elsewhere..			
Total.....			

\_\_\_\_\_, Petitioner.

SCHEDULE B. (4)

*Property in reversion, remainder or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.*

[N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Supposed value of my interest.	
Interest in land.....		\$	c.
Personal property.....			
Property in money, stock, shares, bonds, annuities, etc..			
Rights and powers, legacies and bequests.....			
	Total.....		
<i>Property heretofore conveyed for benefit of creditors.</i>		Amount realised from proceeds of property conveyed.	
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.....		\$	
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy			
	Total.....		

\_\_\_\_\_, *Petitioner.*

SCHEDULE B. (5)

*A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.*

		Valuation.	
Military uniform, arms, and equipments.....		\$	c.
Property claimed to be exempted by state laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the state creating the exemption.....			
	Total.....		

\_\_\_\_\_, *Petitioner.*

## SCHEDULE B. (6)

## BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth with the reason for their custody of the same.

Books.	
Deeds.	
Papers.	

\_\_\_\_\_, *Petitioner.*

## OATH TO SCHEDULE B.

United States of America, District of \_\_\_\_\_, ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, before me personally came \_\_\_\_\_, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

\_\_\_\_\_,  
\_\_\_\_\_,  
[Official character.]

## SUMMARY OF DEBTS AND ASSETS.

[From the statements of the bankrupt in Schedules A and B.]

Schedule A	1	(1) Taxes and debts due United States.			
"	1	(2) Taxes due states, counties, districts, and municipalities.			
"	1	(3) Wages.			
"	1	(4) Other debts preferred by law.			
Schedule A	2	Secured claims.			
Schedule A	3	Unsecured claims.			
Schedule A	4	Notes and bills which ought to be paid by other parties thereto.			
Schedule A	5	Accommodation paper.			
Schedule A, total.					
Schedule B	1	Real estate.			
Schedule B	2-a	Cash on hand.			
"	2-b	Bills, promissory notes, and securities.			
"	2-c	Stock in trade.			
"	2-d	Household goods, &c.			
"	2-e	Books, prints, and pictures.			
"	2-f	Horses, cows, and other animals.			
"	2-g	Carriages and other vehicles.			
"	2-h	Farming stock and implements.			
"	2-i	Shipping and shares in vessels.			
"	2-k	Machinery, tools, &c.			
"	2-l	Patents, copyrights, and trade-marks.			
"	2-m	Other personal property.			
Schedule B	3-a	Debts due on open accounts.			
"	3-b	Stocks, negotiable bonds, &c.			
"	3-c	Policies of insurance.			
"	3-d	Unliquidated claims.			
"	3-e	Deposits of money in banks and elsewhere.			
Schedule B	4	Property in reversion, remainder, trust, &c.			
Schedule B	5	Property claimed to be excepted.			
Schedule B	6	Books, deeds, and papers.			
Schedule B, total.					



[FORM No. 2.]

PARTNERSHIP PETITION.

To the Honorable \_\_\_\_\_,  
Judge of the District Court of the United States  
for the \_\_\_\_\_ District of \_\_\_\_\_:

The petition of \_\_\_\_\_ respectfully represents:

That your petitioners and \_\_\_\_\_ have been partners under the firm name of \_\_\_\_\_, having their principal place of business at \_\_\_\_\_, in the county of \_\_\_\_\_, and district and state of \_\_\_\_\_, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by \_\_\_\_\_ oath, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by \_\_\_\_\_ oath, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said \_\_\_\_\_ further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said \_\_\_\_\_ further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said \_\_\_\_\_ further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said \_\_\_\_\_ further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

\_\_\_\_\_, Attorney.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Petitioners.

\_\_\_\_\_, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information and belief.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Petitioners.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

[Official character.]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM No. 3.]

**CREDITORS' PETITION.**

To the Honorable \_\_\_\_\_, judge of the District Court of the United States  
for the \_\_\_\_\_ district of \_\_\_\_\_:

The petition of \_\_\_\_\_, of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, respectfully shows:

That \_\_\_\_\_, of \_\_\_\_\_, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business, [or resided, or had his domicile] at \_\_\_\_\_, in the county of \_\_\_\_\_ and state and district aforesaid, and owes debts to the amount of \$1,000.

That your petitioners are creditors of said \_\_\_\_\_, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of \$500. That the nature and amount of your petitioners' claims are as follows:

And your petitioners further represent that said \_\_\_\_\_ is insolvent, and that within four months next preceding the date of this petition the said \_\_\_\_\_ committed an act of bankruptcy, in that he did heretofore, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_

Wherefore your petitioners pray that service of this petition, with a subpoena, may be made upon \_\_\_\_\_, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

\_\_\_\_\_,  
\_\_\_\_\_,  
\_\_\_\_\_,  
Petitioners

\_\_\_\_\_, Attorney.

United States of America, District of \_\_\_\_\_, ss:

\_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me, \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 189—.

[Official character.]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM No. 4.]

**ORDER TO SHOW CAUSE UPON CREDITORS' PETITION.**

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_

In Bankruptcy.

Upon consideration of the petition of \_\_\_\_\_ that \_\_\_\_\_ be declared a bankrupt, it is ordered that the said \_\_\_\_\_ do appear at this court, as a court of bankruptcy, to be holden at \_\_\_\_\_, in the district aforesaid, on the \_\_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpoena be served on said \_\_\_\_\_, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the Honorable \_\_\_\_\_, judge of the said court, and the seal thereof, at \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

{ Seal of  
the court. }

\_\_\_\_\_, Clerk.

[FORM No. 5.]

SUBPOENA TO ALLEGED BANKRUPT.

United States of America, \_\_\_\_\_ District of \_\_\_\_\_.

To \_\_\_\_\_, in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the \_\_\_\_\_ district of \_\_\_\_\_, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—, \_\_\_\_\_ to answer to a petition filed by \_\_\_\_\_ in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable \_\_\_\_\_, judge of said court, and the seal thereof, at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

{ Seal of  
the court. }

\_\_\_\_\_, Clerk.

[FORM No. 6.]

DENIAL OF BANKRUPTCY.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of

In Bankruptcy.

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

And now the said \_\_\_\_\_ appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [or, he demands that the same may be inquired of by a jury].

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

[Official character.]

[FORM No. 7.]

ORDER FOR JURY TRIAL.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of

In Bankruptcy.

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

Upon the demand in writing filed by \_\_\_\_\_, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.

{ Seal of  
the court. }

\_\_\_\_\_, Clerk.

## [FORM No. 8.]

## SPECIAL WARRANT TO MARSHAL.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_

In Bankruptcy.

To the marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, filed against \_\_\_\_\_, of the county of \_\_\_\_\_ and state of \_\_\_\_\_, in said district, and said petition is still pending; and whereas it satisfactorily appears that said \_\_\_\_\_ has committed an act of bankruptcy [or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said \_\_\_\_\_, and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable \_\_\_\_\_, judge of the said court, and the seal thereof, at \_\_\_\_\_, in said district, on the \_\_\_\_\_ of \_\_\_\_\_, A. D. 189—.

{ Seal of  
the court. }

\_\_\_\_\_,  
Clerk.

## RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named \_\_\_\_\_, and of all his deeds, books of account, and papers which have come to my knowledge.

\_\_\_\_\_,  
Marshal [or Deputy Marshal].

## Fees and expenses.

- |  |  |
|--|--|
| 1. Service of warrant.....   |  |
| 2. Necessary travel, at the rate of six cents a mile each way.....           |  |
| 3. Actual expenses in custody of property and other services as follows..... |  |

[Here state the particulars.]

\_\_\_\_\_,  
Marshal [or Deputy Marshal].

District of \_\_\_\_\_, A. D. 18—.

Personally appeared before me the said \_\_\_\_\_, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

\_\_\_\_\_,  
Referee in Bankruptcy.

## [FORM No. 9.]

## BONDS OF PETITIONING CREDITOR.

Know all men by these presents: That we, \_\_\_\_\_, as principal, and \_\_\_\_\_, as sureties, are held and firmly bound unto \_\_\_\_\_, in the full and just sum of \_\_\_\_\_ dollars, to be paid to the said \_\_\_\_\_, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the \_\_\_\_\_ district of \_\_\_\_\_ against the said \_\_\_\_\_, and the said \_\_\_\_\_ has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said \_\_\_\_\_, subject to the further orders of said District Court.

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said \_\_\_\_\_ shall indemnify the said \_\_\_\_\_ for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered in presence of \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]

Approved this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—,

\_\_\_\_\_  
District Judge.

[FORM No. 10.]

BOND TO MARSHAL

Know all men by these presents: That we, \_\_\_\_\_, as principal, and \_\_\_\_\_, as sureties, are held and firmly bound unto \_\_\_\_\_, marshal of the United States for the \_\_\_\_\_ district of \_\_\_\_\_, in the full and just sum of \_\_\_\_\_ dollars, to be paid to the said \_\_\_\_\_, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the \_\_\_\_\_ district of \_\_\_\_\_, against the said \_\_\_\_\_, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said \_\_\_\_\_, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said District Court upon a petition of said \_\_\_\_\_ has ordered the said property to be released to him.

Now, therefore, if the said property shall be released accordingly to the said \_\_\_\_\_, and the said \_\_\_\_\_, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]

Approved this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—,

\_\_\_\_\_  
District Judge.

[FORM No. 11.]

ADJUDICATION THAT DEBTOR IS NOT BANKRUPT.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_

} In Bankruptcy.

At \_\_\_\_\_, in said district, on \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, before the Honorable \_\_\_\_\_, judge of the \_\_\_\_\_ district of \_\_\_\_\_.

This cause came on to be heard at \_\_\_\_\_, in said court, upon the petition of \_\_\_\_\_ that \_\_\_\_\_ be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [Here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had.]

And thereupon, and upon consideration of the proofs in said cause [and the arguments of counsel thereon, if any], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said \_\_\_\_\_ was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable \_\_\_\_\_, judge of said court, and the seal thereof, at \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

{ Seal of  
the court. }

\_\_\_\_\_,  
Clerk.

[FORM No. 12.]

ADJUDICATION OF BANKRUPTCY.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_

} In Bankruptcy.

Bankrupt .

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, before the Honorable \_\_\_\_\_, judge of said court in bankruptcy, the petition of \_\_\_\_\_ that \_\_\_\_\_ be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said \_\_\_\_\_ is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable \_\_\_\_\_, judge of said court, and the seal thereof, at \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

{ Seal of  
the court. }

\_\_\_\_\_,  
Clerk.

[FORM No. 13.]

APPOINTMENT, OATH, AND REPORT OF APPRAISERS.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_

} In Bankruptcy.

Bankrupt .

It is ordered that \_\_\_\_\_, of \_\_\_\_\_, \_\_\_\_\_ of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_,  
Referee in Bankruptcy.

\_\_\_\_\_ District of \_\_\_\_\_, ss:

Personally appeared the within-named \_\_\_\_\_ and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_,  
[Official character.]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

	Dollars.	Cents.

In witness whereof we hereunto set our hands, at ———, this ——— day of ———, A. D. 18—.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[FORM No. 14.]

ORDER OF REFERENCE.

In the District Court of the United States for the ——— District of ———.

In the matter of	}	In Bankruptcy.
Bankrupt .		

Whereas, ———, of ———, in the county of ——— and district aforesaid, on the ——— day of ———, A. D. 18—, was duly adjudged a bankrupt upon a petition filed in this court by [or, against] him on the ——— day of ———, A. D. 189—, according to the provisions of the acts of Congress relating to bankruptcy.

It is thereupon ordered, that said matter be referred to ———, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said ——— shall attend before said referee on the ——— day of ——— at ———, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said ——— bankruptcy.

Witness the Honorable ———, judge of the said court, and the seal thereof, at ———, in said district, on the ——— day of ———, A. D. 18—.

{ Seal of  
the court. }

Clerk.

[FORM No. 15.]

ORDER OF REFERENCE IN JUDGE'S ABSENCE.

In the District Court of the United States for the ——— District of ———.

In the matter of	}	In Bankruptcy.

Whereas on the ——— day of ———, A. D. 18—, a petition was filed to have ———, of ———, in the county of ——— and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [or, in case of involuntary bankruptcy, on the next day after the last day on which pleadings might have been filed, and none have been filed

by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to \_\_\_\_\_, one of the referees in bankruptcy of this court. to consider said petition and take such proceedings therein as are required by said acts; and that the said \_\_\_\_\_ shall attend before said referee on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—, at \_\_\_\_\_.

Witness my hand and the seal of the said court, at \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

{ Seal of  
the court. }

\_\_\_\_\_,  
Clerk.

[FORM No. 16.]

REFEREE'S OATH OF OFFICE.

I, \_\_\_\_\_, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_,  
District Judge.

[FORM No. 17.]

BOND OF REFEREE.

Know all men by these presents: That we \_\_\_\_\_ of \_\_\_\_\_ as principal, and \_\_\_\_\_ of \_\_\_\_\_ and \_\_\_\_\_ of \_\_\_\_\_, as sureties are held and firmly bound to the United States of America in the sum of \_\_\_\_\_ dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

The condition of this obligation is such that whereas the said \_\_\_\_\_ has been on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, appointed by the Honorable \_\_\_\_\_, judge of the district court of the United States for the \_\_\_\_\_ district of \_\_\_\_\_, a referee in bankruptcy, in and for the county of \_\_\_\_\_, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said \_\_\_\_\_ shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed  
in the presence of

\_\_\_\_\_, [L. S.]  
\_\_\_\_\_, [L. S.]  
\_\_\_\_\_, [L. S.]

Approved this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

\_\_\_\_\_,  
District Judge.

[FORM No. 18.]

NOTICE OF FIRST MEETING OF CREDITORS.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,  
In Bankruptcy.

In the matter of

Bankrupt.

In Bankruptcy.

To the creditors of \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_, and district aforesaid, a bankrupt.

Notice is hereby given that on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, the said \_\_\_\_\_ was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at \_\_\_\_\_ in \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.



at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

\_\_\_\_\_,  
Referee in Bankruptcy.

\_\_\_\_\_, 18—.

[FORM No. 19.]

LIST OF DEBTS PROVED AT FIRST MEETING.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of	}	In Bankruptcy.
Bankrupt .		

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, before \_\_\_\_\_, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolla.	Cts.

\_\_\_\_\_,  
Referee in Bankruptcy.

[FORM No. 20.]

GENERAL LETTER OF ATTORNEY IN FACT WHEN CREDITOR IS NOT REPRESENTED BY ATTORNEY AT LAW.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of	}	In Bankruptcy.
Bankrupt .		

To \_\_\_\_\_:

I, \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_ and State of \_\_\_\_\_, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and

to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

Signed, sealed, and delivered in presence of \_\_\_\_\_.

[L. S.]

Acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

[Official character.]

[FORM NO. 21.]

**SPECIAL LETTER OF ATTORNEY IN FACT.**

In the matter of	}	In Bankruptcy.
Bankrupt .		

To \_\_\_\_\_,

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, before \_\_\_\_\_, or any adjournment thereof, and then and there \_\_\_\_\_ for \_\_\_\_\_ and in \_\_\_\_\_ name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

[L. S.]

In witness whereof I have hereunto signed my name and affixed my seal the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

Signed, sealed, and delivered in presence of \_\_\_\_\_.

Acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

[Official character.]

[FORM NO. 22.]

**APPOINTMENT OF TRUSTEE BY CREDITORS.**

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of	}	In Bankruptcy.
Bankrupt .		

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, before \_\_\_\_\_, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [here insert the names of the newspapers in which notice was published], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_ and State of \_\_\_\_\_, to be the trustee— of the said bankrupt's estate and effects.

Signatures of creditors.	Residences of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered that the above appointment of trustee— be, and the same is hereby approved.

\_\_\_\_\_,  
Referee in Bankruptcy.

[FORM No. 23.]

APPOINTMENT OF TRUSTEE BY REFEREE.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of	}	
Bankrupt .		In Bankruptcy.

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, before \_\_\_\_\_, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_ and State of \_\_\_\_\_, as trustee of the same.

\_\_\_\_\_,  
Referee in Bankruptcy.

[FORM No. 24.]

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of	}	
Bankrupt .		In Bankruptcy.

To \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_, and district aforesaid:

I hereby notify you that you were duly appointed trustee [or one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at \_\_\_\_\_ dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_,  
Referee in Bankruptcy.

[FORM No. 25.]

BOND OF TRUSTEE.

Know all men by these presents: That we, \_\_\_\_\_, of \_\_\_\_\_, as principal, and \_\_\_\_\_, of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, as sureties, are held and firmly bound unto the United States of America in the sum of \_\_\_\_\_ dollars, in

lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

The condition of this obligation is such, that whereas the above-named \_\_\_\_\_ was, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—, appointed trustee in the case pending in bankruptcy in said court, wherein \_\_\_\_\_ is the bankrupt, and he, the said \_\_\_\_\_, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said \_\_\_\_\_, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in  
presence of

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_, [SEAL.]  
\_\_\_\_\_, [SEAL.]  
\_\_\_\_\_, [SEAL.]

[FORM No. 26.]

ORDER APPROVING TRUSTEE'S BOND.

At a court of bankruptcy, held in and for the \_\_\_\_\_ District of \_\_\_\_\_, at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 189—.

Before \_\_\_\_\_, referee in bankruptcy, in the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of

In Bankruptcy.

Bankrupt .

It appearing to the Court \_\_\_\_\_, of \_\_\_\_\_, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors [or by order of the court], to wit, in the sum of \_\_\_\_\_ dollars, it is ordered that the said bond be, and the same is hereby, approved.

\_\_\_\_\_,  
Referee in Bankruptcy.

[FORM No. 27.]

ORDER THAT NO TRUSTEE BE APPOINTED.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of

In Bankruptcy.

Bankrupt .

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of

the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

*Referee in Bankruptcy.*

[FORM No. 28.]

ORDER FOR EXAMINATION OF BANKRUPT.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

<p style="text-align: center;">In the matter of</p>  <p style="text-align: center;">Bankrupt .</p>	}	<p>In Bankruptcy.</p>
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At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—. Upon the application of \_\_\_\_\_, trustee of said bankrupt [or creditor of said bankrupt], it is ordered that said bankrupt attend before \_\_\_\_\_, one of the referees in bankruptcy of this court, at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

\_\_\_\_\_, *Referee in Bankruptcy.*

[FORM No. 29.]

EXAMINATION OF BANKRUPT OR WITNESS.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

<p style="text-align: center;">In the matter of</p>  <p style="text-align: center;">Bankrupt .</p>	}	<p>In Bankruptcy.</p>
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At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, before \_\_\_\_\_, one of the referees in bankruptcy of said court. \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_, and state of \_\_\_\_\_, being duly sworn and examined at the time and place above mentioned, upon his oath says, [Here insert substance of examination of party.]

\_\_\_\_\_, *Referee in Bankruptcy.*

[FORM No. 30.]

SUMMONS TO WITNESS.

To \_\_\_\_\_:

Whereas \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_, and state of \_\_\_\_\_, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the \_\_\_\_\_ district of \_\_\_\_\_,

These are to require you, to whom this summons is directed, personally to be and appear before \_\_\_\_\_, one of the referees in bankruptcy of the said court, at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable \_\_\_\_\_, judge of said court, and the seal thereof at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

\_\_\_\_\_, *Clerk.*

## RETURN OF SUMMONS TO WITNESS.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of \_\_\_\_\_

In Bankruptcy.

*Bankrupt .*

On this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, before me came \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_ and state of \_\_\_\_\_, and makes oath, and says that he did, on \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—, personally serve \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_ and state of \_\_\_\_\_, with a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

[FORM NO. 31.]

## PROOF OF UNSECURED DEBT.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of \_\_\_\_\_

In Bankruptcy.

*Bankrupt .*

At \_\_\_\_\_, in said district of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—, came \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_, in said district of \_\_\_\_\_, and made oath, and says that \_\_\_\_\_, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of \_\_\_\_\_ dollars; that the consideration of said debt is as follows: \_\_\_\_\_

that no part of said debt has been paid [except \_\_\_\_\_];

that there are no set-offs or counterclaims to the same [except \_\_\_\_\_];

and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—. *Creditor.*

[Official character.]

[FORM NO. 32.]

## PROOF OF SECURED DEBT.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of \_\_\_\_\_

In Bankruptcy.

*Bankrupt .*

At \_\_\_\_\_, in said district of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—. came \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_, in said district of \_\_\_\_\_, and

made oath, and says that \_\_\_\_\_, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of \_\_\_\_\_ dollars; that the consideration of said debt is as follows \_\_\_\_\_; that no part of said debt has been paid [except \_\_\_\_\_]; that there are no set-offs or counterclaims to the same [except \_\_\_\_\_]; and that the only securities held by this deponent for said debt are the following: \_\_\_\_\_

\_\_\_\_\_,  
Creditor.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18\_\_\_\_.

\_\_\_\_\_,  
[Official character.]

[FORM NO. 33.]

PROOF OF DEBT DUE CORPORATION.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of

In Bankruptcy.

Bankrupt .

At \_\_\_\_\_, in said district of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18\_\_\_\_, came \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_, and state of \_\_\_\_\_, and made oath and says that he is \_\_\_\_\_ of the \_\_\_\_\_, a corporation incorporated by and under the laws of the state of \_\_\_\_\_, and carrying on business at \_\_\_\_\_, in the county of \_\_\_\_\_ and state of \_\_\_\_\_, and that he is duly authorized to make this proof, and says that the said \_\_\_\_\_, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition and still is justly and truly indebted to said corporation in the sum of \_\_\_\_\_ dollars; that the consideration of said debt is as follows: \_\_\_\_\_

\_\_\_\_\_; that no part of said debt has been paid [except \_\_\_\_\_]; that there are no set-offs or counterclaims to the same [except \_\_\_\_\_]; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

\_\_\_\_\_,  
of said Corporation.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18\_\_\_\_.

\_\_\_\_\_,  
[Official character.]

[FORM NO. 34.]

PROOF OF DEBT BY PARTNERSHIP.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of

In Bankruptcy.

Bankrupt .

At \_\_\_\_\_, in said district of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18\_\_\_\_, came \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_, in said district of \_\_\_\_\_, and made oath and says that he is one of the firm of \_\_\_\_\_, consisting of himself and \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_ and state of \_\_\_\_\_; that the said \_\_\_\_\_, the person by [or against] whom a petition for adjudication

of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of \_\_\_\_\_ dollars; that the consideration of said debt is as follows: \_\_\_\_\_;

that no part of said debt has been paid [except \_\_\_\_\_];

that there are no set-offs or counterclaims to the same [except \_\_\_\_\_];

and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, \_\_\_\_\_, *Creditor.*

[Official character.]

[FORM NO. 35.]

PROOF OF DEBT BY AGENT OR ATTORNEY.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_

In Bankruptcy.

Bankrupt .

At \_\_\_\_\_, in said district of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, came \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_, and state of \_\_\_\_\_, attorney [or authorized agent] of \_\_\_\_\_, in the county of \_\_\_\_\_, and state of \_\_\_\_\_, and made oath and says that \_\_\_\_\_, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said \_\_\_\_\_, in the sum of \_\_\_\_\_ dollars; that the consideration of said debt is as follows: \_\_\_\_\_;

that no part of said debt has been paid [except \_\_\_\_\_];

and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use had or received any manner of security for said debt whatever. And this deponent further says, that this deposition cannot be made by the claimant in person because \_\_\_\_\_

and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, \_\_\_\_\_.

[Official character.]

[FORM NO. 36.]

PROOF OF SECURED DEBT BY AGENT.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_

In Bankruptcy.

Bankrupt .

At \_\_\_\_\_, in said district of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, came \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_, and state of \_\_\_\_\_, attorney



[or authorized agent] of \_\_\_\_\_, in the county of \_\_\_\_\_, and state of \_\_\_\_\_, and made oath, and says that \_\_\_\_\_, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said \_\_\_\_\_ in the sum of \_\_\_\_\_ dollars; that the consideration of said debt is as follows:

\_\_\_\_\_;  
that no part of said debt has been paid [except \_\_\_\_\_];

that there are no set-offs or counterclaims to the same [except \_\_\_\_\_];

and that the only securities held by said \_\_\_\_\_ for said debt are the following \_\_\_\_\_;

and this deponent further says that this deposition cannot be made by the claimant in person because \_\_\_\_\_;

and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

[Official character.]

[FORM No. 37.]

**AFFIDAVIT OF LOST BILL, OR NOTE.**

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_

In Bankruptcy.

Bankrupt.

On this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, at \_\_\_\_\_, came \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_, and state of \_\_\_\_\_, and makes oath and says that the bill of exchange [or note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit, \_\_\_\_\_

and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said \_\_\_\_\_, or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [or note], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

*Bill or note above referred to.*

Date.	Drawer or maker.	Acceptor.	Sum.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

[Official character.]

## [FORM No. 38.]

## ORDER REDUCING CLAIM.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

in the matter of	}	In Bankruptcy.
Bankrupt .		

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

Upon the evidence submitted to this court upon the claim of \_\_\_\_\_ against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of \_\_\_\_\_, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of \_\_\_\_\_, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—].

\_\_\_\_\_,  
Referee in Bankruptcy.

## [FORM No. 39.]

## ORDER EXPUNGING CLAIM.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of	}	In Bankruptcy.
Bankrupt .		

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

Upon the evidence submitted to the court upon the claim of \_\_\_\_\_ against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

\_\_\_\_\_,  
Referee in Bankruptcy.

## [FORM No. 40.]

## LIST OF CLAIMS AND DIVIDENDS TO BE RECORDED BY REFEREE AND BY HIM DELIVERED TO TRUSTEE.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of	}	In Bankruptcy.
Bankrupt .		

At \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

A list of debts proved and claimed under the bankruptcy of \_\_\_\_\_, with \_\_\_\_\_ dividend at the rate of \_\_\_\_\_ per cent this day declared thereon by \_\_\_\_\_, a referee in bankruptcy.

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.

\_\_\_\_\_,  
*Referee in Bankruptcy.*

[FORM No. 41.]

NOTICE OF DIVIDEND.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of	}	In Bankruptcy.
Bankrupt .		

At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

To \_\_\_\_\_,  
Creditor of \_\_\_\_\_, bankrupt:

I hereby inform you that you may, on application at my office, \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, or on any day thereafter, between the hours of \_\_\_\_\_, receive a warrant for the \_\_\_\_\_ dividend due to you out of the above estate. If you cannot personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

\_\_\_\_\_, *Trustee.*

CREDITOR'S LETTER TO TRUSTEE.

To \_\_\_\_\_,  
Trustee in bankruptcy of the estate of \_\_\_\_\_, bankrupt:

Please deliver to \_\_\_\_\_ the warrant for dividend payable out of the said estate to me.

\_\_\_\_\_, *Creditor.*

[FORM No. 42.]

## PETITION AND ORDER FOR SALE BY AUCTION OF REAL ESTATE.

In the District Court of the United States for the ——— District of ———.

In the matter of

In Bankruptcy.

Bankrupt .

Respectfully represents ———, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: [*here describe it and its estimated value*] should be sold by auction, in lots or parcels, and upon terms and conditions, as follows: ———

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this ——— day of ———, A. D. 18—.

———, Trustee.

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [or after hearing ——— in favor of said petition and ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this ——— day of ———, A. D. 189—.

———, Referee in Bankruptcy.

[FORM No. 43.]

## PETITION AND ORDER FOR REDEMPTION OF PROPERTY FROM LIEN.

In the District Court of the United States for the ——— District of ———.

In the matter of

In Bankruptcy.

Bankrupt .

Respectfully represents ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [or, if the property be personal property, has been pledged or deposited and is subject to a lien] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ———, being the amount of said lien, in order to redeem said property therefrom.

Dated this ——— day of ———, A. D. 18—.

———, Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [or after hearing ——— in favor of said petition and ——— in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ———, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this ——— day of ———, A. D. 189—.

———, Referee in Bankruptcy.

[FORM No. 44.]

PETITION AND ORDER FOR SALE SUBJECT TO LIEN.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_

In Bankruptcy.

Bankrupt .

Respectfully represents \_\_\_\_\_, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate to wit: [here describe the estate or property and its estimated value] is subject to a mortgage [describe mortgage], or to a conditional contract [describe it], or to a lien [describe the origin and nature of the lien], or [if the property be personal property] has been pledged or deposited and is subject to a lien for [describe the nature of the lien], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien, or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

\_\_\_\_\_, Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [or after hearing \_\_\_\_\_ in favor of said petition and \_\_\_\_\_ in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [or, at private sale], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

\_\_\_\_\_, Referee in Bankruptcy.

[FORM No. 45.]

PETITION AND ORDER FOR PRIVATE SALE.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_

In Bankruptcy.

Bankrupt .

Respectfully represents \_\_\_\_\_, duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit, \_\_\_\_\_

it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit: \_\_\_\_\_

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

\_\_\_\_\_, Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [or after hearing \_\_\_\_\_ in favor of said petition and \_\_\_\_\_ in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

\_\_\_\_\_, Referee in Bankruptcy.

## [FORM No. 46.]

## PETITION AND ORDER FOR SALE OF PERISHABLE PROPERTY.

In the District Court of the United States for the ——— District of ———.

In the matter of	}	In Bankruptcy.
Bankrupt .		

Respectfully represents ———, the said bankrupt, [or, a creditor, or the receiver, or the trustee of the said bankrupt's estate.]

That a part of the said estate, to wit, ———

now in ———, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore, he prays the court to order that the same be sold immediately as aforesaid.

Dated this ——— day of ———, A. D. 189—.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt, [or without notice to the creditors], now, after due hearing, no adverse interest being represented thereat, [or after hearing ——— in favor of said petition and ——— in opposition thereto] I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this ——— day of ———, A. D. 189—.

\_\_\_\_\_,  
Referee in Bankruptcy.

## [FORM No. 47.]

## TRUSTEE'S REPORT OF EXEMPTED PROPERTY.

In the District Court of the United States for the ——— District of ———.

In the matter of	}	In Bankruptcy.
Bankrupt .		

At ———, on the ——— day of ———, 18—.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.

General head.	Particular description.	Value.	
		Dolls.	Cts.
Military uniforms, arms, and equipments.....			
Property exempted by state laws.....			

\_\_\_\_\_,  
Trustee.



[FORM No. 50.]

## OATH TO FINAL ACCOUNT OF TRUSTEE.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_

In Bankruptcy.

Bankrupt .

On this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, before me comes \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_ and state of \_\_\_\_\_, and makes oath, and says that he was, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed containing \_\_\_\_\_ sheets of paper, the first sheet whereof is marked with the letter \_\_\_\_\_ [reference may here also be made to any prior account filed by said trustee] is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt, and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts.

Subscribed and sworn to before me at \_\_\_\_\_, in said \_\_\_\_\_ district of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

[Official character.]

[FORM No. 51.]

## ORDER ALLOWING ACCOUNT AND DISCHARGING TRUSTEE.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_

In Bankruptcy.

Bankrupt .

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered, that the same be allowed, and that the said trustee be discharged of his trust.

Referee in Bankruptcy.

[FORM No. 52.]

## PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of \_\_\_\_\_

In Bankruptcy.

Bankrupt .

To the Honorable \_\_\_\_\_,

Judge of the District Court for the \_\_\_\_\_ District of \_\_\_\_\_:

The petition of \_\_\_\_\_, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that \_\_\_\_\_, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to wit: [here set forth the particular cause or causes for which such removal is requested.]

Wherefore \_\_\_\_\_ pray that notice may be served upon said \_\_\_\_\_, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.



[FORM No. 53.]

## NOTICE OF PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of

In Bankruptcy.

Bankrupt .

At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—,  
To \_\_\_\_\_,

Trustee of the estate of \_\_\_\_\_, bankrupt:

You are hereby notified to appear before this court, at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, at \_\_\_\_\_ o'clock —. m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of \_\_\_\_\_, one of the creditors of said bankrupt, filed in this court on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, in which it is alleged [*here insert the allegation of the petition*].

\_\_\_\_\_, Clerk.

[FORM No. 54.]

## ORDER FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of

In Bankruptcy.

Bankrupt .

Whereas \_\_\_\_\_, of \_\_\_\_\_, did, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, present his petition to this court, praying that for the reasons therein set forth, \_\_\_\_\_, the trustee of the estate of said \_\_\_\_\_, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said \_\_\_\_\_ and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said \_\_\_\_\_ be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said \_\_\_\_\_, trustee [or, out of the estate of the said \_\_\_\_\_, subject to prior charges].

Witness the Honorable \_\_\_\_\_, judge of the said court, and the seal thereof, at \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_, Clerk.

Seal of  
the court

[FORM No. 55.]

## ORDER FOR CHOICE OF NEW TRUSTEE.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of

In Bankruptcy.

Bankrupt .

At \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

Whereas by reason of the removal [or the death or resignation] of \_\_\_\_\_, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered, that a meeting of the creditors of said bankrupt be held at \_\_\_\_\_, in \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

\_\_\_\_\_,  
*Referee in Bankruptcy.*

[FORM No. 56.]

CERTIFICATE BY REFEREE TO JUDGE.

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_.

In the matter of

In Bankruptcy.

*Bankrupt.*

I, \_\_\_\_\_, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.]

And the said question is certified to the judge for his opinion thereon.

Dated at \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_,  
*Referee in Bankruptcy.*

[FORM No. 57.]

BANKRUPT'S PETITION FOR DISCHARGE.

In the matter of

In Bankruptcy.

*Bankrupt.*

To the Honorable \_\_\_\_\_,

Judge of the District Court of the United States for the District of \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_ and state of \_\_\_\_\_, in said district, respectfully represents that on the \_\_\_\_\_ day of \_\_\_\_\_ last past he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

\_\_\_\_\_, *Bankrupt.*

ORDER OF NOTICE THEREON.

District of \_\_\_\_\_, ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—, on reading the foregoing petition, it is—

Ordered by the court, that a hearing be had upon the same on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—, before said court, at \_\_\_\_\_, in said district, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon; and that notice thereof be published in \_\_\_\_\_, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable \_\_\_\_\_, judge of the said court, and the seal thereof, at \_\_\_\_\_, in said district, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189—.

( Seal of )  
} the court }

\_\_\_\_\_,  
*Clerk.*

\_\_\_\_\_ hereby depose, on oath, that the foregoing order was published in the \_\_\_\_\_  
 \_\_\_\_\_ on the following \_\_\_\_\_ days, viz:  
 On the \_\_\_\_\_ day of \_\_\_\_\_ and on the \_\_\_\_\_ day of \_\_\_\_\_, in the year 189\_\_\_\_.

District of \_\_\_\_\_.

Personally appeared \_\_\_\_\_, 189\_\_\_\_,  
 and made oath that the foregoing statement by  
 him subscribed is true.  
 Before me,

\_\_\_\_\_,  
 [Official character.]

I hereby certify that I have on this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189\_\_\_\_, sent by mail  
 copies of the above order, as therein directed.

\_\_\_\_\_,  
 Clerk.

[FORM No. 58.]

**SPECIFICATION OF GROUNDS OF OPPOSITION TO BANKRUPT'S DISCHARGE.**

In the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

In the matter of	}	
		In Bankruptcy.
Bankrupt .		

\_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_ and state of \_\_\_\_\_, a party interested in the estate of said \_\_\_\_\_, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [Here specify the grounds of opposition.]

\_\_\_\_\_, Creditor.

[FORM No. 59.]

**DISCHARGE OF BANKRUPT.**

District Court of the United States,  
 \_\_\_\_\_ District of \_\_\_\_\_.

Whereas, \_\_\_\_\_, of \_\_\_\_\_, in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said \_\_\_\_\_ be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189\_\_\_\_, on which day the petition for adjudication was filed \_\_\_\_\_ him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable \_\_\_\_\_, judge of said District Court, and the seal thereof this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 189\_\_\_\_.

{ Seal of  
 the court }

\_\_\_\_\_,  
 Clerk.

[FORM No. 60.]

**PETITION FOR MEETING TO CONSIDER COMPOSITION.**

District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_,

	}	
		In Bankruptcy.
Bankrupt .		

To the Honorable \_\_\_\_\_, Judge of the District Court of the United States for the \_\_\_\_\_ District of \_\_\_\_\_:

The above-named bankrupt respectfully represent that a composition of \_\_\_\_\_ per cent upon all unsecured debts, not entitled to a priority \_\_\_\_\_ in satisfaction of \_\_\_\_\_ debts has been proposed by \_\_\_\_\_ to \_\_\_\_\_ creditors, as provided by

the acts of Congress relating to bankruptcy, and ——— verily believe that the said composition will be accepted by a majority in number and in value of ——— creditors whose claims are allowed.

Wherefore, he pray that a meeting of ——— creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

\_\_\_\_\_,  
*Bankrupt.*

[FORM No. 61.]

APPLICATION FOR CONFIRMATION OF COMPOSITION.

In the District Court of the United States, for the ——— District of ———.

In the matter of

In Bankruptcy.

*Bankrupt.*

To the Honorable ———, Judge of the District Court of the United States for the ——— District of ———.

At ———, in said district, on the ——— day of ———, A. D. 189—, now comes ———, the above-named bankrupt, and respectfully represents to the court that, after he had been examined in open court [or at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of ——— dollars, has been deposited, subject to the order of the judge, in the ——— National Bank, of ———, a designated depository of money in bankruptcy cases.

Wherefore the said ——— respectfully asks that the said composition may be confirmed by the court.

\_\_\_\_\_, *Bankrupt.*

[FORM No. 62.]

ORDER CONFIRMING COMPOSITION.

In the District Court of the United States, for the ——— District of ———.

In the matter of

In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, premises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable ———, judge of said court, and the seal thereof, this ——— day of ———, A. D. 189—.

{ Seal of }  
{ the court }

\_\_\_\_\_, *Clerk.*

[FORM No. 63.]

ORDER OF DISTRIBUTION ON COMPOSITION.

UNITED STATES OF AMERICA:

In the District Court of the United States for the ——— District of ———.

<p style="text-align: center;">In the matter of</p> <hr/> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	<p>In Bankruptcy.</p>
--	---	-----------------------

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

Witness the Honorable ———, judge of said court, and the seal thereof, this ——— day of ———, A. D. 189—.

{ Seal of  
the court }

———, Clerk.

**SEC. 31. COMPUTATION OF TIME.**—*a* Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday. [(1898) 30 Stat. L. 554.]

**Computation of time.**—In accordance with section 31 time shall be computed by excluding the first day and including the last. *Day v. Beck, etc., Hardware Co., (C. C. A. 5th Cir. 1902) 114 Fed. 834, 8 Am. Bankr. Rep. 175; Pittsburgh Laundry Supply Co. v. Imperial Laundry Co., (C. C. A. 3d Cir. 1907) 154 Fed. 662, 18 Am. Bankr. Rep. 756.*

*Where the last day falls on Sunday or on a holiday, one has until the next day thereafter which is not a Sunday or a holiday, in which to act. Matter of Amos, (S. D. Ga. 1908) 19 Am. Bankr. Rep. 804.*

**Computation of time by months or years.**—While the first six words of section 31 would seem to indicate that it was not intended to apply where the time is enumerated by months or years, the following words, "or in any proceeding in bankruptcy," make it applicable to any proceeding in bankruptcy where the

number of days is material. *In re Holmes, (D. C. Vt. 1908) 165 Fed. 225, 21 Am. Bankr. Rep. 339.*

Thus in the dissolution of attachments made within four months, section 31 has been applied in computing these months. *In re Warner, (D. C. Conn. 1906) 144 Fed. 987, 16 Am. Bankr. Rep. 519; In re Holmes, (D. C. Vt. 1908) 165 Fed. 225, 21 Am. Bankr. Rep. 339; Jones v. Stevens, (1901) 5 Am. Bankr. Rep. 571, 94 Me. 582, 48 Atl. 170.*

Where a general assignment was made by the debtor Oct. 1, 1900, and recorded on that day at 10.08 A. M. and the petition in bankruptcy was filed against the debtor at 4.45 P. M., Feb. 1, 1901, it was held that the petition was filed within four months after the date of the recording of the general assignment. *In re Tonawanda St. Planing Mill Co., (D. C. N. Y. 1901) 6 Am. Bankr. Rep. 38.*

**SEC. 32. TRANSFER OF CASES.**—*a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be

transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest. [(1898) 30 Stat. L. 554.]

**Transfer for convenience of parties.—**

Where petitions are filed against the same individual, partnership, or corporation, in different courts of bankruptcy, each of which has jurisdiction thereof, such cases shall be transferred to, and consolidated in, the court which can proceed therewith for the greatest convenience of the parties in interest. *In re Sears*, (W. D. N. Y. 1901) 112 Fed. 58, 7 Am. Bankr. Rep. 279, (C. C. A. 2d Cir. 1902) 117 Fed. 294, 8 Am. Bankr. Rep. 713; *In re United Button Co.*, (S. D. N. Y. 1904) 132 Fed. 378, 12 Am. Bankr. Rep. 761; *In re General Metals Co.*, (S. D. N. Y. 1904) 133 Fed. 84, 12 Am. Bankr. Rep. 770; *In re Southwestern Bridge, etc., Co.*, (D. C. Kan. 1904) 133 Fed. 568, 13 Am. Bankr. Rep. 304; *Kyle Lumber Co. v. Bush*, (C. C. A. 5th Cir. 1905) 133 Fed. 688, 13 Am. Bankr. Rep. 535; *In re United Button Co.*, (D. C. Del. 1904) 137 Fed. 668, 13 Am. Bankr. Rep. 454; *In re Sterne*, (E. D. Tex. 1911) 190 Fed. 70.

The words "*parties in interest*" are not limited to the unsecured creditors of the bankrupt, but include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings. *In re United Button Co.*, (D. C. Del. 1904) 137 Fed. 668, 13 Am. Bankr. Rep. 454.

**The proximity of the place of business of a bankrupt to the court entertaining proceedings in bankruptcy,** and the proximity of a majority of the bankrupt's creditors in number or amount of claims, though persuasive, is not conclusive in determining the court which shall assume final jurisdiction of the proceedings commenced in several districts in courts having concurrent jurisdiction. *In re United Button Co.*, (D. C. Del. 1904) 137 Fed. 668, 13 Am. Bankr. Rep. 454.

**Filing first petition in court of domicile gives exclusive jurisdiction.—**Where a petition was first filed against a corporation in the district of its domicile, which was followed by a prompt adjudication thereon, before a hearing on petitions filed in the meantime in other districts, the court of the domicile acquires exclusive jurisdiction over all proceedings in the case; and the courts in other districts will stay the proceedings therein. *In re United Button Co.*, (S. D. N. Y. 1904) 132 Fed. 378, 12 Am. Bankr. Rep. 761.

**Intermingled business transactions of two corporations.—**Where the business of two corporations, each of which was petitioned against in bankruptcy proceedings which were instituted in different jurisdictions, was so intermingled that it was considered necessary, in order to protect

the interests of the creditors, that the two estates should be administered together, it was held that the court first acquiring jurisdiction should retain it and proceed to a final adjudication and determination of the rights of the creditors in the joint property. *In re Southwestern Bridge, etc., Co.*, (D. C. Kan. 1904) 133 Fed. 568, 13 Am. Bankr. Rep. 304.

**Transfer in partnership cases.—**A consolidation and transfer may be made where different petitions are filed against partnerships, as well as where petitions are filed against individual members of a partnership, in different jurisdictions. *In re Sears*, (W. D. N. Y. 1901) 112 Fed. 58, 7 Am. Bankr. Rep. 279.

**Transfer of petitions against corporations.—**The word "individual" as used in general order in bankruptcy No. 6, which supplements section 32 in providing for the transfer of cases where more than one petition has been filed against the same person, includes a corporation. *In re United Button Co.*, (S. D. N. Y. 1904) 132 Fed. 378, 12 Am. Bankr. Rep. 761; *In re United Button Co.*, (D. C. Del. 1904) 137 Fed. 668, 13 Am. Bankr. Rep. 454.

**First hearing in district of domicile.—**General order in bankruptcy No. 6 provides that where two or more petitions are filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile; and it has been held that the word "domicile," so used, means the domicile which has existed during the greater portion of the six months immediately preceding the filing of the petition in bankruptcy. *In re Isaacson*, (E. D. N. Y.) 1908) 161 Fed. 779, 20 Am. Bankr. Rep. 430.

**Voluntary and involuntary proceedings included.—**Section 32 applies not only to the case of two or more involuntary petitions being filed, but also to a case where an involuntary petition is presented in one district, and the debtor's voluntary petition in another. *In re Waxelbaum*, (S. D. N. Y. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392.

**Clerk of court related to bankrupt.—**Relationship between the deputy clerk of the District Court where the petition was entered and the bankrupt is sufficient ground for transferring the case to another seat of the court in the same division and district, at which latter place the record was ordered to be filed and docketed, and where future proceedings were to be had. *Bray v. Cobb*, (1898) 91 Fed. 102.

## CHAPTER V.

## OFFICERS, THEIR DUTIES AND COMPENSATION.

SEC. 33. CREATION OF TWO OFFICES.—*a* [Referee and trustee.] The offices of referee and trustee are hereby created. [(1898) 30 Stat. L. 555.]

SEC. 34. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.—*a* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction,

(1) [Appointment and removal of referees.] appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and

Who may appoint referee.—*A United States district judge*, even though a judge of the northern and middle districts of Alabama, has no jurisdiction, while holding court in the middle district thereof, to make an order appointing a referee in bankruptcy for the northern district of Alabama. *In re Steele*, (N. D. Ala. 1908) 161 Fed. 886, 20 Am. Bankr. Rep. 446.

Where there are two district judges of a federal district, having equal and concurrent authority, one of such judges, sitting in bankruptcy within the district, the other judge being absent from the district, constitutes the court of bankruptcy, and has power to make a valid and binding appointment of a referee in bankruptcy,

and the absent judge cannot subsequently come into the district, while the judge making the appointment is holding court therein, and, without the latter's concurrence, set aside such appointment and remove the appointee from office. *In re Steele*, (N. D. Ala. 1907) 156 Fed. 853, 19 Am. Bankr. Rep. 671.

A District Court, sitting as a court of bankruptcy, which is a court held by one judge, has power to appoint or remove a referee, although there may be another judge who is also authorized to hold the same court. *Birch v. Steele*, (C. C. A. 5th Cir. 1908) 165 Fed. 577, 21 Am. Bankr. Rep. 539.

(2) [Districts of referees.] designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district. [(1898) 30 Stat. L. 555.]

SEC. 35. QUALIFICATIONS OF REFEREES.—*a* Individuals shall not be eligible to appointment as referees unless they are respectively

(1) [Competent.] competent to perform the duties of that office;

(2) [Not officeholders.] not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public;

(3) [Not related to judges.] not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and

(4) [Residents of districts.] residents of, or have their offices in, the territorial districts for which they are to be appointed. [(1898) 30 Stat. L. 555.]

SEC. 36. OATHS OF OFFICE OF REFEREES.—*a* Referees shall take the same oath of office as that prescribed for judges of United States courts. [(1898) 30 Stat. L. 555.]

Form No. 16 is "referee's oath of office."

SEC. 37. NUMBER OF REFEREES.—*a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy. [(1898) 30 Stat. L. 555.]

SEC. 38. JURISDICTION OF REFEREES.—*a* Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to [(1898) 30 Stat. L. 555.]

**Review of proceedings had before referees.**  
—The right of review provided for by the statute extends to every act of the referee in bankruptcy. *In re Richard*, (E. D. N. C. 1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506; *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 956; *In re Steed*, (E. D. N. C. 1901) 107 Fed. 682, 6 Am. Bankr. Rep. 73; *In re Carver*, (E. D. N. C. 1902) 113 Fed. 138, 7 Am. Bankr. Rep. 539; *In re Mammoth Pine Lumber Co.*, (W. D. Ark. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651; *In re Yost*, (M. D. Pa. 1902) 117 Fed. 792, 9 Am. Bankr. Rep. 154; *In re Miner*, (D. C. Ore. 1902) 117 Fed. 953, 9 Am. Bankr. Rep. 100; *In re Swift*, (D. C. Mass. 1902) 118 Fed. 348, 9 Am. Bankr. Rep. 237; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541; *In re Kurtz*, (E. D. Pa. 1903) 125 Fed. 992, 11 Am. Bankr. Rep. 129; *In re Shea*, (C. C. A. 1st Cir. 1903) 126 Fed. 153, 11 Am. Bankr. Rep. 209; *In re Taft*, (C. C. A. 6th Cir. 1904) 133 Fed. 511, 13 Am. Bankr. Rep. 419; *In re Milgram*, (E. D. Pa. 1904) 133 Fed. 802, 13 Am. Bankr. Rep. 337; *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11; *In re A. L. Robertshaw Mfg. Co.*, (E. D. Pa. 1905) 135 Fed. 220; *Crim v. Woodford*, (C. C. A. 4th Cir. 1905) 136 Fed. 34, 14 Am. Bankr. Rep. 306; *In re Romine*, (N. D. W. Va. 1905) 138 Fed. 837, 14 Am. Bankr. Rep. 785, *affirmed* (C. C. A. 4th Cir. 1906) 16 Am. Bankr. Rep. 210; *Ellis v. Krulewitch*, (C. C. A. 8th Cir. 1905) 141 Fed. 954, 15 Am. Bankr. Rep. 615; *In re Wilde*, (C. C. A. 2d Cir. 1906) 144 Fed. 972, 16 Am. Bankr. Rep. 386; *In re Home Discount Co.*, (N. D. Ala. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168; *In re Foss*, (D. C. Me. 1906) 147 Fed. 790, 17 Am. Bankr. Rep. 439; *In re People's Dept. Store Co.*, (W. D. N. Y. 1908) 159 Fed. 286, 20 Am. Bankr. Rep. 244; *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436; *In re Nippon Trading Co.*, (W. D. Wash. 1910) 182 Fed. 959; *In re Co-operative Knitting Mills*, (E. D. N. Y. 1913) 202 Fed. 1016; *In re Holden*, (C. C. A. 6th Cir. 1913) 203 Fed. 229.

**Petition to review as supersedeas.**—In the absence of statute or rule of court to the contrary, a petition to review or revise an order of a referee in bank-

ruptcy does not of itself operate as a supersedeas; and whether or not it shall have that effect rests in the discretion of the reviewing or reviewed authority in the particular case. *In re Home Discount Co.*, (N. D. Ala. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168.

**Mode of review.**—The general orders in bankruptcy, No. 27, provide that when a bankrupt, creditor, trustee, or other person shall desire a review, by the judge, of any order made by the referee he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon. This order is mandatory. *In re Smith*, (W. D. Tex. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190; *In re Schiller*, (W. D. Va. 1899) 96 Fed. 400, 2 Am. Bankr. Rep. 704; *In re Chambers*, (D. C. R. I. 1900) 98 Fed. 865, 3 Am. Bankr. Rep. 537; *In re T. L. Kelly Dry Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528; *In re Russell*, (N. D. Cal. 1900) 105 Fed. 501, 5 Am. Bankr. Rep. 566; *In re Hawley*, (N. D. Ia. 1902) 116 Fed. 428, 8 Am. Bankr. Rep. 632; *In re Boston Dry Goods Co.*, (C. C. A. 1st Cir. 1903) 125 Fed. 226, 11 Am. Bankr. Rep. 97; *In re Taft*, (C. C. A. 6th Cir. 1904) 133 Fed. 511, 13 Am. Bankr. Rep. 419; *In re Milgram*, (E. D. Pa. 1904) 133 Fed. 802, 13 Am. Bankr. Rep. 337; *In re McIntire*, (N. D. W. Va. 1906) 142 Fed. 596, 16 Am. Bankr. Rep. 85; *In re Home Discount Co.*, (M. D. Ala. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168; *In re Brown*, (S. D. N. Y. 1909) 171 Fed. 281, 22 Am. Bankr. Rep. 496; *In re Clark Coal, etc., Co.*, (W. D. Pa. 1909) 173 Fed. 658, 23 Am. Bankr. Rep. 273; *Craddock-Terry Co. v. Kaufman*, (D. C. Tex. 1909) 175 Fed. 303, 23 Am. Bankr. Rep. 725; *In re Home Discount Co.*, (N. D. Ala. 1906) 17 Am. Bankr. Rep. 175; *In re Turetz*, (E. D. Pa. 1913) 205 Fed. 400.

**Inadvertent filing with clerk, amendable.**—Where a petition to review an order of a referee was inadvertently filed with the clerk of the court, instead of with the referee as required by the general orders in bankruptcy, leave will be granted to correct the error. *In re Nippon Trading Co.*, (W. D. Wash. 1910) 182 Fed. 959, 25 Am. Bankr. Rep. 695.



*Referee's findings and conclusions.*—In every case in bankruptcy, on a petition for discharge and objections thereto sent up for review, the referee should find the facts and state his conclusions of law. *In re Steed*, (E. D. N. C. 1901) 107 Fed. 882, 6 Am. Bankr. Rep. 73.

The provision of the general orders in bankruptcy, No. 27, which requires a referee, on the filing of a petition for the review of an order made by him, to certify a summary of the evidence relating thereto to the judge, should be observed; but where it appears from the referee's certificate that, instead of making a summary, he has returned all the evidence taken, and the matter has been determined by the judge without any motion having been made to require the evidence to be summarized, the proceeding for review will not be invalidated, where it involves substantial matters, because the rule was not observed by the referee. *Crim v. Woodford*, (C. C. A. 4th Cir. 1905) 136 Fed. 34, 14 Am. Bankr. Rep. 302.

*Necessity of petition.*—If there is no petition for review the judge will not review a referee's order, even where the referee certifies the question and recites that due exception was taken to his ruling. *In re Russell*, (N. D. Cal. 1900) 105 Fed. 501, 5 Am. Bankr. Rep. 566. See also *In re Smith*, (W. D. Tex. 1899) 93 Fed. 791 as to necessity of a petition for review setting out the error complained of.

*Time for review.*—There is no provision of the Bankruptcy Act, or of the general orders in bankruptcy, fixing the time within which a petition for the review of an order of a referee must be filed; and it has been quite generally held that, in the absence of a rule of court on the subject, the time within which such a petition may be entertained is discretionary, subject only to the limitation that it must be filed within a reasonable time in view of the general purpose of the act to expedite the proceedings. *In re Smith*, (W. D. Tex. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190; *In re Schiller*, (W. D. Va. 1899) 96 Fed. 400, 2 Am. Bankr. Rep. 704; *In re Chambers*, (D. C. R. I. 1900) 98 Fed. 865, 6 Am. Bankr. Rep. 709; *In re Scott*, (1900) 99 Fed. 404; *In re Russell*, (N. D. Cal. 1900) 105 Fed. 501, 5 Am. Bankr. Rep. 566; *In re New York Economical Printing Co.*, (C. C. A. 2d Cir. 1901) 106 Fed. 839, 5 Am. Bankr. Rep. 697; *In re Hawley*, (N. D. Ia. 1902) 116 Fed. 428, 8 Am. Bankr. Rep. 632; *In re Milgram*, (E. D. Pa. 1904) 133 Fed. 802, 13 Am. Bankr. Rep. 337; *In re Reukauff*, (E. D. Pa. 1905) 135 Fed. 251, 14 Am. Bankr. Rep. 344; *Crim v. Woodford*, (C. C. A. 4th Cir. 1905) 136 Fed. 34, 14 Am. Bankr. Rep. 302; *In re Grant*, (D. C. R. I. 1906) 143 Fed. 661, 16 Am. Bankr. Rep. 256; *Bacon v. Roberts*, (C. C. A.

3d Cir. 1906) 146 Fed. 729, 17 Am. Bankr. Rep. 421; *In re Foss*, (D. C. Me. 1906) 147 Fed. 790, 17 Am. Bankr. Rep. 439; *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216; *In re Verdon Cigar Co.*, (W. D. Mich. 1911) 193 Fed. 813; *In re Octave Mining Co.*, (D. C. Ariz. 1914) 212 Fed. 457.

The right to file a petition for review cannot be so exercised as unreasonably and unnecessarily to delay the distribution of the assets of the bankrupt. *In re Grant*, (D. C. R. I. 1906) 143 Fed. 661, 16 Am. Bankr. Rep. 256.

A motion to vacate an order made by a referee in bankruptcy, on the ground that he was without jurisdiction to make it, should be entertained at any time and disposed of on the merits; the doctrine of laches having no application in such case. *In re Willis W. Russell Card Co.*, (D. C. N. J. 1909) 174 Fed. 202, 23 Am. Bankr. Rep. 300.

By the court rules a petition for revision of a referee's order must be filed within fifteen days. *In re Wink*, (D. C. Md. 1913) 206 Fed. 348.

*Taking exceptions before referee—Necessity.*—The general rule is that exceptions should be duly taken before the referee in bankruptcy, as in other equitable proceedings, so that, on review, the errors complained of may be properly brought to the attention of the court. *In re Carolina Cooperage Co.*, (1899) 96 Fed. 604; *In re Scott*, (E. D. N. C. 1900) 99 Fed. 404, 3 Am. Bankr. Rep. 625; *In re Steed*, (E. D. N. C. 1901) 107 Fed. 632, 6 Am. Bankr. Rep. 73; *In re Covington*, (E. D. N. C. 1901) 110 Fed. 143, 6 Am. Bankr. Rep. 373; *In re Carver*, (1902) 113 Fed. 138; *In re Hawley*, (N. D. Ia. 1902) 116 Fed. 428, 8 Am. Bankr. Rep. 632; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541; *In re People's Dept. Store Co.*, (W. D. N. Y. 1908) 159 Fed. 286, 20 Am. Bankr. Rep. 244; *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436; *In re McCann Bros. Ice Co.*, (E. D. Pa. 1909) 171 Fed. 265, 22 Am. Bankr. Rep. 555; *In re Cohn*, (D. C. N. D. 1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761.

*In excepting to findings of fact or conclusions of law* by a referee in bankruptcy equity rule 83 (now 63) requiring errors to be specifically pointed out, should be followed. *In re Covington*, (E. D. N. C. 1901) 110 Fed. 143, 6 Am. Bankr. Rep. 373; *In re Carver*, (1902) 113 Fed. 138; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541.

*Ruling on evidence.*—Rulings of a referee in bankruptcy excluding evidence, not taken and returned to the appellate court, are not reviewable there. *Philadelphia*

*First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436; *In re McCann Bros. Ice Co.*, (E. D. Pa. 1909) 171 Fed. 265, 22 Am. Bankr. Rep. 555.

**Ruling as to exemption.**—Where a bankrupt files no exceptions to a referee's order determining his right to exemptions, he cannot object to any of its provisions on certificate for review. *In re Cohn*, (D. C. N. D. 1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761.

**Exception cannot be made in reviewing court.**—The ruling of a referee in bankruptcy allowing the claim of a creditor cannot be brought into the District Court for review by filing exceptions thereto in that court. *In re Hawley*, (N. D. Ia. 1902) 116 Fed. 428, 8 Am. Bankr. Rep. 632.

**Formal exceptions unnecessary.**—That no formal exceptions were filed to the decision and ruling of a referee on a creditor's claim does not prevent a review of the referee's findings in the absence of a rule or order of the District Court requiring such exceptions to be filed. *In re People's Dept. Store Co.*, (W. D. N. Y. 1908) 159 Fed. 286, 20 Am. Bankr. Rep. 244; *In re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780.

**Determination on review — De novo on the evidence.**—On review of proceedings before a referee, the judge is not required to reverse the decision because of the erroneous admission or exclusion of evidence; but it is his duty to determine the issues *de novo* upon the competent evidence in the record, or he may recommit the case for further hearing as the circumstances may require. *In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *In re Leech*, (C. C. A. 6th Cir. 1909) 171 Fed. 622, 22 Am. Bankr. Rep. 599; *In re Hawley, etc., Furnace Co.*, (E. D. Pa. 1914) 214 Fed. 500; *In re Elmore Cotton Mills*, (S. D. Ala. 1914) 217 Fed. 808.

And the review may be restricted to the referee's report, the evidence to which he refers therein, and to such evidence as the petitioner may include in his exceptions to the referee's finding. *In re Stokes*, (S. D. Ga. 1910) 185 Fed. 994.

On a referee's certificate to review the partial allowance of a claim against a bankrupt, it was held to be error for the court to increase the allowance for alleged damages for breach of a patent license agreement, \$1,000, where there was no evidence in the case that damages in any amount had been proved by breach of such agreement. *In re Dr. Voorhees Awning Hood Co.*, (C. C. A. 3d Cir. 1911) 188 Fed. 425.

**Judge may take new evidence.**—On certificate of a referee in a proceeding to set aside an alleged fraudulent preference, the district judge, if the petition is sufficient, may take new evidence if it is offered. *In re Leech*, (C. C. A. 6th

Cir. 1909) 171 Fed. 622, 22 Am. Bankr. Rep. 599.

**Court may consider any point presented by record.**—A District Court, in reviewing an order or report of a referee, may properly consider any point presented by the record before it, whether or not such point was discussed before or by the referee. *In re Wilde*, (C. C. A. 2d Cir. 1906) 144 Fed. 972, 16 Am. Bankr. Rep. 386; *In re Kellar*, (C. C. A. 1st Cir. 1912) 192 Fed. 830; *In re Elmore Cotton Mills*, (S. D. Ala. 1914) 217 Fed. 810.

**Costs.**—Where proceedings for the review of an order of a court of bankruptcy are dismissed by the appellate court for want of jurisdiction, without any motion therefor, neither party will be allowed costs. *In re Dickson*, (C. C. A. 1st Cir. 1901) 111 Fed. 729, 7 Am. Bankr. Rep. 186.

**Weight of referee's findings of fact.**—The findings of fact of the referee, where there is a conflict of evidence, are entitled to great weight; and they will not be disturbed excepting where they appear to be clearly erroneous. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 811, 3 Am. Bankr. Rep. 192; *In re Boothe*, (1899) 96 Fed. 943; *In re Rome Planing-Mill Co.*, (1900) 99 Fed. 943; *In re Waxelbaum*, (N. D. Ga. 1900) 101 Fed. 228, 4 Am. Bankr. Rep. 120; *In re Stout*, (W. D. Mo. 1900) 109 Fed. 794, 6 Am. Bankr. Rep. 505; *In re Lafleche*, (1901) 109 Fed. 307; *In re Covington*, (1901) 110 Fed. 143; *In re Carver*, (E. D. N. C. 1902) 113 Fed. 138, 7 Am. Bankr. Rep. 539; *In re Royal*, (E. D. N. C. 1902) 113 Fed. 140, 7 Am. Bankr. Rep. 636; *In re B. H. Douglass, etc., Co.*, (D. C. Conn. 1902) 114 Fed. 772, 8 Am. Bankr. Rep. 113; *In re Swift*, (D. C. Mass. 1902) 114 Fed. 947, 9 Am. Bankr. Rep. 237; *In re West*, (N. D. Ga. 1902) 116 Fed. 767, 8 Am. Bankr. Rep. 564; *In re Miner*, (D. C. Ore. 1902) 117 Fed. 953, 9 Am. Bankr. Rep. 100; *In re Grant*, (S. D. N. Y. 1902) 118 Fed. 73, 9 Am. Bankr. Rep. 93; *In re Williams*, (W. D. Ga. 1903) 120 Fed. 542, 9 Am. Bankr. Rep. 731; *In re Shriver*, (E. D. Pa. 1903) 125 Fed. 511, 10 Am. Bankr. Rep. 746; *In re Royce Dry Goods Co.*, (W. D. Mo. 1904) 133 Fed. 100, 13 Am. Bankr. Rep. 257; *In re Shultz*, (W. D. N. Y. 1905) 135 Fed. 623, 14 Am. Bankr. Rep. 378; *Southern Pine Co. v. Savannah Trust Co.*, (C. C. A. 5th Cir. 1905) 141 Fed. 802, 15 Am. Bankr. Rep. 618; *Love v. Export Storage Co.*, (C. C. A. 6th Cir. 1906) 143 Fed. 1, 16 Am. Bankr. Rep. 171; *In re Harr*, (E. D. Mo. 1906) 143 Fed. 421, 16 Am. Bankr. Rep. 213; *In re Simon*, (E. D. Ga. 1907) 151 Fed. 507, 18 Am. Bankr. Rep. 204; *In re Forth*, (E. D. N. Y. 1907) 151 Fed. 951, 18 Am. Bankr. Rep. 186; *Stephens v. Merchants' Nat. Bank*, (C. C. A. 7th Cir. 1907) 154 Fed. 341, 18 Am. Bankr. Rep. 560; *In re Kenyon*, (S. D. Ohio 1907) 156 Fed. 863, 19 Am. Bankr. Rep. 194; *In re Hatem*, (E.

D. N. C. 1908) 161 Fed. 895, 20 Am. Bankr. Rep. 470; *Ohio Valley Bank Co. v. Mack*, (C. C. A. 6th Cir. 1906) 163 Fed. 155, 20 Am. Bankr. Rep. 40; *Conner v. Webster Tapper Co.*, (C. C. A. 1st Cir. 1909) 168 Fed. 519, 21 Am. Bankr. Rep. 872; *In re McCrary*, (S. D. Ala. 1909) 169 Fed. 485, 22 Am. Bankr. Rep. 161; *In re Braselton*, (N. D. Ga. 1909) 169 Fed. 960, 22 Am. Bankr. Rep. 419; *In re McCann Bros. Ice Co.*, (E. D. Pa. 1909) 171 Fed. 265, 22 Am. Bankr. Rep. 555; *In re Hoffman*, (E. D. Wis. 1909) 173 Fed. 234, 23 Am. Bankr. Rep. 19; *In re Baumhauer*, (S. D. Ala. 1910) 179 Fed. 966; *In re Big Cahaba Coal Co.*, (N. D. Ala. 1910) 183 Fed. 662; *Baumhauer v. Austin*, (C. C. A. 5th Cir. 1911) 186 Fed. 260; *In re Logan*, (N. D. N. Y. 1912) 196 Fed. 678; *In re Walden Bros. Clothing Co.*, (N. D. Ga. 1912) 199 Fed. 315; *In re Cox*, (D. C. N. M. 1912) 199 Fed. 952; *In re Hawks*, (E. D. Kan. 1913) 204 Fed. 309; *Salsburg v. Blackford*, (C. C. A. 4th Cir. 1913) 204 Fed. 438; *Exstein v. Steinfeld*, (C. C. A. 3d Cir. 1914) 210 Fed. 236; *In re Crumling*, (E. D. Pa. 1914) 214 Fed. 503; *In re Pennel*, (C. C. A. 3d Cir. 1914) 214 Fed. 337; *In re Heffron Co.*, (N. D. N. Y. 1914) 216 Fed. 642; *In re Cozatsky*, (D. C. Conn. 1914) 216 Fed. 920; *In re Elmore Cotton Mills*, (D. C. S. D. Ala. 1914) 217 Fed. 810; *In re Klingerman*, (E. D. Pa. 1915) 219 Fed. 758; *Baker v. Bishop-Babcock-Becker Co.*, (C. C. A. 4th Cir. 1915) 220 Fed. 657; *In re Utica Pipe Foundry Co.*, (N. D. N. Y. 1915) 221 Fed. 787.

**Weight dependent on character of evidence.**—The weight to be given to a finding by a referee in bankruptcy, on review by the judge, depends on the character of the evidence; it being entitled to less weight, if a deduction from established facts than if based on conflicting evidence. *In re McCrary*, (S. D. Ala. 1909) 169 Fed. 485, 22 Am. Bankr. Rep. 161; *In re Big Cahaba Coal Co.*, (N. D. Ala. 1910) 183 Fed. 662.

And it has been held that the court is not bound by the findings of the referee in bankruptcy on a question of fact based on inferences drawn from the evidence. *Baumhauer v. Austin*, (C. C. A. 5th Cir. 1911) 186 Fed. 260.

**The rule may be stated to be** that while the findings of fact made by a referee in bankruptcy are presumptively correct, and unless clearly against the weight of evidence, or some obvious error of law has intervened, will not be disturbed, nevertheless they are not so conclusive as the

verdict of a jury or the findings of fact made by a judge in an action at law when a jury has been waived. This is the rule of law applicable to masters in chancery, and is equally applicable to findings made by a referee in bankruptcy. *In re Hawks*, (E. D. Kan. 1913) 204 Fed. 309.

But where a referee's findings are to be made the basis of a commitment for contempt, the general rule above stated does not apply, and the court must be satisfied beyond a reasonable doubt that the findings are correct. *In re Mayer*, (1900) 98 Fed. 839. See, however, *In re Tudor*, 96 Fed. 942, where the court seems to have adhered to the general rule.

**Discretionary orders made by a referee** will not be reversed in the absence of clear abuse of discretion. *In re Sanborn*, (1899) 96 Fed. 551; *In re Belknap*, (1899) 96 Fed. 614.

**Duty to give notice of referee's decisions.**—Where there is an appearance in a contest before referees in bankruptcy, the litigating parties should be notified of the referee's decisions. *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

But where creditors do not appear, or where they appear and their appearance is not noted, no duty rests on the referee to give notice of his decisions, especially where claims are presented and no objection is made. *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

**Certifying questions to District Court.**—Form No. 56 is a "certificate by referee to judge."

Specific questions arising in proceedings before a referee in bankruptcy, and upon which the opinion of the district judge is desired, may and should be presented on the certificate of the referee; or, in the case of orders entered on petition for review, and not in the form of an assignment of errors. *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528.

But a referee has no jurisdiction of his own motion to certify a question not raised by the parties to a bankruptcy proceeding, which the referee foresees may arise, and on which he desires to be advised. *In re Reukauff*, (E. D. Pa. 1905) 135 Fed. 251, 14 Am. Bankr. Rep. 344.

**As to transmission of evidence to the court**, see *infra*, section 39a (5) and the notes thereto, and generally as to review of records and findings certified by referees, see *infra*, sections 41b and 42c and the notes thereto.

(1) [**Consider petitions.**] consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions: [(1898) 30 Stat. L. 555.]

**Authority to make adjudication or dismiss petition.**—The referee, under section 33a (1), has authority to consider such

petitions as have been referred to him by the clerk, and to make an adjudication thereon, or to dismiss the petition.

*In re Clisdell*, (N. D. N. Y. 1900) 101 Fed. 246, 4 Am. Bankr. Rep. 95; *In re Franklin Syndicate*, (E. D. N. Y. 1900) 101 Fed. 402, 4 Am. Bankr. Rep. 244; *Clark v. American Mfg., etc., Co.*, (C. C. A. 1900) 101 Fed. 962; *In re Elby*, (N. D. Ia. 1907) 157 Fed. 935, 19 Am. Bankr. Rep. 734; *In re Polakoff*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 358.

*Dismissal after adjudication.*—The statute does not authorize a referee to dismiss a bankruptcy proceeding after adjudication; that duty devolves alone upon the judge under section 14 of the Act. *In re Elby*, (N. D. Ia. 1907) 157 Fed. 935, 19 Am. Bankr. Rep. 734.

But in *In re Scott*, (D. C. Mass. 1901) 7 Am. Bankr. Rep. 35, it was held that the referee had jurisdiction to dismiss a petition after adjudication for want of jurisdiction.

*Requiring amendment of petition and schedule.*—The referee has power in his discretion to order amendments in the insufficient and defective petition and schedule of a voluntary bankrupt referred to him, and to withhold the calling of the first meeting of creditors until such amendments are made. *In re Brumelkamp*, (1899) 95 Fed. 814.

(2) [Administer oaths, examine witnesses, require production of documents.] exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; [(1898) 30 Stat. L. 555.]

*Examination of witnesses—General rule.*—A referee taking testimony in a controversy or hearing in bankruptcy is required to take, record, and, in case of an appeal, to return to the appellate court, all the evidence offered by either party to the controversy, that which is held by them to be incompetent, irrelevant, or immaterial, as well as that which they deem to be admissible, to the end that, if the appellate court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and conclude the litigation without remanding the suit to procure the excluded evidence. *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436. And see the following earlier cases to the same effect: *In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *In re Lipset*, (S. D. N. Y. 1902) 119 Fed. 379, 9 Am. Bankr. Rep. 32; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541; *In re Wilde*, (S. D. N. Y. 1904) 131 Fed. 142, 11 Am. Bankr. Rep. 714; *In re Romine*, (N. D. W. Va. 1905) 138 Fed. 837, 14 Am. Bankr. Rep. 785; *In re Sturgeon*, (C. C. A. 2d Cir. 1905) 139 Fed. 608, 14 Am. Bankr. Rep. 681; *Ravenswood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463, 16 Am. Bankr. Rep. 206.

*Referee cannot excuse witness from answering.*—A referee in bankruptcy is governed by the rules in equity in taking testimony, and is not authorized to excuse a witness from answering questions on objection thereto. *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541.

*Exception to general rule.*—From the general rule that all evidence offered should be received, the evidence of a privileged witness, privileged evidence, and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or power of the court to compel its production or permit its introduction, is excepted. *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436.

*Manner of conducting examination.*—Under the general orders in bankruptcy, No. 22, the referee, in taking testimony, is required to have it taken down in writing, and preferably in narrative form; and, on objection being raised, to require the question, the objection, and reason therefor, with his ruling, to be entered, and then, though he rule the question to be improper, allow it to be answered. *In re De Gottardi*, (1902) 114 Fed. 328; *In re Romine*, (N. D. W. Va. 1905) 138 Fed. 837, 14 Am. Bankr. Rep. 785.

*Referee should be present at examination.*—A referee in bankruptcy, having power to rule on the admissibility of testimony offered before him, is bound personally to hear the evidence, unless his presence is waived by the parties. *In re Wilde*, (S. D. N. Y. 1904) 131 Fed. 142, 11 Am. Bankr. Rep. 714.

*Production of books.*—A referee in bankruptcy has full and complete jurisdiction to order the bankrupt to produce books of account and papers bearing on his transactions. *In re Soloway*, (D. C. Conn. 1912) 195 Fed. 103.

(3) [Taking possession of and releasing property.] exercise the powers of the judge for the taking possession and releasing of the property of

the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; [(1898) 30 Stat. L. 555.]

**Effect of section.**—Section 38a (3) refers in terms to the power of the judge, and does not restrict section 38a (4), but is the correlative of section 69a. *In re Florcken*, (1901) 107 Fed. 241.

**Ordering surrender of assets.**—The referee may order the bankrupt to surrender assets in his possession to the trustee. See *supra*, notes to section 2 (15). And he may make such an order against a third person holding assets without color of right. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405.

**Appraisal and sale of property.**—Under sections 38a and 1a (7) and General Order No. 18 (see *supra*, note to section 30), the referee is authorized, subject, however, to review by the court, to appoint appraisers to value the bankrupt's estate and to order the trustee to sell the real estate free from incumbrances. If the property, however, is in the hands of a receiver before adjudication, the court alone can order an appraisal or a sale. *In re Styer*, (1899) 98 Fed. 290. See also as to the power of a referee to order a sale free from incumbrances, *In re Sanborn*, (1899) 96 Fed. 551.

The uniform practice of the court under the Act is to make no order of sale until after the adjudication of bankruptcy; but, where the property was such that immediate sale was necessary to preserve its value, where the sale was by consent, and no injurious effects upon any interests were shown, a referee's order made before adjudication was not disturbed. *In re T. L. Kelly Dry-Goods Co.*, (1900) 102 Fed. 747.

As to the jurisdiction of the referee to enjoin the sale of property, to order its sale, and to settle the priority of liens, where there is a voluntary submission to him of the matters in dispute, see *In re Matthews*, (1901) 109 Fed. 603.

Appraisal and sale of property, see in general section 70b and note.

**Confirmation of composition.**—Questions arising out of application for confirmation of a composition are addressed to the judge, although he may require the referee to report the facts. *Adler v. Jones*, (C. C. A. 1901) 109 Fed. 967.

**Application for discharge.**—A referee to whom an application for discharge with opposing specifications has been referred has authority to rule upon the sufficiency of the specifications, and should not take evidence on such as are clearly insufficient. *In re Kaiser*, (1899) 99 Fed. 689, holding also that his authority is not limited to the taking and reporting of the evidence and ruling as to its admissibility, and that he should report findings and recommenda-

tions. See also *In re Steed*, (1901) 107 Fed. 682.

Under the Act the judge is required to hear and determine the application for discharge and the briefs and pleas in opposition thereto, and the matter cannot be turned over to a referee, although it may be referred to him to ascertain and report the facts. *In re McDuff*, (C. C. A. 1900) 101 Fed. 241.

As to hearing application and granting discharge, see more fully sec. 14b and notes thereto.

**Authority with respect to possession and release of property.**—*Referee may appoint receivers.*—A referee has authority to exercise the powers of a judge in the taking possession of, and releasing, the bankrupt's property, on the issuance of a certificate by the clerk showing the absence of the judge from the district, or his inability to act. In accordance with this provision it has been held that the referee may appoint receivers in bankruptcy for the purpose of taking possession of the assets of the estate. *In re Styer*, (E. D. Pa. 1899) 98 Fed. 290, 3 Am. Bankr. Rep. 424; *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528; *In re Florcken*, (S. D. Cal. 1901) 107 Fed. 241, 5 Am. Bankr. Rep. 802; *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366; *In re Sonnabend*, (D. C. Mass. 1906) 18 Am. Bankr. Rep. 117.

The authority of courts of bankruptcy to appoint receivers and marshals to take charge of the property of bankrupts, when necessary for the preservation of the estate, has been considered generally under sections 2 (3) and 3e *supra*, and section 69, *infra*.

It has been said that the jurisdiction of referees to appoint receivers is not qualified by subdivision 3e, but is obviously the correlative of section 69a, authorizing the judge on proof of specified facts to issue a warrant for the seizure of the bankrupt's property. *In re Florcken*, (S. D. Cal. 1901) 107 Fed. 241, 5 Am. Bankr. Rep. 802.

Under General Order No. 12 (see *supra*, note to section 30), the referee's authority to appoint a receiver dates from the time at which the order of reference was placed in his hands, not from the time it was signed or filed. *In re Florcken*, (S. D. Cal. 1901) 107 Fed. 241, 5 Am. Bankr. Rep. 802.

**Must be necessary for receiver.**—A referee is without power to appoint a receiver after adjudication, on the petition of a voluntary bankrupt, without any

finding as to its necessity. *In re Rosenthal*, (D. C. N. J. 1906), 144 Fed. 548, 16 Am. Bankr. Rep. 448.

**Referee cannot act until receipt of order.**

—A referee's authority to appoint a receiver dates from the time the order of reference has actually been placed in his hands, and not from the time of its signing or filing; and his appointment of a receiver, merely on being indirectly informed through a telephone message of the order for his appointment as referee, is unauthorized. *In re Florcken*, (S. D. Cal. 1901) 107 Fed. 241, 5 Am. Bankr. Rep. 802.

**Turning over books to receiver.**—An alleged bankrupt will be required to turn over books of account relating to his business, to a receiver appointed by the court of bankruptcy, where it is shown that they are necessary to enable the receiver to continue the business as directed by the court, notwithstanding a claim of privilege by the bankrupt on the ground that the books contain evidence which would tend to incriminate him, unless it appears that such claim is made in good faith and has a reasonable foundation; it not being his right to determine such questions for himself. *In re Rosenblatt*, (E. D. Pa. 1906) 143 Fed. 663.

**Appointment of a trustee.**—Section 38a providing that the referee shall have the authority of a Bankruptcy Court, except concerning applications for compositions and discharges, when such authority is not denied by other provisions of the Act, and there being no provision which prohibits the appointment by him of a trustee, he may, under certain circumstances, appoint a trustee and the allegation that the appointee was duly appointed trustee by the referee "is equivalent to a declaration that the circumstances existed which empowered the referee to make the appointment." *Jones v. Meyer Bros. Drug Co.*, (1901) 25 Tex. Civ. App. 234, 61 S. W. 553.

*In re Kuffler*, (1899) 97 Fed. 187, it was held, under the circumstances, that the referee has authority to appoint a

trustee, the creditors not being able to agree.

As to the right of the referee presiding at the first meeting of creditors to determine whether proxies of creditors were entitled to vote or not, and as to the discretion of the referee in declining to postpone a trustee's election when he had disqualified certain proxies, see *In re McGill*, (C. C. A. 1901) 106 Fed. 57.

As to the right of the referee to reject a vote for trustee cast by the proxy of a creditor, see *In re Henschel*, (1901) 109 Fed. 861.

**Collection of estate—subpoenas.**—The referee has no authority whatever in respect to the collection of the estate, and subpoenas are not to be issued by him under any circumstances. *In re Pierce*, (1901) 111 Fed. 516.

**Statutory filing fee.**—The referee has no authority to require a bankrupt, who has filed with his petition an affidavit of inability, to pay the statutory fee as a condition precedent to the granting of a discharge, as by clause 4 of General Order No. 35 (see *supra*, note to section 30), such power is given to the court, to be exercised on proof of ability only. *In re Plimpton*, (1900) 103 Fed. 775.

**Paying out funds.**—There is no provision of the Bankruptcy Act authorizing the referee to order, or the trustee to pay out, funds belonging to the bankrupt's estate. *In re Cobb*, (1901) 112 Fed. 655.

**Resemblance to master in chancery.**—In many respects the relation of the referee to the court corresponds to that of a master in chancery. *In re Covington*, (1901) 110 Fed. 143. See also *In re Stead*, (1901) 107 Fed. 682.

As to hearings before referees and the determination of issues thereon, see *In re Rosenberg*, (1902) 116 Fed. 402.

**Changing findings.**—A referee may review and change findings made by him as to the value of property, although in such case it is good policy to give notice to counsel. *In re Hawley*, (1902) 116 Fed. 429.

(4) [Perform certain duties of courts.] perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and [(1898) 30 Stat. L. 555.]

**Authority to perform duties of court.**—Under section 38a (4) the referee is authorized to perform the duties of a court of bankruptcy as prescribed by the statute and the general orders; he is thus made a judicial officer whose official acts, within his jurisdiction, are entitled to due weight as such, subject only to review by the Dis-

trict Court sitting in bankruptcy. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 733; *In re Covington*, (E. D. N. C. 1901) 110 Fed. 143, 6 Am. Bankr. Rep. 373; *In re Scott*, (D. C. Mass. 1901) 111 Fed. 144, 7 Am. Bankr. Rep. 36; *In re Baber*, (E. D. Tenn. 1902) 119 Fed. 520, 9 Am. Bankr. Rep. 406; *In re*

Abbey Press, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11; *In re Drayton*, (E. D. Wis. 1904) 135 Fed. 883, 13 Am. Bankr. Rep. 602; *Ellis v. Krulwich*, (C. C. A. 8th Cir. 1905) 141 Fed. 954, 15 Am. Bankr. Rep. 616; *In re McIntire*, (N. D. W. Va. 1906) 142 Fed. 593; *In re Schenectady Engineering, etc., Co.*, (N. D. N. Y. 1906) 147 Fed. 868, 17 Am. Bankr. Rep. 279; *In re Simon*, (E. D. Ga. 1907) 151 Fed. 507; *In re Hanson*, (D. C. Minn. 1904) 156 Fed. 717, 19 Am. Bankr. Rep. 235; *In re Walsh*, (N. D. Ia. 1908) 163 Fed. 352, 20 Am. Bankr. Rep. 472; *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216; *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 882, 23 Am. Bankr. Rep. 242; *Clendening v. Red River Valley Nat. Bank*, (N. D. 1903) 11 Am. Bankr. Rep. 245; *Conti v. Sunseri*, (Pa. 1907) 18 Am. Bankr. Rep. 891; *In re Overholzer*, (N. D. N. Dak. 1909) 23 Am. Bankr. Rep. 10.

*The referee is, in general, a court of original jurisdiction* possessing, with certain exceptions, all the powers in regard to bankruptcy vested in the United States District Court. *In re Overholzer*, (N. D. N. Dak. 1909) 23 Am. Bankr. Rep. 10.

*Referee cannot acquire jurisdiction by consent.*—If the subject matter of a controversy is not within the jurisdiction of a referee, consent will not confer it; and the court upon a petition for review will acquire none, except to determine the jurisdiction of the referee. *In re Walsh*, (N. D. Ia. 1908) 163 Fed. 352, 20 Am. Bankr. Rep. 472.

*An exception to the jurisdiction of the referees*, where the Bankruptcy Court has jurisdiction, arises when a case is referred to him for a special purpose, or where the bankrupt asks to be adjudged a bankrupt, or seeks a discharge from bankruptcy. *In re Brenner*, (M. D. Pa. 1911) 190 Fed. 209.

*Power to commit for contempt*, see note to section 2 (16). And see section 41b.

*Turning property over to trustee.*—The referee may order the surrender, to the trustee in bankruptcy, of any property of the estate remaining in the hands of the bankrupt; or which is subject, in other hands, to the control, management, or disposition of the bankrupt. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *In re Rosenblatt*, (E. D. Pa. 1906) 143 Fed. 663; *In re Cole*, (C. C. A. 1st Cir. 1906) 144 Fed. 392, 16 Am. Bankr. Rep. 302; *In re Fidler*, (M. D. Pa. 1908) 163 Fed. 973, 21 Am. Bankr. Rep. 101; *In re Baum*, (C. C. A. 8th Cir. 1909) 169 Fed. 410, 22 Am. Bankr. Rep. 295; *In re Averick*, (M. D. Pa. 1909) 170 Fed. 521, 22 Am. Bankr. Rep. 518; *In re Koplin*, (E. D. Pa. 1910) 179 Fed. 1013; *In re Famous Clothing Co.*, (W. D. N. Y. 1910) 179 Fed. 1015; *In re Krall*, (D. C. Conn. 1910) 182 Fed. 191; *In re Shaffer*,

(E. D. N. Y. 1911) 185 Fed. 549; *In re Belfast Mesh Underwear Co.*, (D. C. Conn. 1911) 185 Fed. 834; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148; *In re Shaffer*, 26 Am. Bankr. Rep. 54.

*Summary proceedings.*—"Undoubtedly, one holding property of the bankrupt as an agent or bailee may be required summarily to turn it over to the trustee, and, in a proper case, to a receiver; but we are of the opinion that, whenever the facts alleged on their face disclose possession and a legal right in the party claiming title, the referee has no jurisdiction in a summary proceeding to require the property to be turned over without the consent of the respondent." *In re Blum*, (C. C. A. 7th Cir. 1913) 202 Fed. 883. See also *In re Logan*, (N. D. N. J. 1912) 196 Fed. 678.

*The failure to turn over property*, when ordered to do so by the referee in a proper case, constitutes a contempt, and is punishable as such. See the annotation under section 41a (1).

*A partner may be ordered to turn over* to the firm's trustee in bankruptcy any partnership assets traced into his hands. *In re Shaffer*, (E. D. N. Y. 1911) 185 Fed. 549.

*Where a third party claims an interest in property* which was in the possession of a bankrupt at the time of the bankruptcy and passed into that of his trustee, the referee may by a summary proceeding require such third party to appear in the Bankruptcy Court, and present his claim, and may adjudicate the rights of the parties in respect thereof. *Mound Mines Co. v. Hawthorne*, (C. C. A. 8th Cir. 1909) 173 Fed. 882, 23 Am. Bankr. Rep. 242.

*Where, on a claim of a bankrupt's trustee to possession of property in the possession of another*, the referee finds that the latter's claim is in good faith and probably real, it should then be determined by a plenary suit; but if he finds that the claim is without any actual merit or legal foundation, he should regard the property as subject to the Bankruptcy Court's jurisdiction as property of the bankrupt, and require its surrender to the trustee. *In re Holbrook Shoe, etc., Co.*, (D. C. Mont. 1908) 165 Fed. 973, 21 Am. Bankr. Rep. 511. See also the annotation under section 23b as to jurisdiction and procedure with respect to adverse claimants.

*The fact that respondent was under indictment*, charged with a violation of section 29, for having received and retained money for the purpose of defeating the operation of the Bankruptcy Law, furnishes no excuse for his failing to make a full disclosure of the facts, in response to the referee's order to show cause. *Wayne Knitting Mills v. Nugent*, (D. C. Ky. 1900) 104 Fed. 530, 4 Am. Bankr. Rep. 747.

*Proceedings to require a bankrupt to pay over money or surrender property to his trustee* should ordinarily be by motion for a rule on him to show cause, and should be justified by the facts brought out in the examination of himself and other witnesses in the regular course of the proceedings. Unless under exceptional circumstances, where it is necessary to bring before the court facts not appearing in the examination, or new parties, a formal petition and pleadings as in a suit in equity are unnecessary, and an expense which should not be permitted by the court; nor should the court or referee entertain such proceedings at all unless there is sufficient in the evidence, taken in the regular course of the proceedings, to warrant the order sought *prima facie*. *In re Adler*, (W. D. Tenn. 1904) 129 Fed. 502, 12 Am. Bankr. Rep. 19.

*Order to show cause.*—A referee in bankruptcy has power in the first instance to enter an order to show cause why a person should not be required to pay over, to the trustee in bankruptcy, money in his hands belonging to the bankrupt's estate; and, upon the hearing, to enter an order directing the payment of such money by a certain date. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405.

*Petition for order.*—An order requiring a bankrupt to turn over money or property to his trustee should be made only after a hearing on a petition therefor, making definite averments on the subject and offering a definite issue, upon which both parties may adduce evidence. *In re Ruos*, (E. D. Pa. 1908) 164 Fed. 749, 21 Am. Bankr. Rep. 257.

*Preponderance of evidence sufficient.*—The issue whether an order should be made requiring a bankrupt to turn over money or property to the trustee is purely of a civil character determinable on a preponderance of the evidence. *In re Alphin*, etc., *Cotton Co.*, (E. D. Ark. 1905) 134 Fed. 477, 14 Am. Bankr. Rep. 194; *In re Cole*, (C. C. A. 1st Cir. 1906) 144 Fed. 392, 16 Am. Bankr. Rep. 302.

*Competency of evidence.*—Testimony of a person, other than the bankrupt, or, in case of a corporation, of a person not an officer or a stockholder of such corporation, taken generally and not directed to any defined issue, is not admissible in subsequent proceedings against the bankrupt, or, in case of a corporation, against its officers, to compel a surrender of money or property of the estate, under penalty of punishment for contempt. *In re Alphin*, etc., *Cotton Co.*, (E. D. Ark. 1904) 131 Fed. 824, 12 Am. Bankr. Rep. 653.

*Property must be part of bankrupt estate.*—To justify an order directing money or other property to be turned over to the trustee, it must appear that such money or other property is a part of the assets of the estate in bankruptcy. *In re*

*Rosser*, (C. C. A. 8th Cir. 1900) 101 Fed. 562, 4 Am. Bankr. Rep. 153; *In re Felson*, (N. D. N. Y. 1903) 124 Fed. 288, 10 Am. Bankr. Rep. 716; *In re Jackier*, (M. D. Pa. 1910) 179 Fed. 720; *In re Nisenson*, (D. C. N. J. 1910) 182 Fed. 912. See also the cases cited in the following paragraph.

*Possession or control necessary.*—A referee can only order the turning of assets to the trustee where it clearly appears that such assets are in the possession, or within the control, of the bankrupt, and rightfully constitute a part of his estate in bankruptcy. *In re Rosser*, (C. C. A. 8th Cir. 1900) 101 Fed. 562, 4 Am. Bankr. Rep. 153; *In re J. C. Winship Co.*, (7th Cir. 1903) 120 Fed. 93, 56 C. C. A. 45; *In re Antigo Screen Door Co.*, (7th Cir. 1903) 123 Fed. 249, 59 C. C. A. 248, 252; *In re Felson*, (N. D. N. Y. 1903) 124 Fed. 288, 10 Am. Bankr. Rep. 716; *In re Rodgers*, (7th Cir. 1903) 125 Fed. 169, 60 C. C. A. 567, 575; *Burleigh v. Forman*, (1st Cir. 1903) 125 Fed. 217, 218, 60 C. C. A. 109; *In re Leinweber*, (D. C. Conn. 1904) 128 Fed. 641, 12 Am. Bankr. Rep. 175; *In re Goldfarb*, (N. D. Ga. 1904) 131 Fed. 643, 12 Am. Bankr. Rep. 386; *In re Drayton*, (E. D. Wis. 1904) 135 Fed. 883, 13 Am. Bankr. Rep. 603; *In re Ruos*, (E. D. Pa. 1908) 164 Fed. 749, 21 Am. Bankr. Rep. 257; *In re Reese*, (M. D. Pa. 1909) 170 Fed. 986, 22 Am. Bankr. Rep. 521; *In re Dickens*, (S. D. Ala. 1909) 175 Fed. 808, 23 Am. Bankr. Rep. 660, following *Boyd v. Glucklich*, (8th Cir. 1902) 116 Fed. 139, 53 C. C. A. 459; *Samel v. Dodd*, (5th Cir. 1906) 142 Fed. 68, 73 C. C. A. 254; *In re Mize*, (N. D. Ala. 1909) 172 Fed. 946; *In re Nisenson*, (D. C. N. J. 1910) 182 Fed. 912. See also the annotation under section 41a (1) as to contempt proceedings for failure to turn over property.

*Possession or control necessary when order is made.*—A finding by a referee that at the time of his bankruptcy a bankrupt had in his possession or under his control money or property of his estate which he withheld from his trustee, does not warrant an order, seven years afterward, requiring him to turn the same over to his trustee; it not being shown that he is then able to comply with such order. *In re Ruos*, (E. D. Pa. 1908) 164 Fed. 749, 21 Am. Bankr. Rep. 257.

*Evidence based on comparative value of stock at different times.*—To justify an order requiring a bankrupt to turn over property, the proof that he has withheld property should be clear; and, where it depends upon the comparative estimates of the value of a stock of goods at different times, the discrepancy must be great and such as cannot be otherwise explained. *In re Reese*, (M. D. Pa. 1909) 170 Fed. 986, 22 Am. Bankr. Rep. 521.



*Property out of possession and control.*

—A court of bankruptcy, or a referee, is without power to order a bankrupt to pay over to his trustee money collected from his debtors after he had knowledge of the filing of the petition in bankruptcy against him by creditors, where such money has since passed into the possession of others, and is not under the bankrupt's control. *American Trust Co. v. Wallis*, (C. C. A. 3d Cir. 1903) 126 Fed. 464, 11 Am. Bankr. Rep. 360.

The treasurer of a bankrupt corporation cannot be required, by a summary order, to turn over to the trustee money which he in fact paid out in settlement of debts of the corporation between the filing of the petition and the adjudication, even though such payments were not justified and resulted in preferences to the creditors receiving the same. *In re Laplume Condensed Milk Co.*, (M. D. Pa. 1906) 145 Fed. 1013, 16 Am. Bankr. Rep. 729.

A proceeding to compel the bankrupt to turn over property which was concealed for him or by him may be based upon an examination of the bankrupt's agent as to what disposition he made of the bankrupt's property. But until the property or its proceeds have been traced through the hands of the bankrupt, and until he avoids responsibility by showing that his control over it had terminated because it had reached the possession of his agent and been converted or stolen, and was hence out of his own control, the trustee is not in a position to demand that the agent be compelled to make good or account for the bankrupt's property, unless the property or the proceeds be specifically shown to be in his hands. *In re Fogelman*, (E. D. N. Y. 1911) 188 Fed. 755.

*Ability to comply with order necessary.*

—In view of the fact that the failure of a bankrupt to obey an order to turn over money or property to his trustee is punishable by imprisonment for contempt, such an order should only be made on the clearest proof of his present ability to comply with it, since contempt proceedings cannot be invoked as a means of coercing the payment of debts, or to punish a bankrupt for transferring his property with intent to hinder, delay, or defraud his creditors. *In re Dickens*, (S. D. Ala. 1909) 175 Fed. 808, 23 Am. Bankr. Rep. 660, following *Boyd v. Glucklich*, (8th Cir. 1902) 116 Fed. 139, 53 C. C. A. 459; *Samel v. Dodd*, (5th Cir. 1906) 142 Fed. 68, 73 C. C. A. 254; *In re Mize*, (N. D. Ala. 1909) 172 Fed. 946.

*Presumption of possession or control.*

It is well settled that where assets of the estate in bankruptcy have been traced to the recent possession or control of the bankrupt, they will be presumed to have remained in his possession or under his control until their disposition or disappearance has been satisfactorily accounted

for. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *Wayne Knitting Mills v. Nugent*, (D. C. Ky. 1900) 104 Fed. 530, 4 Am. Bankr. Rep. 747; *In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *Boyd v. Glucklich*, (8th Cir. 1902) 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393; *Schweer v. Brown*, (8th Cir. 1904) 130 Fed. 328, 64 C. C. A. 574; *Seigel v. Cartel*, (8th Cir. 1908) 164 Fed. 691, 90 C. C. A. 512, 21 Am. Bankr. Rep. 140; *In re Meier*, (C. C. A. 8th Cir. 1910) 182 Fed. 799; *In re Nisen-son*, (D. C. N. J. 1910) 182 Fed. 912.

*Effect of admission.*—Where a bankrupt admits having had money or property a short time before his bankruptcy, which is not shown by his schedules, it is incumbent upon him to account clearly for the same to the satisfaction of the court; otherwise, he must be held still to have it in his possession, and to be able to turn it over to his trustee. *In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723.

*Denial of possession or control.*—The denial of the bankrupt that he has money or other property in his possession, or under his control, is not conclusive, but is entitled to its due weight in connection with the other evidence and circumstances shown. *In re Shachter*, (N. D. Ga. 1902) 119 Fed. 1010, 9 Am. Bankr. Rep. 499; *Schweer v. Brown*, (C. C. A. 8th Cir. 1904) 130 Fed. 329, 12 Am. Bankr. Rep. 178; *In re Feldser*, (E. D. Pa. 1905) 134 Fed. 307, 14 Am. Bankr. Rep. 216; *In re Weinreb*, (C. C. A. 2d Cir. 1906) 146 Fed. 243, 16 Am. Bankr. Rep. 702; *Moody v. Cole*, (D. C. Me. 1906) 148 Fed. 295, 17 Am. Bankr. Rep. 818; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785; *In re Holbrook Shoe, etc., Co.*, (D. C. Mont. 1908) 165 Fed. 973, 21 Am. Bankr. Rep. 511.

*Jurisdiction with respect to sales of property.*—A referee to whom a bankruptcy case has been referred generally has jurisdiction, on the petition of the trustee, to enjoin the sale of the property of the bankrupt by one of a number of lienholders, to order its sale free of incumbrances, and to settle the priority of liens, where all the parties in interest voluntarily appear and submit the controversies between them to his decision without objection. See *In re Tilden*, (S. D. Ia. 1899) 91 Fed. 500, 1 Am. Bankr. Rep. 302; *In re Pittelkow*, (E. D. Wis. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 472; *In re Sanborn*, (D. C. Vt. 1899) 96 Fed. 551, 3 Am. Bankr. Rep. 54; *In re Styer*, (E. D. Pa. 1899) 98 Fed. 290, 3 Am. Bankr. Rep. 424; *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528; *McFarland Carriage Co. v. Solanes*, (E. D. La. 1901) 108 Fed. 532, 6 Am. Bankr.

Rep. 221; *In re Keller*, (N. D. Ia. 1901) 109 Fed. 131, 6 Am. Bankr. Rep. 351; *In re Matthews*, (W. D. Ark. 1901) 109 Fed. 603, 6 Am. Bankr. Rep. 96, *affirmed* (C. C. A. 8th Cir. 1902) 9 Am. Bankr. Rep. 444; *McNair v. McIntyre*, (C. C. A. 4th Cir. 1902) 113 Fed. 113, 7 Am. Bankr. Rep. 638; *In re Rosenberg*, (E. D. Pa. 1902) 116 Fed. 402, 8 Am. Bankr. Rep. 624; *In re Waterloo Organ Co.*, (W. D. N. Y. 1902) 118 Fed. 904, 9 Am. Bankr. Rep. 427; *Chauncey v. Dyke*, (C. C. A. 8th Cir. 1902) 119 Fed. 1, 9 Am. Bankr. Rep. 444; *In re Kellogg*, (2d Cir. 1903) 121 Fed. 333, 57 C. C. A. 547, 10 Am. Bankr. Rep. 7, *affirming* (W. D. N. Y. 1902) 7 Am. Bankr. Rep. 623; *In re Granite City Bank*, (C. C. A. 8th Cir. 1905) 137 Fed. 818, 14 Am. Bankr. Rep. 404, *affirming In re Wilka*, (N. D. Ia. 1904) 12 Am. Bankr. Rep. 727; *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 528; *In re Miner's Brewing Co.*, (E. D. Pa. 1908) 162 Fed. 327, 20 Am. Bankr. Rep. 717; *In re Murphy*, (D. C. Mass. 1900) 3 Am. Bankr. Rep. 505 note; *Matter of New England Piano Co.*, (C. C. A. 1st Cir. 1903) 9 Am. Bankr. Rep. 767; *In re Rochford*, (C. C. A. 8th Cir. 1903) 10 Am. Bankr. Rep. 608; *In re Prince*, (M. D. Pa. 1904) 12 Am. Bankr. Rep. 675; *In re Saxton Furnace Co.*, (E. D. Pa. 1905) 14 Am. Bankr. Rep. 483.

**Examination of accounts of receivers and trustees.**—"The whole policy of the law with respect to bankrupt estates is that they shall be economically administered, and it is the duty of referees, as well as of receivers and trustees, none of whom are entitled to receive greater compensation than is fixed by the Bankruptcy Law, to see that estates are administered with the strictest economy. But the law imposes specially upon referees the settlement and distribution of estates. They must pass upon the accounts of receivers and trustees, and be satisfied as to their correctness. It is not proper for a referee to assume that an account is correct, or that payments made by an accountant are proper, simply because no person interested files an exception thereto. What is everybody's business is nobody's business." *In re Fullick*, (W. D. Pa. 1912) 201 Fed. 463.

**Cancellation of lease.**—A referee in bankruptcy has no power to cancel a lease containing a claim requiring the tenant, who is the bankrupt, to execute a bond with surety for the payment of at least a substantial portion of the rent for the entire term. *In re Sapinsky*, (W. D. Ky. 1913) 206 Fed. 523.

**Stays and injunctions.**—The referee has authority to grant stays and injunctions upon a proper showing of cause therefor. *In re Franklin Syndicate*, (E. D. N. Y. 1900) 101 Fed. 402, 4 Am. Bankr. Rep. 244; *In re Steuer*, (D. C. Mass. 1900)

104 Fed. 976, 5 Am. Bankr. Rep. 209; *In re Martin*, (W. D. N. Y. 1900) 105 Fed. 753, 5 Am. Bankr. Rep. 423; *Smith v. Belford*, (C. C. A. 6th Cir. 1901) 106 Fed. 658, 5 Am. Bankr. Rep. 294; *In re Benjamin*, (M. D. Pa. 1905) 140 Fed. 320, 15 Am. Bankr. Rep. 351; *In re Berkowitz*, (E. D. Pa. 1906) 143 Fed. 598, 16 Am. Bankr. Rep. 251; *In re Grist*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 89; *In re Sabine*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 315; *In re Northrop*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 427; *In re Rogers*, (D. C. Ky. 1899) 1 Am. Bankr. Rep. 541; *In re Huddleston*, (N. D. Ala. 1899) 1 Am. Bankr. Rep. 572; *Matter of White*, (N. D. Ala. 1901) 10 Am. Bankr. Rep. 799; *In re Mussey*, 2 Nat. Bankr. N. 113. And see generally the annotation under section 11a.

**Referee cannot restrain court or officer thereof.**—The word "herein" as used in section 38a (4) refers to the entire Act, including the general orders in bankruptcy, and the provision must be construed in connection with General Order No. 12, which denies a referee jurisdiction to grant an injunction to stay the proceedings of a court or officer of the United States or of a state. *In re Berkowitz*, (E. D. Pa. 1906) 143 Fed. 598, 16 Am. Bankr. Rep. 251.

**Proceeding in state court.**—A referee has no power to grant an injunction staying a proceeding in a state court, and such an order is void. *In re Siebert*, (D. C. N. J. 1904) 133 Fed. 781, 13 Am. Bankr. Rep. 348.

**Power to set aside transfers and incumbrances.**—Where the property concerned, the *res*, is in the possession of the court, the referee has full power to deal with its status, and can set aside any transfers or incumbrances. This doctrine results necessarily from the basic principle that power to deal with property which is itself in the possession of the Bankruptcy Court rests exclusively in that court, and, therefore, at least concurrently with the district judge, in the referee. *In re Overholzer*, (N. D. N. Dak. 1909) 23 Am. Bankr. Rep. 10. And see generally sections 23b, 60b, 67e, and 70c.

**Questions arising out of applications for compositions or discharges** are expressly required to be originally presented to the court, and are withheld from the referee. *In re Johnson*, (W. D. Ark. 1908) 158 Fed. 342, 19 Am. Bankr. Rep. 814; *In re Randall*, (E. D. Pa. 1908) 159 Fed. 293, 20 Am. Bankr. Rep. 305; *U. S. v. Sondheim*, (D. C. Mass. 1910) 188 Fed. 378; *In re Taylor*, (N. D. Ala. 1911) 188 Fed. 479.

So, also, it has been held that a referee in bankruptcy, acting as a special master in hearing objections to a bankrupt's discharge, has no legal right to consider evidence which has been previously taken before him as referee; but must be governed

entirely by the admissible evidence produced on the hearing of the application and objections. *In re Murray*, (D. C. Conn. 1908) 162 Fed. 983, 20 Am. Bankr. Rep. 700.

But, although section 38a (4) excepts from the referee's jurisdiction all questions arising out of an application for composition, there may be further proceedings required after a composition has been confirmed which involve no such question. Thus it has been held that no such question would be involved in the receipt and allowance or disallowance of a creditor's claim, not barred by section 57n, even if presented after the confirmation. *U. S. v. Sondheim*, (D. C. Mass. 1902) 188 Fed. 378.

**Costs—Authority to tax.**—A referee sitting as a court of bankruptcy has

authority to award costs in proceedings before him; and may either tax the costs himself or order their taxation by the clerk of the District Court. *Matter of Scott*, (D. C. Mass. 1902) 7 Am. Bankr. Rep. 710.

**Imposition of costs on claimant of property.**—Where a controversy between a trustee and a third person respecting the right to certain property was submitted to a referee it was held that the claimant, who was unsuccessful, might properly be taxed with the costs of the reference, including a reasonable fee for the referee, a docket fee for the trustee's attorney, and the fee of a stenographer employed on the application of the trustee. *In re Todd*, (S. D. N. Y. 1901) 109 Fed. 265, 6 Am. Bankr. Rep. 88.

(5) [Authorize employment of stenographers.] upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings. [(1898) 30 Stat. L. 555.]

**Expenses of examination and stenographer.**—Although, under section 38a (5) an examination of the bankrupt and the employment of a stenographer therefor may, as a general rule, be allowed at the expense of the estate, that should not be allowed for the benefit of general creditors at the expense of the wages claims of workmen objecting thereto, when the funds on hand are only sufficient to pay the preferred claims, but such expenses should be at the charge of the general creditors alone. *In re Rozinsky*, (1900) 101 Fed. 229. See also *In re Todd*, (1901) 109 Fed. 265, wherein the referee was allowed a reasonable fee and the stenographer's fee, and *In re Ellet Electric Co.*, (W. D. N. Y. 1912) 196 Fed. 400, wherein the court reduced an allowance to a stenographer as inordinate.

But the general rule as to the employment of a stenographer at the expense of the estate furnishes no authority for employing stenographers in "adjustment, correspondence and notices in matters of claims, and other business of the estate." *In re Mammoth Pine Lumber Co.*, (W. D.

Ark. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651.

**Approval of stenographer's bill.**—The receiver or creditor applying for the examination will be compelled to approve of the stenographer's bill, and to certify that all of the examination was necessary. The bills can then be passed upon in settling the receiver's accounts, and close scrutiny should be given, with a view to preventing the unnecessary prolongation of such examination. *In re Stark*, (E. D. N. Y. 1907) 155 Fed. 694, 18 Am. Bankr. Rep. 467.

**Hearings before special commissioner.**—Section 38a (5) does not apply to hearings on the examination of the bankrupt before a special commissioner. *In re Stark*, (E. D. N. Y. 1907) 155 Fed. 694, 18 Am. Bankr. Rep. 467.

**Expenses for clerical aid.**—In *In re Caroline Cooperage Co.*, (1899) 96 Fed. 950, it was held that the referee had no authority to charge as expense against the estate an item for "clerical aid," there being no provision in the Act for the hiring of a clerk by the referee.

SEC. 39. DUTIES OF REFEREES.—a [What referees shall do.] Referees shall [(1898) 30 Stat. L. 555.]

As to review of referees' proceedings, see also *supra*, section 38a and the notes thereto.

"Duties of referee" is the title of General Order No. 12.

A personal expense account must be

kept by the referee as provided by General Order 26.

General Order No. 2 provides that "the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character."

(1) **[Declare dividends.]** declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; [(1898) 30 Stat. L. 555.]

The declaration and payment of dividends has been considered under the several subdivisions of section 65.

Form No. 40 is a list of claims and dividends to be recorded by referee and by him delivered to trustee."

(2) **[Examine schedules and lists.]** examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; [(1898) 30 Stat. L. 555.]

As to duty of bankrupt to prepare, verify, and file his schedules, see section 7a (8), *supra*, and the notes thereto.

**Examination of schedules.**—By section 39a (2) the referee is required to examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be

amended. This provision is mandatory. It is the duty of the referee to make the examination and to order an amendment in case of defects or omissions, even though no interested party may move in the matter. *In re Mackey*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 593.

(3) **[Furnish information.]** furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; [(1898) 30 Stat. L. 555.]

**Furnishing copies of proceedings.**—Courts do not furnish copies of proceedings had before them and referees, as such, are not required to do so. This section imposes the duty to furnish only such information as may be requested by the parties in interest, and not the duty of furnishing copies of proceedings pending

before them, and the fact that a referee refuses to furnish on demand a copy of the petition for adjudication and order of reference thereof does not debar him from proceeding with the reference. *In re Lewin*, (D. C. Vt. 1900) 103 Fed. 850, 4 Am. Bankr. Rep. 632.

(4) **[Give notices.]** give notices to creditors as herein provided; [(1898) 30 Stat. L. 555.]

As to notice to creditors generally, see the several subdivisions of section 58, *infra*, and the notes thereto.

**Notice to creditors.**—The referee must prepare suitable notices and place them in the mails, as a part of his duties. *In re Daniels*, (N. D. Ia. 1904) 130 Fed. 597, 12 Am. Bankr. Rep. 446.

**Notice of special meetings.**—It is the duty of the referee to send out the notices of a special meeting, called upon the petition of a creditor, under general rule No.

21. *In re Stoeber*, (E. D. Pa. 1900) 105 Fed. 355, 5 Am. Bankr. Rep. 250.

A district rule authorizing referees to order notice to creditors of the application for the bankrupt's discharge, and to fix the date of hearing, is void as being in conflict with Form No. 57, which requires that such notice shall be ordered, and the date of hearing be fixed, by the court. *In re Johnson*, (W. D. Ark. 1908) 158 Fed. 342, 19 Am. Bankr. Rep. 814.

(5) **[Make up records.]** make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; [(1898) 30 Stat. L. 555.]

**Making up records.**—The duty to make up records, under section 39a (5), and transmit them to the judge, is for the purpose of reviewing the referee's decisions, and has been generally considered

under section 38a, *supra*, note heading *Mode of Review*.

The clear purpose of section 39a (5) is to avoid, as far as possible, the sending of the original proofs to the judge, and

to substitute therefor, where the ends of justice will permit, a summary thereof; and to effectuate this object is the purpose of the General Order No. 27. But it is undoubtedly within the competency of the judge, at the request of either party,

to direct the filing of all or any part of the original documents or proofs which are on file with the referee. *Cunningham v. German Ins. Bank*, (C. C. A. 6th Cir. 1900) 103 Fed. 932, 4 Am. Bankr. Rep. 195.

(6) [Prepare schedules and lists.] prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; [(1898) 30 Stat. L. 555.]

As to bankrupt's duty to prepare, verify, and file schedules, see section 7a (8), *supra*.

(7) [Preserve and transmit records.] safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; [(1898) 30 Stat. L. 555.]

As to records of referees generally, and manner of keeping them, see the several subdivisions of section 42, *infra*.

Referees are their own filing and recording officers in proceedings before themselves, and are so recognized by rule No. 2 of the general orders in bankruptcy. *In re Oderkirk*, (D. C. Vt. 1900) 103 Fed. 779, 4 Am. Bankr. Rep. 617.

Referees must attend to details.—It was intended referees should do the detail work in bankruptcy causes, and the district judge should review their action on exceptions thereto. *In re Covington*, (E.

D. N. C. 1901) 110 Fed. 143, 6 Am. Bankr. Rep. 373.

"Transmission of proved claims to clerk" is the title of General Order No. 24.

Individual schedules in partnership cases.—In proceedings in bankruptcy against a partnership, the individual schedules of the partners are not a part of the record nor can they be considered as such. *In re Blanchard*, (E. D. N. C. 1908) 161 Fed. 797, 20 Am. Bankr. Rep. 422.

(8) [Transmit papers to clerks.] transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; [(1898) 30 Stat. L. 555.]

As to transmission of record of proceedings, see section 42c, *infra*.

(9) [Preserve evidence.] upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and [(1898) 30 Stat. L. 555.]

Preservation of evidence.—It is the duty of examiners, masters, referees, and the court, taking evidence in controversies in bankruptcy, in the absence of a jury, to take, record, and, in case of an appeal, to return to the reviewing court, all the evidence offered by either party, that which they hold to be incompetent or immaterial as well as that which they deem competent and relevant, to the end that if the appellate court is of the opinion that evidence rejected should have been received it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the rejected evidence.

*In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *In re Lipset*, (S. D. N. Y. 1902) 119 Fed. 379, 9 Am. Bankr. Rep. 32; *In re Sturgeon*, (C. C. A. 2d Cir. 1905) 139 Fed. 608, 14 Am. Bankr. Rep. 681; *Ravenswood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463, 16 Am. Bankr. Rep. 206; *In re Goldstein*, (S. D. N. Y. 1907) 155 Fed. 695, 19 Am. Bankr. Rep. 96; *Missouri-American Electric Co. v. Hamilton-Brown Shoe Co.*, (C. C. A. 8th Cir. 1908) 165 Fed. 283, 21 Am. Bankr. Rep. 270; *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 166 Fed. 853, 21 Am.

Bankr. Rep. 436; *In re Waters-Colver Co.*, (E. D. N. Y. 1914) 212 Fed. 761.

*The remedy for a refusal of a referee* to take and preserve such evidence is an application to the District Court, and, failing there, to the Circuit Court of Appeals, for an order that it be taken and preserved. *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436.

*Referee not obliged to certify questions during pendency of proceedings.*—A referee is not required to stop the proceedings before him, and to certify to the court for decision questions raised on objections to evidence. *In re Romine*, (N. D. W. Va. 1905) 138 Fed. 837, 14 Am. Bankr. Rep. 785; *Ravenswood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463, 16 Am. Bankr. Rep. 206.

*Evidence which need not be preserved.*—From the general rule above stated, which necessitates the taking of evidence even though it be excluded by the referee, there are certain exceptions; thus the referee need not receive or preserve evidence which is plainly privileged, or the testimony

of a privileged witness, or evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or the power of the court to compel its production or permit its introduction. *Missouri-American Electric Co. v. Hamilton-Brown Shoe Co.*, (C. C. A. 8th Cir. 1908) 165 Fed. 283, 21 Am. Bankr. Rep. 270.

*Cost of perpetuating testimony.*—Where a trustee in bankruptcy has no funds in his hands, and the bankrupt is without means, the referee will not compel the trustee to pay for the stenographer's minutes, referee's fees, and disbursements in taking the testimony which the bankrupt desires to introduce in opposition to that offered by the trustee, in a proceeding to compel the bankrupt to turn over property; it being within the discretion of the referee to determine how the bankrupt's testimony should be taken and preserved, in order that he may not be in contempt. *In re Goldstein*, (S. D. N. Y. 1907) 155 Fed. 695, 19 Am. Bankr. Rep. 96.

(10) [Obtain papers.] whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them. [(1898) 30 Stat. L. 555.]

#### b [What referees may not do.] Referees shall not

As to offenses by referees, see the several subdivisions of section 29c, *supra*.

(1) [Act if interested.] act in cases in which they are directly or indirectly interested;

*"Interest" as disqualification of referee.*—The interest which will disqualify the referee is an interest either in the proceedings in bankruptcy or in the estate of the bankrupt. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153.

*Judge may revoke reference because of referee's interest.*—The judge, on being apprised of the fact that the referee is a debtor of the bankrupt, may, in his dis-

cretion, revoke the order of reference, and send the case to another referee. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153.

*Interest in compensation immaterial.*—Section 39b does not apply to the interest of a referee by way of commissions on sums paid to creditors as dividends. *In re Abbey Press*, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 11.

(2) [Practice as attorneys.] practice as attorneys and counselors at law in any bankruptcy proceedings; or

(3) [Purchase from estate.] purchase, directly or indirectly, any property of an estate in bankruptcy. [(1898) 30 Stat. L. 555.]

SEC. 40. COMPENSATION OF REFEREES.—a [Fee and commissions.] Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim

filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to the creditors upon the confirmation of a composition. [(Amended 1903, which excepted pending cases) 32 Stat. L. 799.]

As originally enacted this section 40a read as follows:

"SEC. 40. COMPENSATION OF REFEREES.—a. Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition." [30 Stat. L. 556.]

In 1903 it was amended "so as to read as" in the text.

**Referee's commissions.**—A referee is entitled, under section 40a, as amended by the Act of Feb. 5, 1903, to a one per centum commission on all moneys disbursed to creditors by the trustee in estates which have been administered before them; or a commission of one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition. *In re* Sanford Furniture Mfg. Co., (E. D. N. C. 1903) 126 Fed. 888, 11 Am. Bankr. Rep. 414; *In re* Abbey Press, (C. C. A. 2d Cir. 1904) 134 Fed. 51, 13 Am. Bankr. Rep. 15; *In re* Anders Push Button Telephone Co., (S. D. N. Y. 1905) 136 Fed. 995, 13 Am. Bankr. Rep. 643; *In re* Iowa Falls Mfg. Co., (N. D. Ia. 1905) 140 Fed. 527, 15 Am. Bankr. Rep. 384; *In re* Cramond, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *In re* Erie Lumber Co., (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; *Bray v. Johnson*, (C. C. A. 4th Cir. 1908) 166 Fed. 57, 21 Am. Bankr. Rep. 383; *In re* Elk Valley Coal Min. Co., (W. D. Ky. 1914) 213 Fed. 383.

**Prior to the amendment of 1903** referees were paid one per centum commissions on the sums paid out as dividends and commissions in cases which were administered before them, and one-half of one per centum on the amount paid to creditors upon the confirmation of a composition. *In re* Ft. Wayne Electric Corp., (D. C. Ind. 1899) 94 Fed. 109, 1 Am. Bankr. Rep. 707; *In re* Fielding, (W. D. Mo. 1899) 96 Fed. 800, 3 Am. Bankr. Rep. 135; *In re* Barber, (D. C. Minn. 1899) 97 Fed. 547, 3 Am. Bankr. Rep. 306; *In re* Utt, (C. C. A. 7th Cir. 1901) 105 Fed. 754, 5 Am. Bankr. Rep. 383; *In re* Mammoth Pine Lumber Co., (W. D. Ark. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651; *In re* Goldville Mfg. Co., (D. C. S. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 552; *In re* Hinckel Brewing Co., (N. D. N. Y. 1903) 124 Fed. 702, 10 Am. Bankr. Rep. 692; *In re* Sabine, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 342; *In re* Coffin, (E. D. Tex. 1899) 2 Am. Bankr. Rep. 344; *In re* Gerson, (E. D. Pa. 1899)

2 Am. Bankr. Rep. 352; *In re* Muhlhauser Co., (N. D. Ohio 1902) 9 Am. Bankr. Rep. 80.

**Purpose and effect of the amendment of 1903.**—By the original Act of 1898 the referee's one per centum was to be reckoned only on the sums paid as dividends and commissions. It was held that he was not entitled to any allowance upon payments made to secured creditors, as they were not dividends in the bankruptcy sense of that term. It soon became evident that the referees were inadequately compensated. It not infrequently happened that practically all the assets of large and troublesome estates in the end were awarded to secured creditors. In 1903, for the avowed purpose of remedying this state of affairs, Congress so amended section 40 of the Act as to allow a one per centum commission to referees "on all moneys disbursed to creditors by the trustee." Since then the commission has been reckoned on all sums paid to creditors irrespective of whether they were secured or unsecured. *In re* Columbia Cotton Oil, etc., Corp. v. Harlow, (C. C. A. 4th Cir. 1913) 210 Fed. 824.

**Referee entitled to commissions on moneys which should have been paid through trustee.**—The referee, under the law, is entitled to commissions on all moneys which are disbursed to creditors by the trustee; and it has been held that this means all sums which should have been paid through the trustee but for outside agreement between parties and attorneys. Thus when property, subject to liens, is sold by consent of the parties holding such liens, the referee is entitled to his commissions on the purchase price in full. When sold free from incumbrances, the money is constructively paid to the trustee, even when purchased by the party holding such incumbrance, and the referee is entitled to commissions thereon as if it were actually paid. Having used the process of the court to accomplish their purpose, to wit, to sell the property by the trustee in bankruptcy, the incumbrancers have received benefits

and services for which the officers of the court are entitled to pay. *In re Sanford Furniture Mfg. Co.*, (E. D. N. C. 1903) 126 Fed. 888, 11 Am. Bankr. Rep. 414. See also *In re Sabine*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 322; *In re Coffin*, (E. D. Tex. 1899) 2 Am. Bankr. Rep. 344; *In re Barber*, (D. C. Minn. 1899) 3 Am. Bankr. Rep. 306.

**Commissions on sale to lienholders.**—Under the provisions allowing the referee commissions on all moneys which were disbursed to the creditors by the trustee, he is entitled to commissions on all sums which should be paid through the trustee but for outside agreement between parties and attorneys. When property subject to liens is sold by consent of the lienholders, the referee and trustee are entitled to commissions on the purchase price in full, though it is purchased by the lienholders. *In re Sanford Furniture Mfg. Co.*, (1903) 126 Fed. 888. See further, note under section 2(5), *supra*.

**Commissions on moneys constructively disbursed by a trustee.**—The referee is entitled to commissions on the amount constructively disbursed by a trustee to lienholders out of the sum for which they bid in their security. *In re Columbia Cotton Oil, etc., Corp v. Harlow*, (C. C. A. 4th Cir. 1913) 210 Fed. 824.

**Liens must abate for referee's commissions.**—When the Bankruptcy Court lawfully takes hold of and administers the estate of a bankrupt and has the funds in its possession for that purpose, it may direct, and it is its duty to direct, that the lawful fees and commissions of its officers and expenses of such administration be paid therefrom; and when necessary, in such cases, liens on such funds must abate for this purpose. *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22.

But see *In re Anders Push Button Telephone Co.*, (S. D. N. Y. 1905) 136 Fed. 995, 13 Am. Bankr. Rep. 643, wherein it was held that a court of bankruptcy has no power to require a creditor, secured by a valid lien, to pay commissions on the amount realized thereon to the referee, although by stipulation the property is sold by the trustee, because the proceeds of the property, so far as necessary to satisfy the lien, are no part of the estate, from which all commissions are made payable.

See also *In re Iowa Falls Mfg. Co.*, (N. D. Ia. 1905) 140 Fed. 527, 15 Am. Bankr. Rep. 384, wherein it was held that the proceeds of mortgaged property, arising from the sale thereof by the sheriff, should be excluded from the amount upon which the referee may compute his commissions, and that the amount actually disbursed by the trustee to creditors should form the basis of such computation.

Prior to the amendment of 1903, it was held that the referee had no right to

a commission on moneys paid to mortgagees, arising from the sale by the court's order of the mortgaged property, as such moneys were not dividends under the Act. *In re Utt*, (C. C. A. 1901) 105 Fed. 754.

**Commissions on moneys paid to secured and unsecured creditors.**—The provisions are comprehensive enough to entitle referees to commissions on moneys paid to secured and unsecured creditors. *In re Meadows*, (W. D. N. Y. 1912) 199 Fed. 304; *In re Columbia Cotton Oil, etc., Corp. v. Harlow*, (C. C. A. 4th Cir. 1913) 210 Fed. 824.

Prior to the amendment of 1903, it was held that a dividend, within the meaning of the law, is declared and paid on unsecured claims only and that it was only in connection with the latter that the referee was entitled to a commission. *In re Ft. Wayne Electric Corp.*, (1899) 94 Fed. 109.

So likewise prior to the amendment of 1903, it was held that the setting aside of the homestead exemption was not the making of a dividend such as the referee was entitled to a commission for. *In re Gardner*, (1900) 103 Fed. 922.

**Per diem allowance.**—The Bankruptcy Act and General Order No. 35 (see *supra*, note to section 30) afford no authority to a referee for charging a *per diem* in any case whatsoever, nor does it authorize a charge for any order whatsoever that may be entered. *In re Pierce*, (1901) 111 Fed. 516; *In re Barker*, (1901) 111 Fed. 501.

**Services of referee as special master.**—There is no authority for converting a referee in bankruptcy into a special master, nor for allowing him compensation as such. *In re Sweeney*, (C. C. A. 6th Cir. 1909) 168 Fed. 612, 21 Am. Bankr. Rep. 866.

Where the statutory fees received by a referee are sufficient to compensate him liberally for all services rendered in a case, he will not be given a further allowance on account of an extra service rendered as special master in connection with a composition. *In re Talton*, (E. D. N. C. 1905) 137 Fed. 178, 14 Am. Bankr. Rep. 617.

But prior to the amendment of 1903 which, by the addition of section 72 to the statute, prohibited the payment of extra compensation to referees and other officers, it was held that where a referee performed services beyond those required of him in his official capacity as, for instance, those of special master, he might be allowed additional compensation therefor. *Fellows v. Freudenthal*, (C. C. A. 7th Cir. 1900) 102 Fed. 731, 4 Am. Bankr. Rep. 490; *Bragassa v. St. Louis Cycle*, (C. C. A. 5th Cir. 1901) 107 Fed. 77, 5 Am. Bankr. Rep. 700; *In re Grossman*, (E. D. Mich. 1901) 111 Fed. 507, 6 Am. Bankr. Rep. 510.



**Reference of application for discharge.**—General Order No. 35 (see *supra*, note to section 30) does not give the referee any compensation other than that allowed him in section 40a for services on a reference of an application for discharge under General Order No. 12 (see *supra*, note to section 30). *In re Troth*, (1900) 104 Fed. 291.

Where a referee authorized the continuance of the bankrupt's business in order to complete certain government contracts, and for that purpose there was raised and paid out \$480,000 during a period of eighteen months, and some \$30,000 distributed to creditors, it was held that the referee was entitled to a percentage on the latter sum only. *Bray v. Johnson*, (C. C. A. 4th Cir. 1908) 166 Fed. 57, 21 Am. Bankr. Rep. 383.

**Extra compensation.**—A referee in bankruptcy cannot be allowed, for his services, any compensation other than that provided for by the Bankruptcy Law, or the general orders pertaining thereto. *In re Barber*, (1899) 97 Fed. 547; *In re Dixon*, (N. D. Cal. 1902) 114 Fed. 675; *In re Mammoth Pine Lumber Co.*, (W. D. Ark. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541; *In re Daniels*, (N. D. Ia. 1904) 130 Fed. 597; *In re Wilcox*, (W. D. Mich. 1907) 156 Fed. 685, 19 Am. Bankr. Rep. 241; *In re Meadows*, (W. D. N. Y. 1912) 199 Fed. 304; *In re M. F. Rourke Co.*, (E. D. Tenn. 1913) 209 Fed. 877. And see the annotation under section 72.

But see *Matter of Hart*, (D. C. Hawaii 1907) 18 Am. Bankr. Rep. 137, wherein it was held that a referee performing services not within his statutory duties, but of value to the conduct of a bankrupt estate as a going concern, may receive compensation therefor out of the funds of the estate.

A special allowance to a referee for services performed, in addition to the fees fixed by the Bankruptcy Act, cannot be made, even with the consent of the attorneys for the parties in interest. *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541.

**Clerical services rendered by referee.**—The referee is not entitled to charge for his own services in making copies of the petition for discharge, but it may be necessary in some cases for the referee to employ clerical assistance in giving such notices, and then the expense actually incurred by him for such assistance would be a charge against the bankrupt or his estate; but the referee is not entitled to make any charge for clerical services rendered by himself in cases pending before him. *In re Dixon*, (N. D. Cal. 1902) 114 Fed. 675.

**Extra compensation for giving notices.**

—Under General Order in Bankruptcy No. 35(2), providing for compensation to the referee for expenses necessarily incurred in giving notices, he cannot, in case of re-examination of a claim, be allowed for notices to creditors other than the one provided for by Order No. 21(6), to the creditor whose claim is to be re-examined; nor can the referee be allowed for notices on distribution of money to preferred creditors; or for notice of protest against confirmation of sale, none being required by the Act or general orders. *In re Mammoth Pine Lumber Co.*, (W. D. Ark. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651. See also *In re Dixon*, (N. D. Cal. 1902) 114 Fed. 675.

**Claims for miscellaneous services.**—In the case of *In re Mammoth Pine Lumber Co.*, (W. D. Ark. 1902) 116 Fed. 731, 8 Am. Bankr. Rep. 651, the compensation to be allowed referees for giving notices, and the matter of allowance for services of a stenographer and of allowance of commissions, were discussed at length. In that case the court refused to allow a referee compensation for investigation and finding in the case of specific liens. See also section 38a(5) *supra*, and the notes thereto.

**Referee's expenses.**—The only allowance which can be made to a referee, in addition to the fees and commission, is for expenses necessarily incurred, a detailed account of which must be kept and returned to the court, verified by the oath of the referee, and accompanied by vouchers when they can be procured. *In re Carolina Cooperage Co.*, (E. D. N. C. 1899) 96 Fed. 950, 3 Am. Bankr. Rep. 154; *In re Tebo*, (D. C. W. Va. 1900) 101 Fed. 419, 4 Am. Bankr. Rep. 235; *In re Dixon*, (N. D. Cal. 1902) 114 Fed. 675; *In re Daniels*, (N. D. Ia. 1904) 130 Fed. 597, 12 Am. Bankr. Rep. 446. And see generally the annotation under section 62 *infra*, as to expenses of administration.

**Statute covers all lawful disbursements.**

—The language of section 40a covers, and evidently was intended to include, all moneys lawfully disbursed by the trustee, and held by him as such, whether to creditors, secured, unsecured, or having priority, or to other persons. If to creditors, it is immaterial whether the amounts lawfully paid them from the funds in court are paid as dividends, or in satisfaction of a lien or liens on the fund. If the money comes lawfully into the hands of the trustee, as such, and if he in the performance of his duty as such is required to protect, preserve, and care for it, and eventually disburse it pursuant to the order of the court, and does so, there is no reason why he should not have his commissions, if the court allows them, even

if the funds are subject to a lien which in law and equity the court is required to recognize and enforce. *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22.

**Computation.**—Referee's fees must be computed upon the amount paid and disbursed to creditors and not upon the entire amount of the claims and liabilities of the bankrupt as scheduled. *In re Phillips*, (C. C. A. 5th Cir. 1914) 210 Fed. 889. See also *In re Barker*, (1901) 111

Fed. 501; *In re Smith*, (1901) 108 Fed. 39.

**Allowance of referee's fees reviewable.**—The allowance by a referee in bankruptcy of fees to himself is reviewable by the court. *In re Allert*, (W. D. N. Y. 1908) 173 Fed. 691, 23 Am. Bankr. Rep. 101. See the annotation under section 38a, *supra*, as to review generally.

**As to prepayment of the referee's statutory fee**, see *infra*, section 51a (2) and the notes thereto.

**b [Division between two referees.]** Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

**c [Where reference revoked.]** In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee. [(1898) 30 Stat. L. 556.]

**SEC. 41. CONTEMPTS BEFORE REFEREES.**—*a* A person shall not, in proceedings before a referee, [(1898) 30 Stat. L. 556.]

**General exposition of section 41.**—The things forbidden in this section, concerning which the referee is required by section 41b to certify the facts to the judge, "include only those things which would be punishable as contempts by all courts of record. They are the common and familiar heads for the exercise of this jurisdiction by all courts of record. No new or enlarged jurisdiction is conferred, and no power to impose a punishment which might not rightly and lawfully be imposed, on a similar state of facts, by any other United States court. Any act, matter, or thing which any United States court may punish as a contempt may be punished as such by a court of bankruptcy; and any act, matter, or thing which cannot be punished as a contempt by other United States courts cannot be punished as such by a court of bankruptcy. More-

over, the mode of proceeding in a court of bankruptcy to determine whether a constructive contempt has been committed should conform to the established practice in like cases in all other United States courts as near as may be, and what is legally sufficient to purge a contempt in the other courts of the United States is sufficient to purge the like contempt in a court of bankruptcy." *Boyd v. Glucklich*, (C. C. A. 1902) 116 Fed. 131.

**Statute not limited to punishment of bankrupt.**—The statute does not limit contempt proceedings to the bankrupt only, but includes any person; and section 2 (16) empowers the court to punish persons for contempts committed before referees. The same power is conferred upon the court by Judicial Code, sec. 268, title JUDICIARY. *In re Bronstein*, (S. D. N. Y. 1910) 182 Fed. 349.

**(1) [Disobedience.]** disobey or resist any lawful order, process, or writ; [(1898) 30 Stat. L. 556.]

**Disobedience as contempt.**—The disobedience of any lawful order, process, or writ, in proceedings before a referee, constitutes a contempt under section 41a (1), which may be punished as provided in subdivision b of the same section. The proceeding is *quasi-criminal*, and should be employed with caution. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405, 7 Am. Bankr. Rep. 224; *Louisville Trust Co. v. Comingor*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413, 7 Am. Bankr. Rep. 421, *affirming Sinsheimer v. Simonson*, (C.

C. A. 6th Cir. 1901) 107 Fed. 898, 5 Am. Bankr. Rep. 537; *In re Watts*, (1903) 190 U. S. 1, 23 S. Ct. 718, 47 U. S. (L. ed.) 933, 10 Am. Bankr. Rep. 113; *In re Purvine*, (C. C. A. 5th Cir. 1899) 96 Fed. 192, 2 Am. Bankr. Rep. 787; *In re Tudor*, (D. C. Colo.) 96 Fed. 942, 2 Am. Bankr. Rep. 808; *In re McCormick*, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340; *In re Schlesinger*, (S. D. N. Y. 1899) 97 Fed. 930, 3 Am. Bankr. Rep. 342, *affirmed* (2d Cir. 1900) 102 Fed. 119, 42 C. C. A. 207, 4 Am. Bankr. Rep. 361; *In re Mayer*, (E. D. Wis. 1900) 98 Fed.

839, 3 Am. Bankr. Rep. 533; *In re* Mo-Bryde, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729; *In re* Deuell, (W. D. Mo. 1900) 100 Fed. 633, 4 Am. Bankr. Rep. 60; *In re* Tudor, (1900) 100 Fed. 796; *In re* Rosser, (C. C. A. 8th Cir. 1900) 101 Fed. 562, 4 Am. Bankr. Rep. 153, *reversing* (E. D. Mo. 1899) 96 Fed. 305, 2 Am. Bankr. Rep. 746; *Ripon Knitting Works v. Schneider*, (D. C. Wash. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re* Schlesinger, (C. C. A. 2d Cir. 1900) 102 Fed. 117, 4 Am. Bankr. Rep. 361; *In re* Anderson, (D. C. S. C. 1900) 103 Fed. 854, 4 Am. Bankr. Rep. 640; *In re* Miller, (1900) 105 Fed. 57; *Smith v. Belford*, (C. C. A. 6th Cir. 1901) 106 Fed. 658, 5 Am. Bankr. Rep. 291; *In re* Krinsky, (S. D. N. Y. 1902) 112 Fed. 972, 7 Am. Bankr. Rep. 535; *In re* Levin, (S. D. N. Y. 1901) 113 Fed. 498, 6 Am. Bankr. Rep. 743; *In re* De Gottardi, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *In re* Taylor, (D. C. Colo. 1901) 114 Fed. 607, 7 Am. Bankr. Rep. 410; *Boyd v. Glucklich*, (C. C. A. 8th Cir. 1902) 116 Fed. 131, 8 Am. Bankr. Rep. 393; *In re* Hausman, (C. C. A. 2d Cir. 1903) 121 Fed. 984, 10 Am. Bankr. Rep. 64; *In re* Fortunato, (S. D. N. Y. 1903) 123 Fed. 622, 9 Am. Bankr. Rep. 630; *Ex p. O'Neal*, (N. D. Fla. 1903) 125 Fed. 967, 11 Am. Bankr. Rep. 196; *In re* Leinweber, (D. C. Conn. 1904) 128 Fed. 641, 12 Am. Bankr. Rep. 175; *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755; *Samel v. Dodd*, (C. C. A. 5th Cir. 1906) 142 Fed. 68, 16 Am. Bankr. Rep. 163; *In re* Lacov, (C. C. A. 2d Cir. 1905) 142 Fed. 960, 15 Am. Bankr. Rep. 290; *Ravenswood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463, 16 Am. Bankr. Rep. 206; *In re* Cole, (C. C. A. 1st Cir. 1906) 144 Fed. 392, 16 Am. Bankr. Rep. 302; *In re* Home Discount Co., (N. D. Ala. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 170; *In re* Fellerman, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 789; *In re* Cole, (C. C. A. 1st Cir. 1907) 163 Fed. 180, 20 Am. Bankr. Rep. 761; *In re* Gitkin, (E. D. Pa. 1908) 164 Fed. 71, 21 Am. Bankr. Rep. 113; *In re* Bronstein, (S. D. N. Y. 1910) 182 Fed. 349; *In re* Mitchell, (E. D. N. Y. 1913) 202 Fed. 806; *In re* Jamaica Slate Roofing & Supply Co., (E. D. N. Y. 1913) 202 Fed. 810; *In re* Star Spring Bed Co., (C. C. A. 3d Cir. 1913) 203 Fed. 640; *In re* Fogelman, (E. D. N. Y. 1913) 204 Fed. 351; *In re* Friedman, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 301; *In re* Ogles, (W. D. Tenn.) 2 Am. Bankr. Rep. 514; *Turrentine v. Blackwood*, (1900) 4 Am. Bankr. Rep. 338, 125 Ala. 436, 28 So. 95; *In re* Geiser, (D. C. Mont. 1904) 12 Am. Bankr. Rep. 203.

*Disobeying an injunction order* constitutes a contempt under section 41a (1).

*In re* Fortunato, (S. D. N. Y. 1903) 123 Fed. 622, 9 Am. Bankr. Rep. 630.

*Service of a copy of an injunction* issued by a Bankruptcy Court, restraining an assignee for creditors of a bankrupt and others from disposing of his property, is unnecessary in order to put them in contempt for a violation thereof, where they were otherwise advised of its issuance. *In re* Krinsky, (S. D. N. Y. 1902) 112 Fed. 972, 7 Am. Bankr. Rep. 535.

*Order for payment of expenses.*—A court of bankruptcy may enforce an order requiring petitioning creditors to pay the expenses of a receivership procured by them, by proceedings in contempt. *In re* Lacov, (C. C. A. 2d Cir. 1905) 142 Fed. 960, 15 Am. Bankr. Rep. 290.

*Refusal to turn over books and papers.*—Where a bankrupt, for whose estate a receiver was appointed by the Bankruptcy Court on the filing of an involuntary petition against him, neglected and refused to turn over to the receiver his books of account, or notes and mortgages owned by him, but concealed the same, and also disregarded an order of the court commanding him to appear and show cause why he should not be punished for contempt for so doing, leaving the state after the order was served upon him, it was held that he was guilty of contempt. *In re* Wilson, (W. D. Ark. 1902) 116 Fed. 419, 8 Am. Bankr. Rep. 612.

*Failure to file schedules.*—In *Matter of Schulman*, (D. C. N. Y. 1908) 20 Am. Bankr. Rep. 707, it was said: "Many bankrupts pay no attention to their duty to file their schedules, and motions to punish them for contempt for not filing schedules have become very frequent. Hereafter, as a general rule, whenever such motions are made, bankrupts will be fined a sufficient sum to compensate the attorneys for their trouble in making the motion, and, if such fines do not prove sufficient to put a stop to the delay in filing schedules, punishment by imprisonment for contempt will be imposed."

*Fraud.*—Contempt proceedings cannot be employed to punish for frauds committed by the bankrupt against the Bankruptcy Act; nor can they be used to coerce the bankrupt, or transferees, to make restitution of money or property previously transferred in fraud of the Act. *In re* Mayer, (E. D. Wis. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533.

*Contempt for failure to turn over assets.*—It is well settled that the bankrupt may be punished for contempt in failing to comply with an order requiring him to turn over to his trustee assets of the estate which are in his possession or under his control, providing that he have the present ability to do so. *In re* McCormick, (1899) 97 Fed. 566; *In re* Schlesinger, (S. D. N. Y. 1899) 97 Fed. 930, 3 Am. Bankr. Rep. 342, *affirmed* (2d Cir.

1900) 102 Fed. 119, 42 C. C. A. 207, 4 Am. Bankr. Rep. 361; *In re* Mayer, (E. D. Wis. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533; *In re* Duell, (W. D. Mo. 1900) 100 Fed. 633, 4 Am. Bankr. Rep. 60; *In re* Tudor, (1900) 100 Fed. 796; *Ripon Knitting Works v. Schreiber*, (D. C. Wash. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re* Miller, (1900) 105 Fed. 57; *In re* Levin, (1901) 113 Fed. 498; *In re* De Gottardi, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *Boyd v. Glucklich*, (8th Cir. 1902) 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393; *In re* Wilson, (W. D. Ark. 1902) 116 Fed. 419, 8 Am. Bankr. Rep. 612; *In re* Shachter, (N. D. Ga. 1902) 119 Fed. 1010, 9 Am. Bankr. Rep. 499; *In re* Gerstel, (S. D. Ill. 1903) 123 Fed. 166, 10 Am. Bankr. Rep. 411; *In re* Kane, (M. D. Pa. 1903) 125 Fed. 984, 10 Am. Bankr. Rep. 478; *American Trust Co. v. Wallis*, (3d Cir. 1903) 126 Fed. 464, 61 C. C. A. 342, 11 Am. Bankr. Rep. 360; *In re* Goldfarb, (N. D. Ga. 1904) 131 Fed. 643; *In re* Alphin, etc., *Cotton Co.*, (E. D. Ark. 1905) 134 Fed. 477, 14 Am. Bankr. Rep. 194; *In re* Sax, (E. D. Pa. 1905) 141 Fed. 223, 15 Am. Bankr. Rep. 455; *Samel v. Dodd*, (5th Cir. 1906) 142 Fed. 68, 73 C. C. A. 254, 16 Am. Bankr. Rep. 163; *In re* Lutfy, (S. D. N. Y. 1907) 156 Fed. 873, 19 Am. Bankr. Rep. 614; *In re* Walsh, (N. D. Ia. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472; *In re* Cole, (C. C. A. 1st Cir. 1907) 163 Fed. 180, 20 Am. Bankr. Rep. 761; *In re* Lesaius, (M. D. Pa. 1908) 163 Fed. 614, 21 Am. Bankr. Rep. 23; *In re* Ruos, (E. D. Pa. 1908) 164 Fed. 749, 21 Am. Bankr. Rep. 257; *In re* Berman, (E. D. Pa. 1908) 165 Fed. 383, 21 Am. Bankr. Rep. 139; *In re* Stavrah, (C. C. A. 2d Cir. 1909) 174 Fed. 330, 23 Am. Bankr. Rep. 168; *In re* Greenberg, (E. D. N. Y. 1910) 179 Fed. 413; *In re* Potteiger, (E. D. Pa. 1910) 181 Fed. 640; *In re* Herr, (M. D. Pa. 1910) 182 Fed. 715; *In re* Nisenon, (D. C. N. J. 1910) 182 Fed. 912; *In re* Richards, (W. D. Ark. 1910) 183 Fed. 501; *In re* Lippman, (E. D. N. Y. 1910) 184 Fed. 551; *In re* Smith, (E. D. N. Y. 1911) 185 Fed. 983.

*The authority of the referee to make an order for the turning over of property to the trustee has been considered under section 38a (4).*

*It is the court's duty to exercise its power to punish for contempt where there is sufficient evidence to satisfy the judge that the bankrupt has the property in his possession or control. In re Wilson, (W. D. Ark. 1902) 116 Fed. 419, 8 Am. Bankr. Rep. 612.*

*Object of proceeding.—It is not the object of contempt proceedings against a bankrupt for his failure to turn over money or property in his possession, to punish him for concealing assets from his trustees or for frauds or delinquencies of*

*which he may appear to be guilty; but the sole purpose is to reach, and to compel the surrender of, property belonging to the estate in the actual control or possession of the bankrupt. Boyd v. Glucklich, (8th Cir. 1902) 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393; In re Kane, (M. D. Pa. 1903) 125 Fed. 984, 10 Am. Bankr. Rep. 478; In re Alphin, etc., Cotton Co., (E. D. Ark. 1905) 134 Fed. 477, 14 Am. Bankr. Rep. 194.*

*Failure to turn over after-acquired property.—The failure of the bankrupt to turn over property in compliance with an order of the referee may be punished as a contempt although the order had reference to after-acquired property. In re Tudor, (D. C. Colo.) 96 Fed. 942, 2 Am. Bankr. Rep. 808.*

*Effect of pendency of indictment.—It has been held that the court will refuse to punish a bankrupt for contempt in disobeying an order to turn over property, where it appears that an indictment is pending against him in a state court for the embezzlement of the identical property. In such case the contempt proceedings cannot be taken until after he has been tried under the indictment. In re Hooks Smelting Co., (E. D. Pa. 1906) 146 Fed. 336, 17 Am. Bankr. Rep. 141.*

*Bankrupt must account for money traced into his hands.—In proceedings against a bankrupt for contempt for failure to turn over to his trustee, an order of the referee, money traced into his hands, it is not a sufficient accounting by him for such money to say that he gave it to his wife, who has spent it for the benefit of himself and family. In re Kane, (M. D. Pa. 1903) 125 Fed. 984, 10 Am. Bankr. Rep. 478.*

*Where a bankrupt, having been ordered by the referee to pay over to his trustee a sum of money alleged to be in his possession and to belong to his estate in bankruptcy, denies his present possession of the money, and attempts to explain its loss by a story which, though difficult to believe, is not impossible, nor an obvious fabrication, he may be ordered before the judge for further examination as to whether or not he has made a full disclosure of the facts; and if satisfied that his story is false, the court will order commitment. In re McCormick, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340.*

*Failure to appeal from order to turn over.—In a proceeding for contempt in a District Court against a bankrupt for failure to comply with an order of the referee to turn over money or property to the trustee, such order, not appealed from, is conclusive of the fact that at the date of its entry the bankrupt had the money or property in his possession or*

under his control. *In re Frankel*, (S. D. N. Y. 1911) 184 Fed. 539.

**Property must be capable of identification.**—A summary order directing the respondent upon pain of imprisonment to surrender certain goods of which he is said to be holding fraudulent custody, the property still belonging to the bankrupt, should not be made unless the goods can be followed and sufficiently identified to enable the marshal to take them into his possession. *In re Jackier*, (M. D. Pa. 1910) 179 Fed. 720.

And a finding that a bankrupt had in his possession or under his control goods, merchandise, etc., of a certain value, which he withheld, secreted, and concealed, but which failed to describe more specifically the property, or to state where any of the goods were, was held to be insufficient to justify an order requiring its surrender under penalty of commitment for contempt. *In re Rogowski*, (N. D. Ga. 1908) 166 Fed. 165, 21 Am. Bankr. Rep. 553.

**Contempt dependent on ability to comply with order.**—Whether a bankrupt is guilty of contempt in failing to comply with a referee's order directing him to pay over funds alleged to have been withheld, to his trustee, depends on the bankrupt's present ability to comply therewith. *In re Kane*, (M. D. Pa. 1903) 125 Fed. 984, 10 Am. Bankr. Rep. 478; *American Trust Co. v. Wallis*, (C. C. A. 3d Cir. 1903) 126 Fed. 464, 11 Am. Bankr. Rep. 360; *In re Davison*, (D. C. R. I. 1906) 143 Fed. 673, 16 Am. Bankr. Rep. 338; *In re Eddleman*, (W. D. Ky. 1907) 154 Fed. 160, 19 Am. Bankr. Rep. 45; *In re Mize*, (N. D. Ala. 1909) 172 Fed. 945, 22 Am. Bankr. Rep. 577; *In re Marks*, (E. D. Pa. 1910) 176 Fed. 1018, 23 Am. Bankr. Rep. 911; *In re Jackier*, (M. D. Pa. 1910) 179 Fed. 720; *In re Frank*, (C. C. A. 8th Cir. 1910) 182 Fed. 794; *In re Richards*, (W. D. Ark. 1910) 183 Fed. 501; *In re Cummings*, (E. D. Pa. 1911) 186 Fed. 1020, 188 Fed. 767; *In re Reynolds*, (M. D. Ala. 1911) 190 Fed. 967, *affirmed* (C. C. A. 5th Cir. 1913) 204 Fed. 709; *In re Haring*, (W. D. Mich. 1912) 193 Fed. 168; *Epstein v. Steinfeld*, (C. C. A. 3d Cir. 1914) 210 Fed. 236.

"The powers vested in courts of bankruptcy, to accomplish the general purpose of the Bankrupt Law, to wit, to segregate the estate of the bankrupt and provide for its equitable distribution amongst the creditors, are plenary and far-reaching. The court may, by summary order, direct the delivery and turning over to the trustee by the bankrupt, or by any third person holding the same under his order and control, any property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. For disobedience of such order, the court in

bankruptcy undoubtedly has the power, by attachment for contempt, to enforce compliance with such order, and punish refusal to comply. This power, however, is far-reaching and drastic, and must be exercised with cautious discretion. If the bankrupt denies that he has possession or control of the property, or if a third person in possession thereof claims to hold it, not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial or claim is false or fraudulent, and that the case is one of simple concealment or refusal on the part of the bankrupt, or the one in possession, to deliver up the property as ordered, it would be an unwarranted stretch of power on the part of the court to resort to a summary proceeding for contempt for the enforcement of its order. In the absence of fraud or concealment, the Bankrupt Court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control." *American Trust Co. v. Wallis*, (3d Cir. 1903) 126 Fed. 464, *quoted with approval* in *In re Cummings*, (E. D. Pa. 1911) 188 Fed. 767, and in *Epstein v. Steinfeld*, (C. C. A. 3d Cir. 1914) 210 Fed. 236.

**Money paid out by bankrupt.**—A bankrupt cannot be adjudged in contempt for failure to turn over to his trustee, pursuant to order of the referee, money which, before the proceedings were begun, had been paid out by him to creditors. *In re Kane*, (M. D. Pa. 1903) 125 Fed. 984, 10 Am. Bankr. Rep. 478; *American Trust Co. v. Wallis*, (3d Cir. 1903) 126 Fed. 464, 61 C. C. A. 342, 11 Am. Bankr. Rep. 363.

**Payment to wife.**—Where a bankrupt, within a few days prior to the filing of the petition in bankruptcy against him, sells property, and pays the proceeds to his wife, she will be regarded as holding the same as his agent, and such facts will justify an order requiring him to pay the money over to his trustee; but he cannot be adjudged in contempt for a failure to obey such order with respect to certain of the money which his wife is affirmatively shown to have paid out to a third person prior to the bankruptcy. *In re Eddleman*, (W. D. Ky. 1907) 154 Fed. 160, 19 Am. Bankr. Rep. 45.

**Bankrupt's control nominal.**—The court will not punish a bankrupt for contempt in not turning over property in compliance with an order, where it appears that he is in nominal rather than actual control of the business, the scheme of fraud being arranged and carried out by others. *In re Davison*, (D. C. R. I. 1906) 143 Fed. 673, 16 Am. Bankr. Rep. 338.

**Inability occasioned through fault of bankrupt.**—A court cannot by contempt

proceedings undertake to compel the performance of something which the respondent is wholly unable to perform, even though he became so through his own fault, where it arose through a mere misconception of his legal rights. *Sinsheimer v. Simonson*, (C. C. A. 6th Cir. 1901) 107 Fed. 898, 5 Am. Bankr. Rep. 537.

**Bankrupt may prove his inability to comply with order.**—Before punishing a bankrupt for contempt because of his failure to comply with an order, the court should give him an opportunity to prove his inability to do so. *In re Hausman*, (C. C. A. 2d Cir. 1903) 121 Fed. 984.

**Effect of answer denying contempt.**—The sworn answer of the bankrupt denying the alleged contempt is not conclusive, but may be contradicted or supported by other testimony. *Ripon Knitting Works v. Schreiber*, (1900) 101 Fed. 814, and the dissenting opinion in *Boyd v. Glucklich*, (C. C. A. 1902) 116 Fed. 131. See, however, for a contrary view the opinion written for the majority of the court in the case last above cited.

**Mere denial of ability insufficient.**—It is well settled that the bankrupt's mere denial, under oath, that he is able to comply with an order directing him to turn over property or money is not conclusive; and if there is sufficient evidence to show that it is in his possession or under his control, he may be ordered to produce it, and a violation of the order will subject him to punishment for contempt. *Schweer v. Brown*, (8th Cir. 1904) 130 Fed. 328, 64 C. C. A. 574; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785; *In re Richards*, (W. D. Ark. 1910) 183 Fed. 501; *In re Cummings*, (E. D. Pa. 1911) 186 Fed. 1020; *In re Weber Co.*, (C. C. A. 2d Cir. 1912) 200 Fed. 404.

Thus it has been held that an order requiring a bankrupt to turn over money or property should not be made when the bankrupt absolutely denies that he has the property or money, and the evidence that he has it is only inferential, if there can be any reasonable doubt of his ability to comply with the order, because if disobeyed it involves his imprisonment. *In re Friedman*, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 301.

And where the bankrupt claims that his property has been stolen, but it appears that at the time of the alleged theft he made statements that practically nothing had been taken, the court will be justified in punishing him for contempt on his failure to turn the property over in obedience to an order to do so. *In re Levin*, (S. D. N. Y. 1901) 113 Fed. 498, 6 Am. Bankr. Rep. 743.

**Evidence should be clear and convincing.**—The evidence in a proceeding to compel a bankrupt to turn over assets to his trustee must be clear and convincing before

it will justify an order for contempt for failure to comply therewith. *In re Purvine*, (5th Cir. 1899) 96 Fed. 192, 37 C. C. A. 446, 2 Am. Bankr. Rep. 787; *In re Mayer*, (E. D. Wis. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533; *In re Gottardi*, (1902) 114 Fed. 328; *Boyd v. Glucklich*, (C. C. A. 1902) 116 Fed. 131; *In re Adler*, (W. D. Tenn. 1904) 129 Fed. 502, 12 Am. Bankr. Rep. 19; *Samel v. Dodd*, (5th Cir. 1906) 142 Fed. 68, 73 C. C. A. 254, 16 Am. Bankr. Rep. 163; *In re Mize*, (N. D. Ala. 1909) 172 Fed. 945, 22 Am. Bankr. Rep. 577.

Before a bankrupt can be punished for the failure to obey an order to turn over property to the trustee, not only must it be proven that the money or property ordered to be turned over is a part of his estate, but it must also be established that such money or property is in the possession or under the control of the bankrupt. *In re Rosser*, (C. C. A. 1900) 101 Fed. 562; *In re Adler*, (E. D. Okla. 1908) 170 Fed. 634, 21 Am. Bankr. Rep. 371; *In re Mize*, (N. D. Ala. 1909) 172 Fed. 945, 22 Am. Bankr. Rep. 577.

**Power not exercised in doubtful cases.**—The power of a court of bankruptcy to order a bankrupt or other person to turn over money or property found to belong to the bankrupt estate, under penalty of imprisonment for contempt, should not be exercised in doubtful cases. *Samel v. Dodd*, (C. C. A. 5th Cir. 1906) 142 Fed. 68, 16 Am. Bankr. Rep. 163.

And where it is sought to punish a bankrupt for the failure to obey an order to turn over property to the trustee, and it appears that the amount claimed to be withheld depends on mere estimates on one side or the other, it is only where there are great discrepancies which cannot be explained except on the basis that the bankrupt has made away with his property that the matter can be laid hold of by a summary order. *In re Reese*, (M. D. Pa. 1909) 170 Fed. 986.

So, too, where the referee simply finds that the bankrupt had goods in stock a short time before bankruptcy proceedings were instituted, and that the goods have since disappeared without any satisfactory explanation by the bankrupt concerning their disappearance, but the report entirely fails to locate any of the missing goods, an order of the referee to turn over the property to the trustee is not, under the circumstances, sufficient to base contempt proceedings upon in the event of a failure to obey the order. *In re Rogowski*, (N. D. Ga. 1908) 166 Fed. 165.

**Bankrupt entitled to benefit of reasonable doubt.**—It has been held in several cases that, to justify an order requiring a bankrupt to turn over money or property under penalty of imprisonment for contempt, the court must be satisfied beyond a reasonable doubt that he has such money

or property in his possession or under his control. *In re McCormick*, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340; *Ripon Knitting Works v. Schreiber*, (D. C. Wash. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re Goldfarb*, (N. D. Ga. 1904) 131 Fed. 643, 12 Am. Bankr. Rep. 386; *In re Switzer*, (D. C. S. C. 1905) 140 Fed. 973, 15 Am. Bankr. Rep. 468; *Moody v. Cole*, (D. C. Me. 1906) 148 Fed. 295; *In re Mize*, (N. D. Ala. 1909) 172 Fed. 945, 22 Am. Bankr. Rep. 577; *In re Dickens*, (S. D. Ala. 1909) 175 Fed. 808, 23 Am. Bankr. Rep. 660; *In re Nisenenson*, (D. C. N. J. 1910) 182 Fed. 912.

*The burden of accounting for property*, shown to be in his possession, rests upon the bankrupt; but in assuming such burden he, because of the drastic means that may be invoked to enforce the order to turn over (imprisonment for contempt), is entitled to the benefit of the reasonable doubt. *In re Nisenenson*, (D. C. N. J. 1910) 182 Fed. 912.

*Improper interference with assets.*—Any wilful interference with the estate of the bankrupt, any wilful attempt to injure it, to withdraw it from the custody of the court, or to conceal it from the court, or any of its officers whose duty it is to administer it, is a defiance of the power and an affront to the dignity of the court, which may be punished by a judgment for contempt. *Clay v. Waters*, (C. C. A. 8th Cir. 1910) 178 Fed. 385; *In re Potteiger*, (E. D. Pa. 1910) 181 Fed. 640; *In re Lutfy*, (S. D. N. Y. 1907) 156 Fed. 873, 19 Am. Bankr. Rep. 614; *In re Walsh*, (N. D. Ia. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472.

Thus where attorneys for the sellers of personal property to a bankrupt had knowledge of the bankruptcy adjudication against the buyer at the time they sued out writs of replevin, under which they took the property from the possession of the sheriff who was holding it under attachment which had been vacated by the bankruptcy adjudication, and such attorneys, claiming that their clients were entitled to rescind the sales for fraud, shipped the property out of the state and the jurisdiction of the Bankruptcy Court, it was held that they were guilty of contempt, equally with their clients, which could be purged only by their returning the property, paying its value to the trustee, or executing bonds to pay such value, on its finally being determined that the

trustee was entitled to the property. *In re Walsh*, (N. D. Ia. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472.

*A mere threat* by a judgment creditor of a bankrupt to levy execution on his property, pending the bankruptcy proceedings, does not constitute a contempt of the court of bankruptcy or its process. *In re McBryde*, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729.

*Effect of advice of counsel.*—The advice of counsel, sought and acted upon in good faith, will palliate, if it does not entirely excuse, a failure to comply with an order of the referee, where such noncompliance was pursuant to the advice so sought and received. *In re Watts*, (1903) 190 U. S. 1, 23 S. Ct. 718, 47 U. S. (L. ed.) 933, 10 Am. Bankr. Rep. 113; *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755; *In re Zier*, (C. C. A. 7th Cir. 1905) 142 Fed. 102, 15 Am. Bankr. Rep. 646; *In re Home Discount Co.*, (N. D. Ala. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168; *Orr v. Tribble*, (S. D. Ga. 1907) 158 Fed. 897, 19 Am. Bankr. Rep. 849; *In re Strobel*, (E. D. N. Y. 1908) 163 Fed. 380, 20 Am. Bankr. Rep. 754.

Thus it has been held that where a witness, under examination in bankruptcy, refuses to produce books called for by the summons, and to answer questions relating thereto, but does so under the direction of counsel, who in good faith advises him to pursue that course, and professes his readiness to submit to an examination if the court should hold it proper, he will not be punished as for a contempt, but the court will simply order the examination to proceed. *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 746, 2 Am. Bankr. Rep. 822.

*Purging oneself of contempt.*—If a person is in contempt for failure to do what under the Bankruptcy Law he should do, he should first be allowed to purge himself of the civil contempt by doing what he ought, and by putting the creditors in the position they would have been if no contempt had occurred. The question of punishment for the criminal contempt, however, can be met only by a fine or definite imprisonment, if not excused. The question of compliance with the disregarded order is like restitution of property wrongfully taken, and such a result is the right of the parties, whether or no any sentence for the criminal contempt is imposed. *In re Farkas*, (E. D. N. Y. 1913) 204 Fed. 343.

(2) **[Misbehavior.]** misbehave during a hearing or so near the place thereof as to obstruct the same; [(1898) 30 Stat. L. 556.]

*The use of coarse and insulting language* by witnesses before a referee is not compatible with the dignity of the court, or with a due regard for orderly procedure; and such conduct should be certified by

the referee to the court for consideration under section 41b. *Ohio Valley Bank Co. v. Mack*, (S. D. Ohio) 163 Fed. 160 note, 20 Am. Bankr. Rep. 919.

(3) **[Withholding documents.]** neglect to produce, after having been ordered to do so, any pertinent document; or [(1898) 30 Stat. L. 556.]

The neglect to produce pertinent documents or books, when ordered to do so, is punishable as a contempt under section 41a (3), in the absence of a reasonable excuse for such failure. *In re Howard*, (N. D. Cal. 1899) 95 Fed. 415, 2 Am. Bankr. Rep. 582; *In re Fixen*, (S. D. Cal. 1899) 96 Fed. 748, 2 Am. Bankr. Rep. 822; *In re Wilson*, (W. D. Ark. 1902) 116 Fed. 419, 8 Am. Bankr. Rep. 612; *In re Alper*, (S. D. N. Y. 1907) 162 Fed. 207, 19 Am. Bankr. Rep. 612; *Matter of Sorkin*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 637.

But the alleged bankrupt, or members of his family, cannot be held in contempt of court for a refusal to surrender property, or books and papers, to one claiming to represent the receiver, but who produces no written evidence of his authority. *Skubinsky v. Bodek*, (C. C. A. 3d Cir. 1909) 172 Fed. 340, 22 Am. Bankr. Rep. 699.

*Necessity of subpoena duces tecum and*

*tender of fees.*—A witness before a referee in bankruptcy, whose examination had been concluded except that he had refused to voluntarily produce a document, is not in contempt for a failure to appear at an adjourned hearing on a subsequent day, where he was not tendered fees for such appearance, nor served with a subpoena *duces tecum* to produce the document. *In re Johnson, etc., Lumber Co.*, (C. C. A. 7th Cir. 1907) 151 Fed. 207, 18 Am. Bankr. Rep. 50.

*Referee's order as condition precedent.*—A lawful order by the referee directing the bankrupt to produce books of account, is a condition precedent to action by the court regarding punishment for refusal to obey it. *In re Soloway*, (D. C. Conn. 1912) 195 Fed. 100.

*Petition for order.*—The petition for a referee's order directing the production of books and papers, should be verified. *In re Soloway*, (D. C. Conn. 1912) 195 Fed. 100.

(4) **[Refusal to appear, take oath, or be examined.]** refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: [(1898) 30 Stat. L. 556.]

**Contempt by witnesses.**—The refusal to appear as a witness when duly subpoenaed, or to testify, or be examined according to law, constitutes a contempt under section 41a (4); and it has been held that this provision includes, as contempts, the intentional swearing falsely, vaguely, evasively, and contradictorily, notwithstanding the fact that such conduct may also be punishable as a criminal offense. *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755; *In re Fellerman*, (S. D. N. Y. 1906) 149 Fed. 244, 17 Am. Bankr. Rep. 785; *In re Johnson, etc., Lumber Co.*, (C. C. A. 7th Cir. 1907) 151 Fed. 207, 18 Am. Bankr. Rep. 50; *Ex p. Bick*, (S. D. N. Y. 1907) 155 Fed. 908, 19 Am. Bankr. Rep. 68; *In re Gitkin*, (E. D. Pa. 1908) 164 Fed. 71, 21 Am. Bankr. Rep. 113; *Matter of Schulman*, (S. D. N. Y. 1909) 167 Fed. 237, 21 Am. Bankr. Rep. 288; *In re Gordon*, (S. D. N. Y. 1909) 167 Fed. 239, 21 Am. Bankr. Rep. 290; *In re Kretsch*, (S. D. N. Y. 1909) 172 Fed. 523, 22 Am. Bankr. Rep. 284; *In re Singer*, (E. D. Pa. 1909) 174 Fed. 208, 23 Am. Bankr. Rep. 28; *In re Bronstein*, (S. D. N. Y. 1910) 182 Fed. 349.

**Giving false testimony.**—The judge of a Bankruptcy Court has jurisdiction to summarily punish, for contempt, misbehavior of the bankrupt and the giving of

false testimony. *In re Shear*, (W. D. N. Y. 1911) 188 Fed. 677.

Where a bankrupt on his examination was guilty of contumacious conduct and false swearing, it was held that the scope of the Bankruptcy Court's jurisdiction to punish him depended on the interference with the exercise of the court's jurisdiction, and not on the injury to the public welfare and morals, which is the basis of punishment for perjury. *In re Wiesebrook*, (E. D. N. Y. 1911) 188 Fed. 757.

**Evasive testimony.**—Where a bankrupt, after being sworn before the referee, in an examination concerning his property, by answers of "I don't remember," and "What do you mean?" etc., evinced a deliberate purpose to conceal the truth and prevent the trustee from learning the facts which would lead to a recovery of the missing property, it was held that the referee was not bound to continue the examination, but was justified in instituting contempt proceedings against the bankrupt prior to the conclusion of his testimony, and before he had been cross-examined. *In re Schulman*, (C. C. A. 2d Cir. 1910) 177 Fed. 191, 23 Am. Bankr. Rep. 809.

**Refusal to answer improper questions.**—It has been held that an attorney who has been adjudged bankrupt may raise any question of law which could have been



raised had he been represented by another. General Order No. 4 gives him the right to represent himself, and where his objections to his examination are *bona fide* and

well founded, there is no contempt in his declining to answer. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728.

**[When tender of mileage necessary.]** *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him. [(1898) 30 Stat. L. 556.]

**Attendance not compulsory.**—One cannot be compelled to attend a reference in bankruptcy within the state of his residence but at a distance of more than one

hundred miles from where he resides. *In re Hemstreet*, (N. D. Ia. 1902) 117 Fed. 568, 8 Am. Bankr. Rep. 760.

**b [Contempt proceedings — penalty.]** The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court. [(1898) 30 Stat. L. 556.]

**Proceedings before referee for contempt.**—The referee exercises a judicial office, and, while he cannot himself punish for contempt, he may take the needful preliminary steps to bring the bankrupt's conduct to the attention of the court; and he need not give notice of his intention so to do. The contempt is committed in his presence; and in asking that the court investigate the matter further, he is acting on his official responsibility. The court will then give the bankrupt notice of the proceeding, and will afford him an opportunity to be heard. If, however, the referee does not choose to act upon his own motion, the situation is on a different footing. It is then an ordinary dispute between the party presenting the petition and the bankrupt, and the usual course of notice and a hearing should be followed. *In re Magen*, (E. D. Pa. 1910) 179 Fed. 572.

**Proceedings before judge—Proceeding based on referee's certificate.**—A court of bankruptcy has no power to commit any person for a contempt committed before a referee, except strictly in accordance with the provisions of section 41b, which requires that the proceedings shall be based on a certificate of the referee. *In re Gitkin*, (E. D. Pa. 1908) 164 Fed. 71, 21 Am. Bankr. Rep. 113.

**But the referee's failure to certify disobedience of a proper order to the court for action, while an irregularity, is not a jurisdictional defect in proceedings to punish the person guilty of such disobedience as for contempt, so as to subject**

the commitment to collateral attack by habeas corpus. *U. S. v. Henkel*, (S. D. N. Y. 1911) 185 Fed. 553.

**Formal proceedings.**—The trustee should file a formal proceeding setting forth the alleged contempt of which he claims the bankrupt to be guilty; and if he fails to do so, there is no error in dismissing the proceedings. *McNeil v. McCormack*, (5th Cir. 1910) 182 Fed. 808, 105 C. C. A. 240.

But it has been held that contempt proceedings against a bankrupt are not required to be formal, but may be instituted by a petition sufficient to notify the bankrupt of the charge made against him, which may be established by affidavits. *In re Cole*, (C. C. A. 1st Cir. 1908) 163 Fed. 180, 20 Am. Bankr. Rep. 761.

**A rule requiring a bankrupt to show cause** why he should not be punished for contempt for refusing to answer "sundry questions" put to him during his examination before the referee is sufficient although it does not set out the questions, where it refers to the transcript filed with the certificate of the referee, from which they fully appear. *U. S. v. Goldstein*, (W. D. Va. 1904) 132 Fed. 789, 12 Am. Bankr. Rep. 755.

**Wilful disobedience must be alleged.**—It has been held that a bankrupt cannot be punished for contempt merely on an allegation that he disobeyed an order directing him to turn over property to the trustee. It must be alleged that the disobedience was wilful and not the result of inability to comply therewith. *In re*

Cole, (1st Cir. 1908) 163 Fed. 180, 90 C. C. A. 50, 20 Am. Bankr. Rep. 761; *In re Soloway*, (D. C. Conn. 1912) 196 Fed. 132.

**Common-law rules applicable.**—The statute permits the application of the common-law rules applicable to a proceeding for contempt in whatever way it arises. *In re Goodrich*, (C. C. A. 1st Cir. 1910) 184 Fed. 5.

**Defensive pleading.**—It is often advantageous to set out the defense in a definite manner so that the court may pass on it intelligently with a view of bringing the issues clearly before the appellate tribunal; but unnecessary and dilatory pleading should not be permitted. *In re Goodrich*, (C. C. A. 1st Cir. 1910) 184 Fed. 5.

A party to an order made by a referee in bankruptcy cannot ignore the order until the referee certifies his disobedience to the judge, and then, on the summary hearing for which the statute provides, set up in defense matters contested before the referee, unless they show want of jurisdiction to make the order. *In re Home Discount Co.*, (N. D. Ala. 1906) 147 Fed. 538, 17 Am. Bankr. Rep. 168.

**Notice of proceedings necessary.**—Before a bankrupt can be punished for contempt he must have notice of the proposed action, and an opportunity to contest the questions of fact and of law involved. *In re Rosser*, (8th Cir. 1900) 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153; *Boyd v. Glucklich*, (8th Cir. 1902) 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393; *In re Davison*, (D. C. R. I. 1906) 143 Fed. 673, 16 Am. Bankr. Rep. 338; *In re Stavrah*, (2d Cir. 1909) 174 Fed. 330, 98 C. C. A. 202; *McNeil v. McCormack*, (5th Cir. 1910) 182 Fed. 808, 105 C. C. A. 240; *In re Banzai Mfg. Co.*, (C. C. A. 2d Cir. 1910) 183 Fed. 298.

A court of bankruptcy is without power, on an oral motion by counsel for a receiver, to make an order requiring a person, not a party to any proceeding before it, to appear before a referee and produce a document, where he was not brought before the court by the service of any notice, process, or rule to show cause, and did not enter an appearance; and such an order is void, and its disobedience is not a contempt. *In re Johnson, etc., Lumber Co.*, (C. C. A. 7th Cir. 1907) 151 Fed. 207, 18 Am. Bankr. Rep. 50.

And it has been held that the record should show that the bankrupt had an opportunity to be heard, before the order punishing him for contempt is made. *In re Cole*, (1st Cir. 1908) 163 Fed. 180, 90 C. C. A. 50, 20 Am. Bankr. Rep. 761.

**Hearing.**—The hearing in proceedings for the punishment of a contempt committed before a referee must be had before a judge of the District Court; the referee has no jurisdiction over such proceeding. *In re Tudor*, (D. C. Colo.) 96 Fed. 942,

2 Am. Bankr. Rep. 808; *In re McCormick*, (S. D. N. Y. 1899) 97 Fed. 566, 3 Am. Bankr. Rep. 340; *In re Mayer*, (E. D. Wis. 1900) 98 Fed. 839, 3 Am. Bankr. Rep. 533; *In re Deuell*, (W. D. Mo. 1900) 100 Fed. 634, 4 Am. Bankr. Rep. 60; *In re Miller*, (N. D. Ia. 1900) 105 Fed. 57, 5 Am. Bankr. Rep. 184; *Smith v. Belford*, (C. C. A. 6th Cir. 1901) 106 Fed. 658, 5 Am. Bankr. Rep. 291; *In re De Gottardi*, (S. D. Cal. 1902) 114 Fed. 328, 7 Am. Bankr. Rep. 723; *Boyd v. Glucklich*, (C. C. A. 8th Cir. 1902) 116 Fed. 131, 8 Am. Bankr. Rep. 393; *American Trust Co. v. Wallis*, (C. C. A. 3d Cir. 1903) 126 Fed. 466, 11 Am. Bankr. Rep. 360; *In re Adler*, (W. D. Tenn. 1904) 129 Fed. 502, 12 Am. Bankr. Rep. 19; *In re Goldfarb*, (N. D. Ga. 1904) 131 Fed. 643, 12 Am. Bankr. Rep. 386; *In re Romine*, (N. D. W. Va. 1905) 138 Fed. 837, 14 Am. Bankr. Rep. 785; *In re Switzer*, (D. C. S. C. 1905) 140 Fed. 976, 15 Am. Bankr. Rep. 468; *Ravenswood Bank v. Johnson*, (C. C. A. 4th Cir. 1906) 143 Fed. 463, 16 Am. Bankr. Rep. 206; *Moody v. Cole*, (D. C. Me. 1906) 148 Fed. 295, 17 Am. Bankr. Rep. 818; *Ohio Valley Bank Co. v. Mack*, (S. D. Ohio) 163 Fed. 160 note, 20 Am. Bankr. Rep. 919; *In re Cole*, (C. C. A. 1st Cir. 1908) 163 Fed. 180, 20 Am. Bankr. Rep. 761; *In re Gitkin*, (E. D. Pa. 1908) 164 Fed. 71, 21 Am. Bankr. Rep. 113; *In re Schulman*, (C. C. A. 2d Cir. 1910) 177 Fed. 191, 23 Am. Bankr. Rep. 809; *McNeil v. McCormack*, (C. C. A. 5th Cir. 1910) 182 Fed. 808; *Magen v. Campbell*, (C. C. A. 3d Cir. 1911) 186 Fed. 675.

**Hearing de novo.**—In *McNeil v. McCormack*, (C. C. A. 5th Cir. 1910) 182 Fed. 808, it appears that the District Court, in reviewing a contempt proceeding against the bankrupt, ordered the counsel for the trustee, in compliance with the proper practice, to file a proceeding before the court, setting forth the alleged contempt with which the bankrupt was charged, and to give him an opportunity to be heard thereon, in the nature of an investigation *de novo*, before the court would adjudge him guilty of contempt and impose a penalty upon him; and thereupon counsel for the trustee declared their inability to furnish the evidence to support such charges, and stated that they would be obliged to rely solely upon the report of the testimony taken before the referee, and that they were unable to proceed otherwise, and on the strength of this statement the proceedings were dismissed, and it was held that such dismissal was not error.

But see *In re Richards*, (W. D. Ark. 1910) 183 Fed. 501, wherein it appears that a bankrupt ignored an order of the referee directing him to pay to his trustee certain withheld assets, and that such order became final for want of a petition to review, and it was held that the court,

on an application to punish the bankrupt for contempt, would not review the referee's finding of fact, which was the basis of the finding that the bankrupt had in his possession the assets which he was ordered to pay over.

**Contemnor not entitled to jury trial.**—It has been held that a bankrupt is not entitled to a trial by jury on a petition by the trustee to punish him for contempt. *Ripon Knitting Works v. Schreiber*, (D. C. Wash. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299, *affirmed*, (9th Cir. 1900) 104 Fed. 1006, 43 C. C. A. 682.

**Evidence.**—*The testimony of the officers of a bankrupt corporation*, taken under either section 7a (9) or section 21a, and reduced to writing, is admissible against them in a subsequent proceeding by the trustee to require them to surrender money or property of the estate alleged to be in their possession or under their control. *In re Alphin, etc., Cotton Co.*, (E. D. Ark. 1904) 131 Fed. 824, 12 Am. Bankr. Rep. 653.

**Testimony taken at creditors' meetings.**—In a proceeding to compel a bankrupt to pay over money alleged to be still in his hands, the stenographer's notes of the testimony of the bankrupt taken at a creditors' meeting, called for the general purpose of inquiring into the bankrupt's affairs, is admissible; but the testimony given by other witnesses at such meetings is incompetent. *In re Wiesen*, (E. D. Pa. 1905) 135 Fed. 442, 14 Am. Bankr. Rep. 347.

**Order of commitment.**—An order of commitment of a Bankruptcy Court, directing that a person be imprisoned until he complies with an order made in a proceeding in equity under the Bankruptcy Act, is not invalid because it does not run in the name of the United States. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405.

The bankrupt cannot be ordered to turn over the property within a specified time or, failing to do so, be held guilty of contempt, as this would leave the question of his default and consequent contempt of court to be determined by the marshal. *In re Baum*, (8th Cir. 1909) 169 Fed. 410, 94 C. C. A. 632.

And where an order to turn over property to the trustee is made, it is error also to enter in substance a judgment for contempt accompanying an alternative order for committal, as the bankrupt is not in contempt until he has disobeyed the order. *In re Cole*, (1st Cir. 1906) 144 Fed. 392, 75 C. C. A. 330, 16 Am. Bankr. Rep. 302, *reversing* on other grounds (D. C. Me. 1905) 135 Fed. 439, 14 Am. Bankr. Rep. 389.

In so far as it relates to a commitment to jail, it will not be presumed that the court intended to issue a commitment before judgment of contempt had been

pronounced. *O'Connor v. Sunseri*, (C. C. A. 3d Cir. 1911) 184 Fed. 712.

**Punishment.**—In contempt proceedings against a bankrupt for fraudulently refusing to comply with an order, where it clearly appears that such refusal is not due to the bankrupt's inability to comply but rather to his wilful and obstinate defiance of such order, it is the duty of the court to order his imprisonment until the order is complied with or until further order of the court. *In re Krichevsky*, (E. D. Pa. 1915) 219 Fed. 347.

But as there must be some limit to the imprisonment, which was never intended to be perpetual, a bankrupt imprisoned for contempt for failure to comply with an order, will be discharged after a reasonable time, where it appears that he was not able to respond to the order. *In re Karp*, (S. D. N. Y. 1912) 196 Fed. 998.

So likewise, in the case of *In re Taylor*, (D. C. Colo. 1901) 114 Fed. 607, wherein the court ordered the bankrupt to be discharged after he had served one month in jail, for failure to obey an order to turn over property to the trustee, it was held that the court is not authorized to imprison the bankrupt indefinitely, especially when it is not certainly known that he can comply with the order.

**Justification of imprisonment.**—Where it appears that a sentence to a fixed and absolute term of imprisonment has been imposed, it can be justified only by showing that it was inflicted in a proceeding for criminal contempt. *In re Kahn*, (C. C. A. 2d Cir. 1913) 204 Fed. 581.

**Powers of Bankruptcy Court.**—Section 41 does not invest the Bankruptcy Court with any broader powers in the matter of punishment for contempt than are possessed by other federal courts. *Boyd v. Glucklich*, (C. C. A. 8th Cir. 1902) 116 Fed. 131, 8 Am. Bankr. Rep. 393.

**Commitment for failure to turn over assets not imprisonment for debt.**—The obligation of a bankrupt to surrender to his trustee property in possession belonging to his estate is not an obligation to pay a debt, the title to such property being in the trustee; nor can the bankrupt, by refusing to comply with an order of court requiring him to make such surrender, convert himself into a debtor, so as to render his commitment therefor an imprisonment for debt. *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405; *In re Rosser*, (C. C. A. 8th Cir. 1900) 101 Fed. 562, 4 Am. Bankr. Rep. 153; *Ripon Knitting Works v. Schreiber*, (D. C. Wash. 1900) 101 Fed. 810, 4 Am. Bankr. Rep. 299; *In re Schlesinger*, (C. C. A. 2d Cir. 1900) 102 Fed. 117, 4 Am. Bankr. Rep. 361; *Schweer v. Brown*, (C. C. A. 8th Cir. 1904) 130 Fed. 329, 12 Am. Bankr. Rep.

178; *Samel v. Dodd*, (C. C. A. 5th Cir. 1906) 142 Fed. 68, 16 Am. Bankr. Rep. 163; *Moody v. Cole*, (D. C. Me. 1906) 148 Fed. 295, 17 Am. Bankr. Rep. 818.

**Contempt proceedings do not bar recourse to other remedies.**—A contempt proceeding does not prevent the trustee from pursuing any other remedies given for the collection of a judgment from an insolvent debtor. *In re Cole*, (C. C. A. 1st

Cir. 1908) 163 Fed. 180, 20 Am. Bankr. Rep. 761.

**In a habeas corpus proceeding to obtain relief from imprisonment for contempt**, the petitioner is entitled to supplement the record by alleging such additional facts as tend to show that his misbehavior was not a contempt. *Ex p. O'Neal*, (N. D. Fla. 1903) 125 Fed. 967, 11 Am. Bankr. Rep. 196.

**SEC. 42. RECORDS OF REFEREES.**—*a* **[Manner of keeping.]** The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

**Records should be complete.**—The records in a bankruptcy matter at the time of the final closing of the estate should be full and complete, so that any one interested may at any time ascertain from them all the facts in regard to any given transaction, without extrinsic explanation; and until such a record is made by the officers chargeable with that duty, showing a compliance with the requirements of the statute and the rules of the court, a final settlement will not be

ordered. *In re Carr*, (E. D. N. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635.

**Balance sheet and vouchers.**—Upon final settlement of a bankrupt estate, a clear balance sheet should be presented, and proper vouchers should be filed, and the balance shown by such sheet should correspond with that shown by the statement of the depository, in which, by statute and rules, all funds of the estate are required to be deposited. *In re Carr*, (E. D. N. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635.

*b* **[Books and papers.]** A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

*c* **[Become part of court records.]** The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court. [(1898) 30 Stat. L. 557.]

**SEC. 43. REFEREE'S ABSENCE OR DISABILITY.**—*a* **[Filling vacancy.]** Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy. [(1898) 30 Stat. L. 557.]

As to

Disqualification of referee, see section 39b.

Reference of cases to referees generally, see section 22.

**Absence or disability of referee.**—When the referee to whom a case in bankruptcy would regularly be referred is absent or

disqualified, the judge may appoint a special referee and refer the case to him. This may be done before the answer of the alleged bankrupt is filed, and does not require the consent or approval of the respondent or his attorney. *Bray v. Cobb*, (E. D. N. C. 1898) 91 Fed. 102, 1 Am. Bankr. Rep. 153.)

**SEC. 44. APPOINTMENT OF TRUSTEES.**—*a* The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees

of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so. [(1898) 30 Stat. L. 557.]

**Appointment by creditors.**—The bankrupt's creditors have the primary right to appoint the trustee for the bankrupt estate; and such right may be exercised at their first meeting or an adjournment thereof, or, for the purpose of filling a vacancy, at any subsequent time. *In re Gutwillig*, (C. C. A. 2d Cir. 1899) 92 Fed. 337, 1 Am. Bankr. Rep. 391; *In re Lewensohn*, (S. D. N. Y. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299; *In re Sumner*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; *In re Newton*, (C. C. A. 8th Cir. 1901) 107 Fed. 429, 6 Am. Bankr. Rep. 52; *In re Mackellar*, (M. D. Pa. 1902) 116 Fed. 547, 8 Am. Bankr. Rep. 669; *In re Malino*, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205; *In re Hare*, (N. D. N. Y. 1902) 119 Fed. 246, 9 Am. Bankr. Rep. 520; *In re Nice*, (E. D. Pa. 1903) 123 Fed. 987, 10 Am. Bankr. Rep. 639; *In re Mangan*, (M. D. Pa. 1903) 133 Fed. 1000, 13 Am. Bankr. Rep. 303; *In re Eastlack*, (D. C. N. J. 1906) 145 Fed. 68, 16 Am. Bankr. Rep. 529; *In re Jacobs*, (W. D. Pa. 1907) 154 Fed. 988, 18 Am. Bankr. Rep. 728; *In re Hanson*, (D. C. Minn. 1904) 156 Fed. 717, 19 Am. Bankr. Rep. 235; *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835, reversing 19 Am. Bankr. Rep. 33; *In re Fisher*, (M. D. Pa. 1911) 193 Fed. 104; *In re E. A. Walker & Co.*, (N. D. Ala. 1913) 204 Fed. 133; *In re Wenatchee-Stratford Orchard Co.*, (W. D. Wash. 1913) 205 Fed. 964; *In re Wright*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 497; *In re Rung*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 620; *Fowler v. Jenks*, (Minn. 1903) 11 Am. Bankr. Rep. 255; *Matter of Turner*, (D. C. Mass. 1908) 20 Am. Bankr. Rep. 646.

**Substantial right.**—The right of creditors to select a trustee is a substantial one. *In re Malino*, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205.

**Creditors should have reasonable time to appoint.**—The spirit of the Act is in favor of giving the creditors every reasonable opportunity to exercise their undoubted power to choose a trustee. *In re Nice*, (E. D. Pa. 1903) 123 Fed. 987, 10 Am. Bankr. Rep. 639.

While the selection of a trustee cannot be tied up indefinitely by obstructive tactics, which are obviously for the purpose of delay (*In re Sumner*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123), and in proper cases provisional allowances or disallowances may be made in order that a trustee may be expeditiously selected, nevertheless the proceeding should not be so summary as to exclude the consideration of all objections. *In re Malino*,

(S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205.

**Prompt action essential.**—But it is essential to the expeditious administration of the estate that the trustee should be appointed without undue delay, and the creditors will not be encouraged by allowing unusual or unnecessary postponements of the appointment; nor will such appointment be deferred because of dilatory tactics. *In re Richards*, (N. D. N. Y. 1900) 103 Fed. 849, 4 Am. Bankr. Rep. 631; *In re McGill*, (C. C. A. 6th Cir. 1901) 106 Fed. 57, 5 Am. Bankr. Rep. 155; *In re Henschel*, (C. C. A. 2d Cir. 1902) 113 Fed. 443, 7 Am. Bankr. Rep. 662; *In re Syracuse Paper, etc., Co.*, (N. D. N. Y. 1908) 164 Fed. 275, 21 Am. Bankr. Rep. 174; *In re Evening Standard Pub. Co.*, (N. D. N. Y. 1908) 164 Fed. 517, 21 Am. Bankr. Rep. 156.

Thus it has been held that whether the referee will or will not postpone the election of a trustee where claims are objected to is a matter of sound discretion; and if such a number of claims are duly objected to that an election by a majority in number and amount cannot be had, then, if the circumstances demand it, he may and should himself appoint the trustee. *In re Evening Standard Pub. Co.*, (N. D. N. Y. 1908) 164 Fed. 517, 21 Am. Bankr. Rep. 156.

And where, at the first meeting of the creditors of a bankrupt, there was a contest over the election of trustee, and oral objections were made by the attorneys for one party to practically all of the duly proved claims of the other party, in support of which no proof was presented or offered, it was held that such objections were not sufficient to require the referee to adjourn the meeting until they could be tried, before proceeding with the election of the trustee. *In re Syracuse Paper, etc., Co.*, (N. D. N. Y. 1908) 164 Fed. 275, 21 Am. Bankr. Rep. 174.

**Creditors must be present at election.**—Claims of creditors who are not present at the meeting at which the appointment is made are not to be considered in choosing a trustee, even though such claims have been allowed. *In re Mackellar*, (M. D. Pa. 1902) 116 Fed. 547, 8 Am. Bankr. Rep. 669.

If the majority of the creditors are present at all, they are present for all purposes. If they are not present, then the minority creditors who were present have the right to conduct the meeting, and where their candidate for trustee receives the votes of the majority in number and value of the creditors present, the referee is without power to disregard that result. *In re Kaufman*, (W. D. Ky. 1910)

179 Fed. 552. See also *In re Henschel*, (C. C. A. 2d Cir. 1902) 113 Fed. 443, 7 Am. Bankr. Rep. 662.

**Appointment unnecessary in absence of assets.**—In a case of voluntary bankruptcy, if no substantial assets are disclosed by the schedules, or discovered *aliunde*, the appointment of a trustee is not indispensable. *In re Levy*, (E. D. Wis. 1900) 101 Fed. 247. And see *In re Eagles*, (1900) 99 Fed. 695; *In re Smith*, (1899) 93 Fed. 791.

**Separate trustees for partnership and individual estates.**—The court has discretionary power to provide for separate trustees for a partnership and the individual partners, but as such appointment may cause more complications than it cures and is certain to promote contests and expense, this power should be exercised only in case of special and peculiar necessity. *In re Currie*, (E. D. Mich. 1910) 197 Fed. 1012.

**Consent of trustee.**—It is advisable that the consent of the proposed trustee should be obtained, if practicable, before his election, and, if objections to a trustee elected are reserved by the referee, the meeting should be adjourned to a future day, when a new election can be had in case the previous choice is disapproved. *In re Lewensohn*, (1899) 98 Fed. 576.

**Appointment on vacancy.**—If a person chosen as trustee by the creditors is disapproved by the court, or declines to act, or fails to qualify, there is a vacancy in the office, and a new election must be had by the creditors, if that is practicable. *In re Lewensohn*, (S. D. N. Y. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299.

**Where a trustee in bankruptcy absconded** after embezzling the funds of the estate, such conduct amounts to an abandonment of his office, which is thereby vacated; and a new trustee may be appointed without notice to the absconder or a hearing for his removal. *Scofield v. U. S.*, (C. C. A. 6th Cir. 1909) 174 Fed. 1, 23 Am. Bankr. Rep. 259.

**Appointment on discovery of assets.**—In a case of voluntary bankruptcy, where no trustee was appointed for the reason that the schedule showed no assets, and no creditors attended the first meeting, if the referee afterwards learns that property of the bankrupt has been found, which creditors claim as assets of the estate, a trustee should then be appointed, according to General Order No. 15. *In re Smith*, (W. D. Tex. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190.

**Appointment on reopening.**—Where an estate has been reopened after the trustee has been discharged, it devolves upon the creditors to appoint a new trustee. *In re Newton*, (8th Cir. 1901) 107 Fed. 429, 46 C. C. A. 399, 6 Am. Bankr. Rep. 52; *In re Rochester Sanitarium, etc., Co.*, (C. C. A. 2d Cir. 1915) 222 Fed. 22; *Fowler v.*

*Jenks*, (Minn. 1903) 11 Am. Bankr. Rep. 255.

**Creditors' appointment subject to approval.**—The selection of a trustee by the creditors is subject to the approval of the referee or the district judge, but where, for good cause shown, the referee or judge disapproves the appointment, the creditors should be permitted to select another person as trustee. *In re McGill*, (6th Cir. 1901) 106 Fed. 57, 45 C. C. A. 218; *In re Henschel*, (S. D. N. Y. 1901) 109 Fed. 861, 6 Am. Bankr. Rep. 25; *In re Hare*, (N. D. N. Y. 1902) 119 Fed. 246, 9 Am. Bankr. Rep. 520; *In re Lazoris*, (E. D. Wis. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31; *In re E. T. Kenney Co.*, (D. C. Ind. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611; *In re Eastlack*, (D. C. N. J. 1906) 145 Fed. 68, 16 Am. Bankr. Rep. 533; *In re Van De Mark*, (W. D. N. Y. 1910) 175 Fed. 287, 23 Am. Bankr. Rep. 760; *In re Margolies*, (E. D. N. Y. 1911) 191 Fed. 369; *In re Kreuger*, (E. D. Ky. 1911) 196 Fed. 705. And see the annotation under section 45, *infra*.

**Selection of creditors usually permitted to stand.**—The right to elect a trustee for a bankrupt being given to the creditors, their election should be permitted to stand, unless it clearly appears that, in conducting it, some principle of law intended to secure the administration of the bankrupt's estate in the interest of his creditors has been violated. *In re Eastlack*, (D. C. N. J. 1906) 145 Fed. 68, 16 Am. Bankr. Rep. 529.

The selection by a bankrupt's creditors of a trustee is not to be interfered with by the court unless it clearly imperils the fair and efficient administration of the estate. *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36.

**Review by judge.**—The action of the referee, in the approval or disapproval of the trustee chosen by the creditors, may be reviewed by the judge of the District Court. *In re Hare*, (N. D. N. Y. 1902) 119 Fed. 246, 9 Am. Bankr. Rep. 520; *In re Cohen*, (D. C. Mass. 1904) 131 Fed. 391, 11 Am. Bankr. Rep. 439; *In re Hanson*, (D. C. Minn. 1904) 156 Fed. 717, 19 Am. Bankr. Rep. 235; *In re Day*, (C. C. A. 2d Cir. 1910) 178 Fed. 545; *In re Arti-Stain Co.*, (D. C. Mass. 1914) 216 Fed. 942.

**It is discretionary with the district judge** to vacate the appointment of a trustee, by the referee, whose election has been improperly influenced. *In re Day*, (C. C. A. 2d Cir. 1910) 178 Fed. 545.

The matter of discretion depends on the circumstances of each case. The choice of the creditors should not be overruled by the referee or district judge except for substantial reasons, and the confirmation by the district judge of such appointment should not be disturbed by the Circuit

Court of Appeals unless an abuse of discretion appear. *In re Merritt Const. Co.*, (C. C. A. 2d Cir. 1914) 219 Fed. 555.

**Review of evidence.**—On a petition by creditors for a review of an order appointing a trustee, if the creditors desire a review of the evidence, they should either have the evidence before the referee taken down stenographically, and by him certified to the judge, or should specifically point out to the referee the testimony which they wish summarized, and should ask him to certify specific findings of fact. *In re Cohen*, (D. C. Mass. 1904) 131 Fed. 391, 11 Am. Bankr. Rep. 439.

**Improper or irregular vote for trustee.**—The selection of a trustee by creditors may, and usually will, be set aside where the meeting at which the selection was made was improperly or irregularly conducted, to such an extent that it cannot be said that the trustee appointed was fairly chosen. So also the selection will be set aside where persons, disqualified for this purpose, were allowed to vote, where it appears that the selection made was the result of such voting. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695; *In re McGill*, (C. C. A. 6th Cir. 1901) 106 Fed. 57, 5 Am. Bankr. Rep. 155; *In re Lazoris*, (E. D. Wis. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31; *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526; *In re Anson Mercantile Co.*, (N. D. Tex. 1911) 185 Fed. 993. See also cases cited under section 56, *infra*.

**Selection in interest of bankrupt.**—As to the availability of an objection that the trustee is favorable to, or chosen in the interest of, the bankrupt, see the annotation under section 45, *infra*.

**Effect of subsequent allowance of excluded claims.**—Where claims, offered for proof and allowance at a meeting of creditors of a bankrupt, which are excluded from voting in the election of the trustee, being postponed for future consideration or disallowed, are afterwards allowed on hearing or on appeal, the court may set aside the election, and order a new vote to be taken, if it is made to appear that the result would be changed by allowing votes to be cast on such claims, but not otherwise. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695.

**Votes cast on improperly procured proxies.**—Creditors represented by proxies whose powers of attorney do not lawfully authorize them to participate in the meeting, because of having been obtained by the bankrupt to be voted for a trustee of his choice, will not be counted as present and necessary for the choice of trustee. *In re McGill*, (C. C. A. 6th Cir. 1901) 106 Fed. 57, 5 Am. Bankr. Rep. 155.

So also it has been held that unless the proxy has a special authorization to vote

as an attorney in fact, an attorney at law who has been retained to represent a creditor is not entitled to vote. *In re Blankfein*, (1899) 97 Fed. 191. See also *In re Scully*, (1901) 108 Fed. 372.

But where the proxy of a creditor produces a written authority from his creditor therefor, which is to be filed by the referee as a part of the record, he may vote on behalf of such creditor for a trustee. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695.

**Postponing election — disqualification of proxies.**—In *In re McGill*, (C. C. A. 1901) 106 Fed. 57, it was held that the referee did not abuse his power in declining to postpone the election of trustee after certain proxies were disqualified by him.

**Effect of failure to object at creditors' meeting.**—An objection that the claim of a creditor is defective in that it was verified by his attorney without any statement of a reason therefor, while good if interposed at the creditors' meeting before the vote was taken for trustee, when, in the discretion of the referee, it could have been amended in time to permit the creditor to vote, is unsustainable when not interposed until after the appointment and qualification of the trustee. *In re Stradley*, (N. D. Ala. 1911) 187 Fed. 285.

**Vote for ineligible person.**—Votes voluntarily cast for a trustee by creditors of a bankrupt, acting in their own behalf, cannot be rejected and ignored because the person voted for was one who could not be approved by the court. *In re Machin*, (E. D. Pa. 1904) 128 Fed. 315, 11 Am. Bankr. Rep. 449.

**A stockholder, director, or employee of a bankrupt corporation, if also a creditor, is entitled to vote for trustee.** *In re Syracuse Paper, etc., Co.*, (N. D. N. Y. 1908) 164 Fed. 275, 21 Am. Bankr. Rep. 174; *In re Day*, (C. C. A. 2d Cir. 1910) 178 Fed. 545, 24 Am. Bankr. Rep. 252; *In re Stradley*, (N. D. Ala. 1911) 187 Fed. 285.

See further as to qualification of creditors to vote for a trustee, notes to section 56a and b.

**Appointment by court.**—Where the creditors fail to appoint a trustee within a reasonable time, the court may do so, under the express terms of the statute. *In re Kuffler*, (S. D. N. Y. 1899) 97 Fed. 187, 3 Am. Bankr. Rep. 162; *In re Lewensohn*, (S. D. N. Y. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299; *In re Brooke*, (E. D. Pa. 1900) 100 Fed. 432, 4 Am. Bankr. Rep. 50; *In re Richards*, (N. D. N. Y. 1900) 103 Fed. 849, 4 Am. Bankr. Rep. 631; *In re Henschel*, (S. D. N. Y. 1901) 109 Fed. 861, 6 Am. Bankr. Rep. 305, (C. C. A. 2d Cir. 1902) 113 Fed. 443, 7 Am. Bankr. Rep. 662; *In re Machin*, (E. D. Pa. 1904) 128 Fed. 315, 11 Am. Bankr. Rep. 449, *distinguishing In re McGill*,

(6th Cir. 1901) 106 Fed. 57, 45 C. C. A. 218; *In re Cohen*, (D. C. Mass. 1904) 131 Fed. 391, 11 Am. Bankr. Rep. 439; *In re E. T. Kenney Co.*, (D. C. Ind. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611.

"The court shall do so" includes the referee, by virtue of section 1a (7).

Where the vote results in a failure to select a trustee by the requisite number of creditors and amount of claims, and no request for a second election is made, the referee is authorized to make the selection himself. *In re Machin*, (E. D. Pa. 1904) 128 Fed. 315, 11 Am. Bankr. Rep. 449, distinguishing *In re McGill*, (6th Cir. 1901) 106 Fed. 57, 45 C. C. A. 218.

When the creditors in attendance cannot make a selection, as where a majority in number vote for one person, and a majority in amount for another, the referee may appoint the person favored by a majority of the creditors. *In re Richards*, (N. D. N. Y. 1900) 103 Fed. 849, 4 Am. Bankr. Rep. 631.

**Creditors deemed present.**—Even if section 56a authorizes the choice of a trustee to be made by a majority of creditors present, instead of by a majority of allowed claims present, still a creditor is deemed to be present and has a right to be counted where he is represented by a proctor or attorney at law; this notwithstanding the fact that the power of attorney of his representative is not sufficient for the purpose of a vote. *In re Henschel*, (1901) 109 Fed. 861. As to creditors voting by power of attorney under the Act of 1867, see *Matter of Knoepfel*, (1867) 1 Ben. 398, 1 Nat. Bankr. Reg. 70, 14 Fed. Cas. No. 7,892; *Matter of Frank*, (1871) 5 Ben. 164, 5 Nat. Bankr. Reg. 194, 9 Fed. Cas. No. 5,050; *Matter of Higgins*, (1875) 8 Ben. 100, 12 Fed. Cas. No. 6,467; *In re Barrett*, (1869) 2 Hughes 444, 2 Nat. Bankr. Reg. 533, 2 Fed. Cas. No. 1,043; *In re Eagles*, (1900) 99 Fed. 695.

Where validity of claims could not be promptly passed upon.—Where, at the first meeting of the creditors of a bankrupt, the referee found it impracticable to pass on the validity of the claims there presented, because a large number of them were attacked by other creditors, and therefore continued the consideration thereof, it was held that, it being impossible to select a trustee in the ordinary manner, it was proper for the referee to appoint one of his own selection. *In re Cohen*, (D. C. Mass. 1904) 131 Fed. 391, 11 Am. Bankr. Rep. 439.

But an appointment cannot be made by the court unless the creditors neglect or fail to make a choice upon opportunity afforded them, when practicable, so to do. *In re Lewensohn*, (S. D. N. Y. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299; *In re Mackellar*, (M. D. Pa. 1902) 116 Fed. 547, 8 Am. Bankr. Rep. 669; *In re Hare*, (N. D. N. Y. 1902) 119 Fed. 246, 9 Am.

Bankr. Rep. 520; *In re Mangan*, (M. D. Pa. 1903) 133 Fed. 1000, 13 Am. Bankr. Rep. 303; *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366; *Scofield v. U. S.*, (C. C. A. 6th Cir. 1909) 174 Fed. 1, 23 Am. Bankr. Rep. 259.

**Court cannot appoint on disapproval.**—A referee has no authority to appoint merely because he disapproves the appointment made by the creditors; but in such case another meeting of creditors must be called to make the appointment. *In re Mackellar*, (M. D. Pa. 1902) 116 Fed. 547, 8 Am. Bankr. Rep. 669; *In re Hare*, (N. D. N. Y. 1902) 119 Fed. 246, 9 Am. Bankr. Rep. 520; *In re Mangan*, (M. D. Pa. 1903) 133 Fed. 1000, 13 Am. Bankr. Rep. 303.

**Court cannot appoint third trustee, where only two were chosen by creditors.**—Where the creditors of a bankrupt elected two trustees at the first meeting, instead of three, the referee has no power to fill the vacancy in the office of the third trustee, unless the creditors, after the calling of another meeting by the referee, have themselves failed to do so. *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366.

**Irregular appointment by court not subject to collateral attack.**—But where a trustee in bankruptcy absconded, and was removed, it was held that the appointment of a new trustee by the court, without calling a meeting of the creditors for an election, was at most an irregularity, and that the legality of the appointment could not be questioned collaterally. *Scofield v. U. S.*, (C. C. A. 6th Cir. 1909) 174 Fed. 1, 23 Am. Bankr. Rep. 259.

**Power of referee to appoint trustee.**—The term "court," as used in the proviso that if the creditors do not appoint a trustee the court shall do so, includes the referee. Although the control of the election by the creditors should not lightly be disturbed, yet in emergency the referee has ample power to appoint a trustee—a power, however, which should be most sparingly exercised. *In re Knox*, (C. C. A. 6th Cir. 1915) 221 Fed. 36. See also *In re Richards*, (1900) 103 Fed. 849; *In re Kuffler*, (1899) 97 Fed. 187.

**Selection by referee.**—If the creditors at their first meeting have not chosen a trustee, nor requested the holding of an election, nor nominated a candidate, the presiding referee may appoint a trustee, especially where there is no protest against his right to appoint or his act of appointment, and no attempt to comply with the proper form; and the appointment will not be set aside by the court merely because the creditors wish some one else to act. *In re Brooke*, (1900) 100 Fed. 432.

But where the referee declines to approve of the trustee selected by the creditors, it is his duty, not to name a trustee, but to call a meeting of the creditors and



let them do so. *In re Mackellar*, (1902) 116 Fed. 547.

**Appointment of attorney for trustee.**—The general rule is that the trustee has the right to select his own attorney, subject only to the control of the court. *In re Abram*, (N. D. Cal. 1900) 103 Fed. 272; *In re Rusch*, (E. D. Wis. 1900) 105 Fed. 607, 5 Am. Bankr. Rep. 565; *In re Baber*, (E. D. Tenn. 1902) 119 Fed. 525, 9 Am. Bankr. Rep. 406; *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

**Court will not instruct as to attorney's selection.**—The court will not undertake to give any direction in advance to a trustee in bankruptcy in the matter of the employment of an attorney; the trustee must exercise his own judgment, in the first instance, as to the necessity for such employment. *In re Abram*, (N. D. Cal. 1900) 103 Fed. 272.

**Error to allow creditors to select attorney for trustee.**—It is error for a referee in bankruptcy to permit the creditors by a majority vote to select the attorney for the trustee. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

**Where there are disagreements between factions of creditors as to the manner of**

administering a bankrupt estate, the court will not approve the selection by the trustee of an attorney who also represents and continues to act for certain of the creditors. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526; *In re Smith*, (C. C. A. 6th Cir. 1913) 203 Fed. 369.

But it has been held that the creditors should appoint the trustee's attorney in the same manner as the trustee himself was chosen. *In re Little River Lumber Co.*, (W. D. Ark. 1900) 101 Fed. 558, 3 Am. Bankr. Rep. 682; *Matter of Smith*, (N. D. N. Y.) 1 Am. Bankr. Rep. 37.

And in *In re Arnett*, (W. D. Tenn. 1901) 112 Fed. 770, 7 Am. Bankr. Rep. 522, it was held that, under circumstances warranting it, the court will appoint counsel to act for the trustee.

**General Orders and Forms.**—General Order No. 13 relates to "appointment and removal of trustee;" No. 14 is "no official or general trustee;" No. 15 is "trustee not appointed in certain cases;" No. 16 is "notice to trustee of his appointment." Form No. 22 is "appointment of trustee by creditors;" No. 23 is "appointment of trustee by referee;" No. 24 is "notice to trustee of his appointment."

## SEC. 45. QUALIFICATIONS OF TRUSTEES.—a Trustees may be

(1) **[Individuals.]** individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or [(1898) 30 Stat. L. 557.]

**Competency of trustee.**—A trustee should be wholly free from all entangling alliances or associations that might in any way control his complete independence and responsibility. *In re Lewensohn*, (S. D. N. Y. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299; *Falter v. Reinhard*, (1900) 104 Fed. 292, affirmed in *In re McGill*, (C. C. A. 1901) 106 Fed. 57; *In re Rekersdres*, (S. D. N. Y. 1901) 108 Fed. 206, 5 Am. Bankr. Rep. 811; *In re Dayville Woolen Co.*, (1902) 114 Fed. 674; *In re Evans*, (E. D. N. C. 1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730; *In re Gordon Supply, etc., Co.*, (M. D. Pa. 1904) 129 Fed. 622, 12 Am. Bankr. Rep. 94; *In re Mangan*, (M. D. Pa. 1903) 133 Fed. 1000, 13 Am. Bankr. Rep. 303; *In re Ketterer Mfg. Co.*, (M. D. Pa. 1907) 155 Fed. 987, 19 Am. Bankr. Rep. 646; *Matter of Smith*, (N. D. N. Y.) 1 Am. Bankr. Rep. 37. For cases to the same effect under prior acts, see *In re Clairmont*, (1868) 1 Lowell 230, 5 Fed. Cas. No. 2,781; *In re Powell*, (1868) 2 Nat. Bankr. Reg. 45, 19 Fed. Cas. No. 11,354; *In re Bogert*, (1870) 3 Nat. Bankr. Reg. 651, 3 Fed. Cas. No. 1,600.

A bankrupt who has not been discharged is not a proper person to act as trustee of

the estate of another bankrupt. In the *Matter of Smith*, (N. D. N. Y.) 1 Am. Bankr. Rep. 37.

**Alien may be trustee.**—A person is not disqualified from acting as a trustee in bankruptcy because he is an alien, if he is competent to perform the duties, and resides or has an office in the district, and is duly chosen by the creditors. *In re Coe*, (S. D. N. Y. 1907) 154 Fed. 162, 18 Am. Bankr. Rep. 715.

**One who advised commission of act of bankruptcy may be selected as trustee.**—The fact that one who is chosen by the creditors as a trustee in bankruptcy advised the voluntary assignment under the state law which constituted the act of bankruptcy does not render him incompetent as trustee. *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36.

**Merely allegations of hostility and bias immaterial.**—When one of the bankrupt's creditors has been chosen as trustee by the unanimous vote of a large body of the creditors present at the meeting, and nothing appears to impugn his competency or integrity, his election will not be set aside by the court, at the instance of the bankrupt, on allegations by the latter of

hostility and bias against him on the part of such trustee, especially where such animosity, if it exists, may have been caused by the bankrupt's own fault. *In re Lewensohn*, (S. D. N. Y. 1899) 98 Fed. 576, 3 Am. Bankr. Rep. 299.

**Director of corporation as its trustee.**—Where three trustees were elected for a bankrupt corporation, it has been held that it is no ground of objection that one of them is a director of such corporation. *In re Syracuse Paper, etc., Co.*, (N. D. N. Y. 1908) 164 Fed. 275, 21 Am. Bankr. Rep. 174.

**Stockholder in creditor corporation.**—It has been held that the mere fact that a trustee is a stockholder in a corporation having a claim filed amounting to nearly one-half of the bankrupt's entire indebtedness, and that it might become the trustee's duty to move to have such claim expunged or reduced, did not render such trustee ineligible to act. *In re Lazoris*, (E. D. Wis. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31.

**Stockholder and attorney.**—But where a trustee chosen to administer the assets of a bankrupt corporation, by a majority of the creditors, was not only a stockholder in the corporation, but had been closely associated as attorney for those who had previously been in control, and whose management was not only the subject of criticism but might call for action on the part of the trustee to hold them personally responsible, such trustee, though unobjectionable personally, should not be permitted to act over the objections of a minority. *In re Gordon Supply, etc., Co.*, (M. D. Pa. 1904) 129 Fed. 622, 12 Am. Bankr. Rep. 94.

**Attorney for creditors.**—An attorney for the creditors is competent to perform the duties of a trustee. *In re Margolies*, (E. D. N. Y. 1911) 191 Fed. 369. But where an attorney accepts the office of trustee, he surrenders for the time his standing in the court of bankruptcy as an attorney for creditors. *In re Evans*, (E. D. N. C. 1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730.

**Former attorney of bankrupt.**—While a bankrupt's attorney is not necessarily disqualified to be elected trustee yet on general principles and in the majority of cases, it is inexpedient and before he is allowed to become trustee there should be some evidence that his choice has been brought about in part, at least, by the activities of others than himself and the bankrupt. *In re Wink*, (D. C. Md. 1913) 206 Fed. 348.

**Trustee chosen in interest of bankrupt.**—The decisions are unanimous to the effect that the appointment of a trustee will be disapproved where his selection was brought about by the bankrupt, or by others in the interest of the bankrupt. *In re Etheridge Furniture Co.*, (D. C.

Ky. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 115; *Falter v. Reinhard*, (S. D. Ohio 1900) 104 Fed. 292, 4 Am. Bankr. Rep. 782; *In re McGill*, (6th Cir. 1901) 103 Fed. 57, 45 C. C. A. 218, 5 Am. Bankr. Rep. 156; *In re Rekersdres*, (S. D. N. Y. 1901) 108 Fed. 206, 5 Am. Bankr. Rep. 811; *In re Henschel*, (S. D. N. Y. 1901) 109 Fed. 861, 6 Am. Bankr. Rep. 305; *In re Dayville Woolen Co.*, (D. C. Conn. 1902) 114 Fed. 674, 8 Am. Bankr. Rep. 85; *In re Hanson*, (D. C. Minn. 1904) 156 Fed. 717, 19 Am. Bankr. Rep. 235; *In re Day*, (S. D. N. Y. 1909) 174 Fed. 164, 23 Am. Bankr. Rep. 56; *In re Van De Mark*, (W. D. N. Y. 1910) 175 Fed. 287, 23 Am. Bankr. Rep. 760; *In re Sitting*, (N. D. N. Y. 1910) 182 Fed. 917, 25 Am. Bankr. Rep. 682; *Matter of Turner*, (D. C. Mass. 1908) 20 Am. Bankr. Rep. 646.

A question as to whether there is any collusion with the bankrupt is one which should be definitely disposed of before the appointment; and, if there appears to be reasonable cause to believe that such collusion exists, the referee should decline to receive the collusive votes. *In re Dayville Woolen Co.*, (D. C. Conn. 1902) 114 Fed. 674, 8 Am. Bankr. Rep. 85.

But where an attorney's retainer for a bankrupt was limited to the filing of the bankrupt's petition, and the latter paid him no fee, it was held that the attorney was not disqualified to accept claims from creditors sent to him thereafter without his solicitation or the procurement of the bankrupt, and to vote on such claims for the election of a trustee. *In re Cooper*, (E. D. Pa. 1905) 135 Fed. 196, 14 Am. Bankr. Rep. 320.

**Friendly trustee.**—There are instances, however, where a "friendly" trustee may be chosen; harmony of action between an honest bankrupt and an honest trustee tends to promote the creditors' interests, and there is no law against the election of a person as trustee merely because he is acceptable to the bankrupt. *Matter of Turner*, (D. C. Mass. 1908) 20 Am. Bankr. Rep. 646.

**Trustee's residence.**—The phrase "reside or have an office" has reference to the actual presence of the trustee within the judicial district, rather than a legal or voting residence. *In re Seider*, (E. D. N. Y. 1908) 163 Fed. 139, 20 Am. Bankr. Rep. 708.

**Residence where assets are situated unnecessary.**—Where a majority of the creditors in number and in amount of claims have voted for one person for trustee, the referee is not justified in refusing to ratify his election solely because he does not reside in the county where the assets are situated, and in appointing another person trustee. *In re Jacobs*, (W. D. Pa. 1907) 154 Fed. 988, 18 Am. Bankr. Rep. 728.

(2) [Corporations.] corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed. [(1898) 30 Stat. L. 557.]

**SEC. 46. DEATH OR REMOVAL OF TRUSTEES.**—a The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor. [(1898) 30 Stat. L. 557.]

**Removal of trustee.**—Under section 2 (17), *supra*, courts of bankruptcy are given jurisdiction to remove trustees for cause, upon complaints of creditors. This power also existed under the Act of 1867. See *Ex p. Perkins*, (1873) 5 Biss. (U. S.) 254; *In re Stokes*, (1868) 1 Nat. Bankr. Reg. 489, 23 Fed. Cas. No. 13,475; *In re Adler*, (1874) 2 Woods (U. S.) 571.

**Power to remove.**—Under General Order No. 13, the power to remove a trustee is vested in the judge only. *In re Hare*, (N. D. N. Y. 1902) 119 Fed. 246, 9 Am. Bankr. Rep. 520; *In re Allen B. Wrisley Co.*, (C. C. A. 7th Cir. 1904) 133 Fed. 388, 13 Am. Bankr. Rep. 193; *In re E. T. Kenney Co.*, (D. C. Ind. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611.

**Referee cannot remove trustee.**—An order of the referee purporting to remove a trustee in bankruptcy is void. *In re Berree*, (E. D. Pa. 1911) 185 Fed. 224.

**Ground for removal.**—The joining of the trustee with the bankrupt to effect a composition to the detriment of creditors, by means of false representations as to the assets, is ground for the trustee's removal. *In re Allen B. Wrisley Co.*, (C. C. A. 7th Cir. 1904) 133 Fed. 388, 13 Am. Bankr. Rep. 193.

Where a trustee selects as his attorney the attorney of an assignee for the benefit of creditors with whose interests the interests of the estate may conflict, the only remedy is the removal of the trustee. The question in such circumstances is not do these interests necessarily conflict, but may they conflict. It is the duty of the trustees to recover from the assignee all the property of the estate. If he and the assignee and the common attorney for both of them are in such close relation it is

clear that the trustee is not in a position to clash with the assignee over the question of what the latter should turn over to the estate.\* The trustee should not place himself in such position in relation to another as to give any color to a suggestion that he is not acting in the interests of the estate alone. *In re Forestier*, (N. D. Cal. 1915) 222 Fed. 537.

**Change of residence immaterial.**—A trustee in bankruptcy, who at the time of his appointment resided in the district of his appointment, and who then had and still has an office therein, is not subject to removal because he has changed his legal residence to another district, provided that such change does not interfere with the performance of his duties, nor render it difficult for persons interested to communicate with or serve notices upon him. *In re Seider*, (E. D. N. Y. 1908) 163 Fed. 138, 20 Am. Bankr. Rep. 708.

The purpose of this provision of the Bankruptcy Law was to prevent the abatement of suits involving the estate of the bankrupt upon a vacancy in the office of the trustee, and it makes no difference how such vacancy occurs, whether by the death, removal, or resignation of the trustee, under the law his official successor may be formally made a party to the pending proceedings, and the cause proceeded with just as though it had been originally instituted by such successor. *Hull v. Burr*, (1912) 64 Fla. 83, 59 So. 787.

**Forms.**—No. 52 of the Forms in Bankruptcy (in note to sec. 30) is a petition for removal of trustee; No. 53 is a notice of the petition; No. 54 is an order for removal of trustee; and No. 55 is an order for choice of a new trustee.

**SEC. 47. DUTIES OF TRUSTEES.**—a Trustees shall respectively [(1898) 30 Stat. L. 557.]

(1) [Account and pay over.] account for and pay over to the estates under their control all interest received by them upon property of such estates; [(1898) 30 Stat. L. 557.]

(2) [Reduce property to money — close up estate.] collect and reduce to money the property of the estates for which they are trustees, under the

direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; [*Amended 1910, which excepted pending cases*] 36 Stat. L. 840.]

As originally enacted this section 47a (2) read as follows:

"(2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest." [30 Stat. L. 557.]

In 1910 it was amended "so as to read as" in the text.

As to

Avoidance of preferences, see section 60b.

Avoidance of fraudulent transfers, see sections 67e and 70e; see also section 70a (4).

Jurisdiction of referee, see section 38a (3) and (4).

Jurisdiction as to adverse claimants, see section 23a and b.

**Construction — Construed with section 70.**— In the case of *In re Hammond*, (N. D. Ohio 1911) 188 Fed. 1020, it was said that the language of the amendment of 1910 might have found a more appropriate place in section 70 of the Act, and that the two sections must now be construed together, in view of which a trustee cannot be said to have the limited title of the bankrupt he had before the amendment.

**Purpose of statute.**— Prior to the amendment and under the original Act, several of the Circuit Courts of Appeals had held that the filing of the petition in bankruptcy amounted to a seizure of the property of the bankrupt, and conferred upon the trustee the same rights as a creditor would have obtained by the levy of an execution or attachment at the date of the filing of the petition. But in *York Mfg. Co. v. Cassell*, (1906) 201 U. S. 344, 26 S. Ct. 481, 50 U. S. (L. ed.) 782, the Supreme Court held these decisions to be unsound, and ruled that the trustee simply stood in the shoes of the bankrupt, and took the property subject to every claim that could have been urged against him. The amendment of 1910 was passed for the purpose of reinstating the rule as declared by the Circuit Courts of Appeals. *In re Farmers' Co-operative Co.*, (D. C. N. D. 1913) 202 Fed. 1005. See also *In re Williamsburg Knitting Mill*, (E. D. Va. 1911) 190 Fed. 871, affirmed (1912) 193 Fed. 1020, 113 C. C. A. 87; *In re Farmers' Supply Co.*, (N. D. Ga. 1912) 196 Fed. 990; *In re Whatley Bros.*, (N. D. Ga. 1912) 199 Fed. 326; *In re Farmers' Co-operative Co.*, (D. C. N. D. 1913) 202 Fed. 1008; *In re Morris*, (C. C.

A. 2d Cir. 1913) 204 Fed. 770; *In re Rutland-Perry Co.*, (E. D. S. C. 1913) 205 Fed. 200; *Pacific State Bank v. Coats*, (C. C. A. 9th Cir. 1913) 205 Fed. 618, Ann. Cas. 1913E 846; *In re Phillips*, (W. D. Wash. 1913) 209 Fed. 490; *Meier, etc., Co. v. Sabin*, (C. C. A. 9th Cir. 1914) 214 Fed. 231; *In re Chotiner*, (W. D. Pa. 1914) 216 Fed. 916; *Brandt v. Mayhew*, (C. C. A. 9th Cir. 1914) 218 Fed. 422; *Potter Mfg. Co. v. Arthur*, (C. C. A. 6th Cir. 1915) 220 Fed. 843; *Bank of North America v. Penn Motor Car Co.*, (1912) 235 Pa. St. 184, 83 Atl. 622; *Sparks v. Weatherly*, (1912) 176 Ala. 324, 58 So. 280; *Jump v. Sparling*, (1914) 218 Mass. 324, 105 N. E. 878. But in the case of *In re Lane Lumber Co.*, (C. C. A. 9th Cir. 1914) 217 Fed. 560, the court ruled that the effect of the amendment was not to vest in the trustee, as against all secret or unrecorded liens, a title and equity in the property, for the benefit of the creditors of the bankrupt, superior in character to that of the lien of the vendor in all instances where the latter has failed to disclose his claim of lien by some appropriate proceeding to enforce it prior to the vesting of the property of the estate in the hands of the trustee. The court held that the amendment was not intended to prescribe a rule by which the validity or priority of such liens was to be determined or enforced but was designed only to clothe the trustee with the right to question the validity of any lien claimed against the property of the estate which might be defective under the law creating it, notwithstanding the bankrupt might have been estopped to do so. See also *Pacific State Bank v. Coats*, 205 ed. 618, 123 C. C. A. 634, Ann. Cas. 1913E 846.

**The amendment of 1910 did not amend or repeal section 6 of the Bankruptcy Act** and in no way affected the provision of that section, in which the intention of Congress is plainly expressed, that the Bankruptcy Act shall not affect the allowance to bankrupts of the exemptions which

are prescribed by state laws. *Brandt v. Mayhew*, (C. C. A. 9th Cir. 1914) 218 Fed. 422.

But a bankrupt may not acquire property at the expense of creditors who trusted him and through the exemption laws and the provisions of the Bankruptcy Act actually make a profit out of the transaction. The trustee represents the several creditors with varying powers and opportunities appropriate to the different status of the several creditors. *In re Stern*, (N. D. Ohio 1913) 208 Fed. 488. See also *In re Nunemaker*, (N. D. Ohio 1913) 208 Fed. 491.

Not retroactive.—The amendment of 1910 was not retroactive. *Arctic Ice Mach. Co. v. Armstrong County Trust Co.*, (C. C. A. 3d Cir. 1911) 192 Fed. 114; *In re Farmers' Co-operative Co.*, (D. C. N. D. 1913) 202 Fed. 1005; *In re Schneider*, (E. D. Pa. 1913) 203 Fed. 589.

Nor was the effect of the amendment an impairment of then existing rights. *Holt v. Henley*, (1914) 232 U. S. 637, 34 S. Ct. 459, 68 U. S. (L. ed.) 767, reversing (C. C. A. 4th Cir. 1912) 193 Fed. 1020; *Deupree v. Watson*, (C. C. A. 6th Cir. 1914) 216 Fed. 483.

The terms "property" and "estates" of bankrupts are used in section 47a (2) in the broadest sense, and are intended to include every species of property, not legally exempt, that can be made available for the benefit of creditors. *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

Collection and reduction of assets.—It is mandatory that the trustee should, as expeditiously as may be compatible with the best interests of the estate, collect and reduce to money all the assets thereof, in accordance with the statutory provision. *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55; *In re Baber*, (E. D. Tenn. 1902) 119 Fed. 520, 9 Am. Bankr. Rep. 406; *In re Mertens*, (N. D. N. Y. 1904) 131 Fed. 507, 12 Am. Bankr. Rep. 698; *In re Reinboth*, (C. C. A. 2d Cir. 1907) 157 Fed. 672, 19 Am. Bankr. Rep. 15; *In re Hecox*, (C. C. A. 8th Cir. 1908) 164 Fed. 823, 21 Am. Bankr. Rep. 314; *In re Munger Vehicle Tire Co.*, (C. C. A. 2d Cir. 1908) 168 Fed. 910, 21 Am. Bankr. Rep. 395; *In re Kessler*, (C. C. A. 2d Cir. 1911) 186 Fed. 127; *In re Goodman*, (N. D. Ohio 1912) 196 Fed. 566.

A trustee in bankruptcy is bound to use due diligence to get in the assets of the estate, and may be charged in his account with the value of assets which never came into his possession if he failed in his duty; and where a *prima facie* case of negligence is shown, the burden rests on him to disprove it. *In re Reinboth*, (2d Cir. 1907) 157 Fed. 672, 85 C. C. A. 340, 16 L. R. A. (N. S.) 341.

A bankrupt's trustee, representing not

only the bankrupt but the general creditors, must realize from the estate all that he can for distribution. *In re Kessler*, (C. C. A. 2d Cir. 1911) 186 Fed. 127.

Assessment of stockholders.—A court of bankruptcy has power, in a proper case, to order an assessment on the stockholders of a bankrupt corporation for unpaid subscriptions, which constitute a trust fund for the benefit of its general creditors, and the stockholders are not necessary parties to an application for such an order. *In re Miller Electrical Maintenance Co.*, (W. D. Pa. 1901) 111 Fed. 515, 6 Am. Bankr. Rep. 701.

Trustee's right to collect assets.—Prior to the amendment of 1910 a trustee in bankruptcy was vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. He "stood in the shoes of the bankrupt," and had no greater right. But the amendment changed this rule. *In re Smith*, (E. D. Wis. 1912) 198 Fed. 876. See also *Sattler v. Slonimsky*, (E. D. Pa. 1912) 199 Fed. 592.

Since the amendment of 1910 decisions holding that a trustee has no other right than belonged to the bankrupt are no longer controlling. The trustee now has all the rights, remedies and powers of a judgment creditor holding an execution returned unsatisfied. *In re Gehris-Herbine Co.*, (E. D. Pa. 1911) 188 Fed. 502; *In re Hartdagen*, (M. D. Pa. 1911) 189 Fed. 546; *In re Waite-Robbins Motor Co.*, (D. C. Mass. 1911) 192 Fed. 47; *In re Downing*, (N. D. N. Y. 1912) 192 Fed. 683; *Sturdivant Bank v. Schade*, (C. C. A. 8th Cir. 1912) 195 Fed. 188; *In re Osborn*, (C. C. A. 9th Cir. 1912) 196 Fed. 257; *In re J. S. Appel Suit & Cloak Co.*, (D. C. Colo. 1912) 198 Fed. 322; *In re Dancy Hardware & Furniture Co.*, (N. D. Ala. 1912) 198 Fed. 336; *In re Kreuger*, (E. D. Ky. 1912) 199 Fed. 367; *In re Groezinger*, (N. D. Pa. 1912) 199 Fed. 935; *In re Merry*, (D. C. Me. 1913) 201 Fed. 369; *In re Nuckols*, (E. D. Tenn. 1912) 201 Fed. 437; *In re East End Mantel & Tile Co.*, (W. D. Pa. 1913) 202 Fed. 275; *In re Anson Mercantile Co.*, (N. D. Tex. 1911) 203 Fed. 871; *Millikin v. Second Nat. Bank of Baltimore*, (C. C. A. 4th Cir. 1913) 206 Fed. 14; *In re Waters-Colver Co.*, (E. D. N. Y. 1913) 206 Fed. 845; *Gage Lumber Co. v. McEldowney*, (C. C. A. 6th Cir. 1913) 207 Fed. 255; *In re Codori*, (M. D. Pa. 1912) 207 Fed. 784; *In re Superior Drop Forge & Mfg. Co.*, (N. D. Ohio 1913) 208 Fed. 813; *Triumph Elec. Co. v. Patterson*, (C. C. A. 8th Cir. 1914) 211 Fed. 244; *Cooper Grocery Co. v. Park*, (C. C. A. 5th Cir. 1914) 218 Fed. 42; *Massachusetts Bonding, etc., Co. v. Kemper*, (C. C. A. 6th Cir. 1915) 220 Fed. 847; *In re Richheimer*, (C. C. A. 7th Cir. 1915) 221

Fed. 16; *Corey v. Blackwell Lumber Co.*, (1913) 24 Idaho 642, 135 Pac. 742; *Crawford v. Mandell*, (Mich. 1912) 138 N. W. 705; *Marcus Shipping Assoc. v. Barnes*, (1915) 169 Ia. 377, 151 N. W. 525.

In his representative capacity a bankrupt's trustee may assert claims, avoid preferences, and collect assets where the bankrupt, if there had been no bankruptcy, could not act. *In re Kessler*, (C. C. A. 2d Cir. 1911) 186 Fed. 127.

**Unrecorded conditional sale.**—Before the amendment, the trustee's title as against a claim under an unrecorded conditional sale, though the state law required record, did not prevail. It was to obviate this, among other things, that the section was amended. *In re Bazemore*, (N. D. Ala. 1911) 189 Fed. 236; *In re Calhoun Supply Co.*, (N. D. Ala. 1911) 189 Fed. 537.

**Unrecorded chattel mortgage.**—This section does not affect the priority of the holder of an unrecorded chattel mortgage over prior creditors of the mortgagor where the state law makes unrecorded chattel mortgages invalid only as against subsequent creditors of the mortgagor without notice. *In re Riehl*, (D. C. Md. 1912) 200 Fed. 455.

**A trustee is not, like a receiver, a mere caretaker and manager of the estate to execute the orders of the court in the progress of administration, but he is the agent of the creditors, selected by them as a man of affairs to conduct the business of collecting the assets and distributing the proceeds among the creditors.** The statute invests him with the title of the bankrupt, and makes him not only quasi owner, but the owner *pro hac* of all the property and rights of action belonging to the bankrupt. The management of the estate is committed to his discretion, and he is expected to exercise his powers and discharge his duties with the same intelligence that an owner would do, subject, of course, primarily, to the supervision of the creditors in their meetings called for the purpose, and the whole administration subject to the supervision of the court of bankruptcy. *In re Baber*, (E. D. Tenn. 1902) 119 Fed. 520, 9 Am. Bankr. Rep. 406.

**Right to possession.**—On an adjudication in bankruptcy the trustee, on his appointment, is entitled to the possession of property of the bankrupt in the possession of a receiver appointed by a state court within four months; and if such right is not recognized it is competent for, and the duty of, the Bankruptcy Court to enforce it. *Hooks v. Aldridge*, (C. C. A. 5th Cir. 1906) 145 Fed. 865, 16 Am. Bankr. Rep. 658; *In re Hecox*, (C. C. A. 8th Cir. 1908) 164 Fed. 823, 21 Am. Bankr. Rep. 314.

**Right to subrogation.**—A bankrupt's trustee may pay out of the funds in his hands a debt secured by collateral in ex-

cess of the amount thereof, and claim subrogation to the rights of the creditor, for the benefit of the general creditors. *In re Kessler*, (C. C. A. 2d Cir. 1911) 186 Fed. 127.

**A trustee in bankruptcy represents only creditors who were such at the time of the filing of the petition, and he cannot assert rights as the representative of creditors who were parties to a prior composition with the bankrupt which they have not sought to avoid.** *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 122 Fed. 355, 10 Am. Bankr. Rep. 641.

**Trust funds wrongfully appropriated by a bankrupt and mingled with his own funds in a bank do not vest in the bankrupt's trustee by virtue of the amendment to this section.** *In re Dunn*, (E. D. Ark. 1912) 193 Fed. 212.

**Property in the possession of the bankrupt under bailment for sale belongs to the bailor and not to the trustee in bankruptcy.** *In re Reynolds*, (E. D. Ky. 1912) 203 Fed. 162.

**A defectively acknowledged mortgage constitutes a superior lien to the demand of a trustee in bankruptcy.** *Pacific State Bank v. Coats*, (C. C. A. 9th Cir. 1913) 205 Fed. 618, Ann. Cas. 1913E 846.

**Property encumbered by liens.**—"The trustee may elect to refuse to take possession of property encumbered by liens to such an extent that there is not sufficient equity to justify administration thereon; and this not because of any want of power or jurisdiction in the court, but because it would be an abuse of official discretion on the part of the court and its officers to administer upon the property so situated. Until the trustee makes his election, all the property of the bankrupt is in the custody of the court by operation of law. Where the value of property is insufficient to pay off incumbrances, the practice is to declare it burdensome, or, in the alternative, to hold it subject to such application as the mortgagee may make to the court for the satisfaction of his lien." *In re Hasie*, (N. D. Tex. 1913) 206 Fed. 789. See also the note to section 70a preceding clause (1).

**Recovery of concealed property from bankrupt.**—"When, the evidence shows the recent possession by the bankrupt of thousands of dollars' worth of property and but small sales comparatively, and no money or proceeds if sold, and but a small amount of the property on hand and no uncollected accounts, no loss or destruction, etc., of goods, and, added to this, there is substantial evidence that goods were shipped away by the bankrupt as baggage and not accounted for and the bankrupt made no payments which could account for the disappearance of the proceeds if the goods were sold, we can arrive at but one conclusion, and that is that the bankrupt has either the goods or their

proceeds in concealment." Ray, District Judge, in *In re Silverman*, (N. D. N. Y. 1913) 208 Fed. 960.

**Garnishment of dividend.**—The right to garnishee a dividend payable to a creditor of the bankrupt is not generally recognized. *In re American Electric Tel. Co.*, (C. C. A. 7th Cir. 1914) 211 Fed. 88. See also *In re Cunningham*, (1879) 9 Cent. L. J. 208, 19 Nat. Bankr. Reg. 276, Fred Cas. No. 3,478; *Re Hollander*, (D. C. Md. 1910) 181 Fed. 1019; *In re Argonaut Shoe Co.*, (1911) 187 Fed. 784, 109 C. C. A. 632.

In the case of *In re Kranich*, (1910) 182 Fed. 849, the court permitted a garnishment proceeding to be enforced, basing its judgment on the ground that the only objector had failed to establish his right to the fund and the fact that a judgment had been rendered in the state court and that the trustee was not opposing the garnishment. The court insisted, however, that the allowance must be accepted as purely *ex gratia*. And in the case of *In re St. Alban's Foundry Co.*, (1900) 4 Am. Bankr. Rep. 594, the referee permitted the garnishment of a dividend where the bankrupt had been served as garnishee previous to the bankruptcy proceedings.

**Actions by trustee.**—*Scope of treatment.*—In the performance of his duties, under section 47a (2), a trustee in bankruptcy has the undoubted right to bring action in any suitable form for the purpose of recovering possession of the property of the bankrupt estate, or, as expressed in the Act, for the purpose of collecting and reducing the assets to money. This subject has necessarily been considered under several sections throughout the statute, and it would serve no useful purpose to reiterate here such matters as are fully set out elsewhere; thus the jurisdiction of the referee to make an order to turn over property to the trustee in bankruptcy has been considered under section 38a (4), and also incidentally under section 23b; and the right to enforce such an order by proceedings for contempt has been treated generally under section 41a (1). The right to proceed against adverse claimants, and the jurisdiction of actions of that character, have been considered under section 23b; while actions in the Circuit Court (now the District Court), by or against adverse claimants, have been considered under section 23a. So, also, under section 60b, consideration has been given to actions for the recovery of voidable preferences; and the right of the trustee to recover property transferred in fraud of creditors within the four-months period is considered under section 67e; while his right to recover property transferred generally in fraud of creditors has been considered under section 70e, and the trustee's rights

generally, as the owner of the property of the bankrupt estate, have been considered under the various subdivisions of section 70.

**Right to sue.**—The trustee's right to sue is incident to his title and duty in the premises and it is not necessary for him to obtain an order of the Bankrupt Court to justify him in maintaining a suit for the protection of the estate committed to him. *Chism v. Citizens' Bank*, (1900) 77 Miss. 599, 27 So. 637.

*Trustee's duty to litigate questions, etc.*

—In *In re Baird*, (E. D. Pa. 1902) 112 Fed. 960, 7 Am. Bankr. Rep. 448, McPherson, J., said: "It is certainly not the duty of a trustee to litigate every question that may be called to his notice by the creditors, however frivolous or apparently lacking in support it may be. On the other hand, he should not be permitted, by requiring indemnity in every instance against the costs and expenses of a suit, to cast the risk of controversy upon the particular creditor who may request him to undertake it. A general rule upon this subject would be very difficult to lay down, and I shall not essay the enterprise. It may be safely said, however, that if a trustee bears in mind that he is the representative of the estate considered as a whole, is bound to be vigilant and attentive in advancing its interests, and is under obligation to seek to carry out in the strictest good faith the provisions of the Bankrupt Act where they seem to apply plainly to the estate committed to his charge, he is not likely to go far wrong in doing, or in refusing to do, what may be asked of him by the creditors. In doubtful cases the referee and the court will solve his perplexities."

But it has been held that the trustee will not be permitted to seek the advice of the court upon a mere question of law about which he should have consulted an attorney, or, if necessary, tested the question by an action at law. *In re Baber*, (E. D. Tenn. 1902) 119 Fed. 520, 9 Am. Bankr. Rep. 406.

On an application of a trustee in bankruptcy to the court for advice as to whether he should file a petition to have the claim of a creditor expunged for fraud, the referee has no authority to hear and determine the subject matter of such petition on the merits. *In re Baber*, (E. D. Tenn. 1902) 119 Fed. 520, 9 Am. Bankr. Rep. 406.

*Trustee should have probable cause for action.*—The duty of the trustee to institute litigation does not mean that he should burden the assets of the estate with costs and expenses arising out of all manner of questions that may be presented for litigation. There should be probable cause at least for believing that a right of action exists before the bankrupt estate is so burdened. *In re*

Meadows, (W. D. N. Y. 1910) 181 Fed. 911.

**When trustee may abandon claims.**—It is not the privilege of a trustee in bankruptcy to use the estate committed to his charge to settle questions of law which may arise; and if success is doubtful in case of a claim alleged to be due the estate, and the result, if successful, will not enhance the value of the estate after paying the expense, it is his duty as a general rule to abandon the claim, unless at least a substantial majority of the creditors desire the litigation to proceed. *In re Harper*, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918.

**Suit against corporation of which trustee is director.**—Where one of three trustees of a bankrupt corporation is also one of its directors, an action against all of the directors may be maintained by the other trustees. *In re Syracuse Paper, etc., Co.*, (N. D. N. Y. 1908) 21 Am. Bankr. Rep. 174.

**Trustee cannot sue on agreement with state receiver.**—A bankrupt's trustee has no right to sue on an agreement made between state receivers of the bankrupt and one of its creditors. *Love v. Export Storage Co.*, (C. C. A. 6th Cir. 1906) 143 Fed. 1, 16 Am. Bankr. Rep. 171.

**If the trustee has an adequate remedy at law, a bill in equity cannot be maintained in any court.** Whatever equitable jurisdiction may have been conferred upon the District Court by the Bankruptcy Act is confined to controversies relating to a bankrupt estate. Within this limited area whether or not a bill in equity may be maintained must be tested by the ordinary rules that govern bills before any other tribunal, and perhaps the most familiar test is to inquire whether the plaintiff has an adequate remedy at law. *Sessler v. Nemcof*, (E. D. Pa. 1910) 183 Fed. 656.

**Duty to bring suit on request.**—It is the duty of a trustee, on the request of a creditor, to bring an action to set aside a fraudulent transfer, and if he refuses to do so any person interested may bring the same in his own name. *Casey v. Baker*, (N. D. N. Y. 1914) 212 Fed. 247.

**Necessity of averring deficiency of assets.**—Where a transfer is alleged to have been fraudulent as to creditors, and insolvency is alleged to have existed at the time, the trustee is in the position of a creditor who has proved by an execution returned unsatisfied that a deficiency of assets exists. There is, therefore, no necessity for its averment in the statement of claim. *Kraver v. Abrahams*, (E. D. Pa. 1913) 203 Fed. 782.

**Trespass on the case for conspiracy.**—This section as amended entitled the trustee to bring an action on the case based on a conspiracy to fraudulently secrete and transfer the property of the bankrupt.

*Sattler v. Slonimsky*, (E. D. Pa. 1912) 199 Fed. 592.

**Sales of property.**—*Court has discretionary control of sales.*—As respects trustees, and their proceedings in selling the property of bankrupts, section 47a (2) vests the Bankruptcy Court with complete discretionary power of control. *In re Benjamin*, (C. C. A. 2d Cir. 1905) 136 Fed. 175, 14 Am. Bankr. Rep. 481; *In re Knox Automobile Co.*, (D. C. Mass. 1913) 210 Fed. 569. And see also the annotation under section 70b.

**Sale must be for fair consideration.**—The trustee has no power or authority to divest himself of title to any portion of the estate, except for full and fair consideration. *In re Nunn*, (S. D. Ga.) 2 Am. Bankr. Rep. 664.

**May sell remainder interest.**—The Bankruptcy Court has jurisdiction to sell a remainder interest of the bankrupt in certain real property, and pay off a judgment lien thereon if the proceeds be sufficient for that purpose, in order to preserve the equity in the property for the general creditors, but the judgment lien and all rights accruing therefrom must be respected. *In re Arden*, (E. D. N. Y. 1911) 188 Fed. 475.

**Determination of validity of mortgage.**—A Bankruptcy Court in a proceeding by the trustee asking for authority to sell the land has no jurisdiction to determine the validity of a mortgage on the land against the objection of the mortgagee, but the trustee must proceed by a plenary suit to remove the incumbrance. *In re Henderson*, (N. D. Ga. 1913) 206 Fed. 139.

**Sales free from incumbrances.**—The Bankruptcy Court has jurisdiction, under proper circumstances, to order a sale by the trustee of the property of the bankrupt, free and clear from mortgages or other liens, by preserving and transferring the claims to the fund thus provided. *In re Pittelkow*, (1899) 92 Fed. 901, citing the following cases decided under the Bankruptcy Acts of 1841 and of 1867: *Ex p. City Bank*, (1845) 3 How. 292, 11 U. S. (L. ed.) 603; *Nugent v. Boyd*, (1845) 3 How. 426, 11 U. S. (L. ed.) 664; *Houston v. City Bank*, (1848) 6 How. 486, 12 U. S. (L. ed.) 526; *Ray v. Norseworthy*, (1874) 23 Wall. 128, 23 U. S. (L. ed.) 116; *Factors, etc., Ins. Co. v. Murphy*, (1884) 111 U. S. 738, 4 S. Ct. 679, 28 U. S. (L. ed.) 582; *In re Kirtland*, (1873) 10 Blatchf. 515, 14 Fed. Cas. No. 7,851; *Sutherland v. Lake Superior Ship Canal R. etc., Co.*, (1874) 9 Nat. Bankr. Reg. 298, 23 Fed. Cas. No. 13,643; *In re Sacchi*, (1872) 10 Blatchf. (U. S.) 29, 21 Fed. Cas. No. 12,200; *In re Brinkman*, 7 Nat. Bankr. Reg. 421, 4 Fed. Cas. No. 1,884; *In re Kahley*, (1870) 2 Bias. 383, 14 Fed. Cas. No. 7,593; *Foster v. Ames*, (1869) 1 Lowell 313, 9 Fed. Cas.



No. 4,965; *In re Mead*, (1893) 58 Fed. 312.

"The court may direct the trustee to sell the property free from whatever mortgage lien may be found to exist upon it, or the court may direct that it may be sold subject to such lien, or the trustee may be directed to appear in the state court and represent the interest of the bankrupt estate in foreclosure proceedings in that court." *In re San Gabriel Sanatorium Co.*, (C. C. A. 1900) 102 Fed. 310.

"It is, however, the duty of the court to consider the interests of mortgagees and other secured creditors as well as those of the general creditors; and, unless it is apparent (1) that the mortgaged premiums in the given case will probably realize upon a sale an amount substantially in excess of the mortgage, and (2) that there are no complications, by dower rights, conveyances, or other conditions, which require foreclosure under the mortgage, the power to proceed summarily by sale, including the interest of the mortgagees, should not be exercised." *In re Pittelkow*, (1899) 92 Fed. 903.

A sale of the bankrupt's real estate by the trustee free of liens will not be ordered by the Bankruptcy Court "unless the court is satisfied that the interest of the general creditors would thus be advanced, and that the interest of the lien creditors would not be injuriously affected." *In re Styer*, (1899) 98 Fed. 290. See also *In re Worland*, (1899) 92 Fed. 893; *In re Oderkirk*, (1900) 103 Fed. 779.

In *In re Standard Laundry Co.*, (C. C. A. 1902) 116 Fed. 476, a chattel mortgage upon the property of the bankrupt was sustained as a valid lien, and the trustee was ordered to pay to the mortgagee the money realized from the sale of the mortgaged property.

**Injudicious order of sale.**—The trustee should not take charge of or sell any property of the bankrupt so encumbered with liens that nothing can be realized therefrom; and therefore it was held that the referee ought not to have granted an order of sale where the costs would have to be paid out of the estate. *In re Cogley*, (1901) 107 Fed. 73.

**Leave to redeem.**—A court of bankruptcy has no authority to give a creditor of the bankrupt leave to redeem from the sale of real estate made by the trustee under the referee's order; and the fact that the creditor is the bankrupt's wife and claims an interest in the property is not material. *In re Novak*, (1901) 111 Fed. 978.

**Sale of lands in another state.**—A state law that land under an execution must be sold in the county where the land is does not apply to a bankruptcy proceeding in a federal court, and the trustee may sell lands situated in another state than that in which the proceeding is pending.

*James v. Koy*, (Tex. Civ. App. 1900) 59 S. W. 295.

**Confirmation of sale.**—A sale by the trustee in execution of an order of court is subject to the approval of the court. *In re O'Fallon*, (1873) 2 Dill. 548, 18 Fed. Cas. No. 10,445. See also *Citizens' Bank v. Ober*, (1870) 1 Woods 80, 5 Fed. Cas. No. 2,731; *Matter of Hyde*, (1881) 19 Blatchf. (U. S.) 115; *Lathrop v. Nelson*, (1877) 4 Dill. 194, 14 Fed. Cas. No. 8,111.

**Presumption of regularity of sale.**—In the absence of evidence to the contrary, it will be presumed that all the proceedings were regular in a case where the Bankruptcy Court, with all the papers before it, had confirmed a sale and had a deed regularly made to a purchaser. *Howes v. Carlisle*, (Ky. 1899) 52 S. W. 936.

**Court may compel payment.**—A federal District Court, in which a bankruptcy proceeding is pending, has jurisdiction to compel the payment to the trustee of the proceeds of a sale of the bankrupt's assets by virtue of section 47a (2). *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 699, 17 Am. Bankr. Rep. 714.

**Court may control selection of auctioneer.**—In the exercise of the direction of section 47a (2), the court may, if it sees fit, in a particular case, disapprove the selection of an auctioneer to sell the property, which the trustee has made, and order him to select another designated by the court. And it seems that the court may make orders concerning the selection of an auctioneer even before the appointment of one by the trustee. *In re Benjamin*, (C. C. A. 2d Cir. 1905) 136 Fed. 175, 14 Am. Bankr. Rep. 481.

**Bankrupt corporation cannot interfere with purchaser of its business, good will, and name.**—In *S. F. Myers Co. v. Tuttle*, (S. D. N. Y. 1911) 188 Fed. 532, it appeared that the S. F. Myers Company, doing a mail order jewelry business, became bankrupt, and its assets, including its good will and corporate name, were purchased by T. Thereafter the sons of Myers formed a corporation called the "S. F. Myers' Sons Company" and undertook to carry on a similar business at the same place occupied by the bankrupt corporation. This was enjoined, at the suit of T., and the new corporation was ordered either to change its name, or its place of business; it also was enjoined from interfering with the business carried on by T. under the name of the old corporation. It was held that the old corporation, having obtained a discharge in bankruptcy, but having no assets, was not entitled to enjoin T. from continuing to use the name of the old corporation; but such corporation could be restrained from interfering with the business of T. which he was carrying on under such name.

**Real property.**—There seems to be some doubt as to whether this section applies to real estate. "The debates over the amendment indicate that the attention of Congress was directed to personal property only; and the word 'custody' on which the trustee's rights are made to depend is wholly inapplicable to real estate." *In re Snelling*, (D. C. Mass. 1912) 202 Fed. 259, wherein the court held that where the premises had been for more than ten years in the exclusive possession of the purchaser under a claim of right under an oral contract of purchase, under such circumstances the property was not in the "custody" of the trustee or of the court.

**The law of the particular state** determines the rights, remedies and powers as to the bankrupt's real estate which would belong to the creditor. *Clark v. Snelling*, (C. C. A. 1st Cir. 1913) 205 Fed. 24.

**Dower rights.**—The amendment of 1910 cannot be construed to affect estates other than that of the bankrupt, therefore a trustee in bankruptcy is not empowered to divest the dower of a wife. *In re Chotiner*, (W. D. Pa. 1914) 216 Fed. 916.

**Time as of which trustee takes status of creditor.**—The trustee is to be regarded as having acquired the status of a creditor indicated in the section, as of the time when the petition in bankruptcy is filed. *Bailey v. Baker Ice Mach. Co.*, (1915) 239 U. S. 268, 36 S. Ct. 50, *affirming* (C. C. A. 8th Cir. 1913) 209 Fed. 603; *In re Jacobson*, (N. D. Ga. 1912) 200 Fed. 812; *Toof v. City Nat. Bank of Paducah*, (C. C. A. 6th Cir. 1913) 206 Fed. 250; *Big Four Implement Co. v. Wright*, (C. C. A. 8th Cir. 1913) 207 Fed. 535. See also *Aeme Harvester Co. v. Beekman Lumber Co.*, (1911) 222 U. S. 300, 32 S. Ct. 96, 56 U. S. (L. ed.) 208; *Everett v. Judson*,

(1913) 228 U. S. 474, 33 S. Ct. 568, 57 U. S. (L. ed.) 927, 46 L. R. A. (N. S.) 154.

But in the case of *In re Rose*, (N. D. Ga. 1913) 206 Fed. 991, it was said that, in view of section 70 of the Bankruptcy Act by which the trustee of a bankrupt has title to his property as of the date he is adjudged a bankrupt, it seems that the lien given to the trustee by this section accrues and attaches as of the date the trustee takes title.

And in *Anderson v. Chenault*, (C. C. A. 5th Cir. 1913) 208 Fed. 400, it was held that the date at which the trustee's right as of a judgment or lien creditor accrues is that of his qualification as trustee.

**Trustee amenable to court.**—While the Bankruptcy Act creates the office of trustee in bankruptcy, such trustee as a *quasi* officer of the court in a qualified sense. *McLean v. Mayo*, (E. D. N. C. 1901) 113 Fed. 106, 7 Am. Bankr. Rep. 115.

A trustee in bankruptcy as an officer of the court, and as such is subject to its direction by order made in summary proceedings, in all matters concerning money or property which may have come into his possession by virtue of his office. *In re Howard*, (N. D. Cal. 1904) 130 Fed. 1004, 12 Am. Bankr. Rep. 462.

**Trustee entitled to protection.**—The Bankruptcy Court will protect the trustee in the discharge of his *quasi*-official duties. *McLean v. Mayo*, (E. D. N. C. 1901) 113 Fed. 106, 7 Am. Bankr. Rep. 115.

The trustee in bankruptcy is not liable to an action in the state court as for trespass, trover, or conversion, when he follows the order of the court in disposing of property in its possession. *In re Mertens*, (N. D. N. Y. 1904) 131 Fed. 507, 12 Am. Bankr. Rep. 698.

(3) **[Deposit money.]** deposit all money received by them in one of the designated depositories; [(1898) 30 Stat. L. 557.]

**Deposits.**—It is the duty of the trustee to deposit all funds of the estate in a designated depository to the credit of the court or judge, designating the estate to which they belong. *In re Cobb*, (E. D. N. C. 1901) 112 Fed. 655, 7 Am. Bankr. Rep. 202; *In re Carr*, (E. D. N. C. 1902) 117 Fed. 572, 9 Am. Bankr. Rep. 58; *In re Hoyt*, (E. D. N. C. 1903) 119 Fed. 987, 9 Am. Bankr. Rep. 574; *In re Hoyt*, (E. D. N. C. 1904) 127 Fed.

968, 11 Am. Bankr. Rep. 784; *Huttig Mfg. Co. v. Edwards*, (C. C. A. 8th Cir. 1908) 160 Fed. 619, 20 Am. Bankr. Rep. 349.

To deposit the funds of a bankrupt estate in any bank other than a designated depository renders the officers making such deposit liable. *In re Hoyt*, (E. D. N. C. 1903) 119 Fed. 987, 9 Am. Bankr. Rep. 574.

(4) **[Disburse money.]** disburse money only by check or draft on the depositories in which it has been deposited; [(1898) 30 Stat. L. 557.]

**Disbursements.**—Funds can only be paid out on checks countersigned by the judge, or some person designated by him. The paying out of funds in any other man-

ner is irregular. *In re Rude*, (D. C. Ky. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319; *In re Cobb*, (E. D. N. C. 1901) 112 Fed. 665, 7 Am. Bankr. Rep. 202; *In re*

Carr, (E. D. N. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635; *In re Hoyt*, (E. D. N. C. 1903) 119 Fed. 987, 9 Am. Bankr. Rep. 574; *In re Hoyt*, (E. D. N. C. 1904) 127 Fed. 968, 11 Am. Bankr. Rep. 784; *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

**Payment to attorney for client.**—Checks issued by a trustee in payment of dividends, if made payable to attorneys, should designate them as such, and they must also, in compliance with the rules, state the account on which they are drawn, to constitute proper vouchers corresponding with the dividend sheet. *In re Carr*, (E. D. N. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635 (decided under a local rule).

**Checks must correspond with dividend sheet.**—Checks payable to persons whose names do not appear on the dividend sheet, and which do not show the par-

ticular claims covered thereby, or the authority of the payee to receive them, will not be approved as proper vouchers. *In re Carr*, (E. D. N. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635 (decided under a local rule).

**The irregular payment of funds**, under rule 10 of the District Court for the eastern district of North Carolina, subjects both trustee and depository to liability on their bonds, and to attachment for contempt. *In re Cobb*, (E. D. N. C. 1901) 112 Fed. 655, 7 Am. Bankr. Rep. 202; *In re Hoyt*, (E. D. N. C. 1904) 127 Fed. 968, 11 Am. Bankr. Rep. 784.

**Opportunity for appeal should be given.**—Trustees in bankruptcy should not execute orders of referees on contested claims for the payment of money until opportunity for appeal or review has been given. *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

(5) **[Furnish information.]** furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; [(1898) 30 Stat. L. 557.]

**Information concerning the estate** must be furnished by the trustee to all parties in interest. *In re Saur*, (S. D. N. Y. 1903) 122 Fed. 101, 10 Am. Bankr. Rep. 353.

**Party in interest.**—Any person entitled to appear, such as a party opposing a discharge, even though he have no prov-

able claim, is a "party in interest" within this section. *In re Waters-Colver Co.*, (E. D. N. Y. 1914) 212 Fed. 761.

**A creditor is a "party in interest,"** within this section even though he has not formerly proved his claim. *In re Samuelsohn*, (W. D. N. Y. 1909) 174 Fed. 911, 23 Am. Bankr. Rep. 528.

(6) **[Keep accounts.]** keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; [(1898) 30 Stat. L. 557.]

(7) **[Make detailed statement.]** lay before the final meeting of the creditors detailed statements of the administration of the estates; [(1898) 30 Stat. L. 557.]

**Trustee ordered to report fully.**—See *In re Arnett*, (1901) 112 Fed. 770, where the trustee in a complicated case was

ordered to report fully to a special meeting of all the creditors.

(8) **[Make final reports.]** make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; [(1898) 30 Stat. L. 557.]

**The duty to file final accounts** will be enforced by the court when necessary. *O'Conner v. Sunseri*, 26 Am. Bankr. Rep. 1.

**Forms.**—Form No. 48 is "trustee's re-

turn of no assets;" No. 49 is "account of trustee; and No. 50 is "oath to final account of trustee."

(9) **[Pay dividends.]** pay dividends within ten days after they are declared by the referees; [(1898) 30 Stat. L. 557.]

(10) **[Report condition of estate.]** report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other

details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and [(1898) 30 Stat. L. 557.]

(11) [Set apart exemptions.] set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment. [(1898) 30 Stat. L. 557.]

As to exemptions, generally, see section 6, *supra*.

**Setting apart exemptions.**—The trustee is bound, as soon as he conveniently can, to set apart the bankrupt's exemptions, and to report the items and value thereof to the court. *In re Camp*, (N. D. Ga. 1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165; *In re Richard*, (E. D. N. C. 1899) 94 Fed. 633, 2 Am. Bankr. Rep. 506; *In re Grimes*, (W. D. N. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 160; *In re McBryde*, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729; *In re Brown*, (W. D. Pa. 1899) 100 Fed. 441, 4 Am. Bankr. Rep. 46; *In re Lynch*, (S. D. Ga. 1900) 101 Fed. 579, 4 Am. Bankr. Rep. 263; *In re Hatch*, (S. D. Ia. 1900) 102 Fed. 280, 4 Am. Bankr. Rep. 349; *In re Park*, (W. D. Ark. 1900) 102 Fed. 602, 4 Am. Bankr. Rep. 432; *In re White*, (D. C. Vt. 1900) 103 Fed. 774, 4 Am. Bankr. Rep. 613; *In re Oderkirk*, (D. C. Vt. 1900) 103 Fed. 779, 4 Am. Bankr. Rep. 617; *In re Osborn*, (W. D. N. Y. 1900) 104 Fed. 780, 5 Am. Bankr. Rep. 111; *In re Gordon*, (D. C. Vt. 1902) 115 Fed. 445, 8 Am. Bankr. Rep. 255; *In re Reese*, (N. D. Ala. 1902) 115 Fed. 993, 8 Am. Bankr. Rep. 411; *In re Campbell*, (W. D. Va. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723; *In re MacKissic*, (E. D. Pa. 1909) 171 Fed. 259, 22 Am. Bankr. Rep. 817; *In re Soper*, (D. C. Neb. 1909) 173 Fed. 116, 22 Am. Bankr. Rep. 868; *In re Wishnefsky*, (D. C. N. J. 1910) 181 Fed. 896; *In re Maynard*, (N. D. Ga. 1910) 183 Fed. 823; *In re Finklestein*, (M. D. Pa. 1912) 192 Fed. 738; *In re Andrews*, (W. D. Mich. 1911) 193 Fed. 776; *In re Kelly*, (M. D. Pa. 1912) 199 Fed. 984; *In re Nunn*, (S. D. Ga. 1899) 2 Am. Bankr. Rep. 664; *Bell v. Dawson Grocery Co.*, (Ga. 1904) 12 Am. Bankr. Rep. 159; *Matter of Amos*, (S. D. Ga. 1908) 19 Am. Bankr. Rep. 804; *Matter of Cotton*, (S. D. Ga. 1909) 23 Am. Bankr. Rep. 586; *In re Cotton*, 25 Am. Bankr. Rep. 532.

**Right of exemption.**—This section, together with section 7a (8) of the Bankruptcy Act, refers the right of exemptions to conditions existing at the time the petition in bankruptcy is filed. *In re Crum*, (N. D. Ohio 1913) 221 Fed. 729.

**Construction of exemption statute.**—In setting apart exemptions, the exemption statutes should be liberally construed with the view of effectuating the object

of the law maker and that limited protection to the home which is the special object of the law's concern. *In re Swanson*, (W. D. Wash. 1914) 213 Fed. 353.

The administration of an exemption law should comport with the beneficent spirit that prompted its enactment and a court of bankruptcy should not attempt to defeat an exemption by niceties of practice or by mere details of administration when the exemption is plainly made and asserted. *Smith v. Thompson*, (C. C. A. 8th Cir. 1914) 213 Fed. 335.

**General Order No. 17** prescribes the procedure to be pursued by the trustee in setting apart exempt property, and the time and manner in which exceptions may be taken to his report. *In re Smith*, (W. D. Tex. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190; *In re Harrell*, (E. D. N. C. 1915) 222 Fed. 160.

**Provisions as to exemptions are mandatory.**—The provisions of the Bankruptcy Law requiring the trustee to set apart the bankrupt's exemptions, and report the items and estimated value thereof to the court, are mandatory, and these duties cannot be performed by any one else. *In re Grimes*, (W. D. N. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 160.

"It is the duty of the court to see that the portion he [the bankrupt] is entitled to is secured to him, as much as it is to see that the portion he is required to surrender to his creditors is surrendered to them." *In re Stevens*, (1870) 2 Biss. (U. S.) 374.

A payment to a bankrupt by his trustee of a sum claimed as an exemption, from the funds of the estate, will not be allowed on settlement of the estate, where it does not appear that the exemption was set aside by the trustee as required by the Bankruptcy Act. *In re Hoyt*, (E. D. N. C. 1903) 119 Fed. 987, 9 Am. Bankr. Rep. 574.

**Prior to the appointment of a trustee** and a report by him of exempt property the question whether a certain article is or is not exempt cannot come before the court. *In re Smith*, (1899) 93 Fed. 791.

**Trustee acts ministerially.**—In setting apart the property claimed by a bankrupt as exempt, after its appraisal, the trustee acts ministerially. *In re Campbell*, (W. D. Va. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723.

**Conformity to state statutory procedure.**—In valuing and setting apart a

homestead the trustee should conform as near as may be to the methods provided by the state law. *In re McCutchen*, (1900) 100 Fed. 779.

In Virginia merely claiming a homestead in the schedule is no compliance with the statute securing the benefit of the exemption. *In re Garner*, (1902) 115 Fed. 200.

*Selection of exemptions by bankrupt.*—Where the state statute requires a selection of his exemptions by the debtor, he waives his right to the exemptions in bankruptcy proceedings if he fails to make a selection; and the right to exemptions being a personal privilege, such selection cannot be made by his mortgagee so as to inure to the benefit of the latter. *In re Schuller*, (1901) 108 Fed. 591.

Where, as under the laws of North Carolina, the debtor is entitled to certain personal exemptions, which he must select, to the value of \$500, he may not select a trifling amount in chattels, and have the balance made up by the trustee in cash. *In re Woodard*, (1899) 95 Fed. 955.

*Claim of stock in bulk.*—Code Va. 1887, § 3639, allowing to the householder an exemption out of personal property selected in writing describing each parcel or article and affixing his valuation to each, the claim of a stock of goods in bulk is not sufficient; but the bankrupt will be allowed to amend his claim to comply with the statute. *In re Wilson*, (1901) 108 Fed. 197.

*Exemption should be set aside promptly.*—It is the duty of the trustee to set apart the bankrupt's exemptions as soon as practicable after his appointment, without waiting until such exemptions shall have been allowed and set apart by state officers according to the procedure prescribed by the laws of the state. *In re Camp*, (N. D. Ga. 1899) 91 Fed. 745, 1 Am. Bankr. Rep. 165.

*Trustee not entitled to indemnity bond.*—A trustee in bankruptcy has no right to demand from the bankrupt, as a condition upon his delivery to him of the property claimed as exempt and appraised for that purpose, a bond of indemnity. *In re Brown*, (W. D. Pa. 1899) 100 Fed. 441, 4 Am. Bankr. Rep. 46.

*Trustee should deliver possession to bankrupt, in absence of objection.*—It is the duty of a trustee in bankruptcy, who has set apart for the bankrupt the personal property selected by him as exempt, pursuant to an order of the referee, and reported the same, to which report no exception was taken, to deliver possession of such property to the bankrupt. *In re Soper*, (D. C. Neb. 1909) 173 Fed. 116, 22 Am. Bankr. Rep. 868.

*Allowing exemption prior to appointment of trustee.*—The determination of a bankrupt's claim to a homestead exemption by the referee before the appointment of a trustee, although informal, and not

in accordance with the regular course of procedure, may be sanctioned by the court in the exercise of its equity powers, where it appears that the bankrupt has no claim; so that, if the exemption should be allowed, there would be no occasion for property except that involved in the the appointment of a trustee. *In re Allen*, (W. D. Va. 1904) 134 Fed. 620, 13 Am. Bankr. Rep. 518.

*Irregular appraisal.*—The state statute providing that the homestead appraisal shall be made by three persons, one named by the sheriff, another by the bankrupt, and another by the creditors, an appraisal made by three persons all appointed by the trustee, the bankrupt not being represented therein, will, on objections by the bankrupt, be set aside, and another appraisal ordered. *In re McCutchen*, (1900) 100 Fed. 779.

*Exemption from proceeds of sale.*—Where property claimed by a bankrupt as exempt has been sold by the trustee, the exemption should be set apart out of the proceeds of the sale. *In re Park*, (W. D. Ark. 1900) 102 Fed. 602, 4 Am. Bankr. Rep. 432.

*Where homestead is encumbered.*—It is the duty of the trustee to set out the homestead; and where a homestead is inseparable and subject to a prior debt, the bankrupt should have the privilege of retaining the homestead upon paying the trustee the amount of the debt; while, if a sale is necessary, the expense of such sale should be paid by the trustee, and the avails, above such expense, handed over to the bankrupt. *In re Hopkins*, (1900) 103 Fed. 781.

*Fraudulent discharge of mortgage on exempt homestead.*—The bankrupt, a few days before filing his voluntary petition, having disposed of non-exempt property and applied the proceeds in part payment of an incumbrance upon his homestead, it was held that the transaction was in fraud of the Bankruptcy Law, and that by reason thereof the trustee in bankruptcy was entitled to a lien by subrogation to the extent of such payment; whereupon the court ordered that the homestead be set off to the bankrupt subject to the lien, and that the lien be sold unless discharged by payment to the trustee within a time limited. *In re Boston*, (1899) 98 Fed. 587.

*Exemption in lands without jurisdiction.*—A court of bankruptcy is without jurisdiction to allot to a bankrupt, domiciled within its district, a homestead in lands situated in another district. *In re Owings*, (E. D. N. C. 1905) 140 Fed. 739, 15 Am. Bankr. Rep. 472.

Generally speaking a trustee in bankruptcy can set apart only such property as is exempt under the state law. *In re Cheatham*, (W. D. Ky. 1914) 210 Fed. 370.

*Trustee's action not final.*—While it is the duty of the trustee to set apart the exemption of the bankrupt, his action is not final, but the courts of bankruptcy are expressly given jurisdiction by section 2 (11) to determine all claims to exemptions. *In re White*, (D. C. Vt. 1900) 103 Fed. 774, 4 Am. Bankr. Rep. 613.

The fact that a bankrupt accepted the benefit of an order of a referee allowing him certain personal property exemptions does not preclude him from appealing from a part of the same order relating to his homestead exemption. *In re Letson*, (C. C. A. 8th Cir. 1907) 157 Fed. 78, 19 Am. Bankr. Rep. 506.

*The trustee has the right to refuse to set apart the exemptions* claimed in the bankrupt's schedules, where the bankrupt is not entitled to them, even if the claim is correct in form. *In re Ellis*, (N. D. Ohio 1903) 19 Am. Bankr. Rep. 754.

But it must be for some gross fault that a claim to exemption should be disallowed. *In re Tollett*, (6th Cir. 1901) 106 Fed. 866, 46 C. C. A. 11, 54 L. R. A. 222, 5 Am. Bankr. Rep. 404; *In re Falconer*, (8th Cir. 1901) 110 Fed. 111, 49 C. C. A. 50, 6 Am. Bankr. Rep. 557; *Burke v. Guarantee Title, etc., Co.*, (3d Cir. 1905) 134 Fed. 562, 67 C. C. A. 486, 14 Am. Bankr. Rep. 31; *In re Irwin*, (W. D. Pa. 1909) 177 Fed. 284, 22 Am. Bankr. Rep. 165, reversing (C. C. A. 3d Cir. 1909) 174 Fed. 642, 23 Am. Bankr. Rep. 487.

*Return of property to bankrupt.*—Where the state law provides that a debtor has no exemption in personal property in his possession when a claim is made for the purchase price, and that, in an action for the price, the vendor has a right to an order attaching the property, a debtor cannot, by going into voluntary bankruptcy, and then claiming the property as exempt, defeat the execution of attachment process; he may have in such a case temporary possession, and the trustee will be directed to return the property to the bankrupt to be subject to such process. *In re Durham*, (1900) 104 Fed. 231.

*Effect of setting apart of exempt property*—*Jurisdiction of Bankruptcy Court ceases.*—When the exempted property has been duly set apart to the bankrupt by the trustee, in accordance with the statutory mandate, the jurisdiction of the Bankruptcy Court thereover ceases. *In re Grimes*, (W. D. N. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 160; *In re Hatch*, (S. D. Ia. 1900) 102 Fed. 280, 4 Am. Bankr. Rep. 349; *In re Gordon*, (D. C. Vt. 1902) 115 Fed. 445, 8 Am. Bankr. Rep. 255; *In re Reese*, (N. D. Ala. 1902) 115 Fed. 993, 8 Am. Bankr. Rep. 411; *In re Cheatham*, (W. D. Ky. 1914) 210 Fed. 370; *In re Little*, (1901) 110 Fed. 621; *In re Jackson*, (1902) 116 Fed. 46. Neither the court nor the creditors having any further interest therein, the court will

not make an order to restore to the trustee, to be sold for the benefit of a creditor, certain property upon which that creditor has a chattel mortgage. *In re Hatch*, (1900) 102 Fed. 280.

*Report of exempt property.*—The mere act of the trustee in setting apart exempt property has not been given the force of an adjudication. He is required to report the items of exempt property, with the estimated values thereof to the court. This report may be contested, and, as between the creditor and the bankrupt, does not become final and conclusive until the court shall have acted thereon. *Seedig v. Clifton First Nat. Bank*, (Tex. 1914) 168 S. W. 445.

*Exemption cannot be restored to former status.*—After exempt property has been set aside, the court of bankruptcy will not, on the petition of a creditor claiming a lien on such property by virtue of a chattel mortgage, order the bankrupt to restore the property to the trustee, in order that it may be sold by the latter for the benefit of the mortgagees. *In re Hatch*, (S. D. Ia. 1900) 102 Fed. 280, 4 Am. Bankr. Rep. 349.

*The trustee cannot administer on exempt property*; nor can he determine the rights of creditors asserting waivers against it. After it has been set apart he loses all power and control over it. *Bell v. Dawson Grocery Co.*, (Ga. 1904) 12 Am. Bankr. Rep. 159.

*General creditor's interest ceases on setting apart of exemptions.*—Where property claimed by a bankrupt as exempt has been set apart and delivered to him by the trustee, it passes out of the possession and control of the court of bankruptcy, and the trustee has no right or title thereto, nor the general creditors any interest or equity in such property. *In re Hatch*, (S. D. Ia. 1900) 102 Fed. 280, 4 Am. Bankr. Rep. 349.

*Rights of lienholder.*—Setting aside property as exempt does not affect the rights of a lienholder, nor does it in any wise prevent a creditor, whose claim is not avoided by the discharge in bankruptcy, from proceeding against the property in the hands of the bankrupt, just as though he had not been adjudged a bankrupt. *In re Hartsell*, (N. D. Ala. 1905) 140 Fed. 30, 15 Am. Bankr. Rep. 177.

*Enforcement of claim against exemption.*—Where a trustee in bankruptcy retains out of the proceeds of the sale of the bankrupt's property a certain sum for the benefit of any liens or claims that might be established against the property, a state court has jurisdiction to hear and determine an action brought against such trustee to enforce a chattel mortgage executed by the bankrupt, and to recover the amount due on a note which the mortgage was given to secure, if the Bankruptcy Court does not enjoin the

prosecution of such action. *Skilton v. Coddington*, (1906) 15 Am. Bankr. Rep. 810, 185 N. Y. 80, 77 N. E. 790.

**Estimating value of exemption.**—The bankrupt may make his claim for exemptions, but the trustee must set it apart and estimate its value. *In re Osborn*, (W. D. N. Y. 1900) 104 Fed. 780, 5 Am. Bankr. Rep. 111; *In re Manning*, (E. D. Pa. 1902) 112 Fed. 948, 7 Am. Bankr. Rep. 571.

**Severance and valuation by trustee.**—A voluntary bankrupt must, with his petition, file "a claim for such exemptions as he may be entitled to;" but the actual severance of exempt property from the general estate is to be made by the trustee, not by the debtor, and the value of that so severed is to be determined in the first instance by the trustee, not by the debtor; the manner in which exemptions are to be claimed, set apart, and awarded, being regulated by the Bankrupt Act. *In re Friedrich*, (C. C. A. 1900) 100 Fed. 284.

**Sale of exempt property and disposition of proceeds.**—"It is held that a practical method for the determination of disputes arising from valuation of property claimed to be exempt is to order the property in question sold, and the trustee to set apart to the bankrupt the proceeds to the extent of the amount allowed as exemption by the state laws." *In re Osborn*, (1900) 104 Fed. 782. See also *In re Bolinger*, (1901) 108 Fed. 374; *In re Park*, (1900) 102 Fed. 602; *In re Lynch*, (1900) 101 Fed. 579; *In re Brown*, (1899) 100 Fed. 441; *In re Richard*, (1899) 94 Fed. 633; *In re Gardner*, (1900) 103 Fed. 922.

Where a trustee finds the homestead property of the bankrupt, which exceeds in value the homestead exemption, indivisible, he may apply to the referee for an order of sale. *In re Oderkirk*, (D. C. Vt. 1900) 103 Fed. 779, 4 Am. Bankr. Rep. 617.

Where the bankrupt claims a homestead in the property surrendered, and debts are proved in which the benefit of the homestead exemption has been waived, it is the duty of the trustee to sell the property claimed as a homestead, or so much thereof as may be necessary to pay debts proved as having the benefit of the waiver; the residue or the proceeds thereof being allowed the bankrupt under his homestead claim. *In re Sisler*, (1899) 96 Fed. 402.

Where the bankrupt does not apply to have the homestead property assigned to him upon payment of the excess in its value over and above the amount of his exemption, nor object to the referee's order of sale, he cannot question the validity of the sale; and, having received from the trustee without objection certain other nonexempt assets, he cannot object to the deduction of their value from his share of the proceeds of the sale. *In re Oderkirk*, (1900) 103 Fed. 779.

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Under a state law giving a debtor certain personal property to be selected by him, he, as bankrupt, has the right to choose his exemptions to the allowed amount; and, although the stock of goods is incapable of division, except at a loss, and perhaps unsalable except as a whole, yet the court will not order a sale of the whole that the bankrupt may receive the value of his exemptions in cash. *In re Grimes*, (1899) 96 Fed. 529.

An order will not be made for the partition of land out of which the bankrupt claims a homestead exemption, and upon an undivided fraction of which there is a valid mortgage, as the court has no right to impair the security or to discharge any part from the liens thereon until the debts secured thereby shall have been paid in full; but an application may be made for an order to sell parts of the land not actually occupied as a homestead, the proceeds thereof to be applied in payment of the mortgage debt. *In re Thomas*, (1899) 96 Fed. 828.

Where the state statute allowed a miner as exemption "his mining claim actually worked by him, not exceeding in value the sum of \$1,000," and the bankrupt owned a mining claim consisting of three parcels, one appraised at \$5,300, another at \$400, and another at nothing, it was ordered that if the property could be partitioned so as to give the bankrupt a value of \$1,000, without injury to the rest, this should be done; if not, that the property should be sold, all liens paid out of the proceeds, and the bankrupt be allowed \$1,000. *In re Diller*, (1900) 100 Fed. 931.

**Agreement as to conclusiveness of appraisal.**—An agreement between a bankrupt and his creditors that the exemptions shall be valued and allotted by three appraisers, whose decision shall be final and not subject to exception, is void; and an order made by the referee, by consent of parties in the terms of such agreement, will be set aside. *In re Grimes*, (W. D. N. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730.

**Revaluation will be directed when necessary.**—Where a trustee in bankruptcy, in setting apart to the bankrupt the property claimed as his homestead, has adopted the value placed upon it by appraisers fifteen years before, when it was allotted to the bankrupt as a homestead under process of a state court, but it appears that the property has since increased in value beyond the amount allowed as exempt by the laws of the state, the court of bankruptcy will direct the trustee to revalue the property, and set apart to the bankrupt so much thereof as shall not exceed in value the amount so allowed. *In re McBryde*, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729.

**Deduction from amount allowed as exempt**—Where property is sold at bankrupt's request.—Where personal property

which the bankrupts were entitled to claim as exempt was sold at the bankrupt's request that cash be allowed them instead of the property, the bankrupts should be charged with their percentage of the difference between the proceeds of the property and its appraised value, as against the amount of their exemptions. *In re Ansley*, (E. D. N. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457.

*Storage charge deducted.*—It has been held that if the trustee has no cash in hand with which to pay storage charges to a landlord whose property he has occupied for the storage of the bankrupt's goods, he may be ordered to sell sufficient personal property for that purpose; and this will take precedence of the bankrupt's claim to have his exemptions set apart out of such personalty. *In re Grimes*, (W. D. N. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730.

*Fees of court officers.*—The exemptions allowed by the statute were not intended to exonerate the bankrupt from the payment of the fees provided for the court officers. *In re Hines*, (S. D. W. Va. 1902) 117 Fed. 790, 9 Am. Bankr. Rep. 27.

*Where the bankrupts converted a sum of money* which was derived from the sale of goods between the time of the filing of the petition for adjudication and the time when the property was taken into custody by the deputy marshal, it was held that such sum should be deducted from the bankrupts' exemptions. *In re Ansley*, (E. D. N. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457.

*And where the bankrupts failed to make a full disclosure of their personal property*, but the amount of the concealment could not be ascertained, it was held that the trustee should not allow their personal property exemptions until all of the personal property had been accounted for, except on the orders of the court. *In re Ansley*, (E. D. N. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457.

*The court cannot order a trustee in bankruptcy to pay rent, overdue at the time of the adjudication*, out of the property to be set apart to the bankrupt as exempt, although the bankrupt had so agreed with the landlord before the commencement of the proceedings. *In re Grimes*, (W. D. N. C. 1899) 96 Fed. 529, 2 Am. Bankr. Rep. 730.

*Costs and expenses.*—In *In re Le Vay*, (M. D. Pa. 1903) 125 Fed. 990, 11 Am. Bankr. Rep. 114, it was held that where the bankrupt has properly claimed his exemption, it cannot be diminished by, or put aside in favor of, the costs and expenses made in the proceedings, even where these have been incurred in steps taken to preserve the property, as by a sale of it by a receiver as perishable.

*Objections to trustee's report.*—Any creditor may object to the report of the trustee as to the bankrupt's exemptions,

with respect to either their allowance, valuation, or other matter affecting the creditor's interest. *In re Campbell*, (W. D. Va. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723; *Matter of Amos*, (S. D. Ga. 1908) 19 Am. Bankr. Rep. 804; *Matter of Cotton*, (S. D. Ga. 1909) 23 Am. Bankr. Rep. 586; *In re Cotton*, 25 Am. Bankr. Rep. 532.

*The bankrupt may also except to the trustee's report on exemptions.* *In re Ellis*, (N. D. Ohio 1903) 10 Am. Bankr. Rep. 754.

*Issue arises when report is filed.*—No issue as to the bankrupt's right to the exemption arises until the trustee's report is filed; issue may then be taken by exceptions thereto which cast the burden of proving all facts essential to the right upon the bankrupt. *In re Campbell*, (W. D. Va. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723.

The question of the status of a particular chattel claimed by the bankrupt as exempt, and by a creditor as assets of the estate, cannot properly come before the court for determination until a trustee has been appointed and has made his report of the articles set apart by him as exempt. Exceptions to the trustee's action may then be heard by the referee, and certified by him to the judge for final determination. *In re Smith*, (W. D. Tex. 1899) 93 Fed. 791, 2 Am. Bankr. Rep. 190.

*Creditors' exceptions.*—Where the bankrupt's fraud is alleged in exceptions to his claim of exemptions, the facts constituting the fraud must be stated. *In re Tobias*, (1900) 103 Fed. 68.

Where the bankrupt, pursuant to section 7a (8), duly filed a schedule of exemptions claimed; and the trustee, under section 47a (11) and General Order No. 17 (see *supra*, section 30, note), filed his report, with the estimated values of the exemptions duly itemized; and a creditor filed his exceptions thereto within the twenty days allowed in the order; and the referee having made his report thereon, it was held that there was a well-defined issue before the court, without any special pleading. *McGahan v. Anderson*, (C. C. A. 1902) 113 Fed. 115.

In *In re Reese*, (1902) 115 Fed. 993, the court refused to reopen an adjudication setting apart to the bankrupt certain property as exempt, on account of the laches of the petitioning creditor.

*Process unnecessary.*—A creditor is not precluded from objecting to the allowance of exemption to a bankrupt because he is not armed with process; the bankruptcy proceedings themselves being in effect a seizure of all the debtor's property. *In re Campbell*, (W. D. Va. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723.

*Verification of objections.*—While an exception to the report of a trustee setting apart the bankrupt's exemptions is in



some sense a pleading in that it makes an issue, it is doubtful if it need be verified, and in any event the lack of verification is not jurisdictional; and where not objected to on the hearing before the referee, objections cannot be made on a review of his decision by the court. *In re Campbell*, (W. D. Va. 1903) 124 Fed. 417, 10 Am. Bankr. Rep. 723.

**Time to object.**—Objections to a trustee's report setting apart the bankrupt's exemption must, by general order in bankruptcy No. 17, be filed within twenty days after the filing of the report. *Matter of Amos*, (S. D. Ga. 1908) 19 Am. Bankr. Rep. 804; *Matter of Cotton*, (S. D. Ga. 1909) 23 Am. Bankr. Rep. 586, 25 Am. Bankr. Rep. 332.

Where the last day comes on Sunday, a creditor has until the following day in which to file objections. *Matter of Amos*, (S. D. Ga. 1908) 19 Am. Bankr. Rep. 804.

A creditor desiring to object to the trustee's report setting apart the bankrupt's exemption should file all of his objections within the time fixed by law, and cannot come in after the expiration of that time and add new and additional grounds to his objections already of file; but it is otherwise as to the enlargement or amplification of grounds originally taken. *In re Cotton*, (S. D. Ga. 1910) 183 Fed. 190, 25 Am. Bankr. Rep. 532.

**Burden of proof.**—One objecting to the allowance of a bankrupt's exemption must show affirmatively that the bankrupt was not entitled to claim the property. *In re Rippa*, (S. D. Fla. 1909) 180 Fed. 603.

See also *In re Grimes*, (W. D. N. C. 1899) 94 Fed. 800, 2 Am. Bankr. Rep. 160; *In re Filer*, (S. D. N. Y. 1900) 108 Fed. 209, 5 Am. Bankr. Rep. 332.

The burden of showing that an article alleged to be exempt is within the provisions of the statute rests on the bankrupt. *In re Turnbull*, (D. C. Mass. 1901) 106 Fed. 667, 5 Am. Bankr. Rep. 549.

**The finding of a referee** on the facts in reference to an exemption claim should be manifestly erroneous before the court will interfere with it. *In re West*, (1902) 116 Fed. 767.

**Costs in the proceedings.**—Where on a contest between the bankrupt and the trustee as to a claim for exemptions neither party wholly prevailed, no costs were taxed in favor of either against the other. *In re Libby*, (1900) 103 Fed. 776. But where on review by the judge the bankrupt secured a reversal of an adverse ruling of the referee the trustee was ordered to pay the costs out of the estate. *In re Harrington*, (1900) 99 Fed. 390.

In *In re Seabolt*, (1902) 113 Fed. 766, costs were taxed against excepting creditors where their exceptions were overruled.

**Subjection of exempt property to payment of costs.**—If the trustee has no cash in hand with which to pay costs incurred in the case, his right to sell exempt property when necessary to raise the money is paramount to the bankrupt's right of exemption therein. *In re Grimes*, (1899) 96 Fed. 529.

**b [Concurrence of two out of three.]** Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate [(1898) 30 Stat. L. 557.]

**c [File certified copy of decree of adjudication.]** The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings. [(Inserted 1903, which excepted pending cases) 32 Stat. L. 799.]

This subdivision c was not in the original Act, but was added in 1903.

This clause is directory only and does not affect the principle that the bankrupt's title passes by operation of law

to the trustees in bankruptcy as upon the date of his adjudication. *Hull v. Burr*, (1911) 61 Fla. 625, 55 So. 852.

**SEC. 48. COMPENSATION OF TRUSTEES, RECEIVERS AND MARSHALS: (a) [Fee and commissions of trustee.]** Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required

from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition. (*[Amended 1903 and 1910, both of which excepted pending cases]* 32 Stat. L. 799 and 36 Stat. L. 840.)

As originally enacted this section 48(a) read as follows:

"SEC. 48. COMPENSATION OF TRUSTEES.—a Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars." [30 Stat. L. 557.]

In 1903 it was amended "so as to read as follows":

"a Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition, after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition." [32 Stat. L. 799.]

In 1910 it was amended "so as to read as" in the text.

**Trustee's compensation.**—The statute fixes the trustee's compensation, and its provisions in this respect must be strictly adhered to. *In re Utt*, (C. C. A. 7th Cir. 1901) 105 Fed. 754, 5 Am. Bankr. Rep. 383; *In re Hinkel Brewing Co.*, (N. D. N. Y. 1903) 124 Fed. 702, 10 Am. Bankr. Rep. 692; *In re Sanford Furniture Mfg. Co.*, (E. D. N. C. 1903) 126 Fed. 888, 11 Am. Bankr. Rep. 414; *In re Cambridge Lumber Co.*, (D. C. Mass. 1905) 136 Fed. 983; *In re Castleberry*, (N. D. Ga. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 430; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *In re Screws*, (S. D. Ga. 1906) 147 Fed. 989, 17 Am. Bankr. Rep. 269; *In re Kirkpatrick*, 6th Cir. 1906) 148 Fed. 811, 78 C. C. A. 501; *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; *In re Shiebler*, (C. C. A. 2d Cir. 1909) 174 Fed. 336, 23 Am. Bankr. Rep. 162; *In re Ellett Electric Co.*, (W. D. N. Y. 1912) 196 Fed. 400; *In re Muhlhauser*, (N. D. Ohio 1902) 9 Am. Bankr. Rep. 80; *Matter of Hart*, (D. C. Hawaii 1906) 17 Am. Bankr. Rep. 480; *Matter of Pequod Brewing Co.*, (S. D. N. Y. 1907) 18 Am. Bankr. Rep. 352.

The provisions of this section are comprehensive enough to allow to trustees commissions on all sums disbursed by them out of the assets of the bankrupt estate, which obviously includes moneys paid for fees and expenses in the administration thereof. *In re Meadows*, (W. D. N. Y. 1912) 199 Fed. 304.

No commission can be allowed on money which never became a part of the bankrupt estate, nor came into the possession or control of the trustee. *In re Kaiser*, (1902) 112 Fed. 955.

General Order No. 35 also makes provision for compensation of trustees.

**Commissions on payments to lienholders.**—There can now be no question of the right of the trustee to commissions on money turned over to lienors, such commissions having been expressly provided for by the amendment of 1910; prior to that enactment, however, the question presented a conflict of opinion. See the following decisions rendered prior to the amendment: *In re Ft. Wayne Electric Corp.*, (1899) 94 Fed. 109; *In re Fielding*, (1899) 96 Fed. 800; *In re Utt*, (C. C. A. 1901) 105 Fed. 754; *In re Mammoth Pine Lumber Co.*, (1902) 116 Fed. 731; *In re*

Anders Push Button Telephone Co., (S. D. N. Y. 1905) 136 Fed. 995, 13 Am. Bankr. Rep. 643; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *Smith v. Au Gres*, (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745; *In re Morse Iron Works, etc., Co.*, (E. D. N. Y. 1906) 154 Fed. 214, 18 Am. Bankr. Rep. 846; *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576.

Since the amendment of 1910.—In the case of *In re Holmes Lumber Co.*, (N. D. Ala. 1911) 189 Fed. 178, it was held that the amendatory act of 1910, so far as it may be construed to authorize payment of commissions on sales of encumbered property from the proceeds of the sale, can only apply to cases in which the Bankruptcy Court rightfully exercised its jurisdiction to sell free from liens or where the lienholder consented to such sale, and that in cases in which, upon a sale in the Bankruptcy Court, the property fails by a large sum to satisfy the liens upon it, the estate should pay the commissions of the referee and the trustee and not the lienholder.

But in the case of *In re Howard*, (N. D. N. Y. 1913) 207 Fed. 402, it was held that the amendatory act of 1910 settled what was before a disputed question as to the right of trustees to commissions on moneys received by them and disbursed by them, which were derived from the sales of mortgaged property, and which moneys were covered by, and properly applicable to the payment of, the lien, and that the right now clearly exists by virtue of the words "or turned over to any person, including lienholders."

A trustee cannot be compelled to serve without compensation; and where there are no assets, if creditors insist upon the appointment of a trustee they must advance the statutory fee or otherwise arrange for the trustee's compensation. *In re Levy*, (E. D. Wis. 1900) 101 Fed. 247. See also *In re Fees Payable by Voluntary Bankrupts*, (1899) 95 Fed. 120.

A lump sum in place of commissions will not be allowed. *In re Carolina Cooperage Co.*, (1890) 96 Fed. 950.

Extra compensation.—A court of bankruptcy is without authority to allow compensation to a trustee in excess of that fixed by section 48, notwithstanding the fact that such trustee has given his personal time and attention to the business of the estate, and by reason of his business ability he has realized from the bank-

rupt's assets far more than would ordinarily have been obtained. *In re Carolina Cooperage Co.*, (1899) 96 Fed. 950; *In re Epstein*, (W. D. Ark. 1901) 109 Fed. 878, 6 Am. Bankr. Rep. 191. See also *In re George Halbert Co.*, (C. C. A. 2d Cir. 1904) 134 Fed. 236, 13 Am. Bankr. Rep. 399; *In re Meadows*, (W. D. N. Y. 1912) 199 Fed. 304; *Devries v. Orem*, (1906) 17 Am. Bankr. Rep. 876, 104 Md. 648, 65 Atl. 430. And see the annotation under section 72.

A trustee who is also an attorney at law is not entitled to extra compensation for legal services rendered by him to the estate. *In re George Halbert Co.*, (C. C. A. 2d Cir. 1904) 134 Fed. 236, 13 Am. Bankr. Rep. 399; *In re Van Denburg*, (N. D. Ohio 1914) 221 Fed. 475.

Employment of attorney.—In the case of *In re Rusch*, (1900) 105 Fed. 607, where there were various matters in controversy between different classes of creditors, it was held that the trustee was authorized to employ counsel subject to approval, but not one who was also counsel for any of the creditors.

Allowance for service of custodian.—A trustee in bankruptcy is the legal and actual custodian of the property which is the subject of the proceeding and ordinarily he is not entitled to an allowance for the service of a custodian. The right to assistance, at the cost of the property in custody, in addition to compensation, must arise out of circumstances or conditions disclosing a burden beyond the reasonable possibility of performance by the single individual charged therewith. Such situations are found when the property is of great bulk, situated in different localities, or where, in its care and preservation, service of a special or unusual character is required. *In re Pickhardt*, (E. D. Wis. 1912) 198 Fed. 879.

The word "case" as employed in this section is not intended to be of other than the ordinary significance, viz., a comprehensive term, embracing the aggregate in respect to that which is brought and prosecuted in the form of a single proceeding. Although in bankruptcy, a partnership and its members are separate entities, with separate estates, it cannot be claimed that, though joined and prosecuted in the form of a single petition, they present separate cases for the purpose of fees, commissions or aught else. *In re Rider*, (D. C. Mont. 1915) 220 Fed. 193.

(b) [Where more than one trustee.] In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to. [(1898) 30 Stat. L. 558.]

This subdivision (b) was re-enacted in 1910 without change in the Act which amended other parts of sec. 48 (36 Stat. L. 840).

(c) [Withholding compensation.] The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause. [(1898) 30 Stat. L. 558.]

This subdivision (c) was re-enacted in 1910 without change (36 Stat. L. 840).

**Effect of trustee's negligence.**—Where a receiver or trustee has been negligent in the performance of his duty, the court may, in a proper case, without the filing of any exceptions, deny him any commissions. *In re Schoenfeld*, (C. C. A. 3d Cir. 1910) 183 Fed. 219.

Where a bankrupt's trustee was allowed to resign to avoid the odium of removal

because of his friendly attitude to the bankrupts, and his apathy to proceedings instituted to compel the bankrupts to turn over property which they had withheld, it was held that his claim for compensation should be at least partially denied. *In re Fidler*, (M. D. Pa. 1909) 172 Fed. 632, 23 Am. Bankr. Rep. 16.

(d) [Compensation of receivers and marshals appointed under section 2 (3).] Receivers or marshals appointed pursuant to section two, subdivision three, of this Act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: [(Inserted 1910, which excepted pending cases) 36 Stat. L. 840.]

This subdivision (d), including the three following provisions, was not in the Bankruptcy Act as originally enacted, but was added to section 48 in 1910.

**Compensation for preserving estate.**—The appointment of receivers is authorized only when absolutely necessary for the preservation of estate, and their compensation should be measured by that provided for trustees for similar services. *Dunlap Hardware Co. v. Huddleston*, (C. C. A. 5th Cir. 1909) 167 Fed. 433, 21 Am. Bankr. Rep. 731.

**Authority to compensate receiver appointed in another district.**—Where, pending action on an involuntary petition, which was subsequently dismissed by the court, a receiver was appointed, who remained in possession of the property when defendants were adjudicated bankrupts in another district, it was held that the authority to compensate the receiver passed to the court making the adjudication, which took exclusive jurisdiction of the estate. *In re Sears*, (C. C. A. 2d Cir. 1904) 128 Fed. 275.

**Irregular and improper receivership.**—Where, immediately on the filing of a bankruptcy petition by a dry goods merchant, certain lawyers, by purchasing a claim and having the same assigned to a

clerk in the office of one of them, obtained the appointment of one of them as receiver on false representations to the judge, and further secured other associated lawyers to be appointed as appraisers who made no proper appraisal, and then sought, but failed, to obtain an order for the immediate sale of the assets which was unnecessary, it was held that such receivership and the proceedings thereunder were irregular, and improper, and of no value to the estate; and hence an allowance would not be made for the services of the receiver or his attorney, or those of the appraisers. *In re Dearochers*, (N. D. N. Y. 1911) 183 Fed. 992.

**Receiver's fees.**—Where it appeared that the receiver was in possession of the property not more than six days, and opened for business only for three brief periods, and the stock was sold through no effort on his part, it was held that his services would not warrant a fee larger than two per cent. on the first one thousand dollars and one-half of one per cent. on all above one thousand dollars, under

this section. *In re Griesheimer*, (N. D. Cal. 1913) 209 Fed. 134.

**Receiver's expenses.**—*Court may order expenses paid out of assets in first instance.*

—After jurisdiction has attached in a bankruptcy proceeding, and a receiver has been appointed to take charge of the assets of the alleged bankrupt, the court has power in the first instance to direct that the needful expenses and compensation of the receiver be paid out of the property in his hands, though the proceedings are subsequently dismissed; it being no part of the receiver's duty to move to recover such expenses and compensation against the petitioning creditors. *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1907) 159 Fed. 73, 20 Am. Bankr. Rep. 73.

*Court may compel petitioners to pay receiver's expenses.*—A court of bankruptcy has authority, under its general equity powers, to order the petitioning creditors to pay the expenses of a receivership, where the receiver was appointed on their application on the filing of their petition, which was subsequently dismissed as unfounded. *In re Lacov*, (C. C. A. 2d Cir. 1905) 142 Fed. 960, 15 Am. Bankr. Rep. 290.

**Unnecessary expenses.**—A temporary receiver of a bankrupt is not entitled to charge for an expert examination of the bankrupt's books, nor for printing claim vouchers. *In re Leonard*, (D. C. Nev. 1910) 177 Fed. 503, 24 Am. Bankr. Rep. 97.

**Attorney services.**—A receiver in bankruptcy being required to stand independent of the parties to the litigation, he will not be allowed to charge the estate for services rendered him by the attorney for either party during the continuance of such relation. *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528. See also *In re Leonard*, (D. C. Nev. 1910) 177 Fed. 503, 24 Am. Bankr. Rep. 97.

Where a receiver in bankruptcy was afterwards appointed trustee, and the receiver's counsel also acted as counsel for the trustee, it was held that the settlement of the receiver's fees and those of his counsel would be determined in connection with the claim for commissions and fees for services rendered to the estate as a whole. *In re Carothers*, (W. D. Pa. 1910) 182 Fed. 501.

**Attorney's fees.**—The Bankruptcy Act does not contemplate that the number of attorneys employed shall enter into the allowance of attorney's fee, but that the allowances shall be made as though one attorney was employed. *In re Falkenberg*, (D. C. N. M. 1913) 206 Fed. 835.

**Exceptions to the account of a receiver**

in bankruptcy should be verified; but the omission of a verification is a defect which is amendable. *In re Ketterer Mfg. Co.*, (M. D. Pa. 1907) 156 Fed. 719.

**Marshal's compensation and expenses.**—Where the court of bankruptcy, upon the filing of a petition in involuntary proceedings, orders the marshal to take possession of the property of the bankrupt and hold the same until a trustee is appointed, the marshal is entitled to receive, out of the estate, compensation for his services, under such order, in addition to the costs and expenses incurred. *In re Adams Sartorial Art Co.*, (D. C. Colo. 1900) 101 Fed. 215, 4 Am. Bankr. Rep. 107.

**Fees for services.**—In *In re Damon*, (W. D. N. Y. 1900) 104 Fed. 775, 5 Am. Bankr. Rep. 133, it was held that the marshal is entitled to a reasonable fee for the service of papers in bankruptcy proceedings.

**A deputy marshal appointed to take charge of the store of the bankrupt in a town other than that in which he resided, and to inventory the stock of general merchandise contained therein, will be allowed compensation at the rate of \$2.50 per day, together with his actual and necessary expenses, but not including the cost of his board and lodging.** *In re Scott*, (E. D. N. C. 1900) 99 Fed. 404, 3 Am. Bankr. Rep. 625.

Such a deputy may also hire a watchman if he has reason to apprehend danger to the property; and a charge in his accounts of one dollar per day for the services of such watchman will be allowed by the court as expenses. *In re Scott*, (E. D. N. C. 1900) 99 Fed. 404, 3 Am. Bankr. Rep. 625.

**Services performed in obtaining the receiver's appointment, or other matters purely preliminary to such appointment, are rendered, not to the receiver, but in the interest of the moving creditors; and this is a matter for settlement as against the estate in the hands of the trustee, when the question of an allowance to the moving creditors is sought under section 62 of the Bankruptcy Act.** *In re Falkenberg*, (D. C. N. M. 1913) 206 Fed. 835.

**Review.**—The fixation of the receiver's compensation rests in the sound discretion of the district judge and cannot come up for review, except when such discretion has been plainly abused and the record sufficiently indicates upon what state of facts the discretion was exercised. *In re Cash-Papworth, Grow-Sir.*, (C. C. A. 2d Cir. 1913) 210 Fed. 24.

**For allowances under this section, see** *In re Charles Knosher & Co.*, (C. C. A. 9th Cir. 1912) 197 Fed. 136; *In re Griesheimer*, (N. D. Cal. 1913) 209 Fed. 134.

**[On confirmation of composition.]** *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of

one per centum of the amount to be paid creditors on such compositions: [(*Inserted 1910, which excepted pending cases*) 36 Stat. L. 841.]

See the note, *supra*, to the enacting clause of section 48d.

**[When acting as mere custodian.]** *Provided further*, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this Act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: [(*Inserted 1910, which excepted pending cases*) 36 Stat. L. 841.]

See the note, *supra*, to the enacting clause of section 48d.

"A mere custodian" means one whose services are merely those of a keeper. It does not include everyone not carrying on the business of the bankrupt, but a person discharging general duties as a

receiver, not limited to those of a custodian, may be allowed compensation within the limits specified in the general provision of this clause. *In re Ginsburg*, (E. D. Tenn. 1913) 208 Fed. 160.

**[Notice to creditors.]** *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act. [(*Inserted 1910, which excepted pending cases*) 36 Stat. L. 841.]

See the note, *supra*, to the enacting clause of section 48d.

**Sufficiency of notice.**—Where the only notice given creditors, of an application for an allowance of compensation to a receiver, is that the receiver's report will be submitted for approval by the referee

on a date named, it is insufficient, as it should show the amount asked for by the receiver. *In re Falkenberg*, (D. C. N. M. 1913) 206 Fed. 835.

(e) **[Compensation for conducting business.]** Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: [(*Inserted 1910, which excepted pending cases*) 36 Stat. L. 841.]

This subdivision (e), including the two following provisos, was not in the Bankruptcy Act as originally enacted, but was added to section 48 in 1910.

**No additional compensation** can be allowed beyond that provided for in section 48e. See section 2 (5), *supra*, and see also the annotation under section 72.

Prior to the amendment of 1910, however, it was customary to allow additional

compensation for conducting the business of the bankrupt. *In re Shiebler*, (C. C. A. 2d Cir. 1909) 174 Fed. 336, 23 Am. Bankr. Rep. 162; *Matter of Pequod Brewing Co.*, (S. D. N. Y. 1907) 18 Am. Bankr. Rep. 352.

**Effect of transfer of proceedings.**—Where, on the filing of a petition in involuntary bankruptcy, a receiver is appointed and authorized to continue the debtor's business, but a second petition is afterwards filed in another district, where an adjudication is made, and to which the proceedings are transferred, under General Order No. 6, as being the district of his domicile, the court in the other district has jurisdiction to fix the compensation of its receiver and his counsel, although payment can only be made on order of the court having custody of the estate. *In re Isaacson*, (C. C. A. 2d Cir. 1909) 174 Fed. 406, 23 Am. Bankr. Rep. 98.

**Amount of compensation.**—As much as 12 per cent. on the first \$500 or less, and 8 per cent. on moneys in excess of \$500 and less than \$1,500, may be allowed receivers who carry on the business. *In re Falkenberg*, (D. C. N. M. 1913) 206 Fed. 835.

**Continuing business for remainder of day.**—Where a receiver, who took possession of the business of a bankrupt, allowed the employees of the bankrupt to continue the business for the remainder of the day, he was held not to be conducting the business within the meaning of this section so as to receive compensation therefor. *In re Charles Knosher & Co.*, (C. C. A. 9th Cir. 1912) 197 Fed. 136.

**[On confirmation of composition.]** *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: [(Inserted 1910, which excepted pending cases) 36 Stat. L. 841.]

See the note, *supra*, to the enacting clause of section 48.

**[Notice to creditors.]** *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act. [(Inserted 1910, which excepted pending cases) 36 Stat. L. 841.]

See the note, *supra*, to the enacting clause of section 48.

**SEC. 49. ACCOUNTS AND PAPERS OF TRUSTEES.**—*a* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest. [(1898) 30 Stat. L. 558.]

The words "parties in interest" include persons entitled to appear, even though they have no provable claim, such as a

party opposing a discharge. *In re Waters-Colver Co.*, (E. D. N. Y. 1914) 212 Fed. 761.

**SEC. 50. BONDS OF REFEREES AND TRUSTEES.**—*a* **[Referees' bonds.]** Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties. [(1898) 30 Stat. L. 558.]

The manifest purpose of Congress in requiring trustees, referees, and designated depositories to give bonds was to protect estates in bankruptcy from (among other acts on the part of these officers of the

court) paying out funds otherwise than the law and rules permit. *In re Hoyt*, (E. D. N. C. 1903) 119 Fed. 987, 9 Am. Bankr. Rep. 574.

Form No. 17 is "bond of referee."

**b [Trustees' bonds.]** Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall

respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties. [(1898) 30 Stat. L. 558.]

**Forms.**—Form No. 25 is “bond of trustee,” and Form No. 26 is “order approving trustee’s bond.”

**c [Creditors fixing amount of trustee’s bond.]** The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so. [(1898) 30 Stat. L. 558.]

**d [Sureties’ qualification.]** The court shall require evidence as to the actual value of the property of sureties. [(1898) 30 Stat. L. 558.]

**e [Two sureties.]** There shall be at least two sureties upon each bond. [(1898) 30 Stat. L. 558.]

**f [Value of property of sureties.]** The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond. [(1898) 30 Stat. L. 558.]

**g [Corporations as sureties.]** Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected. [(1898) 30 Stat. L. 558.]

**h [Filing of and suit upon bonds.]** Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions. [(1898) 30 Stat. L. 558.]

**Action on trustee’s bond — Jurisdiction.**—A District Court of the United States has jurisdiction of an action brought by a trustee in bankruptcy, in the name of the United States, on the bond of a former trustee to recover the value of property for which he has failed to account. *U. S. v. Union Surety, etc., Co.*, (S. D. N. Y. 1902) 118 Fed. 482, 9 Am. Bankr. Rep. 114.

**Manner of bringing action.**—An action for breach of condition upon the bond of a trustee in bankruptcy may be maintained only in the name of the United States, and leave of court is not necessary for the bringing of such an action. *Alexander v. Union Surety, etc., Co.*, (1903) 11 Am. Bankr. Rep. 32, 89 App. Div. 3, 85 N. Y. S. 282.

Such action is a plenary suit and not

a proceeding in bankruptcy and, it would seem, may be brought in the state court as well as in the federal court. Judgment recovered therein cannot be reviewed by petition to revise under section 24b. *United States v. Ruggles*, (C. C. A. 6th Cir. 1915) 221 Fed. 256.

**Fugitive trustee not necessary party.**—In an action upon the bond of a defaulting trustee in bankruptcy, who is a fugitive from justice, he is a proper but not a necessary party. *Alexander v. Union Surety, etc., Co.*, (1903) 11 Am. Bankr. Rep. 32, 89 App. Div. 3, 85 N. Y. S. 282.

**Order directing trustee to account, as prerequisite to action on bond.**—Where a bankrupt’s trustee had not absconded without settling his accounts, but his account rendered had been allowed, showing the expenditure of the amount demanded



by the trustee in the administration of the estate; it was held that an order directing that the trustee should account was a necessary prerequisite in an action on his bond to recover property belonging to the estate. *U. S. v. Sondheim*, (D. C. Mass. 1910) 188 Fed. 378.

But where a trustee in bankruptcy absconded, and his whereabouts are unknown, an order directing him to account is not a necessary prerequisite to an action on his bond to recover funds of the estate embezzled by him. *Scofield v. U. S.*, (C. C. A. 6th Cir. 1909) 174 Fed. 1, 23 Am. Bankr. Rep. 259.

**Effect of settlement and allowance of trustee's account.**—Where, after confirmation of a bankrupt's composition, the referee entertained an application to set-

tle and allow the trustee's account, and allowed the same and discharged the trustee without any objection or appeal by the bankrupt, it was held that the referee could not thereafter disregard or dispute such allowance in a suit on the trustee's bond to recover the amount in his hands at the time the composition was confirmed. *U. S. v. Sondheim*, (D. C. Mass. 1910) 188 Fed. 378.

**Surety's liability.**—The liability of the trustee's surety extends to the necessary expenditure of the funds of the bankrupt estate as the immediate result of an embezzlement by the trustee; but it does not include the premium on the bond of the new trustee. *Matter of Kajita*, (D. C. Hawaii 1904) 13 Am. Bankr. Rep. 19.

**i [Trustees' personal liability.]** Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees. [(1898) 30 Stat. L. 558].

**j [Joint trustees.]** Joint trustees may give joint or several bonds. [(1898) 30 Stat. L. 558.]

**k [Vacancy by failure to give bond.]** If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office. [(1898) 30 Stat. L. 558.]

**l [Limitation of suits on referees' bonds.]** Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond. [(1898) 30 Stat. L. 558.]

**m [Limitation of suits on trustees' bonds.]** Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed. [(1898) 30 Stat. L. 558.]

Suits may be brought on a trustee's bond at any time within two years after the estate has been closed. *Matter of Kajita*, (D. C. Hawaii 1904) 13 Am. Bankr. Rep. 19.

The trustee's bond does not become void

on the first recovery, but continues in force for two years after the estate is closed, unless the amount thereof is previously exhausted. *Matter of Kajita*, (D. C. Hawaii 1904) 13 Am. Bankr. Rep. 19.

**SEC. 51. DUTIES OF CLERKS.**—*a* Clerks shall respectively [(1898) 30 Stat. L. 558.]

General Orders Nos. 1, 2, and 4 require the clerk to keep a docket and indorse papers filed with him; and No. 10 authorizes him to require indemnity for expenses in certain cases.

(1) **[Account for fees.]** account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; [(1898) 30 Stat. L. 558.]

(2) [Collect fees.] collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees; [(1898) 30 Stat. L. 558.]

**Necessity of paying filing fee.**—A deposit of the statutory filing fee by a proposed voluntary bankrupt, not within the exception in favor of paupers, is a condition precedent to the filing of the petition. *In re Barden*, (E. D. N. C. 1900) 101 Fed. 553, 4 Am. Bankr. Rep. 31.

The exemptions allowed by the Act do not excuse the payment from them of the fees of the Bankruptcy Court. *In re Collier*, (W. D. Tenn. 1899) 93 Fed. 191, 1 Am. Bankr. Rep. 182; *In re Hines*, (S. D. W. Va. 1902) 117 Fed. 790, 9 Am. Bankr. Rep. 27; *In re Mason*, (S. D. Ala. 1910) 181 Fed. 899.

Thus it has been held that the bankrupt may be ordered to pay such fees out of pension money remaining in his hands at the time of the filing of the petition. *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53; *In re Hines*, (S. D. W. Va. 1902) 117 Fed. 790, 9 Am. Bankr. Rep. 27.

But a voluntary bankrupt whose petition is accompanied by an affidavit of inability cannot subsequently be required to pay such fees out of the property set apart to him as exempt, or out of money earned by him after the filing of the petition. *Sellers v. Bell*, (C. C. A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 529, characterized as an "extreme view" in the case of *In re Levy*, (1900) 101 Fed. 247. The latter case held however that the statutory affidavit is *prima facie* evidence of inability and of the bankrupt's right to exemption therefrom, subject to investigation; "and if the inquiry is fairly answered respecting available means, and none appear held by the petitioner when the proceedings were instituted, nor obtainable through his individual earnings or efforts, the exemption must be allowed."

**Pauper affidavit not conclusive.**—In the case of *In re Collier*, (W. D. Tenn. 1899) 93 Fed. 191, 1 Am. Bankr. Rep. 182, it was held that an affidavit of inability by the petitioner to pay the fees is not conclusive of his poverty; and if circumstances appear casting doubt upon the truth of the affidavit, the question may be sent to the referee, to investigate and report the facts as to petitioner's ability to deposit the fees.

**Necessity of soliciting loan to pay fee.**—It has been held that a proposed voluntary bankrupt, who has not money enough to pay the filing fees, is not required to solicit gifts or loans from his friends for that purpose. *Sellers v. Bell*, (C. C.

A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 529; *In re Mason*, (S. D. Ala. 1910) 181 Fed. 899.

But see *In re Hines*, (S. D. W. Va. 1902) 117 Fed. 790, 9 Am. Bankr. Rep. 27, where it was said that a fair construction of section 51 indicates that it was the intention of the Act to allow voluntary bankrupts to file their petition without the payment in advance of the fees therefor, only in case they did not have, and could not obtain, the money with which to pay such fees. In other words, if the bankrupt was absolutely without money or effects of any kind, but was able to borrow from his friends money with which to pay the court costs, he could not properly make the affidavit required in this case, and it would be his duty to pay the fees.

**Filing in forma pauperis.**—Upon presentation of a voluntary bankrupt's petition and schedules, accompanied by an affidavit that he is without, and cannot obtain, the money necessary to pay the filing fees, the clerk must file such petition. *In re Collier*, (W. D. Tenn. 1899) 93 Fed. 191, 1 Am. Bankr. Rep. 182; *Sellers v. Bell*, (C. C. A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 529; *In re Fees Payable by Voluntary Bankrupts*, (1899) 95 Fed. 120; *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53; *In re Plimpton*, (D. C. Vt. 1900) 103 Fed. 775, 4 Am. Bankr. Rep. 614; *In re Hines*, (S. D. W. Va. 1902) 117 Fed. 790; *In re Mason*, (S. D. Ala. 1910) 181 Fed. 899.

**Payment of filing fee as condition for discharge.**—Where a petition was placed on file, and an adjudication made, without payment of the filing fee, it was held that an objection to such filing might be raised on the application for a discharge, and action on such application stayed until the filing fee was paid. *In re Barden*, (E. D. N. C. 1900) 101 Fed. Rep. 553, 4 Am. Bankr. Rep. 31.

But in such case the referee has no authority to require the payment of the statutory fee as a condition to the granting of the discharge, as such power is given to the court alone, under General Order No. 35 (4), and is to be exercised only on proof of the ability to pay such fee. *In re Plimpton*, (D. C. Vt. 1900) 103 Fed. 775, 4 Am. Bankr. Rep. 614.

**Fees paid are not returnable.**—The provisions of General Order No. 10 (see *supra*, note to section 30) as to the repayment to the bankrupt of money advanced by him to the officers and for the purposes mentioned therein, do not apply to the

deposit of twenty-five dollars, which the clerk is to collect upon the filing of the petition; and this money is not return-

able. *In re Matthews*, (1899) 97 Fed. 772.

(3) **[Delivery and return of papers.]** deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; [(1898) 30 Stat. L. 559.]

(4) **[Pay referee's and trustee's fee.]** and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition. [(1898) 30 Stat. L. 559.]

**SEC. 52. COMPENSATION OF CLERKS AND MARSHALS.—a [Clerks' filing fee.]** Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt. [(1898) 30 Stat. L. 559.]

As to clerk's duty to collect and account for fees, see section 51a (1) and (2).

General Order No. 35 makes further provision respecting compensation of clerks.

The fees provided by law to be paid the clerk are not debts, but are presumably for services for the benefit of the bankrupt. *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262; *In re Mason*, (S. D. Ala. 1910) 181 Fed. 899.

**Fees for reference of petitions.—**A clerk of a federal District and Circuit Court is entitled to his statutory *per diem* compensation for the days on which he refers, to the referee in bankruptcy, voluntary peti-

tions in bankruptcy filed during the absence of the judge from the district, though such references are made without written orders to open the court for that or any other purpose. *U. S. v. Marvin*, (1909) 212 U. S. 275, 29 S. Ct. 297, 53 U. S. (L. ed.) 510, 22 Am. Bankr. Rep. 717.

**Fees for notifying creditors.—**Clerks are not entitled to charge a fee of twenty-five cents for each notice sent to creditors on a petition for discharge, but are only entitled to the actual items of expense thereon for postage, stationery, and clerical work. *In re Dunn Hardware, etc., Co.*, (E. D. N. C. 1905) 134 Fed. 997, 14 Am. Bankr. Rep. 186.

**b [Marshals' fees.]** Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals. [(1898) 30 Stat. L. 559.]

As to compensation of the marshal, see section 48 a and c, *supra*.

**Fees for serving rule to show cause.—**Where a rule of the federal court requires that the petition and affidavits upon which an order to show cause is grounded shall be served along with such order the marshal who effects such service in bankruptcy proceedings is entitled to a fee of two dollars for each person served with the petition and affidavits, as well as two dollars for service of the order. *In re Damon*, (1900) 104 Fed. 775.

**Compensation for keeping property, etc.**

—A marshal appointed under authority given by section 2 (3) is entitled to reasonable compensation for his services in keeping the property during the time he is in charge thereof, besides the costs and expense; and a marshal who held certain property for seventeen days was allowed twenty dollars as reasonable compensation. *In re Adams Sartorial Art Co.*, (1900) 101 Fed. 215.

In the case of *In re Scott*, (1900) 99 Fed. 404, a deputy marshal was allowed

compensation at the rate of \$2.50 per day for a month, with his actual and necessary expenses, not including board and lodging, for remaining in possession of the bankrupt's store in a town other than that in which he resided, and for taking an inventory of the stock.

**Watchman's service.**—And likewise in the case of *In re Scott*, (1900) 99 Fed. 404, it was held that the deputy marshal was justified in hiring a watchman to guard the bankrupt's property, and a

charge of a dollar a day for the watchman's services was allowed.

**Compensation for taking inventory, etc.**—Three dollars a day, with actual and necessary expenses, was held to be a just and reasonable fee, "considering the fees fixed in the Act for other officers of the court," for a deputy marshal who took an inventory and performed other duties in connection with the settlement of the estate. *In re Woodard*, (1899) 95 Fed. 995.

**SEC. 53. DUTIES OF ATTORNEY-GENERAL.**—*a* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important. [(1898) 30 Stat. L. 559.]

**SEC. 54. STATISTICS OF BANKRUPTCY PROCEEDINGS.**—*a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so. [(1898) 30 Stat. L. 559.]

## CHAPTER VI.

### CREDITORS.

**SEC. 55. MEETINGS OF CREDITORS.**—*a* [Place and time.] The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held. [(1898) 30 Stat. L. 559.]

**Practice in respect of first meetings.**— "It would not be inappropriate for referees to follow the familiar practice of 'explaining the object of the meeting' to creditors and attorneys not familiar with the practice in the courts of bankruptcy. Many questions similar to those presented may thus be solved, thus saving time, frequently so essential in a proper adjustment of estates. The meeting is for business, and must be held in strict accordance with the notice, at the time and place specified, not at some other time, sooner or later, or another place, though near by. Adjournments may be had if the business requires it, but all adjournments are the same meeting, in contemplation of law. If no creditor appears, the meeting is as effectual as if

they were present or represented. The court, judge, or referee is not authorized or required to wait for or 'count a quorum.' If, in such case, the schedules disclose no assets, the court may order that no trustee be appointed. [General Order No. 15, *supra*, note to section 30.] The referee should be punctually present at the time and place specified in the notice. He or the judge presides, and his duties are judicial. He does not otherwise participate. The bankrupt is required and should be actually present at the first meeting. It is a creditor's meeting, and they (the referee and bankrupt) are there to assist the creditors,—the first as an officer of the law, and the other to aid him in so doing." *Per Pur-nell, J.*, in *In re Eagles*, (1900) 99 Fed.

697. The object, organization, conduct, and adjournment of first meetings were thoroughly discussed in *In re Phelps*, (1868 1 Nat. Bankr. Reg. 525, 19 Fed. Cas. No. 11,071, decided under similar provisions in the Bankruptcy Act of 1867.

**Time of holding first meeting.**—The first meeting of creditors cannot be held until after the adjudication. *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835.

But see section 12a, *supra*, whereby the bankrupt is authorized to offer composition to his creditors either before or after the adjudication. The right to offer composition before adjudication was inserted by the amendment of June 25, 1910, which also provides for the calling of a meeting for the purpose of taking action thereon. Technically, however, that meeting may not be considered such a "first meeting of creditors" as is contemplated by section 55a.

**Referee may refuse to call meeting until petition and schedules are amended.**—It is within the jurisdiction and discretion of a referee in bankruptcy to order amendments to be made in the petition and schedule of a voluntary bankrupt referred to him, in particulars as to which he finds them defective or insufficient, and to refuse to call a first meeting of creditors until such amendments be made. *In re Brumelkamp*, (N. D. N. Y. 1899) 95 Fed. 814, 2 Am. Bankr. Rep. 318.

**Notice of meetings.**—All known creditors are entitled to ten days' notice of the first and of all other meetings of the creditors; such notice must be given by the referee. *In re Stein*, (D. C. Ind.

1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662.

An objection by an involuntary bankrupt to the regularity of a first meeting of his creditors, and to the validity of proceedings had thereat, on the ground that the notices of such meeting were prepared by the referee before the bankrupt's own list of creditors was filed, whereby it resulted that some of the creditors were not notified, will not be sustained when it appears that the bankrupt's list of creditors was not filed within the time limited by the law, and was incomplete and imperfect. *In re Schiller*, (W. D. Va. 1899) 96 Fed. 400, 2 Am. Bankr. Rep. 704.

Form No. 18 is a "notice of first meeting of creditors."

**Presence of creditors at meeting.**—Creditors are not to be counted as present simply because their claims have been allowed. In order to be present they must attend in person or by duly authorized agent or attorney, and those creditors who do so attend constitute the meeting, whether they constitute a majority in number and value of the claims allowed or not. *In re Kaufman*, (W. D. Ky. 1910) 179 Fed. 552.

**Bankrupt's presence at meeting.**—It is not mandatory that the bankrupt be present at the first meeting of creditors unless so directed by the court or a judge thereof. *In re Parker*, (D. C. Kan. 1899) 1 Am. Bankr. Rep. 615.

**Forms.**—Form No. 20 is a general letter of attorney and Form No. 21 is a special letter of attorney to represent a creditor at creditors' meetings.

**b [Presiding officer — duties.]** At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor. [(1898) 30 Stat. L. 559.]

As to

Examination of bankrupt, see section 7a (9).

Proof and allowance of claims, see the several subdivisions of section 57.

**Allowance of claims.**—Claims cannot be allowed without a meeting of creditors. *In re Back Bay Automobile Co.*, (D. C. Mass. 1907 158 Fed. 679, 19 Am. Bankr. Rep. 835.)

**c [Creditors' duty.]** The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act. [(1898) 30 Stat. L. 559.]

**d [Subsequent meetings of creditors.]** A meeting of creditors subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place. [(1898) 30 Stat. L. 559.]

**General Order No. 25** authorizes the court to call a special meeting of creditors under certain circumstances.

**e [Meeting at call of court.]** The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request. [(1898) 30 Stat. L. 560.]

The word "whenever," in section 55e, should be construed to mean "whenever after the first meeting," previously required to be held by section 55a, which can only be held not less than ten nor

more than thirty days after adjudication. *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835, reversing 19 Am. Bankr. Rep. 33.

**f [Final meeting.]** Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered. [(1898) 30 Stat. L. 560.]

**Necessity of final meeting.**—An estate cannot be closed without a final meeting of the creditors. *In re Stein*, (D. C. Ind. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662; *In re Michel*, (E. D. Wis. 1899) 95 Fed. 803, 1 Am. Bankr. Rep. 665.

**Referee acting as special master.**—The

judge may authorize the referee to hold the final meeting of creditors and constitute him a special master for that purpose. *In re Steed*, (1901) 107 Fed. 682, citing *Fellows v. Freudenthal*, (C. C. A. 1900) 102 Fed. 731.

**SEC. 56. VOTERS AT MEETINGS OF CREDITORS.—a [Method of voting.]** Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided. [(1898) 30 Stat. L. 560.]

As to

Claims which may be proved and allowed, see the several subdivisions of section 63.

Proof and allowance of claims generally, see the several subdivisions of section 57.

Voting for trustee, see section 44.

**Matters which may be submitted.**—Section 56a confers no authority to submit to creditors the decision of matters which the statute has otherwise made provision for. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

A majority of the creditors cannot, by vote at a special meeting, compel a trustee to effect a compromise desired by them. *In re Meadows*, (W. D. N. Y. 1910) 181 Fed. 911.

**Manner of voting.**—All creditors, except those having secured or priority claims, who are present at a creditors' meeting are entitled to vote according to the amount of their allowed claims. *In re Walker*, (D. C. N. D. 1899) 96 Fed. 550, 3 Am. Bankr. Rep. 35; *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 733; *In re T. L.*

*Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528; *In re Finlay*, (S. D. N. Y. 1900) 104 Fed. 675, 3 Am. Bankr. Rep. 738; *In re McGill*, (C. C. A. 6th Cir. 1901) 106 Fed. 57, 5 Am. Bankr. Rep. 155, affirming *Falter v. Reinhard*, (S. D. Ohio 1900) 104 Fed. 292, 4 Am. Bankr. Rep. 782; *In re Rekersdres*, (S. D. N. Y. 1901) 108 Fed. 206, 5 Am. Bankr. Rep. 811; *In re Beck*, (D. C. Mass. 1901) 110 Fed. 140, 6 Am. Bankr. Rep. 554; *In re Messengill*, (E. D. N. C. 1902) 118 Fed. 366, 7 Am. Bankr. Rep. 669; *In re Henschel*, (C. C. A. 2d Cir. 1902) 113 Fed. 443, 7 Am. Bankr. Rep. 662, reversing (S. D. N. Y. 1901) 6 Am. Bankr. Rep. 25 and 109 Fed. 861, 6 Am. Bankr. Rep. 305; *In re Dayville Woolen Co.*, (D. C. Conn. 1902) 114 Fed. 674, 8 Am. Bankr. Rep. 85; *In re Mackellar*, (M. D. Pa. 1902) 116 Fed. 547, 8 Am. Bankr. Rep. 669; *In re Malino*, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205; *In re Lazoris*, (E. D. Wis. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31; *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36; *In re E. T. Kenney Co.*, (D. C. Ind. 1905) 136 Fed. 451.

14 Am. Bankr. Rep. 611; *In re Ogles*, (E. D. Tenn.) 2 Am. Bankr. Rep. 514; *Clen-dening v. Red River Valley Nat. Bank*, (N. D. 1903) 11 Am. Bankr. Rep. 245; *Dight v. Chapman*, (1904) 12 Am. Bankr. Rep. 743, 44 Ore. 265; 75 Pac. 585; *In re Milne*, (S. D. N. Y. 1908) 20 Am. Bankr. Rep. 248.

*The vote turns*, not on the number of creditors present and the amount represented by them, but on the number and amount of allowed claims present before the referee at the time of the vote. *In re Henschel*, (S. D. N. Y. 1901) 109 Fed. 861, 6 Am. Bankr. Rep. 305.

A single interest should vote as a single interest, and not otherwise. *In re E. T. Kenney Co.*, (D. C. Ind. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611.

*Defective claims.*—The absence of the date to a creditor's claim in bankruptcy is a fatal defect, which will prevent his participation in the creditors' meeting. *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36.

But the mere fact that at the head of the proof of a claim in bankruptcy the title of the court is not given as required by General Order 21 and Form No. 31 is not sufficient to vitiate the proof so as to prevent the creditor's participation in the meeting. *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36.

*Assigned claims.*—Where a claim has been assigned, the assignee is the real owner, and he alone can vote thereon at a creditors' meeting. *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; *In re Messengill*, (E. D. N. C. 1902) 7 Am. Bankr. Rep. 669.

Thus where one of the partners in a bankrupt firm has a claim against the firm, which he has assigned to a third person as collateral security for a debt the holder cannot prove the claim nor vote on it, not being the owner of the claim; and, for a similar reason, the bankrupt partner cannot prove it. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695.

*Presence at meeting.*—Claims allowed are not to be counted where the creditor is not present, and the power of attorney of his proxy is insufficient. *In re Henschel*, (C. C. A. 2d Cir. 1902) 113 Fed. 443, 7 Am. Bankr. Rep. 662, *reversing* (S. D. N. Y. 1901) 109 Fed. 861, 6 Am. Bankr. Rep. 305; *In re Mackellar*, (1902) 116 Fed. 547.

An attorney, agent, or proxy may cast the vote of a creditor whom he represents, upon the presentation of proper authority so to do; but such authority should be in writing, duly executed, and filed by the referee as a part of the record. *In re Eugenheimer*, (S. D. N. Y. 1899) 91 Fed. 744; *In re Blankfein*, (S. D. N. Y. 1899) 97 Fed. 191, 3 Am. Bankr. Rep. 165; *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 1 F. S. A.—61.

695; *In re Richards*, (N. D. N. Y. 1900) 103 Fed. 849, 4 Am. Bankr. Rep. 631; *Falter v. Reinhard*, (S. D. Ohio 1900) 104 Fed. 292, 4 Am. Bankr. Rep. 782; *In re Gasser*, (C. C. A. 8th Cir. 1900) 104 Fed. 537, 5 Am. Bankr. Rep. 32; *In re Finlay*, (S. D. N. Y. 1900) 104 Fed. 675, 3 Am. Bankr. Rep. 738; *In re Scully*, (E. D. Pa. 1901) 108 Fed. 372, 5 Am. Bankr. Rep. 716; *In re Lazoris*, (E. D. Wis. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31; *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36; *In re Cooper*, (E. D. Pa. 1905) 135 Fed. 196, 14 Am. Bankr. Rep. 320; *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526; *In re Lloyd*, (E. D. Wis. 1906) 148 Fed. 92, 17 Am. Bankr. Rep. 96; *In re Pauly*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 333; *Matter of Law*, (S. D. Ill. 1905) 13 Am. Bankr. Rep. 650.

*Voting by attorney.*—The mere relation of attorney for the creditors of a bankrupt does not authorize such attorney to vote in behalf of his clients at the election of trustee. *In re Scully*, (E. D. Pa. 1901) 108 Fed. 372, 5 Am. Bankr. Rep. 716; *In re Lazoris*, (E. D. Wis. 1903) 120 Fed. 716, 10 Am. Bankr. Rep. 31.

Therefore it is proper for a referee to require a letter of attorney before allowing another to vote on the claim of a creditor. *In re Richards*, (N. D. N. Y. 1900) 103 Fed. 849, 4 Am. Bankr. Rep. 631.

Where a power of attorney authorizing its holder to represent a creditor at a meeting of a bankrupt's creditors is mislaid, and not produced until the meeting is over, the attorney is properly refused the right to participate. *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36.

In bankruptcy proceedings, under General Order No. 21, which requires that a letter of attorney executed on behalf of a partnership must show that the person executing it is a member of the firm, the fact that such statement is contained in the proof of debt accompanying the letter, though absent from the letter itself, is sufficient to entitle the attorney to represent the creditor in the creditors' meeting. *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36.

An attorney should not be permitted to vote any claim which has come to him through the instrumentality of the bankrupt; but the fact that he so received claims is not sufficient ground for excluding his vote on claims which came to him unsolicited. *In re Lloyd*, (E. D. Wis. 1906) 148 Fed. 92, 17 Am. Bankr. Rep. 96.

A power of attorney from a creditor of a bankrupt, running jointly to one of the

bankrupt's attorneys and another, does not entitle either to vote on such claim at a creditors' meeting. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

See further as to the selection of a trustee by creditors or their proxies, *supra*, notes to section 44a.

**Effect of objection to claim — Generally.** — Claims should not be voted where duly verified legal objections are filed thereto; but the referee may proceed to take proof, and if the objecting party cannot produce sufficient evidence to sustain the objections the claim may be allowed. If, however, the objecting party shows legal cause for delay for the purpose of producing evidence not at hand, the referee may in some cases allow the claim for voting purposes. *In re Evening Standard Pub. Co.*, (N. D. N. Y. 1908) 164 Fed. 517, 21 Am. Bankr. Rep. 156.

But it does not rest in the discretion of the referee to allow claims as a voting basis when objections are made which are

apparently genuine. *In re Malino*, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205.

While the mere filing of objections to a claim should not exclude the creditor from voting on the election of a trustee, it has been held that such action by the referee will not be reviewed when no objection is made to the election, and no facts are presented on which to raise the question of the rights of creditors in such case. *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528.

**Objecting creditors and the bankrupt are entitled to a hearing** upon the objections for the purpose of determining, at least, whether they are honestly made and there is reasonable ground for their consideration; and if these facts are established the claims should not be allowed for the purpose of voting. *In re Malino*, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205.

**b [Voting by secured creditors.]** Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess. [(1898) 30 Stat. L. 560.]

As to voting power of secured and priority claims, see section 57, subdivisions e, g, and h.

**Secured and priority creditors are entitled to vote at creditors' meetings to the extent only that their claims have been allowed as being in excess of the securities held by them; but if the securities have been surrendered such creditors become unsecured claimants, and may so vote.** *In re Conhaim*, (D. C. Wash. 1899) 97 Fed. 924, 3 Am. Bankr. Rep. 249; *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695; *In re Utt*, (C. C. A. 7th Cir. 1901) 105 Fed. 754, 5 Am. Bankr. Rep. 383; *In re Malino*, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205; *In re Lantzenheimer*, (N. D. Ia. 1903) 124 Fed. 716, 10 Am. Bankr. Rep. 720; *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526; *In re*

*Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, 17 Am. Bankr. Rep. 609; *Emerine v. Tarault*, (C. C. A. 6th Cir. 1915) 219 Fed. 68.

**Where objections are filed to a claim, on the ground that the claimant has received a preference, he should not be permitted to participate in creditors' meetings until the matter has been heard and determined.** *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

**Surrender of preference.**—In the case of *In re Folb*, (1898) 91 Fed. 107, a preferred creditor was not required, under the circumstances, before being entitled to vote for a trustee, to refund to the bankrupt's estate the amount received in part payment of his claim.

**SEC. 57. PROOF AND ALLOWANCE OF CLAIMS.—a [Of what to consist.]** Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor. [(1898) 30 Stat. L. 560.]



As to

Claims which may be proved, see the several subdivisions of section 63.

Claims for expenses of administration, see section 62.

General Order No. 21 (see *supra*, note to section 30) makes further and more detailed provision for the proof of debts.

**Necessity and manner of proving claim.**

—All claims against a bankrupt's estate must be proved by a statement in writing, under oath, setting forth all the information required by section 57a, and also all the facts in connection therewith which are essential to the clear understanding of the claim made. *In re Sumner*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; *In re Wooten*, (E. D. N. C. 1902) 118 Fed. 670, 9 Am. Bankr. Rep. 247; *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 122 Fed. 355, 10 Am. Bankr. Rep. 641; *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680; *In re Dunn Hardware, etc., Co.*, (E. D. N. C. 1904) 132 Fed. 719, 13 Am. Bankr. Rep. 147; *In re McKenna*, (N. D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4; *In re Rosenberg*, (E. D. Pa. 1906) 144 Fed. 442, 16 Am. Bankr. Rep. 465; *In re Girvin*, (N. D. N. Y. 1908) 160 Fed. 197, 20 Am. Bankr. Rep. 490; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272; *In re Harper*, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918; *In re Graves*, (D. C. Vt. 1910) 182 Fed. 443; *In re Lough*, (C. C. A. 2d Cir. 1910) 182 Fed. 961; *In re Heim Milk Product Co.*, (N. D. N. Y. 1910) 183 Fed. 787; *In re Scott*, (N. D. Tex. 1899) 1 Am. Bankr. Rep. 553; *In re Creasinger*, (S. D. Cal. 1906) 17 Am. Bankr. Rep. 538; *Flower v. Commercial Trust Co.*, (C. C. A. 8th Cir. 1915) 223 Fed. 318.

While strict rules of pleading do not apply, it is nevertheless necessary that the claim and its consideration should be so set forth as to enable the trustee and the creditors to make proper investigation as to its fairness and legality, without undue trouble or inconvenience. *In re Scott*, (N. D. Tex. 1899) 93 Fed. 418; *In re Stevens*, (D. C. Vt. 1901) 107 Fed. 243; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 517; *In re Griffin*, (D. C. Mass. 1910) 188 Fed. 389.

**Positive averments.**—The vital facts to support a proof of claim should be made to appear by positive averments, founded upon the deponent's knowledge, and not upon his belief. *In re United Wireless Telegraph Co.*, (D. C. Me. 1912) 201 Fed. 445.

A claim against a bankrupt is "proved" and entitled to allowance only when it is properly verified and states

"the consideration" therefor and contains the other statements required by section 57a. *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272; *In re United Wireless Telegraph Co.*, (D. C. Me. 1912) 201 Fed. 445.

**Effect of failure to prove.**—If the proof of claim against a bankrupt's estate does not comply with section 57a, it is not entitled to allowance; and if allowed, the trustee when appointed may have it expunged unless it is corrected by amendment or established by proof. *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272.

A claim against a bankrupt is not entitled to consideration unless proved in accordance with the provisions of the Act, and the forms prescribed thereunder. *In re Dunn Hardware, etc., Co.*, (E. D. N. C. 1904) 132 Fed. 719, 13 Am. Bankr. Rep. 147.

**Failure of bankrupt to controvert proof of claim.**—An allegation in a petition in involuntary bankruptcy that a petitioner is a creditor of the bankrupt to an amount stated, and the failure of the bankrupt to answer and controvert the allegation does not make the fact of such indebtedness *res judicata* as to the creditors or the trustee; but such petitioner must still file and prove his claim, which may be contested by the trustee or any creditor. *In re Harper*, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918.

**Taxes need not be proved.**—Since taxes, assessed against the property of a bankrupt during the administration of his estate, are matters of public record, they need not be proved as a claim against the bankrupt's estate in order to be allowed. *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680. And see also the annotation under section 64a.

**Secured claim.**—There is a distinction between proving a claim under section 57a and its allowance under section 57c, resulting in the right to prove a secured claim when the ultimate necessity for its allowance appears reasonably possible even though it may turn out to be unnecessary because the security proves adequate to pay the debt in full. *Emerine v. Tarault*, (C. C. A. 6th Cir. 1915) 219 Fed. 68.

**Nature of proceedings to prove claims.**—Proceedings by creditors to prove their demands against the estate of a bankrupt are part of the suit in bankruptcy, and are not separate or independent suits in law or in equity; the Bankruptcy Act being passed to provide a quick and summary settlement of debts against the bankrupt out of the proceeds of his estate, and proceedings originally commenced as part of the bankruptcy suit are not separated from it and converted into a suit at law.

*Maryman v. Dreyfus*, (1915) 117 Ark. 17, 174 S. W. 549.

The proof must be correctly entitled in the court and in the cause. General order No. 21 (see *supra*, note to section 30). And the same provision in the Bankruptcy Act of 1867 necessitated the rejection of proof not correctly entitled. *In re Natther*, (1876) 14 Nat. Bankr. Reg. 273, 29 Fed. Cas. No. 17,126.

The creditor's Christian name ought to be stated in full. *In re Valentine*, (1869) 4 Biss. (U. S.) 317.

**Statement of consideration.**—In a proof of debt in bankruptcy, the statement of the consideration must be sufficiently full and specific to enable the trustee and the creditors to pursue proper and legitimate inquiries as to the fairness and legality of the claim. *In re Scott*, (N. D. Tex. 1899) 93 Fed. 418; *In re Stevens*, (D. C. Vt. 1900) 104 Fed. 325, 5 Am. Bankr. Rep. 11; *In re Stevens*, (D. C. Vt. 1901) 107 Fed. 243; *In re Blue Ridge Packing Co.*, (M. D. Pa. 1903) 125 Fed. 619, 11 Am. Bankr. Rep. 36; *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272; *In re Creasinger*, (S. D. Cal. 1906) 17 Am. Bankr. Rep. 543.

Proof of claims against a bankrupt's estate, reciting generally that there was a consideration for the debt, does not comply with the requirement that the proof must state "the consideration." *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272.

**Itemized accounts.**—While General Order No. 21 does not directly provide that accounts made up of items shall be itemized, and would seem to relate to the fixing of an average due date where items fall due at different dates, yet the order is predicated on the theory that accounts consisting of items will be itemized and this should be done. *In re Scott*, (N. D. Tex. 1899) 93 Fed. 418.

**Oath to statement.**—It is not a valid objection that the officer before whom the verification was made was the attorney for the creditor. *In re Kimball*, (1899) 100 Fed. 777. *Contra* where he was the attorney of record of the bankrupt. *Matter of Keyser*, (1877) 9 Ben. (U. S.) 224. See generally as to sufficiency of verifications, *supra*, section 20 and notes thereto.

A verification need not be amended to cure defects therein if no objection is made to its sufficiency. *In re Stevens*, (1901) 107 Fed. 243. See also *In re Shaw*, (1901) 109 Fed. 780.

**Proof of claims under Act of 1867.**—As to the sufficiency of proofs made by the agent of the creditor, under the Bankruptcy Act of 1867, see *In re Whyte*, (1874) 9 Nat. Bankr. Reg. 267; *McKinsey v. Harding*, (1869) 4 Nat. Bankr. Reg.

39; *In re Watrous*, (1876) 14 Nat. Bankr. Reg. 258.

As to proof of claims by partnerships, see *In re Barrett*, (1869) 2 Nat. Bankr. Reg. 533.

As to proof of claims by assignees, see *Ex p. Davenport*, (1869) 1 Lowell (U. S.) 384; *Re Murdock*, (1869) 1 Lowell (U. S.) 362; *In re Pease*, (1871) 6 Nat. Bankr. Reg. 173, 19 Fed. Cas. No. 10,880; *In re Strachan*, (1872) 3 Biss. (U. S.) 181, 23 Fed. Cas. No. 13,519; *In re Burchell*, (1880) 4 Fed. 406; *In re Pease*, (1887) 29 Fed. 593; *Matter of Lathrop*, (1871) 5 Ben. (U. S.) 199, 5 Nat. Bankr. Reg. 43, 14 Fed. Cas. No. 8,104; *In re State Ins. Co.*, (1883) 16 Fed. 756.

As to proof of claims by corporations, see *Albany Exch. Bank v. Johnson*, (1842) 1 Fed. Cas. No. 133; *Matter of Morgan*, (1875) 8 Ben. 186, 17 Fed. Cas. No. 9,797; *Ex p. Norwood*, (1873) 3 Biss. 504, 18 Fed. Cas. No. 10,364; *In re Republic Ins. Co.*, (1873) 8 Nat. Bankr. Reg. 197, 20 Fed. Cas. No. 11,705.

As to proof of claims by executors and administrators or other persons acting in a representative capacity, see *In re Jordan*, (1880) 2 Fed. 319; *In re Mills*, (1875) 11 Nat. Bankr. Reg. 74, 17 Fed. Cas. No. 9,611; *In re Republic Ins. Co.*, (1873) 3 Biss. (U. S.) 452.

As to proof of claim by a state, see *In re Corn Exch. Bank*, (1877) 15 Nat. Bankr. Reg. 216, 6 Fed. Cas. No. 3,243.

**Amendment of proofs.**—As in all other equitable proceedings, the proof of a claim in bankruptcy, required by section 57a, may be amended so as to cure defects and irregularities therein, and to supply omissions; and such amendment relates back to the date of the original filing of the proof of claim. *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 135; *In re Myers*, (D. C. Ind. 1900) 99 Fed. 691, 3 Am. Bankr. Rep. 760; *In re Roeber*, (C. C. A. 2d Cir. 1903) 127 Fed. 122, 11 Am. Bankr. Rep. 464; *Buckingham v. Estes*, (C. C. A. 6th Cir. 1904) 128 Fed. 584; 12 Am. Bankr. Rep. 182; *In re Robinson*, (D. C. Mass. 1905) 136 Fed. 994, 14 Am. Bankr. Rep. 626; *Bennett v. American Credit Indemnity Co.*, (C. C. A. 6th Cir. 1908) 159 Fed. 624, 20 Am. Bankr. Rep. 260; *In re Faulkner*, (C. C. A. 8th Cir. 1908) 161 Fed. 900, 20 Am. Bankr. Rep. 542; *In re Miners' Brewing Co.*, (E. D. Pa. 1908) 162 Fed. 327, 20 Am. Bankr. Rep. 717; *In re Medina Quarry Co.*, (W. D. N. Y. 1910) 179 Fed. 929; *In re Carothers*, (W. D. Pa. 1910) 182 Fed. 501; *In re Fisk*, (S. D. N. Y. 1911) 185 Fed. 974; *In re Salvator Brewing Co.*, (S. D. N. Y. 1911) 188 Fed. 522; *In re Fairlamb*, (E. D. Pa. 1912) 199 Fed. 278; *In re Thompson*, (D. C. N. J. 1915) 222 Fed. 167; *Matter of Creasinger*, (S. D. Cal. 1906) 17 Am. Bankr. Rep. 538;

*In re Schiebler*, (E. D. N. Y. 1908) 21 Am. Bankr. Rep. 309.

As to the amendment of proofs of claims subsequent to the time allowed for proving the original claim, and the effect of such subsequent amendment, see the annotation under subdivision n of this section.

*Amendment to avoid objection on ground of usury.*—Where a creditor of a bankrupt sought to prove a note drawing usurious interest, and the claim was disallowed on account of such usury, the creditor is entitled to amend his original proof by substituting therefor a claim for money fraudulently obtained by the bankrupt and received to the claimant's use. *In re Robinson*, (D. C. Mass. 1905) 138 Fed. 994, 14 Am. Bankr. Rep. 626.

*Amendment of claim declared fraudulent disallowed.*—Where a claim of lien under a mortgage had been declared fraudulent, it was held that the claimants were not entitled to amend so as to prove such claim as a general claim against the bankrupt's estate. *In re Vogt*, (E. D. N. Y. 1911) 188 Fed. 764.

*Amendment to obtain undue advantage disallowed.*—The court should not permit a creditor to alter his position materially for the express purpose of obtaining an advantage over other creditors, to which he would not otherwise be entitled. *In re Miners' Brewing Co.*, (E. D. Pa. 1908) 162 Fed. 327, 20 Am. Bankr. Rep. 717.

*Amendment by adding a lien.*—The court has power to allow a creditor who has proved upon an unsecured debt to amend the proof by adding a lien or security. *In re Brand*, (1867) 2 Hughes 334, 4 Fed. Cas. No. 1,809; *In re Wilder*, (1900) 101 Fed. 104, where, however, leave to amend was denied because, under the circumstances, such amendment might aid the creditor in securing a preference in pending legal proceedings.

In the case of *In re Falls City Shirt Mfg. Co.*, (1899) 98 Fed. 592, a creditor who had a lien, but by mistake or inadvertence had filed proof as an unsecured creditor, was allowed to amend so as to save the benefit of his lien.

*Amendments amounting to a new claim.*—“Amendments are allowed for the correction of misdescriptions and minor inaccuracies in the statement of substantially the same claim, but not to new claims after the time for filing claims has expired; and the sufficiency of the amended proofs is to be determined upon their face, without reference to prior ones, except as to whether they are for substantially the same claim.” *In re Stevens*, (1901) 107 Fed. 243.

**Who may prove claims—Creditors.**—Any creditor whose claim is provable in bankruptcy may make the proof required by section 57a. As to what constitutes

provable claims, see the several subdivisions of section 63.

But a creditor of a bankrupt, who is also his debtor in a larger amount, will not be permitted to prove his claim against the estate so long as his own debt remains unpaid. *In re Gerson*, (E. D. Pa. 1901) 105 Fed. 893. See also *In re Wiener, etc., Shoe Co.*, (E. D. Pa. 1899) 96 Fed. 949, 3 Am. Bankr. Rep. 200.

And where, under the law of the state, the assignee of a nonnegotiable judgment note takes it subject to all equities and defenses available against it in the hands of the assignor, he will not be entitled to prove it as a claim against the estate of the maker in bankruptcy, unless the assignor could have done so. *In re Wiener, etc., Shoe Co.*, (E. D. Pa. 1899) 96 Fed. 949, 3 Am. Bankr. Rep. 200.

*Creditor holding claim partly paid by surety.*—A creditor who holds the obligations of a bankrupt which have been partly paid by an accommodation maker, an indorser, or a surety, may prove his claim and have that claim allowed against the estate of the bankrupt for the full amount owing by the bankrupt upon the obligations, but if the dividend on that claim from the bankrupt estate, plus the amount paid by the surety, aggregate more than the entire amount of the obligations and interest, the creditor will hold the surplus in trust for the surety. *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 1902) 117 Fed. 1.

*Stockholders and officers in corporation.*—The claims of creditors of a bankrupt corporation will be deferred to those of other creditors where it appears that such claiming creditors were stockholders and officers in the corporation and in their representative capacity as such officers fraudulently transferred its property. *In re Wenatchee Heights Orchards Co.*, (W. D. Wash. 1913) 209 Fed. 84.

*Proof by relative of bankrupt.*—The fact that one presenting a claim against a bankrupt is closely related to him justifies a more rigid scrutiny than would otherwise be required, but does not of itself warrant its rejection. *Ohio Valley Bank Co. v. Mack*, (S. D. Ohio) 163 Fed. 160 note, 20 Am. Bankr. Rep. 919; *Baumhauser v. Austin*, (C. C. A. 5th Cir. 1911) 186 Fed. 260.

*An undischarged bankrupt* should be allowed to prove against the estate of another bankrupt a claim which accrued subsequent to the filing of his own petition. *Matter of Smith*, (N. D. N. Y.) 1 Am. Bankr. Rep. 37.

*Proof by attorney.*—The attorney for a creditor may, in behalf of his client, make the proof required by the statute; but in such case the reason for the making of proof by the attorney, and the fact that he has the requisite information for that purpose, should be made to appear. *In re*

Kimball, (D. C. Mass. 1899) 100 Fed. 777, 4 Am. Bankr. Rep. 144; *In re McKenna*, (N. D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4; *Matter of Fils*, (D. C. N. J. 1907) 19 Am. Bankr. Rep. 215.

It is not improper for the attorneys of a bankrupt's trustee to make out and present formal proof of the claim of a creditor, where nothing appears to indicate that such attorneys did anything for the creditor that would in any way prejudice the interests of the bankrupt or his estate. *In re McKenna*, (N. D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4.

*Proof by attorney in fact.*—A corporation may make proof of its claim by agent or attorney in fact, when there is a sufficient reason why it should be so made, but not otherwise. *Matter of Fils*, (D. C. N. J. 1907) 19 Am. Bankr. Rep. 215.

*Proof by assignee.*—It is the settled practice in bankruptcy that chooses in action which have been assigned before a petition is filed are to be proved by the assignee as being the substantial party in interest. *Leighton v. Kennedy*, (C. C. A. 1st Cir. 1904) 129 Fed. 737, 12 Am. Bankr. Rep. 229; *In re McCarty Portable Elevator Co.*, (D. C. N. J. 1913) 205 Fed. 986.

The form by which a claim against a bankrupt was transferred is immaterial, and cannot affect the right of the assignee to prove the claim, where it is sufficient to estop the original holder from asserting a right to it. *In re Miner*, (D. C. Ore. 1902) 117 Fed. 953, 9 Am. Bankr. Rep. 100.

A receiver appointed for an insolvent debtor may prove a claim against the bankrupt's estate for a debt due such insolvent debtor. *Dight v. Chapman*, (1904) 12 Am. Bankr. Rep. 743, 44 Ore. 265, 75 Pac. 585.

An executor may make a proof of claim against the estate of a bankrupt, under section 57a, for a debt due to the estate which such executor represents. *In re Woods*, (D. C. Pa. 1904) 133 Fed. 82, 13 Am. Bankr. Rep. 240.

*Proof by legatee.*—Where an executor refuses to prove a claim due his decedent's estate, the legatees should be allowed to do so. *In re Lough*, (C. C. A. 2d Cir. 1910) 182 Fed. 961.

*Effect of proving claims—Proof binds claimant.*—A claimant who makes proof of his claim and secures its allowance is, in the absence of inadvertence, fraud, or mistake, bound thereby, because, when a creditor makes proof of his claim against a bankrupt's estate, he stands in the posi-

tion of a plaintiff at law, and becomes a party to the suit. *In re Kenyon*, (S. D. Ohio 1907) 156 Fed. 863, 19 Am. Bankr. Rep. 195.

*Proof fixes status as creditor.*—One who has filed a formal proof of claim against a bankrupt's estate has a *prima facie* status as a creditor, which cannot be collaterally attacked, but continues, unless his claim is objected to and disallowed either when first presented or on reconsideration. *In re Roanoke Furnace Co.*, (E. D. Pa. 1907) 152 Fed. 846, 18 Am. Bankr. Rep. 661.

*Acquiescence in adjudication.*—A creditor, by filing its claim in bankruptcy, acquiesces in the adjudication. *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 166 Fed. 284, 21 Am. Bankr. Rep. 531.

*Proof does not waive right of action.*—The filing of a proof of claim in bankruptcy is not a waiver of a right of action on the claim in another court. *In re Buchan's Soap Corp.*, (S. D. N. Y. 1909) 169 Fed. 1017, 22 Am. Bankr. Rep. 382; *Maxwell v. Martin*, (1909) 22 Am. Bankr. Rep. 93, 130 App. Div. 80, 114 N. Y. S. 349; *Maryman v. Dreyfus*, (1915) 117 Ark. 17, 174 S. W. 549.

*Toll of limitation period.*—Where a written statement of claim, duly verified, is filed with the referee within the year, such filing is sufficient to take the claim out of the statutory limitation. *In re Mertens*, (C. C. A. 2d Cir. 1906) 147 Fed. 177, 16 Am. Bankr. Rep. 825.

*Withdrawal of proof of claim.*—A creditor who has filed a proof of claim against a bankrupt estate may be permitted to withdraw it. *In re Hubbard*, (1867) 1 Lowell 190, 12 Fed. Cas. No. 6,813; *In re Baxter*, (1882) 12 Fed. 72; *In re Weaver*, (N. D. Ga. 1904) 144 Fed. 229, 16 Am. Bankr. Rep. 265; *In re Strickland*, (S. D. Ga. 1909) 167 Fed. 867, 21 Am. Bankr. Rep. 734; *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

*Withdrawal as matter of right.*—It has also been held that the withdrawal or abandonment of a claim is a matter of right in the creditor, and not a matter of discretion with the referee or judge. *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

*Withdrawal to proceed in state court.*—A creditor may properly be permitted to withdraw his claim and intervention in order to prosecute his remedy in the state court. *In re Strickland*, (S. D. Ga. 1909) 167 Fed. 867, 21 Am. Bankr. Rep. 734; *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

**b [When claim founded upon writing.]** Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or

destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim. [(1898) 30 Stat. L. 560.]

**Failure to file a written instrument,** which is the basis of a claim against a bankrupt's estate, or to attach the same to the proof of claim, does not raise a presumption against the existence of the writing. *In re Dresser*, (C. C. A. 2d Cir. 1905) 135 Fed. 495, 13 Am. Bankr. Rep. 747; *Kelsey v. Munson*, (C. C. A. 8th Cir. 1912) 198 Fed. 841. See also *In re Greenfield*, (E. D. Pa. 1912) 193 Fed. 98.

Where it did not appear that original notes and a mortgage, which were the basis of a claim against a bankrupt, were attached to the claim as required by the

Bankruptcy Law, but no objection was urged on that ground, it was presumed that such original securities were present at the trial and not attached, or that their presence was waived. *In re Carter*, (W. D. Ark. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126.

**Withdrawal of instrument.**—After the proof and allowance of a claim, the referee may permit the withdrawal of the original note, on which the claim was based, on leaving a copy thereof on file. *In re Loden*, (N. D. Ga. 1910) 184 Fed. 965.

**c [Filing claims.]** Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred. [(1898) 30 Stat. L. 560.]

**Filing essential.**—A claim is not proved until it has been filed. *In re Ingalls*, (C. C. A. 2d Cir. 1905) 137 Fed. 517, 13 Am. Bankr. Rep. 512.

**Sufficient filing.**—The presentation and delivery of proof of claim to the trustee in bankruptcy within a year after the adjudication is a sufficient filing within the meaning of section 57c, when read in connection with General Order in Bankruptcy No. 21, which provides that proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. *J. B. Orcutt Co. v. Green*, (1907) 204 U. S. 96, 27 S. Ct. 195, 51 U. S. (L. ed.) 390, 17 Am. Bankr. Rep. 72.

**Filing with employee of trustee.**—Proof that a claim was delivered to an employee of the trustee does not show a filing without proof that the delivery was made at the trustee's office, and proof of the capacity in which the person to whom the claim was delivered was employed, if it also appears that the claim was never in fact filed in the trustee's office. *In re Lathrop*, (C. C. A. 2d Cir. 1912) 197 Fed. 164.

**Creditor non compos mentis.**—A creditor, not actually insane, but *non compos mentis*, who has not been adjudged as incapable by a court of competent jurisdiction, and who has no guardian or committee, may file a claim in a Bankruptcy Court by his next friend. *In re Kronberg*, (E. D. Ark. 1913) 208 Fed. 203.

**A trustee in bankruptcy cannot file with himself his proof of his own claim against the bankrupt estate,** nor will the delivery of such claim to his attorney, to be filed with the referee, be deemed the equivalent of a delivery to such referee. *J. B. Orcutt Co. v. Green*, (1907) 204 U. S. 96, 27 S. Ct. 195, 51 U. S. (L. ed.) 390, 17 Am. Bankr. Rep. 72.

There is a distinction between the allowance of a claim under section 57c and proving it under 57a resulting in the right to prove a secured claim when the ultimate necessity for its allowance appears reasonably possible even though it may turn out to be unnecessary because the security proves adequate to pay the debt in full. *Emerine v. Tarault*, (C. C. A. 6th Cir. 1915) 219 Fed. 68.

**d [When claims allowed.]** Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion. [(1898) 30 Stat. L. 560.]

**Allowance of claims—Effect of formal proof.**—If the formal proof of claim, made in accordance with the requirements of section 57a, sufficiently sets out a prov-

able claim, it will be deemed to be *prima facie* evidence of the claim so asserted; and, in the absence of objection thereto, such claim will be allowed. *Whitney v.*

Dresser, (1906) 200 U. S. 532, 26 S. Ct. 316, 50 U. S. (L. ed.) 584, 15 Am. Bankr. Rep. 326; *In re Summer*, (1900) 101 Fed. 224; *In re Carter*, (W. D. Ark. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126; *In re John H. Livingston Co.*, (C. C. A. 2d Cir. 1905) 144 Fed. 971, 16 Am. Bankr. Rep. 385; *In re Castle Braid Co.*, (S. D. N. Y. 1906) 145 Fed. 224, 17 Am. Bankr. Rep. 143; *In re Mertens*, (C. C. A. 2d Cir. 1906) 147 Fed. 177, 16 Am. Bankr. Rep. 825; *In re Jones*, (W. D. Mich. 1907) 151 Fed. 108, 18 Am. Bankr. Rep. 206; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272; *In re McIntyre*, (C. C. A. 2d Cir. 1909) 174 Fed. 627, 24 Am. Bankr. Rep. 1; *Mackay v. Randolph Macon Coal Co.*, (C. C. A. 8th Cir. 1910) 178 Fed. 881; *In re John A. Baker Notion Co.*, (S. D. N. Y. 1910) 180 Fed. 922; *In re Criblier*, (D. C. Conn. 1911) 184 Fed. 338; *In re United Wireless Telegraph Co.*, (D. C. Me. 1912) 201 Fed. 445.

The "proof" and the "allowance" of claims are separate and distinct steps. — *In re Mertens*, (C. C. A. 2d Cir. 1906) 147 Fed. 177, 16 Am. Bankr. Rep. 825; *In re Two Rivers Woodenware Co.*, (C. C. A. 7th Cir. 1912) 199 Fed. 877.

**Formal proof shifts burden.**—A proof of claim in bankruptcy which complies with section 57a establishes the claim and entitles it to allowance in the first instance; the burden of overthrowing it is then on the trustee when appointed, and on the creditors of the bankrupt if they contest. *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 166 Fed. 516, 22 Am. Bankr. Rep. 272.

**But where a claimant does not stand on his formal proof of claim**, but offers evidence thereof, he cannot thereafter insist on the rule that the formal proof had the probative force of a *prima facie* case. *In re McIntyre*, (C. C. A. 2d Cir. 1909) 174 Fed. 627, 24 Am. Bankr. Rep. 1.

**Allowance may be made without prejudice to others.**—The referee has full power, both by his order and his subsequent control over the administration of the estate, to safeguard all interests from any prejudice because of the allowance of claims. *Mackay v. Randolph Macon Coal Co.*, (C. C. A. 8th Cir. 1910) 178 Fed. 881.

**The allowance need not be for the full amount** but may be for a part of the amount. *In re Goldstein*, (D. C. Mass. 1912) 199 Fed. 665.

**Refusal of claim by referee.**—The act of a referee in bankruptcy in refusing to accept a claim is not a judicial act, requiring an order and petition of review; but the creditor may move to compel him to accept proof thereof. *In re John A. Baker Notion Co.*, (S. D. N. Y. 1910) 180 Fed. 922.

Where an order of a referee in bankruptcy, sustaining the motion of a trustee

to disallow a claim on the *prima facie* case made by the claimant, is reversed, the matter should be sent back to the referee if the trustee desires to submit evidence in opposition to the claim. *In re John H. Livingston Co.*, (C. C. A. 2d Cir. 1905) 144 Fed. 971, 16 Am. Bankr. Rep. 385.

**Allowance of claim as "judgment."**—The allowance of a claim by the referee is not a "judgment" binding upon the bankrupt. *Maryman v. Dreyfus*, (1915) 117 Ark. 17, 174 S. W. 549.

**Objections to allowance.—Who may object.**—The trustee, or any creditor, may object to the allowance of claims presented against the estate. *In re Little River Lumber Co.*, (W. D. Ark. 1900) 101 Fed. 558, 3 Am. Bankr. Rep. 682; *Chatfield v. O'Dwyer*, (C. C. A. 1900) 101 Fed. 799; *Atkins v. Wilcox*, (C. C. A. 1900) 105 Fed. 595, 53 L. R. A. 118; *McDaniel v. Stroud*, (C. C. A. 4th Cir. 1901) 106 Fed. 486, 5 Am. Bankr. Rep. 685; *In re Talbot*, (D. C. Mass. 1901) 110 Fed. 924, 7 Am. Bankr. Rep. 29; *In re Wooten*, (E. D. N. C. 1902) 118 Fed. 670, 9 Am. Bankr. Rep. 247; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541; *In re Lewensohn*, (C. C. A. 2d Cir. 1903) 121 Fed. 538, 9 Am. Bankr. Rep. 368; *In re Lafferty*, (E. D. Pa. 1903) 122 Fed. 558, 10 Am. Bankr. Rep. 290; *In re Worth*, (N. D. Ia. 1904) 130 Fed. 927, 12 Am. Bankr. Rep. 566; *In re Royce Dry Goods Co.*, (W. D. Mo. 1904) 133 Fed. 100, 13 Am. Bankr. Rep. 257; *In re Cannon*, (E. D. Pa. 1904) 133 Fed. 837, 14 Am. Bankr. Rep. 114; *Ayres v. Cone*, (C. C. A. 8th Cir. 1905) 138 Fed. 783, 14 Am. Bankr. Rep. 739; *In re Stern*, (C. C. A. 8th Cir. 1906) 144 Fed. 956, 16 Am. Bankr. Rep. 513; *In re Sully*, (C. C. A. 2d Cir. 1907) 152 Fed. 619, 18 Am. Bankr. Rep. 123; *In re Back Bay Automobile Co.*, (D. C. Mass. 1907) 158 Fed. 679, 19 Am. Bankr. Rep. 835, reversing 19 Am. Bankr. Rep. 33; *In re Hatem*, (E. D. N. C. 1908) 161 Fed. 895, 20 Am. Bankr. Rep. 470; *In re Canton Iron, etc., Co.*, (D. C. Md. 1912) 197 Fed. 767; *Matter of Fletcher*, (S. D. N. Y. 1903) 10 Am. Bankr. Rep. 398; *In re Bailey*, (E. D. Pa. 1907) 18 Am. Bankr. Rep. 226.

**An unsecured creditor of a bankrupt is a "party in interest"** and may, as well as the trustee, object to the allowance of claims against the estate. *In re Hatem*, (E. D. N. C. 1908) 161 Fed. 895, 20 Am. Bankr. Rep. 470. See also *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541.

**Where both a bankrupt and his assignee of exemptions claimed an interest in a fund derived from the sale of certain of his assets**, it was held that they were both entitled to contest the allowance of the claim against it. *In re Sloan*, (E. D.

Pa. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435.

*The bankrupt* may object to the allowance of a claim, if no trustee has been appointed. *In re Ankeny*, (1900) 100 Fed. 614.

*The term "parties in interest"* applies only to those who have an interest in the *res* which is to be administered and distributed in the proceeding, and does not include those who are merely debtors or alleged debtors of the bankrupt. *In re Sully*, (C. C. A. 2d Cir. 1907) 152 Fed. 619, 18 Am. Bankr. Rep. 123; *Rosenbaum v. Dutton*, (C. C. A. 8th Cir. 1913) 203 Fed. 838.

It has been held that "parties in interest" do not include stockholders of a bankrupt company who may be assessed to pay the debt which they seek to have expunged. *In re Pittsburg Lead, etc., Co.*, (W. D. Mo. 1912) 198 Fed. 316.

*Effect of objection.*—Section 57d intends that if objection to a claim is interposed, or if the court is not satisfied with the *prima facie* case made out by the claimant's sworn statement, the claim shall not be accepted as proved until the objection has been disposed of, or until the court is convinced of the validity of the claim. *In re Summer*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; *In re Baumhauer*, (S. D. Ala. 1910) 179 Fed. 966. And see annotation under subdivision *f* of this section.

*Objection barred by laches.*—Where creditors were informed of the pendency of a claim, and made no objection to its allowance for more than eight months after the filing of the order, of which their attorney had notice, it was held that they were barred by laches from obtaining a petition for review. *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216.

*Form of objection.*—While there is nothing in the Act or the general orders in bankruptcy directing the form of objections, they should, nevertheless, be in

writing, and the specifications should be sufficiently explicit to indicate to the claimant the nature and character thereof. *In re Royce Dry Goods Co.*, (W. D. Mo. 1904) 133 Fed. 100, 13 Am. Bankr. Rep. 258; *Spencer v. Lowe*, (C. C. A. 8th Cir. 1912) 198 Fed. 961.

But it has been held that although, as a rule, objections to a claim by a trustee should be filed in writing prior to the hearing thereon, such practice is not imperative; and an oral statement of the objections may be permitted by the referee, in his discretion. *In re Cannon*, (E. D. Pa. 1904) 133 Fed. 837, 14 Am. Bankr. Rep. 114.

*Duty of referee.*—A referee is not justified in allowing a claim against an estate in bankruptcy when the proofs filed do not comply with the statute or general orders promulgated by the Supreme Court, whether creditors or the trustee raise specific objections to the sufficiency of the proofs filed or not. It is the duty of the referee to examine the proofs filed and see that they are sufficient. As a rule a majority of the creditors of a bankrupt cannot afford to go to the expense of employing an attorney to attend and examine the claims filed, and the duty rests on the referee before allowing a claim to see to it that the proofs filed comply with the statute and general orders. *In re Goble Boat Co.*, (N. D. N. Y. 1911) 190 Fed. 92.

*"Duly proved."*—A claim is not "duly proved" when on its face the proofs fail to comply with the general orders promulgated by the Supreme Court as to the proof of claims. *In re Goble Boat Co.*, (N. D. N. Y. 1911) 190 Fed. 92.

*Pleadings.*—On the presentation of claims of creditors against a bankrupt, no pleadings are authorized except the claim duly verified, and such objections as the trustee or any creditor may interpose to the allowance thereof. *In re Carter*, (W. D. Ark. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126.

**e [Claims of secured creditors.]** Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities. [(1898) 30 Stat. L. 560.]

As to what are priority claims, see the several subdivisions of section 64.

*Allowance of secured and priority claims.*—In accordance with the statutory provision, the claims of secured and priority creditors may be allowed for the purpose of enabling them to participate in creditors' meetings; but such allowance shall only be made for the sums appearing to be due in excess of the value of the

security held by such creditor. *In re Headley*, (W. D. Mo. 1899) 97 Fed. 765, 3 Am. Bankr. Rep. 272; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *In re Goldsmith*, (N. D. Tex. 1902) 118 Fed. 763, 9 Am. Bankr. Rep. 419; *Fenley v. Poor*, (C. C. A. 6th Cir. 1903) 121 Fed. 739, 10

Am. Bankr. Rep. 377; *In re Ball*, (D. C. Vt. 1903) 123 Fed. 164, 10 Am. Bankr. Rep. 564; *In re Busby*, (M. D. Pa. 1903) 124 Fed. 469, 10 Am. Bankr. Rep. 650; *In re Lantzenheimer*, (N. D. Ia. 1903) 124 Fed. 716, 10 Am. Bankr. Rep. 720; *In re Noyes*, (C. C. A. 1st Cir. 1903) 127 Fed. 286, 11 Am. Bankr. Rep. 506; *In re Hayward*, (E. D. Pa. 1904) 130 Fed. 720, 12 Am. Bankr. Rep. 264; *In re Matthews*, (E. D. N. C. 1904) 132 Fed. 274, 13 Am. Bankr. Rep. 91; *Gorman v. Wright*, (C. C. A. 4th Cir. 1905) 136 Fed. 164, 14 Am. Bankr. Rep. 135; *In re Mertens*, (C. C. A. 2d Cir. 1905) 142 Fed. 445, 15 Am. Bankr. Rep. 362; *In re Hines*, (D. C. Ore. 1906) 144 Fed. 142, 16 Am. Bankr. Rep. 295; *In re Meredith*, (N. D. Ga. 1906) 144 Fed. 230, 16 Am. Bankr. Rep. 331; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *Beaumont First Nat. Bank v. Eason*, (C. C. A. 5th Cir. 1906) 149 Fed. 204; *Mackay v. Randolph Macon Coal Co.*, (C. C. A. 8th Cir. 1910) 178 Fed. 881; *In re Cale*, (D. C. Minn. 1910) 182 Fed. 439; *Matter of Kenney*, (D. C. Mass. 1903) 10 Am. Bankr. Rep. 452; *Kohout v. Chaloupka*, (Neb. 1903) 11 Am. Bankr. Rep. 265.

*Subdivisions "a" and "c" of section 57*, as to the proof and allowance of secured claims, have reference to the allowance of secured claims for the purpose of fixing the sum on which a dividend from the general estate is to be paid; and also for the limiting of the voting power or voice of the secured creditor, or creditor having a priority, at creditors' meetings. *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22.

*The separate proof of an unsecured claim* does not debar a creditor of a bankrupt from subsequently proving a balance due on a secured claim, after the security has been exhausted. *In re Ball*, (D. C. Vt. 1903) 123 Fed. 164, 10 Am. Bankr. Rep. 564.

"Secured" defined.—In order to be "secured" within the meaning of section 57c, a creditor must either hold security against the property of the bankrupt himself, or be secured by the individual obligation of another who holds such security. *Gorman v. Wright*, (4th Cir. 1905) 136 Fed. 164, 69 C. C. A. 76, *reversing* (E. D. N. C. 1904) 132 Fed. 274.

*Proof of claim must state facts*.—The proof of a preferred or priority claim must state facts which show the claim to be entitled to preference or priority of payment. It is not sufficient to say in the claim that the debt therein mentioned is "preferred" or is a "preferred claim." *In re Dunn*, (N. D. N. Y. 1910) 181 Fed. 701.

*Proof of secured claim not obligatory*.—While the Bankruptcy Act contemplates

that a secured creditor shall prove his claim, he may, notwithstanding, decline to make proof, and he does not thereby waive or lose his lien upon the property pledged. *In re Goldsmith*, (N. D. Tex. 1902) 118 Fed. 763; *In re Stevens*, (D. C. Ore. 1909) 173 Fed. 842, 23 Am. Bankr. Rep. 239; *Ward v. Ironton First Nat. Bank*, (C. C. A. 6th Cir. 1913) 202 Fed. 609.

*Effect of proving secured claim—Waiver of security*.—The filing of a claim against a bankrupt's estate and the receipt of dividends thereon is a waiver of the creditor's security, and this whether the claims to security arise in a Bankruptcy Court or out of it. *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382, *affirming* (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 135; *In re Fisk*, (S. D. N. Y. 1911) 185 Fed. 974; *Kohout v. Chaloupka*, (Neb. 1903) 11 Am. Bankr. Rep. 267.

*Proof by mistake*.—But it has also been held that a lien creditor of a bankrupt, who inadvertently or by mistake proves his claim as an unsecured debt, may be permitted to amend his proof so as to save the benefit of his lien. *In re Falls City Shirt Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437.

*Security unaffected as to exempt property*.—There seems to be no reason why a creditor holding a waiver note should not participate in bankruptcy proceedings and also assert, in a court of competent jurisdiction, his peculiar claim against exempt property. *In re Loden*, (N. D. Ga. 1910) 184 Fed. 965. See also *In re Weaver*, (N. D. Ga. 1904) 144 Fed. 229, 16 Am. Bankr. Rep. 265.

*No waiver where proof has been withdrawn*.—The lien of a judgment on exempt property, which under the law of the state remains in force notwithstanding the bankruptcy of the defendant, is not affected by the fact that the creditor proved his judgment in the bankruptcy proceedings, where he was allowed by the court to withdraw such proof without prejudice. *In re Weaver*, (N. D. Ga. 1904) 144 Fed. 229, 16 Am. Bankr. Rep. 265.

*Proof does not waive right of rescission*.—A creditor of a bankrupt, for the price of goods sold, by proving his debt as one without security, does not waive his right as a vendor to assert a rescission of the sale under the state law. *Sessler v. Paducah Distilleries Co.*, (C. C. A. 5th Cir. 1909) 168 Fed. 44, 21 Am. Bankr. Rep. 723.

*Security received from surety*.—Where a creditor had received from the debtor's surety, as additional security, a note given by the debtor to the surety, it was held that the creditor had the right, on the subsequent bankruptcy of the debtor, to receive dividends both on the note and



on the original claim for which he received the note as additional security. *In re H. V. Keep Shirt Co.*, (S. D. N. Y. 1912) 200 Fed. 80.

**Mortgage withheld from record.**—*In Macon Fourth Nat. Bank v. Willingham*, (C. C. A. 5th Cir. 1914) 213 Fed. 219, the court decided that a chattel mortgage which was withheld from record to bolster the credit of the mortgagor and for the purpose of defrauding the creditors of the mortgagor, the bankrupt company, was void, and not provable as a secured or priority claim in favor of the mortgagee.

**Express waiver of security.**—A secured creditor may, if he wishes to do so, waive the security held by him and prove his claim as an unsecured debt. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 735; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *In re Stevens*, (D. C. Ore. 1909) 173

Fed. 842, 23 Am. Bankr. Rep. 239; *In re Havens*, (E. D. N. Y. 1911) 186 Fed. 583; *In re Hurlbutt*, (C. C. A. 2d Cir. 1906) 16 Am. Bankr. Rep. 198.

**Waiver binds creditor.**—A claimant who has waived a right to claim a preference is not thereafter entitled to leave to amend his claim, after the time for filing claims had expired, so as to claim such preference. *In re Havens*, (E. D. N. Y. 1911) 186 Fed. 583.

And where an execution of a judgment creditor on a judgment waiving exemptions was set aside as an unlawful preference under the Bankruptcy Law, and the creditor thereafter filed his claim, waiving any lien he might have acquired under said execution, it was held that he was estopped from afterwards claiming a preference against the exempt property. *In re Bolinger*, (W. D. Pa. 1901) 108 Fed. 374, 6 Am. Bankr. Rep. 171.

**f [Objections to claims.]** Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit. [(1898) 30 Stat. L. 560.]

**Hearing should be prompt.**—Where an objection is made to the allowance of a claim presented at a meeting of the creditors of a bankrupt, the question of its allowance should be heard as soon as feasible. *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695. See also *In re Quinn*, (C. C. A. 8th Cir. 1908) 165 Fed. 144, 21 Am. Bankr. Rep. 264.

**Production of proof—postponement.**—A party in interest objecting to the allowance of a claim proved against the bankrupt's estate should be given an opportunity to examine the claimant and other witnesses, if their attendance can be procured seasonably and without embarrassing delay; and it may be that in suitable cases the referee should suspend a determination of the matter until evidence can be taken by deposition. But a suspension to obtain evidence of witnesses not within the court's jurisdiction should be exercised only where the referee is convinced that the objection is in good faith and not merely formal, and that there is substantial reason for believing such evidence to be necessary to a just administration of the estate. *In re Sumner*, (1900) 101 Fed. 224.

**Objections by trustee.**—A trustee in bankruptcy can avail himself of only those defenses to a claim on a note which would have been available to the maker of the note. *In re Schwarz*, (E. D. N. Y. 1912) 200 Fed. 309.

**Evidence—Order of proof.**—In proceedings to establish a claim against a bankrupt's estate, it is not necessary that the referee should adhere to any prescribed order of proof. *In re Montgomery*, (N. D. Tex. 1911) 185 Fed. 955.

**Exclusion of immaterial evidence.**—Where, upon the hearing of a claim, testimony offered by objecting creditors is so clearly and affirmatively incompetent, irrelevant, and immaterial that it would be an abuse of the process or power of the court to compel its production or permit its reception, the testimony should be excluded upon objection that it is wholly immaterial to the determination of the matter in issue, where no request is made that the testimony be taken notwithstanding the objection and no foundation is laid showing its pertinency and materiality. *Matter of Clark*, (S. D. Cal. 1909) 21 Am. Bankr. Rep. 776.

**When evidence may be disregarded.**—While positive and uncontradicted testimony on a hearing in bankruptcy should not be disregarded arbitrarily, it may be disregarded if it is grossly or inherently improbable. *In re Baumhauer*, (S. D. Ala. 1910) 179 Fed. 966.

**Production of books and papers.**—Proceedings in bankruptcy to require a claimant of the bankrupt to produce instruments on the hearing of his contested claim are summary, and must be complied with. *Baumhauer v. Austin*, (C. C. A. 5th Cir. 1911) 186 Fed. 260.

But the claimant may not be compelled, in violation of his constitutional rights, to produce books for the purpose of disclosing business transactions with persons other than the bankrupt. *Matter of Clark*, (S. D. Cal. 1909) 21 Am. Bankr. Rep. 776.

**Determination.**—On the hearing of a contested claim, the formal proof thereof must be accepted as a *prima facie* establishment of the claim presented thereby,

and as casting upon the contestants the burden of proving their specifications of objection; and when such formal proof has been fairly met, the proceeding rests on the same basis as other actions in so far as proof is concerned. The decision of the referee on conflicting evidence is entitled to great weight and will not be overturned excepting for manifest error. *Whitney v. Dresser*, (1906) 200 U. S. 532, 26 S. Ct. 316, 50 U. S. (L. ed.) 584, 15 Am. Bankr. Rep. 326; *In re Wood*, (E. D. N. C. 1899) 95 Fed. 946, 2 Am. Bankr. Rep. 695; *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 811, 3 Am. Bankr. Rep. 192; *Hill v. Levy*, (E. D. Va. 1899) 98 Fed. 94, 3 Am. Bankr. Rep. 374; *In re Sumner*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; *In re Shaw*, (E. D. Pa. 1901) 109 Fed. 780, 6 Am. Bankr. Rep. 499; *In re Clark*, (E. D. Wash. 1901) 111 Fed. 893, 7 Am. Bankr. Rep. 96; *In re Hickey*, (N. D. Ia. 1901) 112 Fed. 287, 7 Am. Bankr. Rep. 282; *In re B. H. Douglass, etc., Co.*, (D. C. Conn. 1902) 114 Fed. 772, 8 Am. Bankr. Rep. 113; *In re Lansaw*, (D. C. Mo. 1902) 118 Fed. 365, 9 Am. Bankr. Rep. 167; *In re Wooten*, (E. D. N. C. 1902) 118 Fed. 670, 9 Am. Bankr. Rep. 247; *In re Wilde*, (S. D. N. Y. 1904) 133 Fed. 562, 13 Am. Bankr. Rep. 217; *In re Cannon*, (E. D.

Pa. 1904) 133 Fed. 837, 14 Am. Bankr. Rep. 114; *In re Dresser*, (C. C. A. 2d Cir. 1905) 135 Fed. 495, 13 Am. Bankr. Rep. 747; *In re Carter*, (W. D. Ark. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126; *In re John H. Livingston Co.*, (C. C. A. 2d Cir. 1905) 144 Fed. 971, 16 Am. Bankr. Rep. 385; *In re Castle Braid Co.*, (S. D. N. Y. 1906) 145 Fed. 224, 17 Am. Bankr. Rep. 143; *In re Hatem*, (E. D. N. C. 1908) 161 Fed. 895, 20 Am. Bankr. Rep. 470; *In re Montgomery*, (N. D. Tex. 1911) 185 Fed. 955; *Baumhauer v. Austin*, (C. C. A. 5th Cir. 1911) 186 Fed. 260; *Matter of Rome*, (D. C. N. J. 1908) 19 Am. Bankr. Rep. 820; *In re Schwarz*, (E. D. N. Y. 1912) 200 Fed. 309.

*Res judicata*.—The decision on a contested claim is *res judicata* as to all questions necessarily decided therein. *In re Heinsfurter*, (S. D. Ia. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 109; *Hargadine-McKittrick Co. v. Hudson*, (C. C. A. 8th Cir. 1903) 122 Fed. 232, 10 Am. Bankr. Rep. 225, *affirming* (E. D. Mo. 1901) 111 Fed. 361, 6 Am. Bankr. Rep. 657; *In re Chase*, (D. C. Mass. 1904) 133 Fed. 79, 13 Am. Bankr. Rep. 294; *Ayres v. Cone*, (C. C. A. 8th Cir. 1905) 138 Fed. 778, 14 Am. Bankr. Rep. 739; *Clendening v. Red River Valley Nat. Bank*, (N. D. 1903) 11 Am. Bankr. Rep. 245.

**g [Preferred creditors.]** The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances. [(Amended 1903 which excepted pending cases) 32 Stat. L. 799.]

As originally enacted this section 57g read as follows:

"g The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." [30 Stat. L. 560.]

In 1903 it was amended "so as to read as" in the text.

**Definition of "preference."**—Section 60a contains the legal and controlling definition of the preference specified in section 57g. *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 1902) 117 Fed. 3, decided prior to the amendment of 1903.

**Effect of amendment.**—The amending act did not repeal the prior provision of this section as to pending cases, but left it in full force and effect by the provisions of section 19 of that Act. *In re Docker-Foster Co.*, (1903) 123 Fed. 190.

**What payments are preferences.**—Since the amendment to sections 57g and 60a, in order to deprive a creditor of the right to prove his claim against the bankrupt's estate it must appear that he received from the debtor a payment with reasonable cause to believe that a preference was intended thereby. Thus it has been held that the fact that a claim of a

wholesale house against a retail dealer was past due, and payment was being urged at the time, does not make payments under such circumstances, even by future dated checks, received with "reasonable cause to believe," etc., within the meaning of section 60b so as to make them voidable preferences and require the creditor to surrender them before proving his claim. *In re Goodhile*, (1904) 130 Fed. 471.

Prior to the amendment it was held that knowledge or cause to believe that a preference was intended was not a necessary element of the preference to work a disallowance of the claim. *In re Ft. Wayne Electric Corp.*, (1899) 96 Fed. 803.

So likewise prior to the amendment it was held that where a partial payment of his debt is made to a creditor by a

insolvent debtor within four months before the filing of the petition in bankruptcy against him, the creditor must surrender the payment, if he wishes to prove the balance of his claim, irrespective of the preferential intent of the debtor or the creditor's knowledge or belief that a preference was intended. *Strobel, etc., Co. v. Knost*, (1900) 99 Fed. 409; *In re Conhaim*, (1899) 97 Fed. 923; *In re Fixen*, (C. C. A. 1900) 102 Fed. 295; *In re Sloan*, (1900) 102 Fed. 116; *In re Flick*, (1900) 105 Fed. 503. See also *In re Seckler*, (1901) 106 Fed. 484; *In re Kellar*, (1901) 110 Fed. 348; *Mills v. Lewis*, (C. C. A. 1901) 110 Fed. 512; *In re Dickson*, (C. C. A. 1901) 111 Fed. 726. And for cases holding a contrary doctrine, see *In re Alexander*, (1900) 102 Fed. 464; *In re Ratliff*, (1901) 107 Fed. 80; *In re Oliver*, (1901) 109 Fed. 784; *In re Henry C. King Co.*, (1902) 112 Fed. 110.

Similarly, where the preference consisted in receiving and collecting, through a bank, a future dated check it was held that the creditor had received a preference and that the amount would have to be surrendered before he could prove other claims. *In re Lyon*, (1902) 114 Fed. 326.

"Any creditor" does not include a secured creditor though of course, if a secured creditor attempts to have his claim allowed as an unsecured claim for any sum in excess of the value of his security, he comes clearly within the terms of this section. He cannot have the excess allowed without surrendering the preference. *In re Keystone Press*, (D. C. Minn. 1913) 203 Fed. 710.

**Surrender essential.**—A claimant who has received a preference, or a conveyance, transfer, assignment, or incumbrance, which is void or voidable under section 60b or section 67e, must surrender the same before his claim will be allowed against the bankrupt's estate. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171; *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 136, *affirming* (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382; *Keppel v. Tiffin Sav. Bank*, (1905) 197 U. S. 356, 25 S. Ct. 443, 49 U. S. (L. ed.) 790, 13 Am. Bankr. Rep. 552; *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 26 S. Ct. 289, 50 U. S. (L. ed.) 527, 15 Am. Bankr. Rep. 336; *Eau Claire Nat. Bank v. Jackman*, (1907) 204 U. S. 522, 27 S. Ct. 391, 51 U. S. (L. ed.) 596, 17 Am. Bankr. Rep. 683; *In re Conhaim*, (D. C. Wash. 1899) 97 Fed. 924, 3 Am. Bankr. Rep. 249; *In re Eagles*, (E. D. N. C. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 735; *In re Christensen*, (N. D. Ia. 1900) 101 Fed. 802, 4 Am. Bankr. Rep. 202; *In re Rogers Milling*

*Co.*, (W. D. Ark. 1900) 102 Fed. 687, 4 Am. Bankr. Rep. 540; *In re Schmechel Cloak, etc., Co.*, (W. D. Mo. 1900) 104 Fed. 64, 4 Am. Bankr. Rep. 719; *In re Teslow*, (D. C. Minn. 1900) 104 Fed. 229, 4 Am. Bankr. Rep. 757; *In re Arndt*, (E. D. Wis. 1900) 104 Fed. 234, 4 Am. Bankr. Rep. 773; *In re Flick*, (1900) 105 Fed. 503; *In re Ryan*, (N. D. Ill. 1900) 105 Fed. 760, 5 Am. Bankr. Rep. 396; *McKey v. Lee*, (C. C. A. 7th Cir. 1901) 105 Fed. 923, 5 Am. Bankr. Rep. 267; *In re Seckler*, (D. C. Kan. 1901) 106 Fed. 484, 5 Am. Bankr. Rep. 579; *In re Keller*, (N. D. Ia. 1901) 109 Fed. 118, 6 Am. Bankr. Rep. 334; *In re Oliver*, (W. D. Mo. 1901) 109 Fed. 784, 6 Am. Bankr. Rep. 626; *In re Bashline*, (W. D. Pa. 1901) 109 Fed. 965, 6 Am. Bankr. Rep. 194; *In re Soldosky*, (D. C. Minn. 1901) 111 Fed. 511, 7 Am. Bankr. Rep. 123; *In re Dickson*, (C. C. A. 1st Cir. 1901) 111 Fed. 726, 7 Am. Bankr. Rep. 186; *Peterson v. Nash*, (C. C. A. 8th Cir. 1901) 112 Fed. 311, 7 Am. Bankr. Rep. 181; *In re Abraham Steers Lumber Co.*, (C. C. A. 2d Cir. 1901) 112 Fed. 406, 7 Am. Bankr. Rep. 332; *In re Thompson*, (E. D. Pa. 1902) 112 Fed. 651, 7 Am. Bankr. Rep. 214, *affirming* (E. D. Pa. 1901) 6 Am. Bankr. Rep. 663; *In re Greth*, (E. D. Pa. 1902) 112 Fed. 978; *In re Waterbury Furniture Co.*, (D. C. Conn. 1902) 114 Fed. 255, 8 Am. Bankr. Rep. 79; *C. S. Morey Mercantile Co. v. Schiffer*, (C. C. A. 8th Cir. 1902) 114 Fed. 447, 7 Am. Bankr. Rep. 670; *Gans v. Ellison*, (C. C. A. 3d Cir. 1902) 114 Fed. 734, 8 Am. Bankr. Rep. 153; *In re Chaplin*, (D. C. Mass. 1902) 115 Fed. 162, 8 Am. Bankr. Rep. 121; *Kahn v. Cone Export, etc., Co.*, (C. C. A. 5th Cir. 1902) 115 Fed. 290, 8 Am. Bankr. Rep. 157, *affirming In re Southern Overall Mfg. Co.*, (N. D. Ga. 1901) 6 Am. Bankr. Rep. 633; *In re Meyer*, (N. D. Tex. 1902) 115 Fed. 997, 8 Am. Bankr. Rep. 598; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *In re Malino*, (S. D. N. Y. 1902) 118 Fed. 368, 8 Am. Bankr. Rep. 205; *Livingstone v. Heineman*, (C. C. A. 6th Cir. 1903) 120 Fed. 786, 10 Am. Bankr. Rep. 39; *In re Levi*, (W. D. N. Y. 1903) 121 Fed. 198, 9 Am. Bankr. Rep. 176; *In re Thompson*, (E. D. Pa. 1903) 121 Fed. 607, 10 Am. Bankr. Rep. 288; *Fenley v. Poor*, (C. C. A. 6th Cir. 1903) 121 Fed. 739, 10 Am. Bankr. Rep. 378; *Dunn v. Gans*, (C. C. A. 3d Cir. 1904) 129 Fed. 750, 12 Am. Bankr. Rep. 316; *In re George M. Hill Co.*, (C. C. A. 7th Cir. 1904) 130 Fed. 315; *In re Privett*, (E. D. N. C. 1904) 132 Fed. 592, 13 Am. Bankr. Rep. 151; *In re Oppenheimer*, (N. D. Ia. 1905) 140 Fed. 51, 15 Am. Bankr. Rep. 267; *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 527; *In re Hurlbutt*, (C. C. A. 2d Cir. 1906) 143 Fed. 958, 16 Am. Bankr. Rep.

198; *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, 17 Am. Bankr. Rep. 609; *Wild v. Provident L., etc., Co.*, (C. C. A. 3d Cir. 1907) 153 Fed. 562, 18 Am. Bankr. Rep. 506; *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; *In re Shiebler*, (E. D. N. Y. 1908) 163 Fed. 545, 20 Am. Bankr. Rep. 777; *In re Rice*, (E. D. Pa. 1908) 164 Fed. 514, 21 Am. Bankr. Rep. 202; *In re Bailey*, (D. C. Utah 1910) 176 Fed. 990, 24 Am. Bankr. Rep. 201; *In re Kyte*, (M. D. Pa. 1910) 182 Fed. 166; *In re Feinberg*, (D. C. Mass. 1910) 187 Fed. 283; *In re Elletson Co.*, (N. D. W. Va. 1912) 193 Fed. 84; *Cooper v. Miller*, (C. C. A. 6th Cir. 1913) 203 Fed. 383; *In re Greenberger*, (N. D. N. Y. 1913) 203 Fed. 583; *In re National Boat, etc., Co.*, (D. C. Me. 1914) 216 Fed. 208; *Butterfield v. Woodman*, (C. C. A. 1st Cir. 1915) 223 Fed. 956; *In re Tanner*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 196; *Matter of Proctor*, (N. D. Ia. 1901) 6 Am. Bankr. Rep. 660; *Matter of Read*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 111; *In re Rosenberg*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 316; *Matter of Beswick*, (N. D. Ohio 1900) 7 Am. Bankr. Rep. 395; *Matter of Bothwell*, (D. C. N. J. 1902) 8 Am. Bankr. Rep. 213; *Matter of Wing Yick Co.*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 757; *In re Watkinson*, (E. D. Pa. 1906) 17 Am. Bankr. Rep. 56; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 167.

*Preferences or transfers, etc., which do not come within the language of section 60b or section 67e need not be surrendered under section 57g.* *In re Levi*, (W. D. N. Y. 1903) 121 Fed. 198, 9 Am. Bankr. Rep. 176; *In re Bloch*, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748; *In re Watkinson*, (E. D. Pa. 1906) 143 Fed. 602, 16 Am. Bankr. Rep. 38; *In re Louisville First Nat. Bank*, (C. C. A. 6th Cir. 1907) 155 Fed. 100, 18 Am. Bankr. Rep. 766; *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851.

*Prior to the amendment of 1903, it was held that the section required the surrender of all preferences as set out in section 60a, the only proviso being that when the transfer was made the debtor was insolvent.* *In re Jones*, (1900) 110 Fed. 737; *In re Abraham Steers Lumber Co.*, (1901) 110 Fed. 739.

*Statutory requirement not penal.*—The provision of section 57g for the surrender of preferences as a condition of allowing claims is not a penal requirement and need not be strictly construed. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171.

*A creditor who holds a voidable preference has a claim that is provable in the sense that formal written proof of it may be made and filed, but he may not procure an allowance of it, nor vote at a creditors'*

*meeting, nor obtain any advantage by his claim, under the Bankruptcy Law, until he has surrendered his preference.* *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, 17 Am. Bankr. Rep. 609; *Wells v. Lincoln*, (C. C. A. 9th Cir. 1914) 214 Fed. 227.

*Surrender optional.*—Where it appears that a creditor who filed a claim against a bankrupt estate has received a preference, he has the option to surrender the preference or abandon his claim; but if he retains the preference he is not entitled to a dividend. *In re Privett*, (E. D. N. C. 1904) 132 Fed. 592, 13 Am. Bankr. Rep. 151.

But the trustee may recover a voidable preference if he wishes to do so. See section 60b and the annotation thereunder.

*The surrender should be made to the trustee, not to the bankrupt.* *In re Currier*, (1875) 2 Lowell 436, 6 Fed. Cas. No. 3,492.

*Compulsory surrender.*—The fact that a claimant has retained a voidable preference, or a void or voidable transfer, until he has been compelled to surrender the same by legal proceedings, does not affect the provability or allowance of his debt after such surrender has been made. *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 135, *affirming* (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382; *Keppel v. Tiffin Sav. Bank*, (1905) 197 U. S. 356, 25 S. Ct. 443, 49 U. S. (L. ed.) 790; *Page v. Rogers*, (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332, 21 Am. Bankr. Rep. 496; *In re Oppenheimer*, (N. D. Ia. 1905) 140 Fed. 51; *Barber v. Coit*, (C. C. A. 6th Cir. 1906) 144 Fed. 381, 16 Am. Bankr. Rep. 419; *In re Otto F. Lange Co.*, (N. D. Ia. 1909) 170 Fed. 114, 22 Am. Bankr. Rep. 414; *In re John A. Baker Notion Co.*, (S. D. N. Y. 1910) 180 Fed. 922.

*The word "surrender," as used in section 57g, includes a voidable preference of which a creditor is deprived by the judgment of a court, at the suit of the trustee, as well as a surrender by voluntary act.* *In re Otto F. Lange Co.*, (N. D. Ia. 1909) 170 Fed. 114, 22 Am. Bankr. Rep. 414.

*Prior to the amendment it was held that the Bankruptcy Act contemplated a voluntary surrender by the preferred creditor and although he might surrender the preference at any time before final judgment in the suit attacking the preference, he could not, after a litigation had been carried to the point of final judgment and after the payment, actual or virtual, of such a judgment by the creditor, still prove his debt as if the contest had never taken place.* *In re Greth*, (E. D. Pa. 1902) 112 Fed. 978. And this was the doctrine under the Act of 1867. *In re Toukin*, (1870) 4 Nat. Bankr. Reg.

52, 24 Fed. Cas. No. 14,004; *In re Rich-ter*, (1870) 1 Dill. 544, 20 Fed. Cas. No. 11,803.

But upon the question how far a suit by the trustee could proceed against a preferred creditor, short of recovery of judgment and satisfaction thereof, without depriving the latter of his right to surrender the preference and prove his claim, there was much conflict of authority. *In re Lee*, (1876) 14 Nat. Bankr. Reg. 89, 15 Fed. Cas. No. 8,179; *In re Riorden*, (1876) 14 Nat. Bankr. Reg. 332, 20 Fed. Cas. No. 11,852; *Matter of Montgomery*, (1869) 3 Ben. (U. S.) 567; *In re Kipp*, (1871) 4 Nat. Bankr. Reg. 593, 14 Fed. Cas. No. 7,836; *Matter of Davidson*, (1870) 4 Ben. 10, 7 Fed. Cas. No. 3,599; *In re Scott*, (1870) 4 Nat. Bankr. Reg. 414, 21 Fed. Cas. No. 12,518; *In re Cramer*, (1875) 13 Nat. Bankr. Reg. 225, 6 Fed. Cas. No. 3,345; *Matter of Leland*, (1874) 7 Ben. 159, 15 Fed. Cas. No. 8,230; *Burr v. Hopkins*, (1875) 6 Biss. 345, 4 Fed. Cas. No. 2,192; *Zahm v. Fry*, (1874) 9 Nat. Bankr. Reg. 546, 30 Fed. Cas. No. 18,198; *Hood v. Karper*, (1871) 5 Nat. Bankr. Reg. 358, 12 Fed. Cas. No. 6,664.

*A creditor, preferred by a conveyance constructively fraudulent*, may, after the preference is set aside, nevertheless prove the debt so voidably preferred. *Keppel v. Tiffin Sav. Bank*, (1905) 197 U. S. 356, 25 S. Ct. 443, 49 U. S. (L. ed.) 790, 13 Am. Bankr. Rep. 552; *Barber v. Coit*, (C. C. A. 6th Cir. 1906) 144 Fed. 381, 16 Am. Bankr. Rep. 419.

*Referee to fix time for surrender and allowance*.—On a finding by a referee, on the hearing of objections to a claim, that the creditor has received a voidable preference, he should fix a reasonable time within which the creditor may surrender the preference and have his claim allowed. *In re Oppenheimer*, (N. D. Ia. 1905) 140 Fed. 51, 15 Am. Bankr. Rep. 267.

*Dividend allowable against order for surrender*.—A court of bankruptcy, in entering judgment compelling a creditor to surrender an unlawful preference, should permit the creditor to prove his claim against the bankrupt estate, and deduct from the amount of the preference, which he is required to surrender, the dividend which the court finds is coming to him. *Page v. Rogers*, (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332, 21 Am. Bankr. Rep. 496.

*Independent transactions*.—There is a conflict of opinion as to whether or not a claim may be allowed without first surrendering a preference obtained by the claimant in connection with a separate and distinct transaction; the following cases hold that such a preference must be surrendered before the claim can be allowed: *In re Dickson*, (C. C. A. 1st Cir. 1901) 111 Fed. 726; *In re Seay*, (N. D.

Ga. 1902) 113 Fed. 969; *In re Meyer*, (N. D. Tex. 1902) 115 Fed. 997, 8 Am. Bankr. Rep. 598; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *Swarts v. Siegel*, (C. C. A. 8th Cir. 1902) 117 Fed. 13, 8 Am. Bankr. Rep. 689; *Livingstone v. Heineman*, (C. C. A. 6th Cir. 1903) 120 Fed. 786, 10 Am. Bankr. Rep. 39; *Dunn v. Gans*, (C. C. A. 3d Cir. 1904) 129 Fed. 750, 12 Am. Bankr. Rep. 316.

Thus it has been held that a creditor who has several claims of the same class, upon one of which he has received a preference, must surrender the preference before any of his claims can be allowed. *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673.

And in *Dunn v. Gans*, (C. C. A. 3d Cir. 1904) 129 Fed. 750, 12 Am. Bankr. Rep. 316, it was held that section 57g should be construed as dealing with the creditors and not with their claims; so that where a creditor has received a preference he is not entitled to segregate the bankrupt's indebtedness according to the notes by which it is evidenced, and apply the preference in payment of some of the notes, and prove the others as separate claims against the bankrupt's estate, without surrendering such preference.

But it has also been held that the allowance of a claim in bankruptcy is not affected by the receipt of a preference in connection with a separate and distinct transaction. *In re Abraham Steers Lumber Co.*, (C. C. A. 2d Cir. 1901) 112 Fed. 406, 7 Am. Bankr. Rep. 332, *affirming* (S. D. N. Y. 1901) 110 Fed. 738, 6 Am. Bankr. Rep. 315; *In re Seay*, (N. D. Ga. 1902) 113 Fed. 969, 7 Am. Bankr. Rep. 700; *In re Bullock*, (E. D. N. C. 1902) 116 Fed. 667, 8 Am. Bankr. Rep. 646; *In re Wolf*, (W. D. Tenn. 1903) 122 Fed. 127, 10 Am. Bankr. Rep. 153.

Thus where it appeared that a creditor received payment in full from his debtor within four months prior to the latter's bankruptcy, but without knowledge of his insolvency, and afterwards sold him another invoice of goods, which were not paid for at the time of the bankruptcy, it was held that the last sale created a new and separate debt, which was allowable without a surrender of the money received in payment of the previous debt. *In re Wolf*, (W. D. Tenn. 1903) 122 Fed. 127, 10 Am. Bankr. Rep. 153.

It has also been held that a creditor who presents a claim upon which he has received no preference cannot be compelled to surrender an alleged preference upon an entirely settled and extinguished debt which is disconnected with the other. *In re Wolf*, (W. D. Tenn. 1903) 122 Fed. 127, 10 Am. Bankr. Rep. 153.

And in *In re Franklin*, (E. D. N. C.

1907) 151 Fed. 642, 18 Am. Bankr. Rep. 218, it was held that the receipt of a preference on a separate and distinct transaction does not divest a creditor of his vested rights to property or the proceeds thereof.

Likewise, under the Act of 1867, it was held that where a creditor had two disconnected debts and had received a fraudulent preference as to one only, he might prove the other and receive dividends upon it. *In re McVay*, (1882) 13 Fed. 443; *In re Aspinwell*, (1882) 11 Fed. 136; *Richter's Estate*, (1870) 1 Dill. 544, 20 Fed. Cas. No. 11,803; *In re Holland*, (1873) 8 Nat. Bankr. Reg. 190, 12 Fed. Cas. No. 6,604.

**Transaction resulting in benefit to estate.**—In the case of *In re Topliff*, (1902) 114 Fed. 323, it was held that where the effect of transactions was to increase the net indebtedness of the customer and presumably the bankrupt's estate, the customer was not obliged to surrender payments made to him by the bankrupt within the four months, to entitle him to prove his claim against the estate. In that case, decided prior to the amendment of 1903, the court considered the conflicting decisions of various courts regarding sections 57g and 60 of the Act.

**Payments of interest on renewal notes.**

—A bank need not surrender payments of interest in advance made by the insolvent

within four months prior to his bankruptcy, to obtain a renewal of the notes held by the bank. *In re Kellar*, (1901) 110 Fed. 348.

**Payments on running account.**—The receipt by a creditor of payments upon a current account in the usual course of business which are followed by new credits for property delivered to a debtor which becomes a part of his estate, for which the creditor is not paid and which equals or exceeds in amount and value the payments, does not constitute a preference, under section 57g. *C. S. Morey Mercantile Co. v. Schiffer*, (C. C. A. 1902) 114 Fed. 447, citing *Kimball v. E. A. Rosenham Co.*, (C. C. A. 1902) 114 Fed. 85; *In re Richter*, (1870) 1 Dill. 544, 20 Fed. Cas. No. 11,803; *In re Dickson*, (C. C. A. 1901) 111 Fed. 726; *Peterson v. Naah*, (C. C. A. 1901) 112 Fed. 311.

**Report of referee as to preferences.**—Where the referee, on a hearing before him of the trustee's objections to claims against the bankrupt's estate, in that the creditors had received unlawful preferences and had not surrendered the same, finds that there are such preferences, he should specify, in his report, the sums which each creditor so received, and which they will have to surrender. *Stern v. Louisville Trust Co.*, (C. C. A. 1901) 112 Fed. 501.

**h [Securities held by secured creditors.]** The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. [(1898) 30 Stat. L. 560.]

**Determining value of securities.**—The value of securities held by a claimant must be determined by converting them into money pursuant to the agreement under which they are held; if the agreement does not fix the mode of ascertaining the value of such securities, then their value must be determined by one of the ways specified in the statute, as directed by the court. *Hiscock v. Varick Bank*, (1907) 206 U. S. 28, 27 S. Ct. 681, 51 U. S. (L. ed.) 945; *In re Browne*, (E. D. Pa. 1900) 104 Fed. 762, 5 Am. Bankr. Rep. 220; *In re Meredith*, (N. D. Ga. 1906) 144 Fed. 230, 16 Am. Bankr. Rep. 331; *In re Castle Braid Co.*, (S. D. N. Y. 1906) 145 Fed. 224, 17 Am. Bankr. Rep. 143; *In re Quinn*, (C. C. A. 8th Cir. 1908) 165 Fed. 144, 21 Am. Bankr. Rep. 264; *In re Davison*, (N. D. N. Y.

1910) 179 Fed. 750; *In re Brown*, (E. D. Pa. 1900) 5 Am. Bankr. Rep. 220.

*The supervision of the court* is confined to the ascertainment of value where the bankrupt and his creditor have themselves failed to deal with this subject. In such an event the court may direct how the value is to be ascertained, and may choose among the methods of agreement, arbitration, compromise, or litigation, supervising and controlling either form of proceeding. *Hiscock v. Varick Bank*, (1907) 206 U. S. 28, 27 S. Ct. 681, 51 U. S. (L. ed.) 945; *In re Browne*, (E. D. Pa. 1900) 104 Fed. 762, 5 Am. Bankr. Rep. 220.

*If the value has been legally determined* outside of the court of bankruptcy, it will be governed by that fact. *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22.

*The secured creditor cannot dispose of the securities to himself, at a price fixed by himself, under the pretense of a sale, public or private, and then say the value has been fixed by a public or private sale to himself, and that the court has nothing further to say regarding the transaction.* *In re Mertens*, (N. D. N. Y. 1905) 134 Fed. 104, 14 Am. Bankr. Rep. 226.

*Where bonds deposited as collateral to a corporation's note were simple promises, not secured, and had never been used by the bankrupt until delivered to secure the bankrupt's note, it was held that the creditor was not entitled to sell the bonds to realize funds with which to pay the note; since to do so would simply increase the corporation's indebtedness, to the prejudice of other creditors.* *In re Matthews*, (S. D. N. Y. 1911) 188 Fed. 445.

*But a creditor cannot be compelled to part with his securities for a debt, there being no preference, until the debt is paid in full, except in case the securities are sold or converted into cash, and in such case he is entitled to the proceeds of the sale or conversion to apply on the debt.* *In re Noyes*, (C. C. A. 1st Cir. 1903) 127 Fed. 286, 11 Am. Bankr. Rep. 506; *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851; *In re Davison*, (N. D. N. Y. 1910) 179 Fed. 750.

*"Secured creditors."*—The words "secured creditors" must be read in view of and in connection with the definition of the phrase in *la* (23). *Young v. Gordon*, (C. C. A. 4th Cir. 1914) 219 Fed. 168, wherein it was held that certain receivers were not secured creditors within the meaning of this section.

*Statute applies only to bankrupt's property.*—Where the property held as security is not that of the bankrupt, the provisions of section 57h do not apply. *In re Mertens*, (N. D. N. Y. 1905) 134 Fed. 104, 14 Am. Bankr. Rep. 226; *In re Graves*, (D. C. Vt. 1908) 163 Fed. 358, 20 Am. Bankr. Rep. 818.

Thus where a creditor was allowed to prove his claim as against a bankrupt indorser as an unsecured claim, it was held that he was not required to realize and credit the proceeds of collateral securities held by him against the maker of the obligation, who was the principal debtor, before being allowed to participate in the distribution of the estate of the indorser. *Gorman v. Wright*, (4th Cir. 1905) 136 Fed. 164, 69 C. C. A. 76, *reversing* (E. D. N. C. 1904) 132 Fed. 274.

*A creditor of a bankrupt partnership is not required to apply securities in his hands, which are the individual property of one of the partners, upon his claim against the partnership estate, but is entitled to the allowance of his debt in full against such estate, and to apply the se-*

*curities upon his claim against the individual estate of the partner to whom the property belongs.* *In re Mertens*, (C. C. A. 2d Cir. 1906) 144 Fed. 818, 15 Am. Bankr. Rep. 362.

*Sale of mortgaged property.*—A sale is not essential to ascertain how much a mortgagee should be allowed to prove against the general estate. While it may be proper for the trustee to convert into money incumbered property where the incumbrance exceeds the value of the incumbered property, yet regard for the interest of the mortgagee must be considered in the light of the circumstances of each case; and where property is mortgaged to its full value and its sale will result in no benefit to the bankrupt estate or the settlement thereof, it would not be proper for the trustee to take possession and sell it. In such a case the trustee should negotiate with the mortgagee and see if he will not take the property to satisfy his claim. *In re Rose*, (E. D. Ky. 1911) 193 Fed. 815.

*Hearing.*—On a hearing as to the valuation of secured claims, both the claimant and the objecting creditors are entitled to be heard, and to adduce testimony; and the allowance can be reviewed only on a petition by the trustee or another creditor for a re-examination. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

*Allowance for balance only.*—A creditor who holds security cannot receive dividends from the bankrupt estate, except on the unpaid balance of his claim after the value of the security has been deducted. *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681. And see the annotations to section 57e and to section 65a, where the cases to this effect are collected.

A creditor holding the note of a bankrupt, and, as collateral security therefor, another note on which the bankrupt is also liable, is not entitled to prove his claim against the estate in bankruptcy for both, but only for the amount of the actual indebtedness to him. *Beaumont First Nat. Bank v. Eason*, (C. C. A. 5th Cir. 1906) 149 Fed. 204, 17 Am. Bankr. Rep. 593.

*Right to interest.*—*Interest and dividends accruing upon pledged securities*, after the filing of a petition in bankruptcy against the pledgor, may be first applied by the pledgees to the after-accruing interest upon the debt. *Sexton v. Dreyfus*, (1911) 219 U. S. 339, 31 S. Ct. 256, 55 U. S. (L. ed.) 244, *reversing* (C. C. A. 2d Cir. 1910) 180 Fed. 979.

But secured creditors of a bankrupt, selling their security after the filing of the petition in bankruptcy, and finding the proceeds insufficient to pay the whole amount of their claims, are not entitled

to apply such proceeds first to interest accrued since the filing of the petition, then to the principal debt, and then prove for the balance. *Sexton v. Dreyfus*, (1911) 219 U. S. 339, 31 S. Ct. 256, 55

U. S. (L. ed.) 244, *reversing* (C. C. A. 2d Cir. 1910) 180 Fed. 979.

As to sales of the bankrupt estate free from incumbrances, see notes to section 47a (2) and to section 70b.

**i [Claims secured by individual undertaking.]** Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor. [(1898) 30 Stat. L. 560.]

As to

Liability of codebtors, see section 16.

Liability of officers and stockholders of bankrupt corporations, see section 4b, paragraph *Liability of Officers, etc.*

**Proof by surety.**—A surety, to obtain his distributive share of the bankrupt's estate, must proceed in the manner pointed out by the Bankruptcy Law; that is, if the creditor fails to prove the claim, the surety must prove it in the name of the creditor, and he will then be permitted to participate in the distribution to the extent that he has discharged the obligation. *In re Bingham*, (D. C. Vt. 1899) 94 Fed. 796; *In re Dillon*, (D. C. Mass. 1900) 100 Fed. 627, 4 Am. Bankr. Rep. 63; *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.*, (C. C. A. 6th Cir. 1900) 101 Fed. 699, 4 Am. Bankr. Rep. 183; *In re Nickerson*, (D. C. Mass. 1902) 116 Fed. 1003, 8 Am. Bankr. Rep. 707; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *Swarts v. Siegel*, (C. C. A. 8th Cir. 1902) 117 Fed. 13, 8 Am. Bankr. Rep. 689; *Livingstone v. Heineman*, (C. C. A. 6th Cir. 1903) 120 Fed. 786, 10 Am. Bankr. Rep. 39; *In re McGuire*, (N. D. Ohio 1905) 137 Fed. 967, 13 Am. Bankr. Rep. 704; *In re Carter*, (W. D. Ark. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126; *In re Coe*, (S. D. N. Y. 1907) 157 Fed. 308, 19 Am. Bankr. Rep. 618; *Sessler v. Paducah Distilleries Co.*, (C. C. A. 5th Cir. 1909) 168 Fed. 44, 21 Am. Bankr. Rep. 723; *In re Otto F. Lange Co.*, (N. D. Ia. 1909) 170 Fed. 114, 22 Am. Bankr. Rep. 414; *In re McCord*, (S. D. N. Y. 1909) 174 Fed. 72, 22 Am. Bankr. Rep. 204.

A surety may prosecute his claim in bankruptcy in the name of the principal creditor when subrogation takes place after proof of debt. *Sessler v. Paducah Distilleries Co.*, (C. C. A. 5th Cir. 1909) 168 Fed. 44, 21 Am. Bankr. Rep. 723.

The words "if he discharge such undertaking," in section 57i, are not limited to the time before adjudication. *In re Dillon*, (D. C. Mass. 1900) 100 Fed. 627, 4 Am. Bankr. Rep. 63.

**A surety succeeds to the creditor's rights**

**cum onere;** and where the creditor would be obliged to surrender a preference or fraudulent transfer prior to the allowance of his claim, the surety will also be under a like obligation. *In re Schmechel Cloak, etc., Co.*, (W. D. Mo. 1900) 104 Fed. 64, 4 Am. Bankr. Rep. 719; *In re Siegel Hillman Dry Goods Co.*, (E. D. Mo. 1901) 111 Fed. 980, 7 Am. Bankr. Rep. 351; *Livingstone v. Heineman*, (C. C. A. 6th Cir. 1903) 120 Fed. 786, 10 Am. Bankr. Rep. 39; *In re Lyon*, (C. C. A. 2d Cir. 1903) 121 Fed. 723, 10 Am. Bankr. Rep. 25; *In re Scherzer*, (N. D. Ia. 1904) 130 Fed. 631, 12 Am. Bankr. Rep. 451.

A surety who has paid a claim which primarily was a debt of the bankrupt, and who wishes to prove such claim against him under this section, is subject to all the disabilities to which the creditor is subject: so that, where the creditor has not surrendered a preference, as he was required to do before he could prove a claim, the surety is precluded from proving his claim by subrogation; nor is it material that the preference was a distinct matter, with which the surety had nothing to do, as he stands in the actual stead of the creditor for the purpose of proof. *Morgan v. Wordell*, (1901) 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33.

**Surety's claim barred by discharge.**—A claim provable by a surety under section 57i, but not proved, is barred by the bankrupt's discharge. *Smith v. Wheeler*, (1900) 55 App. Div. 170, 86 N. Y. S. 780.

**Priority of creditor's right.**—A creditor is entitled to prove his full claim in preference to a surety who has discharged a part of his indebtedness. *In re Heyman*, (1899) 95 Fed. 800, adopting the construction of similar provisions in the Bankruptcy Act of 1867 which was established or impliedly favored in *In re Ellerhorst*, (1871) 5 Nat. Bankr. Reg. 144, 8 Fed. Cas. No. 4,381; *Matter of Hollister*, (1880) 3 Fed. 452; *Stewart v. Armstrong*, (1893) 56 Fed. 171; *Re Souther*, (1874) 2 Lowell (U. S.) 322; *Madison Square Bank v. Pierce*, (1893) 137 N. Y. 444, 33 N. E. 557, 33 A. S. R. 751, 20 L. R. A. 335. See also *Downing v. Traders'*



Bank. (1873) 2 Dill. 136, 7 Fed. Cas. No. 4,046.

**Contingent claim not provable.**—The contingent claim of a surety of a bankrupt principal is not provable; it being the creditor's claim only that is provable. *Insley v. Garside*, (C. C. A. 9th Cir. 1903) 121 Fed. 699, 10 Am. Bankr. Rep. 62.

**The right of subrogation.**—The latter part of section 57i is not intended as a restriction upon a surety creditor, but is intended merely to permit a surety who has paid the debt of his principal to be subrogated to the peculiar rights with respect to security which the payee may hold against the bankrupt. *In re New*, (1902) 116 Fed. 116.

**Subrogation of bankrupt's wife to creditor's rights.**—Where a bankrupt's wife signed notes and executed a mortgage on her separate property to secure money borrowed for the bankrupt and used by him in his business, it was held that the wife, on payment of the loan, was entitled to subrogation to the creditor's rights, or, in case the latter failed to prove the claim, to prove it in the creditor's name. *In re Carter*, (W. D. Ark. 1905) 138 Fed. 846, 15 Am. Bankr. Rep. 126.

**Subrogation of indorser.**—Under this section an indorser cannot prove against a bankrupt in his own name, whether the note is due or not due, and whether the indorser has paid anything on the note or not. The holder of the note proves the claim, and if he neglects to do so the indorser can prove in the holder's name, but not in his own name. If the indorser pays the note in whole or in part, the section provides that he is subrogated to

that extent to the rights of the holder. But this does not mean that he can prove for such payment against the bankrupt. In a case where an indorser has paid the note in whole or in part, the holder of the note, if he should receive from the bankrupt its equal to that which the indorser had paid in trust for the indorser, and would be obliged to reimburse him to that amount; but, where an indorser has paid in part, the holder is entitled to receive the entire dividends from the bankrupt under his proof as holder until the amounts paid to the holder in the shape of dividends from the bankrupt and the amount paid by the indorser pay the note in full. *In re Manhattan Brush Mfg. Co.*, (S. D. N. Y. 1913) 209 Fed. 997.

**A subsequent indorser, as against the estate of a prior indorser,** may prove the amount paid by him on the obligation. *In re McCord*, (S. D. N. Y. 1909) 174 Fed. 72, 22 Am. Bankr. Rep. 204.

**An accommodation maker of a note** must discharge the undertaking in whole or in part before he can be subrogated to the rights of the creditor or assert the rights of the creditor under the Bankruptcy Act. *Swartz v. Siegel*, (1902) 114 Fed. 1001.

**Payment before or after adjudication.**—A surety is entitled to subrogation whether his payment be made before or after adjudication, the words "if he discharge such undertaking" having no limitation of time. *Hayer v. Comstock*, (1901) 115 Ia. 187, 88 N. W. 351. See also *In re Dillon*, (1900) 100 Fed. 627; *Rosenthal v. Nove*, (1900) 175 Mass. 559, 56 N. E. 884, 78 A. S. R. 512.

**j [Debts owing to United States, state, county, etc.]** Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law. [(1898) 30 Stat. L. 561.]

As to priority of debts due under federal and state laws, see section 64b (5).

**Penalties imposed on a corporation for failure to return an increase of capital stock, file reports, etc.,** are not taxes within the meaning of any law, and are not entitled to priority under the Bankruptcy Act, and cannot be allowed except for the amount of the pecuniary loss sustained by the act or transaction out of which the penalty arose. A penalty is a fine or punishment or forfeiture, and does not become an obligation until imposed by lawful authority, and the penalties so imposed on the corporation are different from penalties for nonpayment of taxes,

the latter being exacted in lieu of interest, while those on the corporation are by way of punishment. *In re York Silk Mfg. Co.*, (M. D. Pa. 1911) 188 Fed. 735; *Pennsylvania v. York Silk Mfg. Co.*, (C. C. A. 3d Cir. 1911) 192 Fed. 81, *affirming* (M. D. Pa. 1911) 188 Fed. 735.

**Penalty or forfeiture.**—A judgment for a penalty is not a debt which can be proved or allowed as such because it is not for a fixed liability, but any pecuniary loss which the state, imposing the penalty, has sustained by the forbidden act, together with actual and reasonable costs and interest, may be proved. *In re*

**Abramson**, (C. C. A. 2d Cir. 1914) 210 Fed. 878.

*Obligation on forfeiture bail bond.*—  
A recovery on a recognizance is essentially

the recovery of a penalty and is a forfeiture. *In re Caponigri*, (S. D. N. Y. 1912) 193 Fed. 291; *In re Weber*, (1914) 212 N. Y. 290, 106 N. E. 58.

**k [Reconsideration of claims.]** Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has closed. [(1898) 30 Stat. L. 561.]

**Scope of section.**—Section 57k and General Order No. 21, par. 6 (see *supra*, note to section 30) refer to claims against the bankrupt that were in existence when the petition was filed, and not to claims against the estate for expenses of administration. *In re Reliance, Storage, etc., Co.*, (1900) 100 Fed. 619.

**Reconsideration allowable.**—The court may, under section 57k, for good cause shown, permit the reconsideration of claims; and thereupon such claims may be allowed or rejected, in whole or in part. *In re Lipman*, (S. D. N. Y. 1899) 94 Fed. 353, 2 Am. Bankr. Rep. 46; *In re Ankeny*, (N. D. Ia. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72; *In re Howard*, (N. D. Cal. 1900) 100 Fed. 630, 4 Am. Bankr. Rep. 69; *In re Sumner*, (E. D. N. Y. 1900) 101 Fed. 224, 4 Am. Bankr. Rep. 123; *In re Christensen*, (N. D. Ia. 1900) 101 Fed. 243, 4 Am. Bankr. Rep. 99; *In re Little River Lumber Co.*, (W. D. Ark. 1900) 101 Fed. 558, 3 Am. Bankr. Rep. 682; *Chatfield v. O'Dwyer*, (C. C. A. 8th Cir. 1900) 101 Fed. 797, 4 Am. Bankr. Rep. 313; *In re Shaw*, (E. D. Pa. 1901) 109 Fed. 780, 6 Am. Bankr. Rep. 499; *In re Baird*, (E. D. Pa. 1902) 112 Fed. 960, 7 Am. Bankr. Rep. 448; *In re Hamilton Furniture Co.*, (E. D. Pa. 1902) 116 Fed. 115, 8 Am. Bankr. Rep. 588; *In re Lewensohn*, (C. C. A. 2d Cir. 1903) 121 Fed. 538, 9 Am. Bankr. Rep. 368; *In re Hinckel Brewing Co.*, (N. D. N. Y. 1903) 123 Fed. 942, 10 Am. Bankr. Rep. 484; *In re Watkinson*, (E. D. Pa. 1904) 130 Fed. 218, 12 Am. Bankr. Rep. 370; *In re Arnold*, (E. D. Mo. 1904) 133 Fed. 789, 13 Am. Bankr. Rep. 320; *In re Sully*, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304; *In re Stern*, (C. C. A. 8th Cir. 1906) 144 Fed. 958, 15 Am. Bankr. Rep. 510; *In re Sully*, (C. C. A. 2d Cir. 1907) 152 Fed. 619, 18 Am. Bankr. Rep. 123; *In re Rome*, (D. C. N. J. 1908) 162 Fed. 971, 19 Am. Bankr. Rep. 820; *In re Effinger*, (D. C. Md. 1910) 184 Fed. 724; *In re W. A. Paterson Co.*, (C. C. A. 8th Cir. 1911) 186 Fed. 629; *In re Smith*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 648; *In re Doty*, (S. D. N. Y. 1900) 5 Am. Bankr. Rep. 58; *In re Chambers*, (D. C. R. I. 1901) 6 Am. Bankr. Rep. 707; *In re Levy*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 56; *In re Lyon*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 61; *In re Linton*, (E. D. Pa. 1902) 7 Am. Bankr. Rep. 676.

*Reconsideration in interest of third*

*party.*—The right to have a re-examination of claims allowed against a bankrupt estate should not be denied to creditors who clearly have an interest therein, because they seek such re-examination chiefly or solely in the interest of a third party. *In re Sully*, (C. C. A. 2d Cir. 1907) 152 Fed. 619, 18 Am. Bankr. Rep. 123.

*Reconsideration allowed to comply with authoritative ruling.*—Where a referee's order disallowing claims in bankruptcy on the sole ground that the claims were not offered for proof within the time required, was sustained on a petition for review, and shortly thereafter the Circuit Court of Appeals, in another case, so construed the Bankruptcy Act that such claims would not have been barred, it was held that the claimants were entitled to a rehearing, though no appeal was taken. *In re Keyes*, (D. C. Mass. 1907) 160 Fed. 763, 20 Am. Bankr. Rep. 183.

*Claim barred by limitation.*—A claim duly proved and allowed against the estate of a bankrupt may be expunged, on motion, when it is shown to have been barred by the Statute of Limitations at the time the petition in bankruptcy was filed. *In re Lipman*, (S. D. N. Y. 1899) 94 Fed. 353, 2 Am. Bankr. Rep. 46.

*Court may order return of assets as a condition upon which a claim will be allowed to stand.*—A court of bankruptcy has jurisdiction, by a summary proceeding, to diminish or expunge an allowed claim unless the claimant pays to the trustee the value of the property of the bankrupt which he has taken and converted to his own use, without any prior claim to it, after the petition in bankruptcy was filed. *In re W. A. Paterson Co.*, (C. C. A. 8th Cir. 1911) 186 Fed. 629.

**Who may apply for reconsideration—Trustee.**—After the appointment of a trustee in bankruptcy, he alone is authorized to institute proceedings for the reconsideration of claims. *In re Sully*, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304; *In re Mexico Hardware Co.*, (D. C. N. M. 1912) 197 Fed. 650.

In respect of opposing the allowance of claims, and moving for their reconsideration after they have been allowed, the trustee is not bound to comply with every request preferred by objecting creditors—irrespective of its merits; nor is he clothed with absolute discretion to refuse. As the representative of the estate, he is bound to exercise his judgment and to act

for the best interests of all concerned, but subject to the supervising power of the referee and the district judge. He does not act judicially, but only administratively, and if he refuses to oppose a claim or to move for its reconsideration when he ought to do so, he may be compelled to act or to permit the objecting creditors to act in his name. *In re Stern*, (C. C. A. 8th Cir. 1906) 144 Fed. 956, 16 Am. Bankr. Rep. 510.

**Remedy of creditors dissatisfied with allowance of other creditor.**—Where a general creditor is dissatisfied with the allowance of the claim of another creditor, his proper remedy is a demand upon the trustee to move for a reconsideration or review of such claim, or, if the trustee upon demand declines to act, then by a motion to the District Court that the trustee be required to move, or that the objecting creditor be permitted to move in his own name. *In re Mexico Hardware Co.*, (D. C. N. M. 1912) 197 Fed. 650.

**Where no trustee has been appointed** for the estate of a bankrupt, a motion for the re-examination and expunction of a claim, proved and allowed against his estate, may be made by the bankrupt himself. *In re Ankeny*, (N. D. Ia. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72.

**Laches.**—The provision of this section that claims which have been allowed may be reconsidered for cause before but not after the estate has been closed, indicates that as a general rule reconsideration should be allowed before the estate has been closed, there being no other limitation expressed in the Act as to the time within which such reconsideration may be made. A delay of more than one year, without other facts appearing, and before a dividend has been declared or paid is not of itself such laches as to bar a re-examination. *In re Globe Laundry*, (M. D. Tenn. 1912) 198 Fed. 365, *distinguishing In re Hamilton Furniture Co.*, (1902) 116 Fed. 115, on the ground that a creditor petitioned for a reconsideration after participation in a dividend and against the appearance and objection of the trustee; and *In re Hinkel Brewing Co.*, (N. D. N. Y. 1903) 123 Fed. 942, 10 Am. Bankr. Rep. 484, on the ground that the trustee's petition was disallowed for laches which if not held a bar would have worked great prejudice to the creditor whose claim had been allowed, by reason of the change of status.

**Notice of the application** must be given by the referee. General Order No. 21, par. 6 (see *supra*, note to section 30) *infra*, section 58c. *In re Stover*, (1900) 105 Fed. 355.

**Pleadings — Petition for reconsideration.**—The petition of a trustee, asking an order for the reconsideration of a claim which has been allowed, need not allege facts which, if proved, would defeat the claim, but is sufficient if it shows facts constituting a good cause for the re-exam-

ination. *In re Watkinson*, (E. D. Pa. 1904) 130 Fed. 218, 12 Am. Bankr. Rep. 370.

Where a petition for the reconsideration and disallowance of a claim, proved against the estate of a bankrupt, does not aver the essential facts with sufficient particularity, the proper method of objecting to it is by a motion for a more specific statement, not by motion to strike out parts of the petition. *In re Ankeny*, (N. D. Ia. 1900) 100 Fed. 614, 4 Am. Bankr. Rep. 72.

**Necessity of answering.**—Under the provisions of General Order in Bankruptcy No. 37, which extend the equity rules to proceedings instituted for the purpose of carrying into effect the provisions of the Bankruptcy Act, the failure to file an answer to a petition seeking to expunge a claim justifies a decree *pro confesso*, under Equity Rule 18, carrying the ordinary incidents and consequences of such a decree. *In re Docker-Foster Co.*, (E. D. Pa. 1903) 123 Fed. 190, 10 Am. Bankr. Rep. 584.

**Burden of proof.**—Upon a petition by one creditor praying that the debt of another already proved might be reconsidered and reduced, in that, as was alleged, it had been partly canceled and satisfied by agreement before the bankruptcy, it was held that the burden of proof of these allegations was on the petitioning creditor. *In re Howard*, (1900) 100 Fed. 630.

**Determination.**—On an application to a referee to expunge a creditor's proof of claim, the referee has no power to do more than allow the petition, expunge or diminish the claim, or refuse to do either; he cannot render any affirmative judgment against the creditor. *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851.

**Waiver of right to object to reconsideration.**—A claimant who, on the hearing of a reconsideration of the allowance of his claim, appears and testifies before the referee without objection, thereby waives the right to object, after such hearing, that the petition for the reconsideration was not presented in due time. The failure to make such objection has the same effect as has the general appearance of a defendant sued out of his district, or the action of a plaintiff who without objection goes on with his case in the federal court to which the case had been removed by a defendant, although the petition for removal had not been filed in time. *In re Effinger*, (D. C. Md. 1910) 184 Fed. 724.

**Reconsideration proceedings not a "suit."**—An order of the court of bankruptcy rejecting a claim, and, in addition thereto, requiring the creditor to repay to the trustee the amount of a dividend theretofore received, is not made in a suit, within the meaning of the Bankruptcy Act, section 23b, relating to suits by the trustee. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171.

*l* [Recovery of dividend by trustee.] Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part. [(1898) 30 Stat. L. 561.]

*m* [Claims by one estate against another.] The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors. [(1898) 30 Stat. L. 561.]

*n* [Time for proving claims.] Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: [(1898) 30 Stat. L. 561.]

**Time for proving claims — One-year limitation.**—Section 57*n* has the effect of a statute of limitation, and, in accordance therewith, it has been held that claims against the estate of a bankrupt must be proved within one year from the day of the adjudication; otherwise such proof will be barred. *J. B. Orcutt Co. v. Green*, (1907) 204 U. S. 96, 27 S. Ct. 195, 51 U. S. (L. ed.) 390; *In re Stein*, (D. C. Ind. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662; *In re Rider*, (1899) 96 Fed. 808; *Bray v. Cobb*, (E. D. N. C. 1900) 100 Fed. 270, 3 Am. Bankr. Rep. 788; *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982; *In re Rhodes*, (W. D. Pa. 1900) 105 Fed. 231, 5 Am. Bankr. Rep. 197; *In re Liebowitz*, (N. D. Tex. 1901) 108 Fed. 617, 6 Am. Bankr. Rep. 268; *In re Hawk*, (C. C. A. 8th Cir. 1902) 114 Fed. 916, 8 Am. Bankr. Rep. 71; *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382; *In re Moebius*, (E. D. Pa. 1902) 116 Fed. 47, 8 Am. Bankr. Rep. 590; *In re Bimberg*, (S. D. N. Y. 1903) 121 Fed. 942, 9 Am. Bankr. Rep. 601; *In re Thompson*, (E. D. Pa. 1903) 123 Fed. 174, 10 Am. Bankr. Rep. 581; *In re Brown*, (D. C. Colo. 1903) 123 Fed. 336, 10 Am. Bankr. Rep. 588; *In re Paine*, (W. D. Ky. 1904) 127 Fed. 246; *In re Muskoka Lumber Co.*, (W. D. N. Y. 1904) 127 Fed. 886, 11 Am. Bankr. Rep. 761; *In re Ingalls*, (C. C. A. 2d Cir. 1905) 137 Fed. 517, 13 Am. Bankr. Rep. 512; *In re Noel*, (D. C. N. H. 1906) 144 Fed. 439, 16 Am. Bankr. Rep. 457; *In re Rosenberg*, (E. D. Pa. 1906) 144 Fed. 442, 16 Am. Bankr. Rep. 465; *In re Baird*, (E. D. Pa. 1907) 154 Fed. 215, 18 Am. Bankr. Rep. 228; *In re Bell Piano Co.*, (S. D. N. Y. 1907) 155 Fed. 272, 18 Am. Bankr. Rep. 183; *Bennett v. American Credit Indemnity Co.*, (6th Cir. 1908) 159 Fed. 624, 86 C. C. A. 614; *In re Sanderson*, (D. C. Vt. 1908) 160 Fed. 278, 20 Am. Bankr. Rep. 396; *In re Peck*, (N. D. N. Y. 1908) 161 Fed. 762, 20 Am. Bankr. Rep. 629, *affirmed* (C. C. A. 2d Cir.

1909) 168 Fed. 48, 21 Am. Bankr. Rep. 707; *In re Faulkner*, (C. C. A. 8th Cir. 1908) 161 Fed. 900, 20 Am. Bankr. Rep. 542; *In re Strobel*, (E. D. N. Y. 1908) 163 Fed. 787; *In re Sampter*, (C. C. A. 2d Cir. 1909) 170 Fed. 938, 22 Am. Bankr. Rep. 357; *In re French*, (D. C. Mass. 1909) 181 Fed. 583; *In re Meyer*, (D. C. Ore. 1910) 181 Fed. 904; *In re Blond*, (D. C. Mass. 1910) 188 Fed. 452; *In re Lathrop*, (C. C. A. 2d Cir. 1912) 197 Fed. 164; *In re McCarthy Portable Elevator Co.*, (D. C. N. J. 1913) 205 Fed. 986; *In re Knoeco*, (N. D. Ohio 1913) 208 Fed. 201; *In re Thompson*, (D. C. N. J. 1915) 222 Fed. 167; *In re Maytag-Mason Motor Co.*, (N. D. Ia. 1915) 223 Fed. 684; *In re Lathrop*, (C. C. A. 2d Cir. 1915) 223 Fed. 912; *Matter of Prindle Pump Co.*, (S. D. N. Y. 1903) 10 Am. Bankr. Rep. 406; *Matter of Pettingill*, (D. C. Mass. 1905) 14 Am. Bankr. Rep. 763; *Steinhardt v. National Park Bank*, (1907) 19 Am. Bankr. Rep. 72, 120 App. Div. 255, 105 N. Y. S. 23, *reversing* 18 Am. Bankr. Rep. 86.

*Where an adjudication has been appealed from*, and the appeal dismissed, the creditors are entitled to prove their claims within a year from the date of such dismissal. *In re Lee*, (E. D. Pa. 1909) 171 Fed. 266, 22 Am. Bankr. Rep. 820.

**Statute strictly construed.**—The provisions of section 57*n* are to be strictly construed against the creditor, in order to carry out the liberal spirit shown by other provisions of the Act toward the debtor. *In re Muskoka Lumber Co.*, (W. D. N. Y. 1904) 127 Fed. 886, 11 Am. Bankr. Rep. 761.

*Other creditors not injured by neglect.*—Neglect in proving a claim until the year allowed by the Bankruptcy Act has nearly expired cannot affect the rights of a creditor where other creditors have not been injured and will not be injured by the creditor's delay. *In re Dunlap Carpet Co.*, (E. D. Pa. 1913) 206 Fed. 726.

*Cannot allow claim nunc pro tunc.*—Neither the court nor a referee has any discretionary power to permit the filing of proofs of claim after the expiration of one year, either *nunc pro tunc* or otherwise; nor is their power in that respect enlarged by the fact that proofs were delivered to the trustee within the year. *In re Ingalls*, (C. C. A. 2d Cir. 1905) 137 Fed. 517, 13 Am. Bankr. Rep. 512, *In re Co-Operative Knitting Mills*, (E. D. N. Y. 1913) 202 Fed. 1016.

*Proof of claim after close of estate.*—One who neglects to prove his claim until after a final dividend has been declared and the estate closed, though before the expiration of the year, must look to subsequently discovered assets and unclaimed dividends. *In re Stein*, (1899) 94 Fed. 124.

*Absence of notice immaterial.*—A creditor cannot prove his debt against a bankrupt estate after the expiration of the year limited therefor, although he had no notice or knowledge of the proceedings during that time, and the estate is still undisturbed. *In re Muskoka Lumber Co.*, (W. D. N. Y. 1904) 127 Fed. 886, 11 Am. Bankr. Rep. 761.

*Accident or mistake afford no relief.*—The court has no power to permit proof of a claim after the expiration of the time fixed, though the creditor's failure to make proof within such time arose solely through accident or mistake. *In re Sanderson*, (D. C. Vt. 1908) 160 Fed. 278, 20 Am. Bankr. Rep. 396.

*The fact that a composition is effected does not extend the time given a creditor to prove his claim.* *In re Brown*, (D. C. Colo. 1903) 123 Fed. 336, 10 Am. Bankr. Rep. 588. See also *In re French*, (D. C. Mass. 1909) 181 Fed. 583; *In re Blond*, (D. C. Mass. 1910) 188 Fed. 452.

*Effect of fraudulent concealment of assets.*—The provision that no claim shall be proved against a bankrupt estate subsequent to one year after adjudication has been repeatedly construed by the courts, and they are practically agreed that it is not only a limitation, but is prohibitory, and that the courts have no power or discretion to extend the time therein specified, or permit the proof of claims after the expiration of the year, even if the claimant has been misled by the fraudulent concealment of the assets of the bankrupt. *In re Paine*, (W. D. Ky. 1904) 127 Fed. 246, 11 Am. Bankr. Rep. 351; *In re Peck*, (C. C. A. 2d Cir. 1909) 168 Fed. 48, 21 Am. Bankr. Rep. 707, *affirming* (N. D. N. Y. 1908) 161 Fed. 762, 20 Am. Bankr. Rep. 629; *In re Meyer*, (D. C. Ore. 1910) 181 Fed. 904.

But see *In re Towne*, (D. C. Mass. 1903) 122 Fed. 313, 10 Am. Bankr. Rep. 284, wherein it was held that if a creditor has been misled by the bankrupt's fraud, in the preparation of his schedules, in such

a manner as to indicate that there were no assets, proof may be allowed after the expiration of the time limited by the statute.

*As to other than general creditors* this section does not prevent courts of equity from fixing a time for the filing of the claims against an estate in bankruptcy. *In re Lathrop*, (C. C. A. 2d Cir. 1915) 223 Fed. 912.

*Time of proving claims liquidated by litigation.*—As provided in the statute, where a claim has been liquidated by litigation, and the final judgment therein is rendered thirty days before or after the expiration of the one-year limitation period, in such case the claim so liquidated may be proved within sixty days after the rendition of final judgment. *In re Thompson*, (E. D. Pa. 1903) 123 Fed. 174, 10 Am. Bankr. Rep. 581; *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 766; *In re Fagan*, (D. C. S. C. 1906) 140 Fed. 758, 15 Am. Bankr. Rep. 520; *In re Mertens*, (C. C. A. 2d Cir. 1906) 147 Fed. 177, 16 Am. Bankr. Rep. 825; *Powell v. Leavitt*, (C. C. A. 1st Cir. 1907) 150 Fed. 89, 18 Am. Bankr. Rep. 10, *reversing* (D. C. N. H. 1906) 16 Am. Bankr. Rep. 457; *In re Baird*, (E. D. Pa. 1907) 154 Fed. 215, 18 Am. Bankr. Rep. 228; *In re Eldred*, (E. D. N. Y. 1907) 155 Fed. 686, 19 Am. Bankr. Rep. 52; *In re Landis*, (E. D. Pa. 1907) 156 Fed. 318, 19 Am. Bankr. Rep. 420; *In re Keyes*, (D. C. Mass. 1907) 160 Fed. 763, 20 Am. Bankr. Rep. 183; *In re Strobel*, (C. C. A. 2d Cir. 1908) 160 Fed. 916, 20 Am. Bankr. Rep. 22; *In re Peck*, (N. D. N. Y. 1908) 161 Fed. 762, 20 Am. Bankr. Rep. 629; *In re Standard Telephone, etc., Co.*, (E. D. Wis. 1911) 186 Fed. 586; *In re Salvator Brewing Co.*, (C. C. A. 2d Cir. 1912) 193 Fed. 989; *In re Venstrom*, (W. D. Wash. 1913) 205 Fed. 325; *In re Cahill*, (N. D. Ohio 1912) 208 Fed. 193; *Atlanta First Nat. Bank v. Cameron*, (C. C. A. 5th Cir. 1913) 209 Fed. 611; *Matter of Damon*, (W. D. N. Y. 1905) 14 Am. Bankr. Rep. 809.

*The phrase "liquidated by litigation"* is general, and the object of the exception which is made to the statutory limit of time is plainly to allow the proof of a claim after the expiration of a year by a creditor who, during that time, was engaged in litigation with the bankrupt's estate concerning its liability to him. *Powell v. Leavitt*, (C. C. A. 1st Cir. 1907) 150 Fed. 89, 18 Am. Bankr. Rep. 10.

The term "liquidated by litigation," as used in section 57n, permitting proof of claims after a year if liquidated by litigation, applies to a case where the creditor has claimed to hold security, and has litigated that question and been defeated, and thereafter attempts to prove as a general creditor. *In re Salvator Brewing Co.*, (S. D. N. Y. 1911) 188 Fed. 522.

When the question litigated necessarily involves the determination of the net amount for which claims should be finally allowed, the claims are to be considered as "liquidated by litigation," within the meaning of section 57n. *In re Keyes*, (D. C. Mass. 1907) 160 Fed. 763, 20 Am. Bankr. Rep. 183.

The words "liquidated by litigation" were not intended to preserve solely to litigant creditors their rights against the bankrupt estate, but apply to a surety on an appeal bond in an action between the bankrupt and a third party. *In re Lyons Beet Sugar Refining Co.*, (W. D. N. Y. 1911) 192 Fed. 445.

The term "liquidation," as used in section 57n, is not limited to proceedings having for their object only the ascertainment of the amount due on the claim, but it includes as well proceedings to ascertain the kind and character as well as the amount of the claim. *In re Standard Telephone, etc., Co.*, (E. D. Wis. 1911) 186 Fed. 586.

*Liquidation after one-year limitation.*—Section 57n should be construed to mean that, if a final judgment be entered within thirty days before the expiration of the time specified, or at any time thereafter, the claim might be proved within sixty days after the rendition of the judgment. *Powell v. Leavitt*, (C. C. A. 1st Cir. 1907) 150 Fed. 89, 18 Am. Bankr. Rep. 10, *followed* *In re Baird*, (E. D. Pa. 1907) 154 Fed. 215, 18 Am. Bankr. Rep. 228; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623.

A proceeding to recover a preference or fraudulent transfer is within the phrase "liquidation by litigation;" and a defendant creditor, in such an action, may prove his claim against the estate within sixty days after the rendition of final judgment, even though it was not filed or proved prior to the expiration of the one-year limitation period. *In re Fagan*, (D. C. S. C. 1905) 140 Fed. 758, 15 Am. Bankr. Rep. 520; *Powell v. Leavitt*, (C. C. A. 1st Cir. 1907) 150 Fed. 89, 18 Am. Bankr. Rep. 10; *In re Otto F. Lange Co.*, (N. D. Ia. 1909) 170 Fed. 114, 22 Am. Bankr. Rep. 414; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623. See also *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 136, *affirming* (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382; *In re Baird*, (E. D. Pa. 1907) 154 Fed. 215, 18 Am. Bankr. Rep. 228.

Thus it has been held that a creditor of a bankrupt, whose debt was paid within four months prior to the bankruptcy, but from whom the amount was recovered by the trustee by suit as a preference, is one holding a "claim liquidated by judgment," within the meaning of section 57n;

and he may prove the same against the estate, within sixty days thereafter, although more than a year after the adjudication. *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623. *Compare In re Kemper*, (N. D. Ia. 1905) 142 Fed. 210, 15 Am. Bankr. Rep. 675, wherein it was held that a creditor who received a voidable preference which was subsequently recovered in a suit by the trustee cannot prove a claim therefor after the expiration of one year from the adjudication, either as an original claim or by way of amendment of a prior claim proved and allowed within the time limited.

*Attachment suit by creditor as liquidation.*—A creditor, who at the time of the bankruptcy of his debtor has an attachment suit pending, is not required to prove his claim in bankruptcy until the termination of such suit; when, if defeated, he may prove the same, although more than a year has elapsed since the adjudication, as a claim liquidated by litigation. *In re Baird*, (E. D. Pa. 1907) 154 Fed. 215, 18 Am. Bankr. Rep. 228.

*On reopening of estate.*—A creditor who has failed to prove his claim in the original proceedings cannot prove such claim on the reopening of the estate, where more than one year has elapsed. *In re Shaffer*, (E. D. N. C. 1900) 104 Fed. 982, 4 Am. Bankr. Rep. 728.

But where a bankrupt scheduled no assets, and in consequence thereof no claims were proved and no trustee was appointed, and the estate was formally closed and the bankrupt discharged, it was held that on the discovery of previously unknown assets, and the reopening of the estate, the court may permit the filing of claims for a year from the date of the order, although the year from the adjudication, to which the filing of claims is limited by section 57n, has expired. *In re Pierson*, (S. D. N. Y. 1909) 174 Fed. 160, 23 Am. Bankr. Rep. 58, wherein it was said that if, before the estate had been formally closed, there had been claims proved, and an actual administration of the estate, then only such claims could come in on the reopening.

*Claims due United States.*—Section 57n is a statute of limitations, and is not binding on the United States. *In re Stoeber*, (E. D. Pa. 1904) 127 Fed. 394, 11 Am. Bankr. Rep. 345.

*Tax claims* need not be proved within the year's limitation fixed by section 57n. *In re Cleanfast Hosiery Co.*, (S. D. N. Y. 1900) 4 Am. Bankr. Rep. 702.

A claim of ownership of property adverse to the bankrupt and his estate is not the sort of claim affected by this section. Ordinary debts or demands against the estate were intended to come within the section and not adverse claims of title which are ordinarily asserted by interven-

tion in the bankruptcy proceedings. For the former the section prescribes the method of proofs and allowance, but for the latter a compliance with the ordinary practice in equity is sufficient. *Nauman Co. v. Bradshaw*, (C. C. A. 8th Cir. 1912) 193 Fed. 350.

The right to use a claim as a set-off, as against the trustee in an independent action, is not affected by failure to prove it in the bankruptcy proceedings as required by section 57*n*. *Norfolk, etc., R. Co. v. Graham*, (C. C. A. 4th Cir. 1906) 145 Fed. 809, 16 Am. Bankr. Rep. 610.

**Final dividend declared before expiration of year.**—This section does not prevent the declaration of a final dividend after four months, and before the expiration of the year limited, as provided for in section 65*b* of this Act. Therefore after a decree of final distribution is made at the expiration of four months it will not be set aside on petition of creditors. *In re Coulter*, (W. D. Pa. 1913) 206 Fed. 906.

**Amendment after one-year period.**—A proof of claim which is defective in some substantial particular is amendable subsequent to the expiration of one year after adjudication, although the effect of such amendment may be that proof of claim is thereby effectively made after the year limited by section 57*n*. *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 135, *affirming* (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382, practically *overruling In re Moebius*, (E. D. Pa. 1902) 116 Fed. 47, 8 Am. Bankr. Rep. 590; *In re Roeber*, (C. C. A. 2d Cir. 1903) 127 Fed. 122, 11 Am. Bankr. Rep. 464; *Bennett v. American Credit Indemnity Co.*, (C. C. A. 6th Cir. 1908) 161 Fed. 900, 20 Am. Bankr. Rep. 258; *In re Faulkner*, (C. C. A. 8th Cir. 1908) 161 Fed. 900, 20 Am. Bankr. Rep. 542; *In re Kessler*, (C. C. A. 2d Cir. 1910) 184 Fed. 51; *In re Basha*, (C. C. A. 2d Cir. 1912) 200 Fed. 951, *reversing* (S. D. N. Y. 1912) 193 Fed. 151; *In re Hamilton Automobile Co.*, (C. C. A. 7th

Cir. 1913) 209 Fed. 596; *In re Horne*, (S. D. Miss. 1909) 23 Am. Bankr. Rep. 590.

Thus it has been held that although the creditors of a bankrupt did not file their claim within one year following the adjudication, as required by the statute, an assignment thereof, filed with the referee by the assignee within the year, may be treated as sufficiently presenting the claim to permit an amendment thereof after the year. *Bennett v. American Credit Indemnity Co.*, (C. C. A. 6th Cir. 1908) 159 Fed. 624, 20 Am. Bankr. Rep. 258.

A creditor who proves a claim as unsecured may, after the lapse of a year from the adjudication, amend the proof so as to assert that it is secured, where the failure to make the proper proof of the claim in the first place was a mere mistake which hurt no one. *Maxwell v. M'Daniels*, (C. C. A. 4th Cir. 1912) 195 Fed. 426.

But a new or entirely different claim cannot be substituted by way of amendment after the expiration of the one-year period allowed for proving claims. *In re Stevens*, (D. C. Vt. 1901) 107 Fed. 243, 5 Am. Bankr. Rep. 806; *In re Thompson*, (E. D. Pa. 1903) 123 Fed. 174, 10 Am. Bankr. Rep. 581; *In re McCallum*, (E. D. Pa. 1904) 127 Fed. 768, 11 Am. Bankr. Rep. 447.

**New claim on separate contract.**—A creditor who has proved a claim against the estate of a bankrupt partnership, based on a promissory note made by the firm, cannot, by amendment after the expiration of the year allowed for filing claims, add a claim against the estate of one of the partners, based upon his indorsement of the note. *In re McCallum*, (E. D. Pa. 1904) 127 Fed. 768, 11 Am. Bankr. Rep. 447.

**Creditor cannot amend withdrawn claim.**—A claim filed against a bankrupt estate, after the expiration of the year fixed by the statute, cannot be allowed as an amendment of, or substitute for, a prior claim which was withdrawn without reservation ten months before. *In re Thompson*, (E. D. Pa. 1903) 123 Fed. 174, 10 Am. Bankr. Rep. 581.

**[Infants and insane persons.]** *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer. [(1898) 30 Stat. L. 561.]

**SEC. 58. NOTICES TO CREDITORS. (a) [Ten days' notice.]** Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of [(1898) 30 Stat. L. 561.]

This part of section 53 was re-enacted without change in 1910 (36 Stat. L. 841).

(1) **[Examinations.]** all examinations of the bankrupt; [(1898) 30 Stat. L. 561.]

This clause (1) was re-enacted without change in 1910 (36 Stat. L. 841).

As to

Examination of the bankrupt, see section 7a (9).

Examination of persons other than the bankrupt, see section 21a.

**Unnotified creditor not affected.**—A discharge will not release the bankrupt from a debt which was omitted from the schedule annexed to his petition, and which may be due to a creditor who did not have notice or knowledge of the bankruptcy proceedings in time to have proved his claim. *In re Monroe*, (1902) 114 Fed. 398.

**Where a claimant against a bankrupt had no notice**, at the time the bankrupt and other witnesses were examined before the referee at meetings of creditors, that the evidence would be used on the hearing of his claim, it was held that such evidence was inadmissible against him. *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863.

**When notice not required.**—If the examination is limited to obtaining information on which to prepare the schedules, it is not essential to the validity of the proceeding that ten days' notice thereof

by mail should have been given to the creditors. *In re Franklin Syndicate*, (E. D. N. Y. 1900) 101 Fed. 402, 4 Am. Bankr. Rep. 244. See also *In re Abrahamson*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 44.

**A bankrupt's application for a special reference** requiring the referee to report upon his discharge will not be heard until the trustee or the creditors have notice thereof. *In re Sykes*, (1901) 106 Fed. 669.

**As to attorney's fees.**—Notice to creditors is not required before the referee can settle proper attorney's fees. *In re Stotts*, (1899) 93 Fed. 438.

**Actual, personal notice of the various proceedings is not essential to the validity of a discharge.** *Rayl v. Lapham*, (1875) 27 Ohio St. 452; *In re Archibrown*, (1875) 11 Nat. Bankr. Reg. 149; *Williams v. Butcher*, 12 Nat. Bankr. Reg. 143; *Covey v. Ripley*, 4 Nat. Bankr. Reg. 503; *Platt v. Parker*, 13 Nat. Bankr. Reg. 14; *Heard v. Arnold*, (1876) 15 Nat. Bankr. Reg. 543; *Pattison v. Wilbur*, (1873) 10 R. I. 448; *Symonds v. Barnes*, 6 Nat. Bankr. Reg. 377.

(2) **[Application for confirmation of composition.]** all hearings upon applications for the confirmation of compositions; [(1898) 30 Stat. L. 561; (1910) 36 Stat. L. 841.]

The amendment of 1910 omitted from section 58a (2) the concluding words "or the discharge of bankrupts," which appeared in the original Act; the matter so omitted, however, was incorporated in subdivision (9) which was added to this section by the said amendment.

As to compositions generally, see sections 12 and 13.

(3) **[Meetings.]** all meetings of creditors; [(1898) 30 Stat. L. 561.]

This clause (3) was re-enacted without change in 1910 (36 Stat. L. 841).

As to

Meetings of creditors generally, see the several subdivisions of section 55.

As to

Voters at creditors' meetings, see section 56.

(4) **[Sales.]** all proposed sales of property; [(1898) 30 Stat. L. 561.]

This clause (4) was re-enacted without change in 1910 (36 Stat. L. 841).

**As to sale of property generally**, see sections 47a (2), and 70b; see also General Order in Bankruptcy No. 18, note to section 30.

**Notice of new order of sale must be given.**—Where the time fixed in an order by a referee, authorizing a private sale of the property of a bankrupt at a specified

upset price, had expired without a sale having been made, it was held that notice to creditors and others interested was essential before the making of a new order of sale. *Allgair v. Fisher*, (C. C. A. 3d Cir. 1906) 143 Fed. 962, 16 Am. Bankr. Rep. 278.

**Sale without notice.**—It has been held



that under a district rule based on General Order No. 18 (2), the court or the referee has discretionary power to order a private sale of a bankrupt's property, with or without notice; and the action of a referee in directing such a sale ought not to be disturbed unless it clearly appears that his discretion was improvi-

dently exercised. *In re Hawkins*, (W. D. N. Y. 1903) 125 Fed. 633, 11 Am. Bankr. Rep. 49.

Notice of confirmation of sale.—Notice to a creditor of an application to confirm a sale is not required by this section. *In re Nevada-Utah Mines, etc., Corp.*, (S. D. N. Y. 1912) 198 Fed. 497.

(5) **[Dividends.]** the declaration and time of payment of dividends; [(1898) 30 Stat. L. 561.]

This clause (5) was re-enacted without change in 1910 (36 Stat. L. 841).

As to declaration and payment of dividends, see the several subdivisions of section 65.

(6) **[Final accounts.]** the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; [(1898) 30 Stat. L. 561.]

This clause (6) was re-enacted without change in 1910 (36 Stat. L. 841).

As to trustee's duty to make final report and accounts, see section 7a (8).

(7) **[Compromises.]** the proposed compromise of any controversy; [(1898) 30 Stat. L. 561.]

This clause (7) was re-enacted without change in 1910 (36 Stat. L. 841).

As to compromising controversies, see section 27.

(8) **[Dismissal of proceedings.]** the proposed dismissal of the proceedings, and [(1898) 30 Stat. L. 561.]

This clause (8) was re-enacted without change in 1910 (36 Stat. L. 841).

As to

Dismissal of proceedings and notice required thereon, see section 59g.

When proceedings should be dismissed, see section 18 d, e, g.

Section 58a (8) and section 59g must be read and construed together, having in mind the rule that specific provision relating to a particular subject must govern, in respect to that subject, as against general provisions, in other parts of the law, which might otherwise be broad enough to include it. *In re Levi*, (C. C. A. 2d Cir. 1905) 142 Fed. 962, 15 Am. Bankr. Rep. 294. For the general rule of construction, see *ante*, this volume, p. 164.

Notice of a proposed dismissal of the proceedings is indispensable, and an order

of dismissal without notice is erroneous. *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665.

Notice unnecessary where dismissal results from hearing.—The provision of section 58a (8) as to notice relates only to dismissals which withdraw the case without its having been submitted to the court for a decision on the merits, and not to dismissals which follow as the result of a trial or hearing. *Neustadter v. Chicago Dry-Goods Co.*, (D. C. Wash. 1899) 96 Fed. 830, 3 Am. Bankr. Rep. 96; *Lackawanna Leather Co. v. La Porte Carriage Co.*, (C. C. A. 7th Cir. 1914) 211 Fed. 318.

(9) **[Applications for discharge.]** there shall be thirty days' notice of all applications for the discharge of bankrupts. [(Inserted 1910, which excepted pending cases) 36 Stat. L. 841.]

As to this clause see note to section 58a (2), *supra*.

As to application for discharge generally, see the several subdivisions of section 14.

Notice essential.—The application for

discharge, and the issuance, publication, and mailing of notices to creditors upon the application, constitute a step, and one of extreme importance to the bankrupt,

in the administration of the estate. *In re Hatcher*, (W. D. Tex. 1906) 145 Fed. 658, 16 Am. Bankr. Rep. 722.

**Discharge and examination notice combined.**—The notice to creditors to attend in opposition to the discharge should embrace also a notice of the examination of the bankrupt. *In re Price*, (S. D. N. Y. 1899) 91 Fed. 635, 1 Am. Bankr. Rep. 419.

**More irregularity immaterial.**—The fact that the receiver for a creditor of a bankrupt did not receive the written notice of the bankrupt's application for discharge, owing to the fact that the creditor's address was not given in the schedules, although the receiver's name and address were disclosed by the proofs, is an irregularity merely, which is not sufficient ground for setting aside the order for discharge, where the notice was published as required, and in the absence of fraud. *In re Fritz*, (E. D. N. Y. 1909) 173 Fed. 560, 23 Am. Bankr. Rep. 84.

**Application of partner for discharge.**—In voluntary proceedings by a partner wherein his petition prays for adjudication and discharge in his individual capacity and as a member of the firm, it should be stated in the notice to creditors to attend the first meeting that the firm as well as the individual creditors are notified to attend, as the bankrupt is seeking a discharge from both classes of claims. *In re Laughlin*, (1899) 96 Fed. 589. And in the notice to creditors of the filing and hearing upon the petition for discharge, the fact that a release from the firm debts is prayed for should be specifically set forth. *In re Laughlin*, (1899) 96 Fed. 589; *In re Meyers*, (1899) 97 Fed. 757; *In re Russell*, (1899) 97 Fed. 32.

**Notice by publication.**—As to the sufficiency of notice by publication alone of applications for discharge, see notes to section 58b.

**b [First meeting — publication of notice.]** Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct. [(1898) 30 Stat. L. 561.]

As to

Creditors' meetings generally, see the several subdivisions of section 55. Designation of newspapers, see section 28.

**Notice must be published, as required by the statute, in a newspaper, and mailed by the clerk to the creditors.** *In re Hatcher*, (W. D. Tex. 1906) 145 Fed. 658, 16 Am. Bankr. Rep. 722.

**Foundation for notice by publication.**—

Notice by publication to judgment creditors is insufficient to entitle a bankrupt to discharge, unless he shows that the addresses of such creditors cannot be ascertained after diligent search and inquiry. *In re Dvorak*, (N. D. Ia. 1901) 107 Fed. 76, 6 Am. Bankr. Rep. 66.

**c [Notices given by referee.]** All notices shall be given by the referee, unless otherwise ordered by the judge. [(1898) 30 Stat. L. 561.]

As to duty of referee to give notice, see section 39a (4).

**"All" notices.**—This paragraph is not confined to the various notices enumerated in section 58a; hence the notices of a re-examination of a claim as required by General Order No. 21, par. 6 (see *supra*, note to section 30), should be given by the referee, and the duty to give

notice does not rest on the petitioner for re-examination. *In re Stoeve*, (1900) 105 Fed. 355.

In the preliminary matter of calling a meeting of creditors to authorize a trustee to interpose objection to a bankrupt's discharge the general provisions of this section apply. *In re Hockman*, (E. D. Pa. 1912) 205 Fed. 330.

**SEC. 59. WHO MAY FILE AND DISMISS PETITIONS.—a [Voluntary bankrupt.]** Any qualified person may file a petition to be adjudged a voluntary bankrupt. [(1898) 30 Stat. L. 561.]

As to

Practice subsequent to filing of voluntary petition, see section 18g.

Who may be adjudged voluntary bankrupts, see section 4a.

Any qualified person may file a petition

to be adjudged a voluntary bankrupt. *In re Waxelbaum*, (S. D. N. Y. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392; *In re Mussey*, (D. C. Mass. 1900) 99 Fed. 71, 9 Am. Bankr. Rep. 592; *In re Chappell*, (E. D. Va. 1901) 113 Fed. 545, 7 Am

Bankr. Rep. 608; *In re Ives*, (C. C. A. 8th Cir. 1902) 113 Fed. 911, 7 Am. Bankr. Rep. 692; *In re Stegar*, (N. D. Ala. 1902) 113 Fed. 978, 7 Am. Bankr. Rep. 665; *In re Carleton*, (D. C. Mass. 1902) 115 Fed. 246, 8 Am. Bankr. Rep. 270; *Hanover Nat. Bank v. Moyses*, (1902) 8 Am. Bankr. Rep. 1, 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113; *Matter of Carbone*, (D. C. Wash. 1904) 13 Am. Bankr. Rep. 55.

**Filing voluntary petition not act of bankruptcy.**—The filing of a voluntary petition in bankruptcy is not of itself an act of bankruptcy, but simply institutes a proceeding in which the court acquires jurisdiction to adjudge bankruptcy, if the facts warrant such an adjudication. *In re Ceballos*, (D. C. N. J. 1908) 161 Fed. 445, 20 Am. Bankr. Rep. 459.

**Filing not obligatory.**—There is nothing in the law requiring an insolvent person to file a petition under any circumstances. He has the right to do so when he finds that he is unable to pay his debts and desires to make a surrender of his property, under the provisions of the Bankruptcy Act, distribute it equally among his creditors, and be relieved from further liability. The right to file a voluntary petition is a privilege extended by the law, to be exercised or not by a debtor as he may see proper. It is the right of the creditor to institute and prosecute involuntary proceedings, but he cannot, under any conditions, compel the debtor to take the initiative. *Richmond Standard Steel Spike, etc., Co. v. Allen*, (C. C. A. 4th Cir. 1906) 148 Fed. 657, 17 Am. Bankr. Rep. 583.

**Creditors may set up want of jurisdiction.**—Upon the filing of a voluntary petition in bankruptcy, and before an adjudication thereon, creditors may move to set the petition aside or dismiss it, on the ground that the court has no jurisdiction, the residence or domicile of the debtor being in another district; and thereupon the court may inquire into the facts of jurisdiction, and make the adjudication or dismiss the petition according to the result. *In re Waxelbaum*, (S. D. N. Y. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392.

**Effect of previous involuntary petition.**—A debtor may file a voluntary petition in bankruptcy even though his creditors have previously filed a petition in involuntary proceedings against him; in such case, however, the creditors will be notified and such action taken as the court may deem best for the interests of the estate. *In re Waxelbaum*, (S. D. N. Y. 1899) 98 Fed. 589, 3 Am. Bankr. Rep. 392; *In re Dwyer*, (D. C. N. D. 1902) 112 Fed. 777, 7 Am. Bankr. Rep. 532; *In re Stegar*, (N. D. Ala. 1902) 113 Fed. 978, 7 Am. Bankr. Rep. 665.

**Effect of failure to apply for discharge in former proceedings.**—Where the second proceeding is under a voluntary petition filed by the bankrupt, in which he brings

into court no material assets for administration, and the sole purpose is to obtain a discharge from the debts involved in the former proceeding, no ground of relief is presented, and the proceedings should be dismissed as futile; or, at least, further proceedings in the case should be stayed, or the bankrupt restrained and enjoined from filing a petition for discharge therein. *In re Pullian*, (E. D. Tenn. 1909) 171 Fed. 595, 22 Am. Bankr. Rep. 513.

So, also, it has been held that where a bankrupt made no application for a discharge in original bankruptcy proceedings, a judgment subsequently perfected on a claim provable therein does not create a new debt which could form a basis for a subsequent proceeding in bankruptcy. *In re Schnabel*, (E. D. N. Y. 1909) 166 Fed. 383, 23 Am. Bankr. Rep. 22. And see to the same effect *Kuntz v. Young*, (8th Cir. 1904) 131 Fed. 719, 65 C. C. A. 477; *In re Weintraub*, (D. C. N. J. 1905) 133 Fed. 1000, 13 Am. Bankr. Rep. 711; *In re Kuffler*, (2d Cir. 1907) 151 Fed. 12, 80 C. C. A. 508; *In re Kuffler*, (E. D. N. Y. 1907) 155 Fed. 1018; *In re Bramlett*, (N. D. Ga. 1908) 161 Fed. 588. And see also the annotation under section 14 a and b.

Where, however, new creditors are listed in the second proceeding, a different question arises. *In re Pullian*, (E. D. Tenn. 1909) 171 Fed. 595, 22 Am. Bankr. Rep. 513.

**The pendency of proceedings in insolvency, under a state law, on the debtor's voluntary petition, begun before the passage of the Bankruptcy Act, is not sufficient ground for dismissing the debtor's subsequent voluntary petition in bankruptcy, even though he has contracted no new debts.** *In re Mussey*, (D. C. Mass. 1900) 99 Fed. 71, 3 Am. Bankr. Rep. 592.

**Withdrawal of voluntary petition.**—Where a bankrupt, having been discharged in voluntary proceedings on Jan. 17, 1902, filed another voluntary petition on Jan. 11, 1907, it was held that he would not be permitted to withdraw the same over the protest of his creditors because he could not, under section 14b (5), obtain a discharge within twelve months after adjudication. *In re Smith*, (E. D. N. Y. 1907) 155 Fed. 688, 19 Am. Bankr. Rep. 63.

**Corporations.**—Municipal, railroad, insurance, and banking corporations are not entitled to the benefit of the statute as voluntary bankrupts. See section 4a, which, in this respect, was amended in 1910.

**A voluntary petition for adjudication of a corporation as a bankrupt, in the absence of any restriction by statute or by the charter and by-laws, may be filed by authority of the board of directors.** *In re Guanacevi Tunnel Co.* (C. C. A. 2d Cir. 1912) 201 Fed. 316.

**b [Involuntary bankrupt.]** Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt. [(1898) 30 Stat. L. 561.]

As to

Acts of bankruptcy for which petition may be filed, see the several subdivisions of section 3a.

Practice generally subsequent to filing petition, see the several subdivisions of section 18.

Provable claims, see section 63 a and b.

Who may be adjudged, see sections 4a and b, and 5a.

I. Who may file petition in involuntary bankruptcy, 990.

II. Form, averments, and amendment of petition, 994.

#### I. WHO MAY FILE PETITION IN INVOLUNTARY BANKRUPTCY.

Creditors having provable claims.—A petition in involuntary bankruptcy proceedings can only be filed by creditors, in the number and amount specified in section 59b, who have provable claims against the debtor whose adjudication is sought. *Frederick L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591, 21 Am. Bankr. Rep. 484; *In re Mercur*, (E. D. Pa. 1899) 95 Fed. 634, 2 Am. Bankr. Rep. 626; *In re Novak*, (N. D. Ia. 1900) 101 Fed. 800, 4 Am. Bankr. Rep. 311; *In re Gillette* (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 119; *In re Gerson*, (E. D. Pa. 1901) 105 Fed. 891, 5 Am. Bankr. Rep. 89, *affirming* (C. C. A. 3d Cir. 1901) 6 Am. Bankr. Rep. 11; *Boyce v. U. S. Fidelity, etc., Co.*, (C. C. A. 6th Cir. 1901) 111 Fed. 138, 7 Am. Bankr. Rep. 6; *In re Brown*, (E. D. Mo. 1901) 111 Fed. 979, 7 Am. Bankr. Rep. 102; *Phillips v. Dreher Shoe Co.*, (M. D. Pa. 1902) 112 Fed. 400, 7 Am. Bankr. Rep. 326; *In re Schenkein*, (W. D. N. Y. 1902) 113 Fed. 421, 7 Am. Bankr. Rep. 162; *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365, 8 Am. Bankr. Rep. 69; *In re Fishplate Clothing Co.*, (E. D. N. C. 1903) 125 Fed. 986, 11 Am. Bankr. Rep. 204; *Brake v. Callison*, (C. C. A. 5th Cir. 1904) 129 Fed. 201, 11 Am. Bankr. Rep. 797; *In re Rothenberg*, (S. D. N. Y. 1905) 140 Fed. 798, 15 Am. Bankr. Rep. 485; *In re McMurtrey*, (W. D. Tex. 1905) 142 Fed. 853, 15 Am. Bankr. Rep. 427; *In re Ellis*, (C. C. A. 6th Cir. 1906) 143 Fed. 103, 16 Am. Bankr. Rep. 221; *In re Brown*, (C. C. A. 9th Cir. 1908) 164 Fed. 673, 21 Am. Bankr. Rep. 123; *Walker v. Woodside*, (C. C. A. 9th Cir. 1908) 164 Fed. 680, 21 Am. Bankr. Rep. 132; *In re Corwin Mfg. Co.*, (D. C. Mass.

1910) 185 Fed. 976; *In re Eureka Anthracite Coal Co.*, (W. D. Ark. 1912) 197 Fed. 216; *In re Wyoming Valley Cop. Ass'n*, (M. D. Pa. 1912) 198 Fed. 436; *Perkins v. Dorman*, (D. C. N. M. 1913) 206 Fed. 858; *In re Smith*, (N. D. Cal. 1913) 209 Fed. 91; *In re Penzansky*, (D. C. Mass. 1902) 8 Am. Bankr. Rep. 99.

As to what claims are provable, see section 63 a and b.

If a debt is wholly wanting in existence, if it has been paid, for example, or if it has been fabricated for that purpose, the defendant should be allowed to show that fact in some form. *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696.

An adjudication in involuntary proceedings is intended to be the result of the respective rights and obligations of the debtor and his creditors as they exist at the time of the commission of an act of bankruptcy, or of the filing of the petition; but such an adjudication does not concern any one with whom the debtor has never dealt. The court is not, in every case, bound by the mere words of the Act to recognize the holder of a provable claim for the time being as necessarily entitled to maintain an involuntary petition. *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 752, 22 Am. Bankr. Rep. 780.

Persons who have sold and assigned their claims against a debtor have no standing to petition that such debtor be adjudged a bankrupt. *In re Burlington Malting Co.*, (E. D. Wis. 1901) 109 Fed. 777, 6 Am. Bankr. Rep. 369.

The claim need not be proved; if it be a fair and honest claim of debt, which is provable in the sense that it is a claim that the court of bankruptcy after adjudication will hear and establish, if proved, the creditor should not be bound before the adjudication to so prove and establish it, but should be allowed to rely upon its provable quality, *prima facie*, to support an involuntary petition in bankruptcy. *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696.

The petitioner's claim need not be payable, that is, allowable, at the time of the filing of the petition. The mere fact that the claim is a provable one under section 63 is sufficient to warrant the creditor's joining in the petition. *In re Hornstein*, (N. D. N. Y. 1903) 122 Fed. 266, 10 Am. Bankr. Rep. 308; *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696; *In re Rothenberg*, (S. D. N. Y.

1905) 140 Fed. 798, 15 Am. Bankr. Rep. 485.

Thus the owner of a note not yet due, indorsed by an alleged bankrupt, holds a provable claim against him, and may join in a petition to have him adjudged an involuntary bankrupt; the fact that the claim is not allowable until the maturity of the note is immaterial. *In re Rothenberg*, (S. D. N. Y. 1905) 140 Fed. 798, 15 Am. Bankr. Rep. 485.

*Time when petitioner must be creditor.*—There is nothing in section 59, or in any other provision of the Bankruptcy Act, requiring that a petitioning creditor should have been one at the time of the commission of the act of bankruptcy; all that the Act requires is that he have a provable claim against the alleged bankrupt when the petition is filed. *In re Hanyan*, (S. D. N. Y. 1910) 180 Fed. 498. See also *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 752, 22 Am. Bankr. Rep. 780.

But it has been held that a petitioning creditor must have had a provable claim at the time the act of bankruptcy was committed. *Beers v. Hanlin*, (D. C. Ore. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re Brinckmann*, (D. C. Ind. 1900) 103 Fed. 65, 4 Am. Bankr. Rep. 551; *In re Callison*, (S. D. Fla. 1903) 130 Fed. 987, 12 Am. Bankr. Rep. 344, *affirming* (C. C. A. 5th Cir. 1904) 129 Fed. 201, 11 Am. Bankr. Rep. 797.

*Effect of petitioner's subsequent indebtedness to bankrupt's assignee.*—Where the claim of a petitioning creditor was provable, when the petition was filed, for an amount exceeding \$500, it was held to be immaterial that thereafter the creditor became liable to the bankrupt's assignee for the benefit of creditors because of a wrongful attachment. *In re Bevins*, (C. C. A. 2d Cir. 1908) 165 Fed. 434, 21 Am. Bankr. Rep. 344.

*Bankrupt creditor.*—Where one of the petitioners, in a petition in involuntary bankruptcy, becomes a bankrupt before the hearing, his trustee may be substituted in his place as a petitioner. *Hays v. Wagner*, (C. C. A. 6th Cir. 1907) 150 Fed. 533, 18 Am. Bankr. Rep. 163.

*The authority of an agent to act for his principal* in petitioning for an adjudication in involuntary bankruptcy is material, and should be set forth in the affidavit, or otherwise established. *Matter of Livingston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357.

*The president of a corporation may*, under a by-law giving him general authority to transact its business, determine when bankruptcy proceedings should be instituted against its debtor, and his action in that behalf is conclusive until revoked by the board of directors. *In re Winston*, (W. D. Tenn. 1903) 122 Fed. 187, 10 Am. Bankr. Rep. 171.

*Creditors who are stockholders.*—Creditors of a corporation who happen also to be stockholders and directors in the company are not precluded by reason of such relation from commencing proceedings in involuntary bankruptcy against the corporation. But the stockholders of a corporation have no standing either as representatives of the corporation or its creditors to file a petition for the involuntary bankruptcy of the corporation. *In re Eureka Anthracite Coal Co.*, (W. D. Ark. 1912) 197 Fed. 216.

*A relative within the third degree by affinity* may be a sole petitioner in an involuntary proceeding under the second clause of this section. *Perkins v. Dorman*, (D. C. N. M. 1913) 206 Fed. 858.

*Claim by wife of bankrupt.*—Where the state law permits the creation of debts which may be enforced as between husband and wife, and the wife is the actual creditor of her husband in good faith, she has a provable claim in bankruptcy and may join in a petition in involuntary bankruptcy against him, or may alone file a petition against him if his creditors do not number twelve and her claim amounts to \$500 or more. Her claim, however, will be carefully scrutinized in order to protect the rights of other parties. *In re Novak*, (1900) 101 Fed. 800.

*Nature of claims.*—If the petitioning creditors have claims sufficient in number and amount specified in section 59b, to support the proceedings, they are entitled to proceed even though it be against the wish of a much larger number of creditors representing a vastly greater amount of indebtedness. *In re Smith*, (N. D. Cal. 1913) 209 Fed. 91.

*Preferred creditors.*—Since under section 57g a preferred creditor may surrender his preference and obtain the allowance of his claim, he may be a petitioner in involuntary bankruptcy proceedings under section 59b. *Simonson v. Sinsheimer*, (C. C. A. 6th Cir. 1900) 100 Fed. 426, 3 Am. Bankr. Rep. 824; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764, 5 Am. Bankr. Rep. 140; *In re Herzikopf*, (S. D. Cal. 1902) 118 Fed. 101; *In re Hornstein*, (N. D. N. Y. 1903) 122 Fed. 266, 10 Am. Bankr. Rep. 308; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, 17 Am. Bankr. Rep. 609; *In re Norcross*, (W. D. Mo. 1899) 1 Am. Bankr. Rep. 644; *In re Cain*, (N. D. Ill. 1899) 2 Am. Bankr. Rep. 378; *In re Wise*, 2 Nat. Bankr. N. 151.

*Must surrender preference.*—A preferred creditor who petitions in involuntary proceedings must surrender his preference. *In re Rogers' Milling Co.*, (1900) 102 Fed.

687; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764; *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 119; *In re Burlington Malting Co.*, (E. D. Wis. 1901) 109 Fed. 777, 6 Am. Bankr. Rep. 369; *In re Schenkein*, (W. D. N. Y. 1902) 113 Fed. 421, 7 Am. Bankr. Rep. 162; *In re Hornstein*, (N. D. N. Y. 1903) 122 Fed. 266, 10 Am. Bankr. Rep. 308; *In re Fishplate Clothing Co.*, (E. D. N. C. 1903) 125 Fed. 986, 11 Am. Bankr. Rep. 204. See also *Clinton v. Mayo*, (1875) 12 Nat. Bankr. Reg. 39, 5 Fed. Cas. No. 2,899; *In re Israel*, (1875) 3 Dill. 511, 12 Nat. Bankr. Reg. 204, 13 Fed. Cas. No. 7,111; *In re Currier*, (1875) 2 Lowell 436, 13 Nat. Bankr. Reg. 68, 6 Fed. Cas. No. 3,492.

And such creditor will not be counted as a petitioner, in ascertaining whether the required number have joined in the petition, until his preference has been surrendered. *In re Miner*, (D. C. Mass. 1900) 104 Fed. 520; *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123; *In re Hornstein*, (N. D. N. Y. 1903) 122 Fed. 266, 10 Am. Bankr. Rep. 308; *Leighton v. Kennedy*, (1st Cir. 1904) 129 Fed. 737, 64 C. C. A. 265; *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263; *Stevens v. Nave-McCord Mercantile Co.*, (C. C. A. 8th Cir. 1906) 150 Fed. 71, 17 Am. Bankr. Rep. 609.

**Creditors holding unliquidated claims.**—A creditor may join in or file a petition in involuntary bankruptcy even though his claim be an unliquidated one; providing it is capable of being liquidated under section 63b, and provable under section 63a. *Frederick L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591, 21 Am. Bankr. Rep. 484, *affirming* (W. D. N. Y. 1903) 125 Fed. 576, 11 Am. Bankr. Rep. 48, and (C. C. A. 2d Cir. 1904) 130 Fed. 881, 12 Am. Bankr. Rep. 349; *In re Hilton*, (S. D. N. Y. 1900) 104 Fed. 981, 4 Am. Bankr. Rep. 774; *In re Manhattan Ice Co.*, (S. D. N. Y. 1901) 114 Fed. 400, 7 Am. Bankr. Rep. 408; *In re Stern*, (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569.

Formerly, however, it was held that the ownership of an unliquidated claim was insufficient to support an involuntary petition. *Beers v. Hanlin*, (D. C. Ore. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re Brinckmann*, (D. C. Ind. 1900) 103 Fed. 65, 4 Am. Bankr. Rep. 551; *In re Morales*, (S. D. Fla. 1901) 105 Fed. 761, 5 Am. Bankr. Rep. 425; *In re Big Meadows Gas Co.*, (W. D. Pa. 1902) 113 Fed. 974, 7 Am. Bankr. Rep. 697.

**Disqualification of creditors as petitioners**—*Generally*.—A creditor may, by his conduct, disqualify himself as a petitioner in involuntary bankruptcy proceedings; and such disqualification will be deemed to have taken place where it appears that

a creditor, either by fraud, deceit, or unfair dealing, has brought about, or assisted in bringing about, the commission of an act of bankruptcy by the debtor. *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463; *In re Curtis*, (S. D. Ill. 1899) 91 Fed. 737, 1 Am. Bankr. Rep. 440, *affirmed* (C. C. A. 7th Cir. 1899) 94 Fed. 630, 2 Am. Bankr. Rep. 226; *In re Gutwillig*, (C. C. A. 2d Cir. 1899) 92 Fed. 337, 1 Am. Bankr. Rep. 388; *Sinsheimer v. Simonson*, (D. C. Ky. 1899) 96 Fed. 579, *affirmed* (C. C. A. 6th Cir. 1900) 100 Fed. 426, 3 Am. Bankr. Rep. 824; *In re Winston*, (W. D. Tenn. 1903) 122 Fed. 187, 10 Am. Bankr. Rep. 171; *Clark v. Henne*, (C. C. A. 5th Cir. 1904) 127 Fed. 288, 11 Am. Bankr. Rep. 583; *Leighton v. Kennedy*, (C. C. A. 1st Cir. 1904) 129 Fed. 737, 12 Am. Bankr. Rep. 229; *Lowenstein v. Henry McShane Mfg. Co.*, (D. C. Md. 1904) 130 Fed. 1007, 12 Am. Bankr. Rep. 601; *Moulton v. Coburn*, (C. C. A. 1st Cir. 1904) 131 Fed. 201, 12 Am. Bankr. Rep. 553; *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; *In re Weiss*, (E. D. Pa. 1905) 142 Fed. 279; *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772; *Stroheim v. Lewis F. Perry, etc., Co.*, (C. C. A. 1st Cir. 1910) 175 Fed. 52, 23 Am. Bankr. Rep. 695.

**Procuring issuance of execution.**—There is no difference in principle between inducing or participating in an assignment and procuring a judgment creditor to issue execution for the sole purpose of enabling the procurer to file a petition in bankruptcy against a debtor, who, if permitted to utilize his resources, could continue in business and eventually meet all his obligations. *In re Weiss*, (E. D. Pa. 1905) 142 Fed. 279.

**Proceeding in state court.**—A creditor who has instituted a proceeding in a state court for the collection of his debt, on discovering that the debtor has given a preference or transferred his property, has the right, at his election, to abandon such proceedings and file a petition in bankruptcy against his debtor within four months. *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864.

Creditors of an insolvent partnership are not estopped to maintain proceedings to have the firm adjudged an involuntary bankrupt, because of filing and proving their claims in a suit in a state court, under a state statute, for winding up the affairs of a bank owned by the partnership, instituted after the filing of the petition in bankruptcy, where the alleged act of bankruptcy was a conveyance of property not employed in the banking business nor involved in the state suit. *In re Salmon*, (W. D. Mo. 1906) 143 Fed. 395, 16 Am. Bankr. Rep. 122.

**Having receivers appointed.**—But where creditors of a corporation intervened in a suit against it in a state court, and assisted in having receivers appointed, and participated in such proceedings, while large sums were expended and sales of property negotiated by the receivers, they are thereby estopped to subsequently file a petition in bankruptcy based on the appointment of such receivers as an act of bankruptcy. *Lowenstein v. Henry McShane Mfg. Co.*, (D. C. Md. 1904) 130 Fed. 1007, 12 Am. Bankr. Rep. 601; *In re Gold Run Min., etc., Co.*, (D. C. Colo. 1912) 200 Fed. 162.

A surety who has not taken up the obligation has no provable claim, and therefore has no standing as a petitioner. "All that he can do is to prove the claim later on, if the creditor fails to do so [see section 57:] after somebody else has moved." *Phillips v. Dreher Shoe Co.*, (1902) 112 Fed. 404.

**Attachment creditor.**—An attachment creditor whose attachment was permitted under such circumstances as to constitute a preference cannot maintain a petition in involuntary bankruptcy against his debtor, since, under sections 67c and d/g, he has no provable claim, unless he formally releases his levy. *In re Burlington Malting Co.*, (1901) 109 Fed. 777.

Under the Act of 1867, the general proposition was upheld that an attaching creditor could not institute bankruptcy upon his claim while retaining his levy, the dual positions being antagonistic under the fundamental doctrine of the Bankrupt Law that equality is equity. See *In re Hazens*, (1877) 4 Dill. 549, 11 Fed. Cas. No. 6,285; *In re Scrafford*, (1877) 4 Dill. 376, 21 Fed. Cas. No. 12,556; *In re Jewett*, (1876) 7 Biss. 242, 13 Fed. Cas. No. 7,305; *In re Rado*, (1872) 6 Ben. 230, 20 Fed. Cas. No. 11,522.

**Splitting claims.**—Creditors who have split up claims for the sole purpose of using them in order to make up the required number of creditors or amount of indebtedness thereby disqualify themselves as petitioners in involuntary proceedings. *Leighton v. Kennedy*, (C. C. A. 1st Cir. 1904) 129 Fed. 737, 12 Am. Bankr. Rep. 229; *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772; *Stroheim v. Lewis F. Perry, etc., Co.*, (C. C. A. 1st Cir. 1910) 175 Fed. 52, 23 Am. Bankr. Rep. 695; *In re Pangborn*, (W. D. Mich. 1910) 185 Fed. 673.

But where there are no objectionable features connected with the transaction, claims against a bankrupt may be purchased in order to make up the requisite number of petitioning creditors to sustain an involuntary petition. *In re Bevins*, (C. C. A. 2d Cir. 1908) 165 Fed. 434, 21 Am. Bankr. Rep. 344.

1 F. S. A.—63

Thus it has been held that a creditor is not disqualified as a petitioner because he acquired a claim by assignment after commission of an act of bankruptcy. *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772.

**And, generally, where the conduct of a creditor is fair**, and consistent with an honest effort to secure the payment of a just indebtedness, he will not be disqualified as a petitioner by the fact that he advised, or aided in fairly bringing about, the bankruptcy proceeding. *In re Worcester County*, (C. C. A. 1st Cir. 1900) 102 Fed. 808, 4 Am. Bankr. Rep. 496; *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123; *In re Burlington Malting Co.*, (E. D. Wis. 1901) 109 Fed. 777, 6 Am. Bankr. Rep. 369; *In re Brown*, (E. D. Mo. 1901) 111 Fed. 979, 7 Am. Bankr. Rep. 102; *In re Hornstein*, (N. D. N. Y. 1903) 122 Fed. 266; *Lowenstein v. Henry McShane Mfg. Co.*, (D. C. Md. 1904) 130 Fed. 1007, 12 Am. Bankr. Rep. 601; *Woolford v. Diamond State Steel Co.*, (D. C. Del. 1906) 138 Fed. 582, 15 Am. Bankr. Rep. 31; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *In re Mertens*, (6th Cir. 1906) 147 Fed. 177, 77 C. C. A. 473; *In re Bevins*, (C. C. A. 2d Cir. 1908) 165 Fed. 434, 21 Am. Bankr. Rep. 344; *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864.

**Disqualification by participation in general assignment.**—A creditor who has assented to a general assignment for the benefit of creditors is, as a general rule, disqualified thereby as a petitioner in subsequent involuntary proceedings in bankruptcy against the assignor, where an adjudication is sought on the ground that the assignment constitutes an act of bankruptcy. *In re Romanow*, (D. C. Mass. 1899) 92 Fed. 510, 1 Am. Bankr. Rep. 461; *In re Miner*, (D. C. Mass. 1900) 104 Fed. 520, 4 Am. Bankr. Rep. 710; *Durham Paper Co. v. Seaboard Knitting Mills*, (E. D. N. C. 1903) 121 Fed. 179, 10 Am. Bankr. Rep. 29, *distinguishing In re Curtis*, (C. C. A. 7th Cir. 1899) 94 Fed. 630, 2 Am. Bankr. Rep. 226; *Moulton v. Coburn*, (C. C. A. 1st Cir. 1904) 131 Fed. 201, 12 Am. Bankr. Rep. 553; *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772; *Stroheim v. Lewis F. Perry, etc., Co.*, (C. C. A. 1st Cir. 1910) 175 Fed. 52, 23 Am. Bankr. Rep. 695; *Despres v. Galbraith*, (C. C. A. 8th Cir. 1914) 213 Fed. 190; *Utz, etc., Co. v. Regulator Co.*, (C. C. A. 8th Cir. 1914) 213 Fed. 315; *In re Commonwealth Lumber Co.*, (W. D. Wash. 1915) 223 Fed. 667.

**Effect of fraud, or nonassenting participation.**—Creditors who are fraudulently

induced to participate in a general assignment, or whose participation therein cannot be said to signify an assent thereto, are not precluded from filing a petition in involuntary bankruptcy against the assignor, or from joining in such a petition. *In re Curtis*, (C. C. A. 7th Cir. 1899) 94 Fed. 630, 2 Am. Bankr. Rep. 226; *Durham Paper Co. v. Seaboard Knitting Mills*, (E. D. N. C. 1903) 121 Fed. 179, 10 Am. Bankr. Rep. 29; *Hays v. Wagner*, (C. C. A. 6th Cir. 1907) 150 Fed. 533, 18 Am. Bankr. Rep. 163; *Canner v. Webster Tapper Co.*, (C. C. A. 1st Cir. 1909) 168 Fed. 519, 21 Am. Bankr. Rep. 872; *In re Lewis F. Perry, etc., Co.*, (D. C. Mass. 1909) 172 Fed. 745, 22 Am. Bankr. Rep. 772; *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870. See also *In re Hirose*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 154.

So likewise there is no estoppel if the creditor has not in any positive manner ratified the assignment. *Simonson v. Sinsheimer*, (C. C. A. 1900) 100 Fed. 426, *affirming* (D. C. Ky. 1899) 96 Fed. 579. See also *In re Curtis*, (C. C. A. 1899) 94 Fed. 630; *In re Gillette*, (1900) 104 Fed. 769.

**Officer's assent as individual does not disqualify corporation creditor.**—The fact that an officer of a corporation creditor of a bankrupt agreed to act as the bankrupt's assignee in his capacity as an individual only does not estop the corporation, which was not a preferred creditor under the assignment, from joining in a petition to have the debtor declared an involuntary bankrupt. *In re Winston*, (W. D. Tenn. 1903) 122 Fed. 187, 10 Am. Bankr. Rep. 171.

**Submission of claim to assignee for comparison.**—Creditors are not estopped to maintain a petition on the ground of their having participated in proceedings under an assignment, where they submitted to the assignee, at his request, unverified statements of their claims, merely for the purpose of enabling him to compare the same with the entries in the insolvent's books. *Simonson v. Sinsheimer*, (C. C. A. 6th Cir. 1900) 100 Fed. 426, 3 Am. Bankr. Rep. 824.

**Participation for purpose of attacking assignment.**—A creditor who goes into the state court for the purpose of attacking as fraudulent certain alleged preferences in a general assignment does not thereby waive his right to file a petition in involuntary bankruptcy against the assignor. *Leidigh Carriage Co. v. Stengel*, (C. C. A. 6th Cir. 1899) 95 Fed. 637, 2 Am. Bankr. Rep. 385.

**Delay in instituting bankruptcy proceedings.**—Nor are creditors estopped from maintaining a petition because, having knowledge of an assignment and of the acts of the assignee thereunder, they delayed instituting proceedings in bankruptcy for about two months. *Simonson*

*v. Sinsheimer*, (C. C. A. 6th Cir. 1900) 100 Fed. 426, 3 Am. Bankr. Rep. 824, *affirming* (D. C. Ky. 1899) 96 Fed. 579.

## II. FORM, AVERMENTS, AND AMENDMENT OF PETITION.

**Form.**—Petitions in bankruptcy should be made out in accordance with the forms and general orders in bankruptcy prescribed by the Supreme Court. *Mahoney v. Ward*, (E. D. N. C. 1900) 100 Fed. 278, 3 Am. Bankr. Rep. 770; *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673; *Sabin v. Blake-McFall Co.*, (C. C. A. 9th Cir. 1915) 223 Fed. 501. See also *Matter of Wing Yick Co.*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 757; *Matter of Gorman*, (D. C. Hawaii 1906) 15 Am. Bankr. Rep. 587. And see General Order No. 5 and Form No. 3.

**Prayer for intervention in earlier proceeding.**—Where an involuntary bankruptcy petition was in fact an original petition, it will not be deprived of its status as such by the fact that it contained a prayer of the petitioner to intervene in earlier proceedings as a cautionary measure, in order that the petitioner might be represented in the proceedings on the earlier petition for the administration and preservation of the estate. *In re Haff*, (2d Cir. 1905) 136 Fed. 78, 68 C. C. A. 646, 13 Am. Bankr. Rep. 362.

**Assignee under general assignment cannot be joined with bankrupt.**—The statute contains no specific provision authorizing any third person to be joined as a party to a petition in involuntary bankruptcy; and, even conceding that a general assignee of the alleged bankrupt is a proper party, it can only be for the purpose of enabling him to contest the adjudication, the result of which might be to prejudice his rights as assignee. He cannot, by being so joined, be thus brought into the case for the purposes of all future inquiries and determinations made during the administration of the estate. *Sinsheimer v. Simonson*, (C. C. A. 6th Cir. 1901) 107 Fed. 898, 5 Am. Bankr. Rep. 537.

**Averment of facts.**—All jurisdictional facts must affirmatively and distinctly appear in the petition; and all issuable facts should be set out clearly and with reasonable certainty. *In re Cliffe*, (E. D. Pa. 1899) 94 Fed. 354, 2 Am. Bankr. Rep. 317; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 124; *In re Nelson*, (W. D. Wis. 1899) 98 Fed. 76, 2 Am. Bankr. Rep. 556; *In re Plotke*, (7th Cir. 1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171; *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 121; *Clark v. Henne*, (C. C. A. 5th Cir. 1904) 127 Fed.



288, 11 Am. Bankr. Rep. 583; *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171; *In re Vetterman*, (D. C. N. H. 1905) 135 Fed. 443, 14 Am. Bankr. Rep. 245; *In re Hark*, (E. D. Pa. 1905) 135 Fed. 603, 14 Am. Bankr. Rep. 400; *In re Flint Hill Stone, etc., Co.*, (N. D. N. Y. 1907) 149 Fed. 1007, 18 Am. Bankr. Rep. 83; *Hoffschlaeger Co. v. Young Nap*, (D. C. Hawaii 1904) 12 Am. Bankr. Rep. 510.

*Time of objecting for insufficiency.*—After verdict or judgment an objection that the petition fails to state facts sufficient to constitute a cause of action is tenable only when the pleading fails to allege the substance or foundation of a cause of action; and the petition is impregnable to attack because it is otherwise defective, informal, indefinite, or incomplete, even though it was demurrable before answer or judgment. *In re Belle Fourche First Nat. Bank*, (C. C. A. 8th Cir. 1907) 152 Fed. 64, 18 Am. Bankr. Rep. 265.

*Averment as to amenability of debtor.*—A petitioner in involuntary bankruptcy must show that the defendant is not within one of the classes excepted from the operation of the Act, either by a negative averment to that effect or by a direct averment of his principal business. *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *In re Taylor*, (C. C. A. 7th Cir. 1900) 102 Fed. 728, 4 Am. Bankr. Rep. 515; *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484; *Green River Deposit Bank v. Craig*, (W. D. Ky. 1901) 110 Fed. 137, 6 Am. Bankr. Rep. 381; *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *Beach v. Macon Grocery Co.*, (C. C. A. 5th Cir. 1903) 120 Fed. 736, 9 Am. Bankr. Rep. 782; *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171; *Callison v. Brake*, (C. C. A. 5th Cir. 1904) 129 Fed. 196, 11 Am. Bankr. Rep. 797; *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492; *Woolford v. Diamond State Steel Co.*, (D. C. Del. 1905) 138 Fed. 582, 15 Am. Bankr. Rep. 33; *In re Callison*, (S. D. Fla. 1903) 130 Fed. 987, 12 Am. Bankr. Rep. 344; *In re Blumberg*, (E. D. Pa. 1904) 133 Fed. 845, 13 Am. Bankr. Rep. 343; *In re White*, (E. D. Pa. 1905) 135 Fed. 199, 14 Am. Bankr. Rep. 241; *Rise v. Bordner*, (M. D. Pa. 1905) 140 Fed. 566, 15 Am. Bankr. Rep. 297; *Edelstein v. U. S.*, (C. C. A. 8th Cir. 1906) 149 Fed. 636, 17 Am. Bankr. Rep. 649; *Matter of Livingston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357; *In re Lackow*, (E. D. Pa. 1905) 15 Am. Bankr. Rep. 826.

Thus it is necessary to aver, in a petition for involuntary bankruptcy, that the alleged bankrupt is not a wage-earner, nor engaged chiefly in farming or the tillage of the soil, unless the other averments

sufficiently exclude the fact of such occupation. *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *Matter of Livingston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357.

*Petition subject to demurrer.*—A petition in involuntary bankruptcy which does not show the business of the defendant, or that he does not come within the excepted classes, is subject to demurrer on such grounds. *In re Taylor*, (C. C. A. 7th Cir. 1900) 102 Fed. 728, 4 Am. Bankr. Rep. 515.

*Number of creditors and amount of claims.*—A petition in involuntary bankruptcy proceedings must aver the existence of the number of creditors, and the amount of claims, necessary to warrant the filing of such petition. *In re Tierre*, (S. D. N. Y. 1899) 95 Fed. 425, 2 Am. Bankr. Rep. 493; *In re Blair*, (S. D. N. Y. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588; *In re Mason*, (W. D. N. C. 1900) 99 Fed. 256, 3 Am. Bankr. Rep. 599; *In re Rogers Milling Co.*, (W. D. Ark. 1900) 102 Fed. 687, 4 Am. Bankr. Rep. 540; *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 119; *In re Plotke*, (C. C. A. 7th Cir. 1900) 104 Fed. 964, 5 Am. Bankr. Rep. 175; *In re Mammoth Pine Lumber Co.*, (W. D. Ark. 1901) 109 Fed. 308, 6 Am. Bankr. Rep. 84; *In re Brown*, (E. D. Mo. 1901) 111 Fed. 979, 7 Am. Bankr. Rep. 102; *In re Independent Thread Co.*, (D. C. N. J. 1902) 113 Fed. 998, 7 Am. Bankr. Rep. 704; *In re Stein*, (E. D. Pa. 1904) 130 Fed. 377, 12 Am. Bankr. Rep. 384; *Moulton v. Coburn*, (C. C. A. 1st Cir. 1904) 131 Fed. 201, 12 Am. Bankr. Rep. 553; *In re White*, (E. D. Pa. 1905) 135 Fed. 199, 14 Am. Bankr. Rep. 241; *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665; *In re Tribelhorn*, (C. C. A. 2d Cir. 1905) 137 Fed. 3, 14 Am. Bankr. Rep. 492; *In re Lackow*, (E. D. Pa. 1905) 140 Fed. 573, 14 Am. Bankr. Rep. 514; *C. C. Taft Co. v. Century Sav. Bank*, (C. C. A. 8th Cir. 1905) 141 Fed. 369, 15 Am. Bankr. Rep. 594; *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; *In re Hughes*, (S. D. N. Y. 1910) 183 Fed. 872; *In re Stone*, (E. D. Pa. 1913) 206 Fed. 356; *In re Norcross*, (W. D. Mo. 1899) 1 Am. Bankr. Rep. 645; *In re Cain*, (N. D. Ill. 1899) 2 Am. Bankr. Rep. 378.

*The actual amount due to petitioners is immaterial*, providing they are creditors to an extent sufficient to satisfy the Act. *In re Hughes*, (S. D. N. Y. 1910) 183 Fed. 872.

Where a petition shows on its face a sufficient petitioning creditor, and there is established upon the trial a sufficient petitioning creditor, the absence of a statement of amount in the petition may be disregarded. *In re Pangborn*, (W. D. Mich. 1910) 185 Fed. 673.

*To entitle less than three creditors to*

**maintain a petition** in involuntary bankruptcy, it must appear that there were less than twelve creditors at the date of the filing of the petition. *Moulton v. Coburn*, (C. C. A. 1st Cir. 1904) 131 Fed. 201, 12 Am. Bankr. Rep. 553.

**The statutory right of a single creditor to have his debtor adjudged a bankrupt** exists only under special circumstances, namely, that his claim shall be sufficient in amount, and that all of the creditors shall be less than twelve. *Moulton v. Coburn*, (C. C. A. 1st Cir. 1904) 131 Fed. 201, 12 Am. Bankr. Rep. 553.

**Time to ascertain number of creditors and amount of claims.**—The time of the adjudication in bankruptcy, and not the time of the institution of the proceedings, is the time to test the sufficiency of the number of the petitioning creditors, and of the amount of their claims, to warrant the adjudication. *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665.

**Creditors competent to joint in a petition subsequent to its filing**, who are otherwise competent to appear, may be counted in making up the number of creditors and amount of claims required by this section. *In re Romanow*, (1899) 92 Fed. 510; *In re Mercur*, (1899) 95 Fed. 634.

**Preferred creditors counted.**—Since the claims of preferred creditors are provable debts on surrender or recovery of the preference, they must be taken into account in determining the amount of indebtedness. *In re Tierre*, (S. D. N. Y. 1899) 95 Fed. 425; *In re McMurtrey*, (W. D. Tex. 1905) 142 Fed. 853, 15 Am. Bankr. Rep. 427; *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870.

**Nature of claims.**—If the petitioning creditors have claims sufficient in number and amount specified in section 59b, to support the proceedings, they are entitled to proceed, even though it be against the wish of a much larger number of creditors representing a vastly greater amount of indebtedness. *In re Smith*, (N. D. Cal. 1913) 209 Fed. 91.

**Debtor cannot evade statute by transfer.**—An insolvent having more than twelve creditors cannot defeat bankruptcy proceedings against him by transferring his property for the benefit of some of his creditors, leaving less than three unprovided for, but leaving them to be counted so that those remaining will be insufficient in number to maintain a petition in bankruptcy. *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97. See also *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870.

**Averment of commission of act of bankruptcy.**—The petition must allege the commission of an act of bankruptcy by the debtor; and such averment must be supported by such allegations of fact as are essential to bring the proceeding within the language of the statute. *Davis*

*v. Stevens*, (D. C. S. D. 1900) 104 Fed. 235, 4 Am. Bankr. Rep. 763; *In re Ewing*, (C. C. A. 2d Cir. 1902) 115 Fed. 707, 8 Am. Bankr. Rep. 269; *Bradley Timber Co. v. White*, (C. C. A. 5th Cir. 1903) 121 Fed. 779, 10 Am. Bankr. Rep. 329; *In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598. See also *Seaboard Steel Casting Co. v. William R. Trigg Co.*, (E. D. Va. 1903) 124 Fed. 75, 10 Am. Bankr. Rep. 594; *In re Vetterman*, (D. C. N. H. 1905) 135 Fed. 443, 14 Am. Bankr. Rep. 245; *In re Stone*, (E. D. Pa. 1913) 206 Fed. 356; *In re Louisell Lumber Co.*, (C. C. A. 5th Cir. 1913) 209 Fed. 784. And see generally the annotation under the several subdivisions of section 3a as to what constitutes acts of bankruptcy, and the constituent elements thereof.

**May allege several acts of bankruptcy.**—A petition is not objectionable for the joinder of several acts of bankruptcy which are known to the creditors, and which were committed by the insolvent within four months prior to the filing of the petition. *Bradley Timber Co. v. White*, (C. C. A. 5th Cir. 1903) 121 Fed. 779, 10 Am. Bankr. Rep. 329; *In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598.

**Sufficiency of averment.**—An allegation of the commission of an act of bankruptcy in a creditors' petition should state the specific fact relied on, with time, place, and circumstances, so that the alleged bankrupt may be distinctly apprised of what he is required to answer. Therefore an allegation that the defendant committed various and sundry acts of bankruptcy by paying several of his creditors various sums of money while insolvent, with intent to give preferences, without stating the names of the creditors or the sums so paid, is wholly insufficient. *Clark v. Henne*, (C. C. A. 5th Cir. 1904) 127 Fed. 288, 11 Am. Bankr. Rep. 583.

Petitioning creditors are bound to as full a disclosure in their petition in respect to the acts of bankruptcy charged as their information enables them to make, supplemented by an explanation of its lack of completeness, so far as it may be thus lacking, and their case must rest on something more than rumor or vague hearsay or mere suspicion. *In re Blumberg*, (E. D. Pa. 1904) 133 Fed. 845, 13 Am. Bankr. Rep. 343.

**Language of Act insufficient.**—Allegations of acts of bankruptcy, in an involuntary petition, in the language of the Act, without setting forth any other facts or circumstances, are usually insufficient. *In re Hark*, (E. D. Pa. 1905) 135 Fed. 603, 14 Am. Bankr. Rep. 400.

**Averment of intent.**—It is well settled that general averments without any specification sufficient to apprise the alleged bankrupt of the charge against him so as

to enable him to answer it are not sufficient. Thus an averment that the bankrupt had made transfers to hinder, delay or defraud creditors and transfers with intent to prefer creditors was held to be insufficient where there was no specification of any of the acts and no facts in relation thereto set forth. *In re Condon*, (C. C. A. 2d Cir. 1913) 209 Fed. 800; *In re Rosenblatt*, (C. C. A. 2d Cir. 1912) 193 Fed. 638.

An averment that, "while insolvent, the debtors transferred portions of their property to one or more of their creditors, with intent to prefer such creditors over their other creditors," has been held to be insufficient because of the failure to specifically state the particulars of such transfer, by describing the property transferred, and when and to whom the same was made. *Conway v. German*, (C. C. A. 4th Cir. 1908) 166 Fed. 67, 21 Am. Bankr. Rep. 577.

In the case of *In re Ewing*, C. C. A. 2d Cir. 1902) 115 Fed. 707, 8 Am. Bankr. Rep. 269, it was held that a petition alleging payments to a creditor while insolvent as an act of bankruptcy was demurrable, unless it further averred that such payments were made with intent to prefer such creditor over the other creditors.

Since the amendment of 1910, it seems that the averment should be as to a reasonable cause to believe that the transaction would effect a preference. See section 60b.

*Fraudulent concealment* may be shown as well by circumstantial as by direct evidence, and where the evidence is wholly circumstantial it is impossible, and therefore unnecessary, to aver in the petition the precise details of the act of concealment. *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171.

*Preferential payments*.—A petition in involuntary bankruptcy, which alleges as an act of bankruptcy preferential payments made by the bankrupt to certain creditors within four months and while insolvent, should set out the names of the creditors to whom such payments were made, if known; but if the petitioners do not know their names the petition is good, although it may only aver in general terms that the payments were made, adding a sufficient reason why a more specific allegation is not possible. *In re Lackow*, (E. D. Pa. 1905) 140 Fed. 573, 14 Am. Bankr. Rep. 514.

*Unnecessary averments*.—Only the constituent elements of the act charged need be alleged; thus, where insolvency is not essential to the commission of an act of bankruptcy, it need not be averred in the petition; and if averred, it need not be proved. See *George M. West Co. v. Lea*, (1899) 174 U. S. 590, 19 S. Ct. 836, 43

U. S. (L. ed.) 1098, 2 Am. Bankr. Rep. 463.

*Amendment of petition*.—Under its general powers, the court of bankruptcy may permit the amendment of involuntary petitions in bankruptcy, to the same extent as amendments of pleadings are allowed in other proceedings; and such amendments, when allowed, relate back to the filing of the original petition. *Armstrong v. Fernandez*, (1908) 208 U. S. 324, 28 S. Ct. 419, 52 U. S. (L. ed.) 514, 19 Am. Bankr. Rep. 746; *In re Ogles*, (W. D. Tenn. 1899) 93 Fed. 426, 1 Am. Bankr. Rep. 671; *In re Cliffe*, (E. D. Pa. 1899) 94 Fed. 354, 2 Am. Bankr. Rep. 317; *In re Hartman*, (N. D. Ia. 1899) 96 Fed. 593; *In re Nelson*, (W. D. Wis. 1899) 98 Fed. 76, 2 Am. Bankr. Rep. 556; *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577; *In re Beerman*, (N. D. Ga. 1901) 112 Fed. 662, 7 Am. Bankr. Rep. 434; *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *In re Mercur*, (C. C. A. 3d Cir. 1903) 122 Fed. 384, 10 Am. Bankr. Rep. 505, (E. D. Pa. 1899) 2 Am. Bankr. Rep. 626; *Beach v. Macon Grocery Co.*, (C. C. A. 5th Cir. 1903) 125 Fed. 736, 9 Am. Bankr. Rep. 762; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171; *In re Riggs Restaurant Co.*, (C. C. A. 2d Cir. 1904) 130 Fed. 691, 11 Am. Bankr. Rep. 508; *In re Blumberg*, (E. D. Pa. 1904) 133 Fed. 845, 13 Am. Bankr. Rep. 343; *In re White*, (E. D. Pa. 1905) 135 Fed. 200, 14 Am. Bankr. Rep. 241; *In re Shoesmith*, (C. C. A. 7th Cir. 1905) 135 Fed. 684, 13 Am. Bankr. Rep. 645; *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665; *In re Haff*, (C. C. A. 2d Cir. 1905) 136 Fed. 78, 13 Am. Bankr. Rep. 362; *Wilder v. Watts*, (D. C. S. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57; *Woolford v. Diamond State Steel Co.*, (D. C. Del. 1905) 138 Fed. 582, 15 Am. Bankr. Rep. 31; *Chicago Motor Vehicle Co. v. American Oak Leather Co.*, (7th Cir. 1905) 141 Fed. 518, 72 C. C. A. 576, 15 Am. Bankr. Rep. 804; *In re Hark*, (E. D. Pa. 1905) 142 Fed. 279; *Gleason v. Smith*, (C. C. A. 3d Cir. 1906) 145 Fed. 895, 16 Am. Bankr. Rep. 602; *In re Pure Milk Co.*, (S. D. Ala. 1907) 154 Fed. 682, 18 Am. Bankr. Rep. 735; *In re Crenshaw*, (S. D. Ala. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502; *In re Hammond*, (E. D. N. Y. 1908) 163 Fed. 548, 20 Am. Bankr. Rep. 776; *Conway v. German*, (C. C. A. 4th Cir. 1908) 166 Fed. 67, 21 Am. Bankr. Rep. 577; *Ryan v. Hendricks*, (C. C. A. 7th Cir. 1908) 166 Fed. 94, 21 Am. Bankr. Rep. 570; *Iowa First State Bank v. Haswell*, (C. C. A. 8th Cir. 1909) 174 Fed. 209, 23 Am. Bankr. Rep. 330; *Millan v. Exchange Bank*, (C. C. A. 4th Cir. 1910) 183 Fed. 753; *In re Richardson*, (D. C.

Mass. 1911) 192 Fed. 50; *In re Louisell Lumber Co.*, (C. C. A. 5th Cir. 1913) 209 Fed. 784.

*But the rule that an amendment will relate back* so as to take effect as of the date when the original petition is filed, does not apply where the amendment sets up a new cause of action or where to cause it to relate back would deprive an adverse party of a substantial right on which no attack was made in the original pleading. *In re Louisell Lumber Co.*, (C. C. A. 5th Cir. 1913) 209 Fed. 784.

*While rule 11 of the general orders in bankruptcy deals with amendments to a petition and schedules*, it was not intended to abrogate or restrict the court's general power of amendment in other respects. *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310.

*Discretion of court.*—The whole matter of permitting or refusing amendments in bankruptcy proceedings in the federal courts rests entirely in the sound judicial discretion of the lower court, and, in accordance with the general rule, its decision will not be interfered with by a reviewing court, unless abuse of discretion has been shown. *Sabin v. Blake-McFall Co.*, (C. C. A. 9th Cir. 1915) 223 Fed. 501.

*Effect on four months period.*—The date of the amendment must be taken as the date from which the four months period of section 3b is to be calculated. *In re Condon*, (C. C. A. 2d Cir. 1913) 209 Fed. 800.

*Amendment of statement of facts.*—Thus a petition in involuntary bankruptcy may be amended to set forth more fully and clearly the facts which show that an adjudication should be made. *Ryan v. Hendricks*, (C. C. A. 7th Cir. 1908) 166 Fed. 94, 21 Am. Bankr. Rep. 570.

*Amendment to show claims of petitioners.*—And a petition may be amended to describe more fully and in detail the claims of the petitioners, if deemed insufficient in that respect. *Conway v. German*, (C. C. A. 4th Cir. 1908) 166 Fed. 67, 21 Am. Bankr. Rep. 577.

*Amendment to correct name.*—So, also, the court may permit the amendment of an involuntary petition, correcting the name of the alleged bankrupt. *Gleason v. Smith*, (C. C. A. 3d Cir. 1906) 145 Fed. 895, 16 Am. Bankr. Rep. 602.

*Amended petition cannot be converted into an original.*—An amended petition in bankruptcy executed as such by a creditor to be filed in proceedings previously instituted, cannot, after such execution, and after the proceedings have been dismissed by the court, be converted into an original petition by striking out the word "amended," and be made the basis of a new and independent proceeding; and where it has been so filed it will be dismissed on the facts being made to appear

to the court. *In re Hyde, etc., Mfg. Co.*, (E. D. N. Y. 1900) 103 Fed. 617, 4 Am. Bankr. Rep. 602.

*Amendment of fatal defects.*—Where the petition is fatally defective, an amendment thereof will not be allowed, unless the cause of the error in the original petition is shown, as required by General Order in Bankruptcy No. 11. *White v. Bradley Timber Co.*, (S. D. Ala. 1902) 116 Fed. 768, 8 Am. Bankr. Rep. 671; *Wilder v. Watts*, (D. C. S. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57; *Woolford v. Diamond State Steel Co.*, (D. C. Del. 1905) 138 Fed. 582, 15 Am. Bankr. Rep. 31; *In re Portner*, (E. D. Pa. 1907) 149 Fed. 799, 18 Am. Bankr. Rep. 89; *In re Pure Milk Co.*, (S. D. Ala. 1907) 154 Fed. 682, 18 Am. Bankr. Rep. 735. See also *In re Sears*, (C. C. A. 2d Cir. 1902) 117 Fed. 294, 8 Am. Bankr. Rep. 713.

*Jurisdictional defects.*—Where a sufficient cause therefor is shown the federal courts have power to permit amendments of pleadings by the insertion or correction of jurisdictional as well as other averments. *In re Blair*, (S. D. N. Y. 1900) 99 Fed. 76, 3 Am. Bankr. Rep. 588; *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665; *In re Hammond*, (E. D. N. Y. 1908) 163 Fed. 548, 20 Am. Bankr. Rep. 776.

And it has been held that jurisdictional defects in bankruptcy proceedings should be considered by the court, even though called to its attention by creditors having no standing to contest the adjudication on its merits. *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 166 Fed. 284, 21 Am. Bankr. Rep. 531.

But it was held that leave to amend should not be granted where the effect will be to withdraw the administration of the property from the then Circuit Court, unless for cogent reasons. *Woolford v. Diamond State Steel Co.*, (D. C. Del. 1905) 138 Fed. 582, 15 Am. Bankr. Rep. 31.

*Amendment of allegation as to act of bankruptcy.*—The averments as to the acts of bankruptcy charged in the petition may be amended so as to cure any defect therein. *In re Laughlin*, (N. D. Ia. 1899) 96 Fed. 589, 3 Am. Bankr. Rep. 1; *In re Hark*, (E. D. Pa. 1905) 142 Fed. 279; *Iowa First State Bank v. Haswell*, (C. C. A. 8th Cir. 1909) 174 Fed. 209, 23 Am. Bankr. Rep. 330.

*Additional acts of bankruptcy* may also, in the discretion of the court, be inserted by amendment. *In re Mercur*, (E. D. Pa. 1899) 95 Fed. 634, 2 Am. Bankr. Rep. 626; *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231; *In re Miller*, (W. D. N. Y. 1900) 104 Fed. 764; *In re Nusbaum*, (N. D. N. Y. 1907) 152 Fed. 835, 18 Am. Bankr. Rep. 598; *Pittsburgh Laundry Supply Co. v. Imperial*

Laundry Co., (C. C. A. 3d Cir. 1907) 154 Fed. 662, 18 Am. Bankr. Rep. 756; *In re Cleary*, (E. D. Pa. 1910) 179 Fed. 990.

But where a proposed amendment to an involuntary bankruptcy petition seeks to plead alleged acts of bankruptcy occurring subsequently to those stated in the original petition, which must have been known to some of the original petitioners at the time such original petition was filed, and the alleged amendment is not served on the bankrupt, and no excuse is offered why the acts sought to be so pleaded were omitted from the original petition, leave to file such amendment will be denied. *Wilder v. Watts*, (D. C. S. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57.

It has also been held that the original bankruptcy petition cannot be amended by setting out acts of bankruptcy not therein referred to, and occurring more than four months before the application for an order allowing the amendment. *In re Haff*, (2d Cir. 1905) 136 Fed. 78, 68 C. C. A. 646, 13 Am. Bankr. Rep. 362; *In re Pure Milk Co.*, (S. D. Ala. 1907) 154 Fed. 682, 18 Am. Bankr. Rep. 735; *Walker v. Woodside*, (C. C. A. 9th Cir. 1908) 164 Fed. 680, 21 Am. Bankr. Rep. 132.

**Amendment of allegation as to amenability of debtor.**—Averments showing the amenability of the debtor to bankruptcy proceedings may also be permitted. *Armstrong v. Fernandez*, (1908) 208 U. S. 324, 28 S. Ct. 419, 52 U. S. (L. ed.) 514, 19 Am. Bankr. Rep. 746; *Beach v. Macon*

*Grocery Co.*, (C. C. A. 5th Cir. 1903) 120 Fed. 736, 9 Am. Bankr. Rep. 762; *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492; *In re White*, (E. D. Pa. 1905) 135 Fed. 199, 14 Am. Bankr. Rep. 241; *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665; *In re Crenshaw*, (S. D. Ala. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502; *Conway v. German*, (C. C. A. 4th Cir. 1908) 166 Fed. 67, 21 Am. Bankr. Rep. 577; *In re Marion Contract, etc., Co.*, (W. D. Ky. 1909) 166 Fed. 618, 22 Am. Bankr. Rep. 81.

**Time when amendment may be made.**—For the purpose of curing ordinary defects and omissions an amendment will be allowed at any time during the pendency of the proceedings, such allowance being within the legal discretion of the court. *In re Mercur*, (E. D. Pa. 1902) 116 Fed. 655, 8 Am. Bankr. Rep. 275; *In re Mercur*, (C. C. A. 3d Cir. 1903) 122 Fed. 384, 10 Am. Bankr. Rep. 505; *Hark v. C. M. Allen Co.*, (C. C. A. 3d Cir. 1906) 146 Fed. 665, 17 Am. Bankr. Rep. 3; *Millan v. Exchange Bank*, (C. C. A. 4th Cir. 1910) 183 Fed. 753.

**Verification.**—Although a verification of a petition in involuntary bankruptcy is insufficient, nevertheless the defect is not jurisdictional and may be cured by amendment. The infirmity will not work a dismissal of the petition. *Sabin v. Blake-McFall Co.*, (C. C. A. 9th Cir. 1915) 223 Fed. 501.

**c [Petitions in duplicate.]** Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt. [(1898) 30 Stat. L. 561.]

As to time of filing petition, see section 3b.

**Filing of petition — Filing in duplicate.**—The statute requires the filing within the specified period of four months of a petition in duplicate; one copy for the clerk and the other for service on the alleged bankrupt. *In re Stevenson*, (D. C. Del. 1899) 94 Fed. 111, 2 Am. Bankr. Rep. 66; *In re Dupree*, (E. D. N. C. 1899) 97 Fed. 28, 8 Am. Bankr. Rep. 321 note; *In re Sykes*, (W. D. Tenn. 1901) 106 Fed. 669, 6 Am. Bankr. Rep. 264; *In re Bellah*, (D. C. Del. 1902) 116 Fed. 69, 8 Am. Bankr. Rep. 310; *In re Wolf*, (D. C. N. J. 1899) 2 Am. Bankr. Rep. 322; *Matter of Levingston*, (D. C. Hawaii 1905) 13 Am. Bankr. Rep. 357.

A paper is said to be on file when it is delivered to the proper officer to be kept on file. *In re Von Borcke*, (1899) 94 Fed. 352.

The petition should be filed with the clerk and not sent to the judge directly. *In re Sykes*, (1901) 106 Fed. 669.

**Waiver.**—The objection that a petitioner in bankruptcy failed to file a duplicate of his petition is waived by an answer

by the bankrupt within four months of the alleged acts of bankruptcy without presenting the objection. *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665.

**Two originals unnecessary.**—In *Millan v. Exchange Bank*, (C. C. A. 4th Cir. 1910) 183 Fed. 753, it was held that the statute is fully satisfied when an original and a copy are both filed in the clerk's office before the expiration of the four months' period.

"In duplicate" means one petition in the form of two duplicate originals. *In re Stevenson*, (1899) 94 Fed. 116; *In re Bellah*, (1902) 116 Fed. 69.

**Promptness desired.**—The various provisions of the Bankrupt Act clearly disclose a legislative intent that proceedings in bankruptcy shall be conducted and closed with all reasonable expedition; and, while it is true that a petition may be filed at such time on the last day of the period of limitation as to render impossible either the service or issuance of process within that period, it was nevertheless the manifest intention of Congress that the duplicate copy for service should be

filed within that period, ready to be served with all convenient speed. *In re Stevenson*, (D. C. Del. 1899) 94 Fed. 111, 2 Am. Bankr. Rep. 66.

**Vacancy in judge's office immaterial.**—A District Court does not cease to exist because of a vacancy in the office of judge, in such sense that proceedings in bankruptcy may not be instituted therein; but in such cases it is the duty of the clerk to receive and file the petition when offered, and it seems that he may also issue a subpoena thereon, tested in his own name, as provided by R. S. sec. 911, title JUDICIARY. *In re Urban*, etc., Realty Title Co., (D. C. N. J. 1904) 132 Fed. 140, 12 Am. Bankr. Rep. 687.

**Docket should show filing.**—Under General Order No. 1 in bankruptcy, providing that "the clerk shall keep a docket" which "shall contain a memorandum of the filing of the petition," the docket should show that the petition was filed in duplicate, as required by the statute, if this requirement of the law is really complied with. *In re Stevenson*, (D. C. Del.

1899) 94 Fed. 111, 2 Am. Bankr. Rep. 66; *In re Dupree*, (E. D. N. C. 1899) 97 Fed. 28, 8 Am. Bankr. Rep. 321 note. See also General Orders Nos. 1 and 2.

**Notice to creditors unnecessary.**—The statute not having provided for notice to creditors of the filing of a petition in bankruptcy, such notice is not necessary. *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80.

The failure of the Bankruptcy Act to provide for notice to creditors of the filing of a petition in voluntary proceedings, does not deprive such creditors of their property without due process of law, in view of the provisions of the Act for ten days' notice of the first meeting of creditors, and of each of the subsequent steps in the administration, and of the various provisions relative to the granting of a discharge, and for revocation of the same when procured by fraud or not warranted by the facts. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1.

**d [Notice to other creditors — hearing — dismissal.]** If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed. [(1898) 30 Stat. L. 561.]

**Failure to allege number of creditors.**—The failure of an involuntary petition filed by a single creditor to allege that the creditors were less than twelve in number does not deprive the court of jurisdiction where three creditors with provable claims have united in earlier proceedings, and the bankrupt does not deny the claims of such creditors, nor file a list of all of his creditors, with their addresses, under oath. *In re Haff*, (2d Cir. 1905) 136 Fed. 78, 68 C. C. A. 646, 13 Am. Bankr. Rep. 362.

**Determining number of creditors.**—Whether the number of creditors of an involuntary bankrupt is less than twelve, so as to entitle a single creditor to file an involuntary petition, is to be determined as of the date of the petition. *In re Coburn*, (D. C. Mass. 1903) 126 Fed. 218, 11 Am. Bankr. Rep. 212, affirmed (C. C. A. 1st Cir. 1904) 131 Fed. 201.

**The list of creditors required of the defendant debtor, when he sets up as a defense to a petition by a single creditor that the number of his creditors is more than twelve, should contain, besides the**

bare names and addresses of such creditors, at least a statement of the amount due each, the date of the debt, when it is due, whether due by note or account or by some other form of contract, the consideration therefor, whether owed jointly with another as partner or otherwise, and such full particulars as will enable the petitioning creditor to negotiate with others to join with him in the petition, and save the necessity and cost of a reference to ascertain the facts. *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696.

**Reference to settle dispute.**—If the particulars of the debts shown in the list of creditors filed under section 59d, where it is alleged by the debtor that his debts are more than twelve in number, are not disclosed in the answer, the court will, if necessary, refer the case to ascertain them, and thus settle any dispute between the parties concerning them. *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696.

**e [Computing number of creditors—employees and relatives.]** In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted. [(1898) 30 Stat. L. 562.]

**Purpose of section.**—Employees and near relatives are presumably under the influence of, or at least in sympathy with, the alleged bankrupt. If these may be counted as creditors to defeat a proceeding by less than three creditors, the temptation will often exist to use them fictitiously for such purpose, and thus to defeat the ends of the Act. Congress, by the provision above quoted, says that this may not be done, and plainly indicates that if it is sought to oust the jurisdiction of a Bankruptcy Court, by proof that a sufficient number of creditors out of the total list of creditors have not moved, the latter list must be made up of those who are clearly creditors, not those who, by reason of their relationship to the defendant, may in all probability be only colorably such. The intent is to remove the temptation and danger of using employees

and relatives by way of defense. *Perkins v. Dorman*, (D. C. N. M. 1913) 206 Fed. 858.

**Corporation officers may be counted against it.**—Where a corporation is insolvent, and has been forced by reason of its insolvency to commit acts of bankruptcy in failing to vacate executions levied on its property, the fact that directors and stockholders, who are also creditors join with other creditors in a petition to have it adjudged a bankrupt in order to secure an equitable distribution of its assets, is not an evidence of bad faith or collusion which will avail the execution creditors to defeat the adjudication. *Wilkes Barre First Nat. Bank v. Wyoming Valley Ice Co.*, (M. D. Pa. 1905) 136 Fed. 466, 14 Am. Bankr. Rep. 448.

**f [Appearance of creditors.]** Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition. [(1898) 30 Stat. L. 562.]

**Purpose of section.**—"The undoubted purpose of this section is to enable creditors, others than original petitioners, to acquire a standing in the proceedings such as would, with respect to those desiring to join in the prayer for an adjudication, prevent a dismissal in case it developed that original petitioners were disqualified; and to grant to those desiring to oppose an adjudication, the right to join the alleged bankrupt therein, or to assert his right in opposition in case of his failure to do so. It was designed to furnish to creditors a summary method whereby they could make themselves parties petitioner or respondent, giving to them respectively all the rights and privileges with regard to the maintenance or defense of, the proceedings, which the law gives to original petitioners who instituted, or to the bankrupt resisting, them. It is capable of no other interpretation save that it gives to creditors so coming in by appearance and joinder in the petition or answer a definite status or standing from which they cannot be eliminated except upon a hearing which, under the law, must be accorded to original parties. If this is true, then any determination by the Bankruptcy Court of the matter committed to it must affect them just as it affects original parties. In other words,

they have a definite status as parties." *In re Dandridge*, (C. C. A. 7th Cir. 1913) 209 Fed. 838.

**Joining in petition.**—It is well settled that creditors may join in a petition in involuntary bankruptcy proceedings at any time, even though it be more than four months after the alleged act of bankruptcy was committed; and creditors so joining may be counted to make up the number of creditors and amount of claims required for this purpose by section 59b. *In re John A. Etheridge Furniture Co.*, (D. C. Ky. 1899) 92 Fed. 329, 1 Am. Bankr. Rep. 112; *In re Romanow*, (D. C. Mass. 1899) 92 Fed. 510, 512; *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182, 1 Am. Bankr. Rep. 266; *In re Mercur*, (E. D. Pa. 1899) 95 Fed. 634, 2 Am. Bankr. Rep. 626; *In re Beddingfield*, (N. D. Ga. 1899) 96 Fed. 190, 2 Am. Bankr. Rep. 355; *In re Stein*, (C. C. A. 2d Cir. 1901) 105 Fed. 749, 5 Am. Bankr. Rep. 288; *Sinsheimer v. Simonson*, (C. C. A. 1901) 107 Fed. 898; *In re Mammoth Pine Lumber Co.*, (W. D. Ark. 1901) 109 Fed. 308, 6 Am. Bankr. Rep. 84; *In re Mackey*, (D. C. Del. 1901) 110 Fed. 355, 6 Am. Bankr. Rep. 577; *In re Columbia Real Estate Co.*, (C. C. A. 7th Cir. 1902) 112 Fed. 643, 7 Am. Bankr. Rep. 441; *In re Ryan*, (M. D. Pa. 1902) 114 Fed.

373, 7 Am. Bankr. Rep. 562; *In re C. Moench, etc., Co.*, (W. D. N. Y. 1903) 123 Fed. 977, 10 Am. Bankr. Rep. 590; *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118; *In re Brett*, (D. C. N. J. 1904) 130 Fed. 981, 12 Am. Bankr. Rep. 492; *In re Plymouth Cordage Co.*, (8th Cir. 1905) 135 Fed. 1000, 68 C. C. A. 434, 13 Am. Bankr. Rep. 665; *Ayres v. Cone*, (C. C. A. 8th Cir. 1905) 138 Fed. 778, 14 Am. Bankr. Rep. 739; *In re Billing*, (M. D. Ala. 1906) 145 Fed. 395, 17 Am. Bankr. Rep. 80; *Hays v. Wagner*, (C. C. A. 6th Cir. 1907) 150 Fed. 533, 18 Am. Bankr. Rep. 163; *Manning v. Evans*, (D. C. N. J. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217; *In re Crenshaw*, (S. D. Ala. 1907) 156 Fed. 638, 19 Am. Bankr. Rep. 502; *In re Luffy*, (S. D. N. Y. 1907) 156 Fed. 873, 19 Am. Bankr. Rep. 614; *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864; *In re Charles Town Light, etc., Co.*, (N. D. W. Va. 1910) 183 Fed. 160; *In re Bolognesi*, (C. C. A. 2d Cir. 1915) 223 Fed. 771.

**Joinder by assignee.**—But since an involuntary bankruptcy petition relates to the date of its commencement, it has been held that an intervening creditor, who became such by taking an assigned claim after the petition was filed, could not be counted in determining whether enough creditors had joined to sustain the petition. *Stroheim v. Lewis F. Perry, etc., Co.*, (C. C. A. 1st Cir. 1910) 175 Fed. 52, 23 Am. Bankr. Rep. 695.

**The fact that an original involuntary bankruptcy petition is insufficient**, by reason of the fact that one or more of the petitioners were disqualified, does not prevent the defect from being cured by the intervention of other creditors competent to sign the same. *In re Vastbinder*, (M. D. Pa. 1903) 126 Fed. 417, 11 Am. Bankr. Rep. 118.

**Petitioners may request creditors to join.**—A creditor who files a petition in bankruptcy has the right to ask other creditors to intervene, when such intervention becomes necessary to preserve the proceedings. *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864.

**Intervention after dismissal.**—Where an involuntary bankruptcy petition has been dismissed for insufficiency of petitioning creditors, it is then too late for a nonparticipating creditor to intervene as a matter of right. *In re Tribelhorn*, (C. C. A. 2d Cir. 1905) 137 Fed. 3, 14 Am. Bankr. Rep. 492.

A delay of one year before asking for the reinstatement of a dismissed petition is so unreasonable as to warrant a denial of the application. *In re Jemison Mercantile Co.*, (C. C. A. 5th Cir. 1902) 112 Fed. 966, 7 Am. Bankr. Rep. 588.

**Intervention does not advance date of filing.**—Amendments to a petition in in-

voluntary bankruptcy filed by a single creditor, by which other creditors join therein, and setting out their claims, relate back to the filing of the petition, and, although such joinder was necessary to the sufficiency of the petition, do not advance the date of its filing. *Iowa First State Bank v. Haswell*, (C. C. A. 8th Cir. 1909) 174 Fed. 209, 23 Am. Bankr. Rep. 330.

**An objection to an application for intervention** should be made by motion to strike it from the files, and not by demurrer. *Neustadter v. Chicago Dry-Goods Co.*, (D. C. Wash. 1899) 96 Fed. 830, 3 Am. Bankr. Rep. 96.

**Defective application for joinder allowable.**—The fact that the petition of a creditor, who intervenes and joins in a petition in involuntary bankruptcy, is defective in matter of form in setting out his claim, is immaterial, where the deficiency is supplied by the proof on the hearing. *Hays v. Wagner*, (C. C. A. 6th Cir. 1907) 150 Fed. 533, 18 Am. Bankr. Rep. 163.

**Creditor cannot be compelled to join.**—No power is vested in a court of bankruptcy to compel a creditor to become a petitioner in an involuntary proceeding. *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123.

**Opposing petition—Involuntary proceedings.**—Creditors may also, under section 59f, intervene in opposition to the petition in involuntary proceedings. *In re C. Moench, etc., Co.*, (W. D. N. Y. 1903) 123 Fed. 977, 10 Am. Bankr. Rep. 590; *In re Taylor*, 1 Nat. Bankr. N. 412; *Johansen Bros. Shoe Co. v. Alles*, (C. C. A. 8th Cir. 1912) 197 Fed. 274. And see generally the annotation to this effect under section 18b.

**Voluntary petition.**—Section 59f does not authorize intervention in opposition to a petition in voluntary bankruptcy proceedings. *In re Ives*, (C. C. A. 8th Cir. 1902) 113 Fed. 911, 7 Am. Bankr. Rep. 692; *In re Carleton*, (D. C. Mass. 1902) 115 Fed. 246, 8 Am. Bankr. Rep. 270; *Matter of Carbone*, (D. C. Wash. 1904) 13 Am. Bankr. Rep. 55.

**Contest by assignee for creditors.**—Where the act of bankruptcy charged in an involuntary petition against a partnership is the transfer of its property to an assignee for the benefit of its creditors, such assignee is entitled to appear and contest the petition. *In re Meyer*, (C. C. A. 2d Cir. 1899) 98 Fed. 976, 3 Am. Bankr. Rep. 559.

**Opposition by preferred creditor.**—Where the petition alleges that an unlawful preference has been given by the bankrupt to a certain creditor, the latter may, on his own petition, be made a party defendant and plead to the petition in bankruptcy. *Goldman v. Smith*, (D. C. Ky. 1899) 93 Fed. 182.

**Limitation of time to answer.**—This



section was not intended to permit creditors to come in one by one, and each have an opportunity to contest the questions incident to an involuntary adjudication; and, therefore, after the time fixed by section 18b for pleading has expired, and such time has not been extended, and the petition has been presented and heard, a creditor cannot appear and file an answer raising new points and issues. *In re Mutual Mercantile Agency*, (S. D. N. Y. 1901) 111 Fed. 152.

**Appeal.—Intervening creditors may appeal.**—Creditors who appear in opposition to a petition in involuntary bankruptcy, against their debtor, and contest the adjudication thereon, as authorized by the Bankruptcy Act, have a right to appeal from a decree of the District Court making the adjudication. *In re Meyer*, (C. C. A. 2d Cir. 1899) 98 Fed. 976, 3 Am. Bankr. Rep. 559.

**Intervening creditors must join or be severed.**—On an appeal from a decree dismissing a petition the interveners who have joined in the petition must join in the appeal or by appropriate proceedings be severed from the appeal. *In re Dandridge*, (C. C. A. 7th Cir. 1913) 209 Fed. 838.

**Withdrawal from petition.**—A court of bankruptcy is authorized, in its discretion, to permit the withdrawal of a petition filed by a creditor asking leave to join in a petition in involuntary bankruptcy, which has been filed against the

debtor, no action having been taken thereon. *Moulton v. Coburn*, (C. C. A. 1st Cir. 1904) 131 Fed. 201, 12 Am. Bankr. Rep. 553; *Cummins Grocery Co. v. Talley*, (C. C. A. 6th Cir. 1911) 187 Fed. 507.

But creditors who have joined in a petition in involuntary bankruptcy are not entitled to withdraw without the consent of all, when the effect of such withdrawal would be to require a dismissal of the proceedings. *In re Quincy Granite Quarries Co.*, (D. C. Mass. 1904) 147 Fed. 279, 16 Am. Bankr. Rep. 823; *In re Bedingsfield*, (1899) 96 Fed. 190. See also *In re Jemison Mercantile Co.*, (C. C. A. 1902) 112 Fed. 971; *In re Heffron*, (1874) 6 Biss. (U. S.) 156; *Matter of Vogel*, (1878) 9 Ben. (U. S.) 498; *In re Sargent*, (1875) 13 Nat. Bankr. Reg. 144, 21 Fed. Cas. No. 12,361.

**Withdrawal of original petitioners.**—Any petitioner may be allowed to withdraw in the court's discretion. If the original petitioners so withdraw before others intervene, that ends the proceeding completely, there is nothing left to intervene in. But until they do withdraw there is a proceeding, in which others may intervene; and if others have done so in the lifetime of the proceedings, subsequent withdrawal of the originators will leave the interveners free to proceed. *In re Bolognesi*, (C. C. A. 2d Cir. 1915) 223 Fed. 771.

**g [Notice of dismissal.]** A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard. [(Amended 1910, which excepted pending cases) 36 Stat. L. 841.]

As originally enacted this subdivision g read as follows:

"g A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors." [30 Stat. L. 562.]

In 1910 it was amended "so as to read as" in the text.

As to notice to creditors generally, see section 58a (8), and see also the other subdivisions of section 58.

**"Want of prosecution" and "consent of parties."**—"Want of prosecution" ordinarily signifies a failure to follow up the case so that by reason of staleness, or of omission to file proper pleadings it has become subject to dismissal without a hearing on the merits. So where the petitioning creditors followed up the petition in all formal matters and when it was set down for hearing duly attended before

the referee, their mere failure to produce or offer any evidence at the hearing was not such a "want of prosecution" or "consent of parties" within the meaning of this section, as required notice to all the other creditors before a dismissal of the petition. *In re Chalfen*, (D. C. Mass. 1915) 223 Fed. 379.

Of course where there has been a full hearing on the merits at which the petitioners have introduced evidence, the provisions of this section do not apply. Under such circumstances, if the decision be

adverse to the petitioners, the petition is dismissed without notice to creditors who are not parties to the proceeding. *Blackstone v. Everybody's Store*, (C. C. A. 1st Cir.) 207 Fed. 752; *In re Chalfen*, (D. C. Mass. 1915) 223 Fed. 379.

**Notice to creditors.**—As provided by the amendment of 1910, before entering an application for dismissal, the court will require the bankrupt to file a verified list of all his creditors, with their addresses, and shall cause notices to be sent to all such creditors of the pendency of such application; and such creditors shall be given a reasonable time and opportunity to be heard. Even prior to this amendment it was the rule to give notice to all such creditors as were scheduled or known. *Neustadter v. Chicago Dry-Goods Co.*, (D. C. Wash. 1899) 96 Fed. 830, 3 Am. Bankr. Rep. 96; *In re Cronin*, (D. C. Mass. 1899) 98 Fed. 584, 3 Am. Bankr. Rep. 552; *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123; *In re Jemison Mercantile Co.*, (C. C. A. 5th Cir. 1902) 112 Fed. 966, 7 Am. Bankr. Rep. 588; *Gage v. Bell*, (W. D. Tenn. 1903) 124 Fed. 371, 10 Am. Bankr. Rep. 696; *In re Lederer*, (S. D. N. Y. 1903) 125 Fed. 96, 10 Am. Bankr. Rep. 492; *In re Lewis*, (D. C. Del. 1904) 129 Fed. 147, 11 Am. Bankr. Rep. 683; *In re Plymouth Cordage Co.*, (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 13 Am. Bankr. Rep. 665; *In re Tribelhorn*, (C. C. A. 2d Cir. 1905) 137 Fed. 3, 14 Am. Bankr. Rep. 492; *In re Levi*, (C. C. A. 2d Cir. 1905) 142 Fed. 962, 15 Am. Bankr. Rep. 294; *Bernard v. Abel*, (C. C. A. 9th Cir. 1907) 156 Fed. 649, 19 Am. Bankr. Rep. 383. See also *In re Rosenblatt*, (C. C. A. 2d Cir. 1912) 193 Fed. 638. And see the annotation under section 18 *d* and *g*.

**Trustee may oppose application for dismissal.**—A trustee in bankruptcy, duly elected, may properly appear and answer a petition for dismissal of the proceedings for want of jurisdiction. *In re Pennsylvania Consol. Coal Co.*, (E. D. Pa. 1908) 163 Fed. 579, 20 Am. Bankr. Rep. 872.

**A petition in voluntary bankruptcy,**

which schedules no debt which would be barred by a discharge, may be dismissed in the discretion of the court. *In re Colaluca*, (D. C. Mass. 1904) 133 Fed. 255, 13 Am. Bankr. Rep. 292.

Thus it has been held that a petition in voluntary bankruptcy which schedules no property except such as is exempt under the laws of the state, and but a single debt, which is a judgment from which the petitioner would not be released by a discharge, fails to disclose any subject matter upon which the court can act, and an adjudication of bankruptcy made thereon will be set aside on motion, and the proceedings dismissed for want of jurisdiction. *In re Maples*, (D. C. Mont. 1901) 105 Fed. 919, 5 Am. Bankr. Rep. 426.

**Right of voluntary dismissal.**—Where all the creditors, or their assignee, in involuntary proceedings, apply for leave to dismiss the petition, they should, as a rule, be allowed to do so. *In re Heffron*, (1874) 6 Biss. (U. S.) 156. See also *In re Jemison Mercantile Co.*, (C. C. A. 5th Cir. 1902) 112 Fed. 966, 7 Am. Bankr. Rep. 588.

**Simultaneous pendency of voluntary and involuntary petitions.**—"When a bankrupt against whom an involuntary petition is pending files his voluntary petition, notice should be given to the creditors filing the involuntary petition, before any adjudication is made upon the voluntary petition, and then such action should be taken as the hearing shows to be for the best interest of the estate." *In re Dwyer*, (1902) 112 Fed. 777; *In re Stein*, (C. C. A. 1901) 105 Fed. 749.

**Withdrawal of voluntary petition.**—Where there are no creditors of the estate of a voluntary bankrupt who have proved their claims, or who object thereto, he is entitled to withdraw his petition; and his right to do so cannot be affected by the objections of subsequent creditors, who have acquired liens on his wages, and desire to prevent the institution of new proceedings. *In re Hebbart*, (D. C. Vt. 1900) 104 Fed. 322, 5 Am. Bankr. Rep. 8.

**SEC. 60. PREFERRED CREDITORS.**—*a* [What constitutes preference.] A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required. [(Amended 1903, which excepted pending cases.) 32 Stat. L. 799.]

Section 60a as originally enacted read as follows:

"SEC. 60. PREFERRED CREDITORS.—A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." [30 Stat. L. 562.]

It was amended in 1903 "so as to read" as in the text.

As to preference as an act of bankruptcy, see section 3a (2) and (3).

- I. Creation of preferences, 1005.
- II. Constituent elements, 1014.

#### I. CREATION OF PREFERENCES.

Section 60a furnishes the legal and controlling definition of the preference specified in section 57g, and other parts of the Bankrupt Act. *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673.

The primary purpose of section 60 a and b is to secure equality of distribution among creditors of the same class. *In re Bloch*, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748; *Dulany v. Morse*, (1913) 39 App. Cas. (D. C.) 523; *Utah Ass'n of Credit Men v. Boyle Furniture Co.*, (1913) 43 Utah 523, 136 Pac. 572.

Subdivision a defines what shall constitute a preference, and subdivision b states a consequence of it, and gives a remedy against it. The former defines it to be a transfer of property which will enable the creditor to whom the transfer is made to obtain a greater percentage of his debt than other creditors. The latter provides a consequence to be that the transfer may be avoided by the trustee and the property or its value recovered, provided, however, that the preference was given four months before the filing of the petition in bankruptcy or before the adjudication, and the creditor had reason to believe a preference was intended. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171, 5 Am. Bankr. Rep. 814.

A preference was valid at common law, and is not rendered tortious by the Bankruptcy Act, nor is it penalized in any other way than is expressly pointed out in that Act. *Wilson v. Mitchell-Woodbury Co.*, (1913) 214 Mass. 514, 102 N. E. 119.

Sections 3a and this section as amended by the Act of 1903 are to be construed in harmony. *In re Donnelly*, (N. D. Ohio 1912) 193 Fed. 755.

**Preference and fraudulent conveyance distinguished.**—There is a wide difference between a preference under section 60a and a fraudulent conveyance under section 67e, inasmuch as a preference is not necessarily fraudulent (*Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 16 Ann. Cas. 1008; *Van Iderstine v. National Discount Co.*, (1913) 227 U. S. 575, 33 S. Ct. 343, 57

U. S. (L. ed.) 652); and while a fraudulent conveyance is void regardless of its date, a preference is valid unless made within the prohibited period. *Van Iderstine v. National Discount Co.*, (1913) 227 U. S. 575, 33 S. Ct. 343, 57 U. S. (L. ed.) 652.

Fraudulent transfers that are not preferences are not covered by this section. *Underleak v. Scott*, (1912) 117 Minn. 136, 134 N. W. 731.

Prior to the amendment of 1903 there was no time limit to the operation of section 60a; it included judgments and transfers beyond, as well as those within, the four months period. *In re Jones*, (1900) 110 Fed. 736; *In re Abraham Steers Lumber Co.*, (1901) 110 Fed. 738. See also *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171.

**Preference created by judgment.**—A preference is given when, within four months prior to the bankruptcy of the debtor, a lien is secured on his property by a creditor by virtue of a judgment, entered against him by confession or otherwise, which enables the creditor to get out of the property, in any manner, more than he would have done had he remained a general creditor. *Benjamin v. Chandler*, (N. D. Pa. 1905) 142 Fed. 217, 15 Am. Bankr. Rep. 439. See also *In re Richards*, (W. D. Wis. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 518; *In re Heinsfurter*, (S. D. Ia. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 109; *In re Metzger Toy, etc., Co.*, (W. D. Ark. 1902) 114 Fed. 957, 8 Am. Bankr. Rep. 307; *In re English*, (C. C. A. 2d Cir. 1904) 127 Fed. 940, 11 Am. Bankr. Rep. 674; *Grant v. National Bank of Auburn*, (N. D. N. Y. 1912) 197 Fed. 581; *Jones v. Schaff Bros. Co.*, (1915) 187 Mo. App. 597, 174 S. W. 177; *McNeel v. Folk*, (W. Va. 1914) 83 S. E. 192; *In re Collins*, (S. D. Ia. 1899) 2 Am. Bankr. Rep. 1; *Wilson v. Nelson*, (1901) 7 Am. Bankr. Rep. 142, 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147.

A judgment which becomes a lien, or in consequence of which a lien has been created, within the four months period is annulled under section 67f. See the annotation thereunder.

Where a creditor procures a judgment against an insolvent debtor, and thereafter procures execution thereon to be issued and levied on personal property of the debtor, and at the execution sale such property is sold and the proceeds of the sale paid to the creditor in satisfaction

of the debt, such execution sale and payment of the proceeds thereof constitutes a transfer of his property by the debtor, within the meaning of those words as used in the Act. *Galbraith v. Whitaker*, (1912) 119 Minn. 447, 138 N. W. 772, 43 L. R. A. (N. S.) 427.

For construction of the words "procured," "suffered," and "permitted" as they were used in earlier bankruptcy acts, see *Wilson v. City Bank of St. Paul*, (1873) 17 Wall. 473, 21 U. S. (L. ed.) 723; *Rogers v. Palmer*, (1880) 102 U. S. 263, 28 U. S. (L. ed.) 164; *Traders' Nat. Bank v. Campbell*, (1871) 14 Wall. 87, 20 U. S. (L. ed.) 832; *Little v. Alexander*, (1874) 21 Wall. 500, 22 U. S. (L. ed.) 625; *In re Gallinger*, (1870) 1 Sawy. (U. S.) 224; *Wight v. Muxlow*, (1875) 8 Ben. (U. S.) 52; *Matter of Dibblee*, (1869) 3 Ben. (U. S.) 354; *Matter of Black*, (1868) 2 Ben. (U. S.) 196; *Matter of Craft*, (1868) 2 Ben. (U. S.) 214; *In re Sutherland*, (1868) Deady (U. S.) 344; *In re Heller*, (1871) 3 Biss. (U. S.) 153; *Smith v. Buchanan*, (1871) 8 Blatchf. (U. S.) 153; *Brown v. Jefferson County Nat. Bank*, (1881) 19 Blatchf. (U. S.) 315; *Parsons v. Caswell*, (1880) 1 Fed. 74; *In re Runzi*, (1879) 3 Fed. 790; *In re Schick*, (1867) 1 Nat. Bankr. Reg. 177; *In re Haughton*, (1868) 1 Nat. Bankr. Reg. 460; *In re Woods*, (1873) 7 Nat. Bankr. Reg. 126.

*An adversary decree removing a trustee* and ordering him to pay over the trust fund to his successor is not a judgment "procured or suffered" by the insolvent within the meaning of section 60a. *Fry v. Pennsylvania Trust Co.*, (1900) 195 Pa. St. 343, 46 Atl. 10.

"Enforcing" defined.—Where a lien stands as security for an undisputed debt, "enforcing" it would mean nothing more than leaving it to stand as such security and permitting the plaintiffs to take it unless the bankrupt paid the debt. *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931.

"Transfer" defined.—The word "transfer" in section 60a, both by section 1 (25) and by authoritative decision, includes the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security. *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513. See also *In re Frazer*, (W. D. N. Y. 1915) 221 Fed. 83.

*This section correlated with other sections.*—"This section gives the legal and controlling definition of the preference mentioned in section 57g and other parts of the Bankrupt Act." *Kimball v. E. A. Rosenham Co.*, (C. C. A. 1902) 114 Fed. 85; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 1902) 117 Fed. 1; *In re Waterbury Furniture Co.*, (1902) 114

Fed. 255. See also *Gans v. Ellison*, (C. C. A. 1902) 114 Fed. 737.

*All technicality and narrowness of meaning is precluded.*—The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171; *In re Kellar*, (N. D. Ia. 1901) 110 Fed. 348.

*The words "transfer any of his property"* include the giving or conveying anything of value—anything which has debt paying or debt securing power. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171, 5 Am. Bankr. Rep. 814.

*Thus a trust deed securing an antecedent debt*, without a new consideration, executed by a corporation, while insolvent, for the purpose of preferring one creditor over another, and which was accepted for that purpose and operated as a preference, was held to be a preferential transfer. *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639.

*Indorsement.*—The indorsement, without consideration, by an insolvent firm, within four months of the filing of a petition in bankruptcy, of individual notes of the partners, apparently for the purpose of enabling the holders of the notes to participate with the partnership creditors in the distribution of the partnership property has been held to be a preference. *In re Jones*, (E. D. Mo. 1900) 100 Fed. 781.

*In In re Frazer*, (W. D. N. Y. 1915) 221 Fed. 83, the court held that the indorsement of renewal notes by an individual partner, not individually liable, but who indorsed them only at the request of the petitioning creditors, who knew that the insolvency of the firm was imminent and had reasonable cause to believe that the effect of the indorsement would be to constitute a preference, was a violation of this section.

*Purchase of partnership assets by member of firm.*—In *In re Head*, (W. D. Ark. 1902) 114 Fed. 489, it is said that the dissolution of a firm while insolvent, and the purchase of its assets by a member thereof within four months of the institution of the bankruptcy proceedings, is in effect a gift by the insolvent firm to the creditors of the individual members, and therefore a preference to them over the partnership creditors; and that such dissolution should be set aside and the assets of the firm in the hands of both partners treated as partnership property.

*A sale on execution is a "transfer."* *Grant v. Auburn National Bank*, (1912) 197 Fed. 581; *Galbraith v. Whitaker*,

(1912) 119 Minn. 447, 138 N. W. 772, 43 L. R. A. (N. S.) 427.

*Transfer of a revocable privilege as security, the privilege being subsequently revoked by the party originally conceding it, was not a transfer of property. In re Martin, (C. C. A. 3d Cir. 1912) 200 Fed. 940.*

**Preference created by transfer.**—Any transfer of the bankrupt's property, coming within the definitions set out in the preceding paragraphs, made or effected within four months before the filing of the petition in bankruptcy, and while the bankrupt was insolvent, will under section 60a, be deemed to be a preference, if the effect of such transfer is such as to enable any one of the bankrupt's creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Pirie v. Chicago Title, etc., Co., (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171, 5 Am. Bankr. Rep. 814; Carter v. Hobbs, (D. C. Ind. 1899) 94 Fed. 108, 2 Am. Bankr. Rep. 224; In re Cobb, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; In re Heinsfurter, (S. D. Ia. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 109; In re Gillette, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 119; In re Burlington Malting Co., (E. D. Wis. 1901) 109 Fed. 777, 6 Am. Bankr. Rep. 369; Stern v. Louisville Trust Co., (C. C. A. 6th Cir. 1901) 112 Fed. 501, 7 Am. Bankr. Rep. 305; In re Beerman, (N. D. Ga. 1901) 112 Fed. 663, 7 Am. Bankr. Rep. 431; In re Schenkein, (W. D. N. Y. 1902) 113 Fed. 421, 7 Am. Bankr. Rep. 162; In re Waterbury Furniture Co., (D. C. Conn. 1902) 114 Fed. 255, 8 Am. Bankr. Rep. 79; In re Metzger Toy, etc., Co., (1902) 114 Fed. 957; Boyd v. Lemon, etc., Co., (C. C. A. 5th Cir. 1902) 114 Fed. 647, 8 Am. Bankr. Rep. 81; Swarts v. St. Louis Fourth Nat. Bank, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; In re Manning, (D. C. S. C. 1903) 123 Fed. 181, 10 Am. Bankr. Rep. 500; In re English, (C. C. A. 2d Cir. 1904) 127 Fed. 940, 11 Am. Bankr. Rep. 674; Johnston v. Huff, etc., Co., (C. C. A. 4th Cir. 1904) 133 Fed. 704, 13 Am. Bankr. Rep. 287; In re Morrow, (S. D. Ohio 1901) 134 Fed. 686, 13 Am. Bankr. Rep. 392; In re Clifford, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 281; In re Porterfield, (N. D. W. Va. 1905) 138 Fed. 192, 15 Am. Bankr. Rep. 11; In re Blount, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; In re Bloch, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748; In re Hines, (W. D. Pa. 1906) 144 Fed. 543, 16 Am. Bankr. Rep. 500; Morgan v. Mannington First Nat. Bank, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639; In re Gesas, (C. C. A. 9th Cir. 1906) 146 Fed. 734, 16 Am. Bankr. Rep. 872; In re Anselcy, (E. D. N. C. 1907) 153 Fed. 983, 18 Am.*

Bankr. Rep. 457; Hanson v. Blake, (D. C. Me. 1907) 155 Fed. 342, 19 Am. Bankr. Rep. 325; *In re Nechamkus, (E. D. N. Y. 1907) 155 Fed. 867, 19 Am. Bankr. Rep. 189; Rutland County Nat. Bank v. Graves, (D. C. Vt. 1907) 156 Fed. 168, 19 Am. Bankr. Rep. 446; In re Floyd, (E. D. N. C. 1907) 156 Fed. 206, 19 Am. Bankr. Rep. 438; Mills v. Fisher, (C. C. A. 6th Cir. 1908) 159 Fed. 897, 20 Am. Bankr. Rep. 237; In re W. W. Mills Co., (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; Brewster v. Goff, (M. D. Pa. 1908) 164 Fed. 127, 21 Am. Bankr. Rep. 239; McElvain v. Hardesty, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; Rogers v. Fidelity Sav. Bank, etc., Co., (W. D. Ark. 1909) 172 Fed. 735, 23 Am. Bankr. Rep. 1; *In re Smith, (N. D. N. Y. 1910) 176 Fed. 428, 23 Am. Bankr. Rep. 864; Atherton v. Green, (C. C. A. 7th Cir. 1910) 179 Fed. 806; In re Crafts-Riordon Shoe Co., (D. C. Mass. 1910) 185 Fed. 931; In re Tomlinson, (E. D. N. Y. 1912) 193 Fed. 101; Brown City Savings Bank v. Windsor, (C. C. A. 6th Cir. 1912) 198 Fed. 28; In re Watson, (E. D. Ky. 1912) 201 Fed. 962; In re Stiger, (D. C. N. J. 1913) 202 Fed. 791; In re Farmers' Co-operative Co., (D. C. N. D. 1913) 202 Fed. 1005; Collett v. Bronx Nat. Bank, (C. C. A. 2d Cir. 1913) 205 Fed. 370; In re Jacob Y. Shantz & Son Co., (W. D. N. Y. 1913) 205 Fed. 425; Northern Neck State Bank v. Smith, (C. C. A. 4th Cir. 1913) 205 Fed. 894; Rubenstein v. Lotow, (1915) 220 Mass. 156, 107 N. E. 718; In re Collins, (S. D. Ia. 1899) 2 Am. Bankr. Rep. 1; In re Klingaman, (S. D. Ia. 1899) 2 Am. Bankr. Rep. 44; In re Knost, (S. D. Ohio) 2 Am. Bankr. Rep. 471; Silberstein v. Stahl, (1900) 4 Am. Bankr. Rep. 626. 32 Misc. 353, 66 N. Y. S. 646; In re Wertheimer, (S. D. N. Y. 1901) 6 Am. Bankr. Rep. 187; Landry v. Andrews, (1901) 6 Am. Bankr. Rep. 281, 22 R. I. 597, 48 Atl. 1036; In re Rosenberg, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 313; In re Belding, (D. C. Mass. 1902) 8 Am. Bankr. Rep. 713; Frank v. Musliner, (1902) 9 Am. Bankr. Rep. 229, 76 App. Div. 617, 78 N. Y. S. 369; Hackney v. Raymond Bros. Clarke Co., (Neb. 1903) 10 Am. Bankr. Rep. 213; In re Riggs Restaurant Co., (C. C. A. 2d Cir. 1904) 11 Am. Bankr. Rep. 508; Hackney v. Hargreaves, (1904) 13 Am. Bankr. Rep. 164, 68 Neb. 624, 94 N. W. 822, 93 N. W. 675; West v. Lahoma Bank, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 323, 85 Pac. 469.**

**Tested by result of transaction.**—When a person is adjudged a bankrupt his property is sequestrated by law for equal distribution among his creditors; and all transactions, payments, or transfers of property within the four months prior to the filing of the petition in bankruptcy

are reviewable; and if it should appear that, as the result of any such transactions, one creditor has obtained, or is likely to obtain, a greater percentage of the estate than other creditors of the same class, such transactions shall be deemed to be a preference which must be surrendered so that equality may be preserved. *In re Manning*, (D. C. S. C. 1903) 123 Fed. 181, 10 Am. Bankr. Rep. 500.

The court must look at results, and not at the devious ways by which they are accomplished. *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487.

Whether a transaction is a preference must be determined by its effect to prefer the creditor receiving the benefit thereof, and not by its form. *Rogers v. Fidelity Sav. Bank, etc., Co.*, (W. D. Ark. 1909) 172 Fed. 735, 23 Am. Bankr. Rep. 1.

*Schemes and artifices to evade the letter and spirit of the law will not be tolerated.*—*In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; *Parker v. Black*, (W. D. N. Y. 1906) 143 Fed. 560, 16 Am. Bankr. Rep. 202; *Roberts v. Johnson*, (C. C. A. 4th Cir. 1907) 151 Fed. 567, 18 Am. Bankr. Rep. 132; *Benedict v. Deshel*, (1903) 11 Am. Bankr. Rep. 20, 177 N. Y. 1, 68 N. E. 999.

A creditor will not be permitted to obtain a preference indirectly by any colorable device or transaction intended to evade the provisions of the Bankruptcy Act. *Hackney v. Raymond Bros. Clarke Co.*, (Neb. 1903) 10 Am. Bankr. Rep. 213.

Section 60a does not contemplate a usage of merchants, or a conventional arrangement between the parties, which would enable any one of the creditors of a bankrupt to obtain a greater percentage of his debt than any other of such creditors of the same class. *In re Morrow*, (S. D. Ohio 1901) 134 Fed. 686, 13 Am. Bankr. Rep. 392.

A transfer of exempt property like a homestead does not constitute a preference. *Huntington v. Baskerville*, (C. C. A. 8th Cir. 1911) 192 Fed. 813.

The performance of labor for a creditor by an insolvent debtor, for which he is credited on his indebtedness, was held not to be a transfer constituting a preference. *In re Abraham Steers Lumber Co.*, (1901) 110 Fed. 738.

*Transaction constituting merely a debt to bankrupt.*—A company was hiring laborers to gather ties, the insolvent operating stores and supplying the men. The custom of the company was to deduct the amount of supplies furnished from the earnings of each man on sending him a check on the bi-weekly payroll account, and to send the insolvent a check to cover the supplies irrespective of what the insolvent might owe the company. The insolvent owed the company more than \$20,000 when, within four months of the

filing of a petition in bankruptcy, the company retained the amount owing the insolvent for supplies for three months, crediting it on the claim against him. It was held that this was no preference whatever, since the company became indebted to the bankrupt for the amount retained. *Western Tie, etc., Co. v. Brown*, (1905) 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571, *reversing* (1904) 129 Fed. 728, 64 C. C. A. 256.

A transfer made under coercion is nevertheless a preference if it is otherwise within the language of the section; it was so held under the earlier Bankruptcy Acts. *Clarion Bank v. Jones*, (1874) 21 Wall. 325, 22 U. S. (L. ed.) 542; *Sawyer v. Turpin*, (1875) 91 U. S. 114, 23 U. S. (L. ed.) 235; *Giddings v. Dodd*, (1871) 1 Dill. (U. S.) 115; *Rison v. Knapp*, (1870) 1 Dill. (U. S.) 187; *Arnold v. Maynard*, (1842) 2 Story (U. S.) 349; *Campbell v. Traders' Nat. Bank*, (1871) 2 Biss. (U. S.) 423; *Re Batchelder*, (1869) 1 Lowell (U. S.) 373; *Strain v. Gourdin*, (1874) 2 Woods (U. S.) 380; *Foster v. Hackley*, (1869) 2 Nat. Bankr. Reg. 406, 9 Fed. Cas. No. 4,971; *Atkinson v. Farmers' Bank*, (1844) *Crabbe* (U. S.) 529, 2 Fed. Cas. No. 609; *Graham v. Stark*, (1869) 3 Ben. (U. S.) 520, 10 Fed. Cas. No. 5,676; *Wilson v. Brinkman*, (1869) 2 Nat. Bankr. Reg. 468, 30 Fed. Cas. No. 17,794.

**Conditional sale — Bankrupt's own property transferred.**—The section leaves no doubt that to be within its terms the transfer must be one which a bankrupt makes of his own property and which operates to prefer one creditor over others; and if further light be needed there is a declaration in the Bankruptcy Act, section 1, clause 25 that the word "transfer" shall be taken to include every mode "of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." It therefore is plain that section 60 refers to an act on the part of a bankrupt whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor and thereby diminishes the estate which the Bankruptcy Act seeks to apply for the benefit of all the creditors. It follows that a conditional sale to the bankrupt recorded as required by law within four months prior to his bankruptcy is not a "transfer" which is affected by this section. *Bailey v. Baker Ice Mach. Co.*, (1915) 239 U. S. 268, 36 S. Ct. 50, *affirming* (C. C. A. 8th Cir. 1913) 209 Fed. 603. To the same effect see *John Deere Plow Co. v. Edgar Farmer Store Co.*, (1915) 154 Wis. 490, 143 N. W. 194; *In re Farmers' Co-operative Co.*, (1913) 202 Fed. 1005.

*Property transferred to a person under a valid conditional contract of sale may be recovered back on the buyer becoming a*

bankrupt as there is no "preference" involved in such a transaction. *John Deere Plow Co. of Moline v. Edgar Farmer Store Co.*, (1913) 154 Wis. 490, 143 N. W. 194.

Preferences created by attachment are not within the definition of this section. *Folger v. Putnam*, (C. C. A. 9th Cir. 1912) 194 Fed. 793, wherein the court said: "This definition of a 'preference' confines its sufferance or acquirement to two classes of transactions, namely, a judgment obtained within four months before the time of the filing of the petition in bankruptcy and before adjudication, and a transfer made by the bankrupt within the same period of time. It will be noted, also, that by the classification it contradistinguishes the preference by transfer from that by procuring or suffering a judgment to be entered. There is here a complete absence of all mention of an attachment in any form or stage as constituting a preference."

An attachment lien of the character described in the first clause of section 67c (3) was held to be a preference, even if it be not regarded either as a "judgment" or a "transfer" within the meaning of section 60a. *In re Schenkein*, (1902) 113 Fed. 421; *In re Burlington Matting Co.*, (1901) 109 Fed. 777.

**Preference created by mortgage.**—A preferential transfer may be, and very frequently is, created by a mortgage; and the fact that it was so made renders it none the less a preference, providing its effect is to enable one creditor to obtain, within the four months' period, a greater percentage of his debt than is obtained by other creditors of the same class. *Pittsburgh Plate Glass Co. v. Edwards*, (C. C. A. 8th Cir. 1906) 148 Fed. 377, 17 Am. Bankr. Rep. 447; *Hussey v. Richardson-Roberts Dry Goods Co.*, (C. C. A. 8th Cir. 1906) 148 Fed. 598, 17 Am. Bankr. Rep. 511; *In re Hunt*, (1905) 139 Fed. 283; *Loeser v. Savings Deposit Bank, etc., Co.*, (1906) 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233; *In re Mission Fixture, etc., Co.*, (1900) 180 Fed. 263; *Mattley v. Giesler*, (1911) 187 Fed. 970, 110 C. C. A. 90; *Smith v. Au Gres*, (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513; *Coder v. McPherson*, (C. C. A. 8th Cir. 1907) 152 Fed. 951, 18 Am. Bankr. Rep. 523; *In re Reynolds*, (W. D. Ark. 1907) 153 Fed. 295, 18 Am. Bankr. Rep. 666; *In re Tindal*, (E. D. S. C. 1907) 155 Fed. 456, 18 Am. Bankr. Rep. 773; *Rutland County Nat. Bank v. Graves*, (D. C. Vt. 1907) 156 Fed. 168, 19 Am. Bankr. Rep. 446; *In re Floyd*, (E. D. N. C. 1907) 156 Fed. 206, 19 Am. Bankr. Rep. 438; *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; *In re Hickerson*, (D. C. Idaho 1908) 162 Fed. 345, 20 Am. Bankr. Rep. 682; *In re Her-*

*sey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864; *In re Levine*, (E. D. N. Y. 1912) 196 Fed. 589; *Butcher v. Werksman*, (E. D. N. Y. 1913) 204 Fed. 330; *Lathrop Bank v. Holland*, (C. C. A. 8th Cir. 1913) 205 Fed. 143; *In re Boyd*, (1914) 213 Fed. 774; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148.

The lien of a preferential mortgage "is within the ban of the Bankruptcy Act," and no state statute giving the mortgage a priority over an earlier unrecorded mortgage can save it from being discharged. *Petition of Rouse*, (C. C. A. 6th Cir. 1913) 208 Fed. 881.

Where a bankrupt, after having used funds belonging to a township to purchase merchandise, executed a mortgage on his stock of goods in favor of the township, it was held that such mortgage operated as a preference, and was unenforceable by the township. *Smith v. Au Gres*, (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745.

**A mortgage executed by an insolvent partnership** on its property, within four months prior to its bankruptcy, to secure the individual debt of a partner, is voidable as against partnership creditors. *In re Floyd*, (E. D. N. C. 1907) 156 Fed. 206, 19 Am. Bankr. Rep. 438.

**Time of giving mortgage.**—A mere promise by a debtor, at the time the debt was contracted, to give a mortgage to secure it, without specifying the nature of the mortgage or the property on which it was to be given, does not create a mortgage; and the giving of one on a subsequent renewal of the debt, at a time when the debtor is insolvent, and within four months prior to his bankruptcy, constitutes a transfer of property to secure an antecedent debt, and creates a preference. *Pollock v. Jones*, (C. C. A. 4th Cir. 1903) 124 Fed. 163, 10 Am. Bankr. Rep. 616.

**A lien given to secure a pre-existing debt** within the statutory period, while the giver of the lien is insolvent, and without present consideration, is invalid as a preference. *In re Belding*, (1902) 116 Fed. 1016.

**Preference created by payment.**—"Money is certainly property, whether we regard any of its forms or any of its theories." *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171. To the same point see *In re Starkweather*, (W. D. Mo. 1913) 206 Fed. 797; *In re Ft. Wayne Electric Corp.*, (1899) 96 Fed. 803; *C. S. Morey Mercantile Co. v. Schiffer*, (C. C. A. 1902) 114 Fed. 447.

**The payment of an existing indebtedness** within the four months' period and during insolvency, when it results in the preference of one creditor over another

of the same class, constitutes a preferential transfer within the meaning of section 60a. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171; *Jaquith v. Alden*, (1903) 189 U. S. 78, 23 S. Ct. 649, 47 U. S. (L. ed.) 717, 9 Am. Bankr. Rep. 773; *New York County Nat. Bank v. Massey*, (1904) 192 U. S. 138, 24 S. Ct. 199, 48 U. S. (L. ed.) 380, 11 Am. Bankr. Rep. 42; *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 26 S. Ct. 289, 50 U. S. (L. ed.) 527, 15 Am. Bankr. Rep. 336; *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231; *In re Conhaim*, (D. C. Wash. 1899) 97 Fed. 923; *In re Wolf*, (N. D. Ia. 1899) 98 Fed. 74, 3 Am. Bankr. Rep. 555; *In re Ft. Wayne Electric Corp.*, (7th Cir. 1900) 99 Fed. 400, 39 C. C. A. 582; *In re Sloan*, (S. D. Ia. 1900) 102 Fed. 116, 4 Am. Bankr. Rep. 356; *In re Fixen*, (C. C. A. 9th Cir. 1900) 102 Fed. 296, 4 Am. Bankr. Rep. 10; *In re Arndt*, (E. D. Wis. 1900) 104 Fed. 234, 4 Am. Bankr. Rep. 773; *In re Sanderlin*, (E. D. N. C. 1901) 109 Fed. 867; *McNair v. McIntyre*, (C. C. A. 4th Cir. 1902) 113 Fed. 113, 7 Am. Bankr. Rep. 638; *In re Waterbury Furniture Co.*, (D. C. Conn. 1902) 114 Fed. 255, 8 Am. Bankr. Rep. 79; *Boyd v. Lemon, etc., Co.*, (C. C. A. 5th Cir. 1902) 114 Fed. 647, 8 Am. Bankr. Rep. 83; *In re Belding*, (D. C. Mass. 1902) 116 Fed. 1016, 8 Am. Bankr. Rep. 718; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *In re Jones*, (D. C. S. C. 1902) 118 Fed. 673, 9 Am. Bankr. Rep. 262; *In re Thompson*, (E. D. Pa. 1903) 121 Fed. 607, 10 Am. Bankr. Rep. 288; *In re Colton Export, etc., Co.*, (C. C. A. 2d Cir. 1903) 121 Fed. 663, 10 Am. Bankr. Rep. 14; *In re Lyon*, (C. C. A. 2d Cir. 1903) 121 Fed. 723, 10 Am. Bankr. Rep. 25; *In re Wolf*, (W. D. Tenn. 1903) 122 Fed. 127, 10 Am. Bankr. Rep. 153; *In re Jones*, (D. C. S. C. 1903) 123 Fed. 128, 10 Am. Bankr. Rep. 513; *In re George M. Hill Co.*, (C. C. A. 7th Cir. 1904) 130 Fed. 315, 12 Am. Bankr. Rep. 221; *In re Foley*, (E. D. Pa. 1905) 140 Fed. 300, 15 Am. Bankr. Rep. 832; *Ridge Ave. Bank v. Studheim*, (C. C. A. 3d Cir. 1906) 145 Fed. 798, 16 Am. Bankr. Rep. 863; *In re Plant*, (S. D. Ga. 1906) 148 Fed. 37, 17 Am. Bankr. Rep. 272; *McNaboe v. Columbian Mfg. Co.*, (C. C. A. 2d Cir. 1907) 153 Fed. 967, 18 Am. Bankr. Rep. 684; *Pratt v. Columbia Bank*, (S. D. N. Y. 1907) 157 Fed. 137, 18 Am. Bankr. Rep. 406; *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; *Ohio Valley Bank Co. v. Mack*, (C. C. A. 6th Cir. 1906) 163 Fed. 155, 20 Am. Bankr. Rep. 40; *In re Rice*, (E. D. Pa. 1908) 164 Fed. 514, 21 Am. Bankr.

Rep. 202; *In re Kearney*, (E. D. Pa. 1909) 167 Fed. 995, 21 Am. Bankr. Rep. 721; *In re Knost*, (S. D. Ohio) 2 Am. Bankr. Rep. 471; *Landry v. Andrews*, (1901) 6 Am. Bankr. Rep. 281, 22 R. I. 597, 48 Atl. 1036; *In re Rosenberg*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 316; *West v. Lahoma Bank*, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 328, 85 Pac. 469.

"But in the usual course of business a payment of money is appropriable only to an existing debt, and, in the nature of the case, can be related as a preference to such debt alone." *In re Abraham Steers Lumber Co.*, (1901) 110 Fed. 738.

*Preferential payments to several creditors.*—A payment made by an insolvent corporation to a creditor, within four months prior to its bankruptcy, is no less a preference because some other creditors may also have obtained larger payments in proportion to their claims during such period. *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551.

*Payment of notes.*—In *In re Bullock*, (1902) 116 Fed. 667, it appeared that a debtor closed an account by giving notes. Such notes were executed six months prior to the adjudication. The creditor sold such notes and within the four months some of them were paid to the indorsee. It was held that this was not a preferential payment to the payee, *distinguishing* *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171.

Payments by the bankrupt, while insolvent, within four months prior to the filing of the petition in bankruptcy against him, upon his indorsed notes, which the indorsers would have paid if he had not, constitute a preference, whether the creditor preferred derived any benefit from these payments or not. *Swarts v. St. Louis Fourth Nat. Bank*, (8th Cir. 1902) 117 Fed. 1, 54 C. C. A. 387.

Where notes, given by a debtor to close an account for goods, were still held by the creditor and unpaid at the time a further indebtedness on account was contracted, it was held that both the notes and account constituted the indebtedness then due, and that a payment of the notes thereafter, when the debtor was insolvent, and within four months prior to his bankruptcy, constituted the giving of a preference. *In re Jones*, (D. C. S. C. 1903) 123 Fed. 128, 10 Am. Bankr. Rep. 513.

The payment to a bank by an insolvent, within four months prior to his bankruptcy, of notes given to third persons, but which have been indorsed to and are owned by the bank, constitutes a preference given to the bank. *In re George M. Hill Co.*, (C. C. A. 7th Cir. 1904) 130 Fed. 315, 12 Am. Bankr. Rep. 221.



*The subsequent payment of a post-dated check*, while insolvent and within the prohibited period, constitutes a preference. *In re Lyon*, (C. C. A. 2d Cir. 1903) 121 Fed. 723, 10 Am. Bankr. Rep. 25.

*Repayment of loan*.—A payment made by a bankrupt two days before the bankruptcy and while insolvent, in repayment of a loan, constitutes a voidable preference. *In re Kearney*, (E. D. Pa. 1909) 167 Fed. 995, 21 Am. Bankr. Rep. 721.

*Payment of rent* by an insolvent is not necessarily a preference; but when it is done as a means and for the purpose of carrying on a business in fraud of creditors it should be so regarded. *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231.

*Payment in goods*.—Where, within a month prior to the filing of a bankruptcy petition, the bankrupts delivered certain goods to their father and another, in part payment of unsecured debts, it was held that such payment was a preference, and that the trustee was entitled to recover the goods or their value from the transferees. *In re Ansley*, (E. D. N. C. 1907) 153 Fed. 983, 18 Am. Bankr. Rep. 457.

*Directing another to pay creditors*.—Where a partner of a bankrupt firm directed a mortgagee of firm property, who had foreclosed the mortgage and obtained a surplus after satisfaction of the mortgage debt, to pay such surplus to a firm creditor, it was held that the transaction was in effect a direct payment by the firm to the creditor, and constituted a preferential payment. *Johnson v. Hanley, etc., Co.*, (D. C. R. I. 1911) 188 Fed. 752.

*But the repayment of money stolen* does not constitute a preference. *McNaboe v. Columbian Mfg. Co.*, (C. C. A. 2d Cir. 1907) 153 Fed. 967, 18 Am. Bankr. Rep. 684.

*Money due from a bankrupt as trustee*, and which cannot be distinguished from any other moneys in his possession or under his control, or which is due from him only because he has used trust funds for his own purposes, or otherwise misapplied them, cannot be considered as property held by the bankrupt in trust, and a transfer of the same creates a preference when the other elements of a preference are present. *In re Dorr*, (C. C. A. 9th Cir. 1912) 196 Fed. 292.

*Payments made on open accounts* and in due course of business within the four months' period, and which are received in good faith, without the creditor's knowledge of the debtor's insolvency, leaving a net amount due from the bankrupt's estate, do not constitute a preference. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171; *Jaquith v. Alden*, (1903) 189 U. S. 78, 23 S. Ct. 649, 47 U. S. (L. ed.) 717, 9 Am. Bankr. Rep. 773; *Yaple v. Dahl-Millikan Grocery Co.*, (1904) 193 U. S.

526, 24 S. Ct. 552, 48 U. S. (L. ed.) 776; *Wild v. Provident L., etc., Co.*, (1909) 214 U. S. 292, 29 S. Ct. 619, 53 U. S. (L. ed.) 1003, 22 Am. Bankr. Rep. 109; *In re Sagor*, (C. C. A. 2d Cir. 1903) 121 Fed. 658, 9 Am. Bankr. Rep. 361; *Wild v. Provident L., etc., Co.*, (C. C. A. 3d Cir. 1907) 153 Fed. 562, 18 Am. Bankr. Rep. 506, *affirming* (E. D. Pa. 1906) 17 Am. Bankr. Rep. 56; *In re Hall*, (W. D. N. Y. 1900) 4 Am. Bankr. Rep. 671; *In re Smoke*, (1900) 104 Fed. 289; *In re Ratliff*, (1901) 107 Fed. 80. *Contra, In re Fixen*, (C. C. A. 1900) 102 Fed. 295. *In re Farmers' Store, etc., Co.*, (N. D. W. Va. 1914) 214 Fed. 505, the court said: "It is clear from these decisions that merchants may sell goods to an insolvent customer, and may receive payments from him on account thereof within the four months prior to adjudication in bankruptcy, without such payments constituting a preference, provided the creditor so selling has no knowledge of the insolvency of his customer. If he has such knowledge, then such payments become preferential."

This conclusion rests upon the broad principle that the net effect of such dealings between the creditor and the bankrupt after the bankrupt's insolvency is to enrich the bankrupt's estate by the total sales, less the total payments. *Jaquith v. Alden*, (1903) 189 U. S. 78, 23 S. Ct. 649, 47 U. S. (L. ed.) 717; *Wild v. Provident L., etc., Co.*, (1909) 214 U. S. 292, 29 S. Ct. 619, 53 U. S. (L. ed.) 1003; *In re Dickson*, (1901) 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349.

Such payments on a running account are no more preferences than if the purchases had been for cash. *Jaquith v. Alden*, (1903) 189 U. S. 78, 23 S. Ct. 649, 47 U. S. (L. ed.) 717.

*Payment by indorser*.—Where an indorser of a bankrupt's paper, well secured by the indorser's collateral, paid the paper to the bank, and charged the amount against its debt on open account to the bankrupt, it was held that equity did not require that the payment be held to constitute a preference to the bank by the bankrupt on the theory that the transaction was an evasion of the Act. *Mason v. National Herkimer County Bank*, (C. C. A. 2d Cir. 1909) 172 Fed. 529, 22 Am. Bankr. Rep. 733.

*Necessity of increasing bankrupt's estate*.—It has been held that it is only where new sales succeed payments, and the net result is to increase the value of the estate, that payments made by an insolvent debtor, or on running account, are not to be considered as preferential transfers. *Wild v. Provident L., etc., Co.*, (C. C. A. 3d Cir. 1907) 153 Fed. 562, 18 Am. Bankr. Rep. 506.

Section 57g, providing that "the claims of creditors who have received preferences

shall not be allowed unless such creditors shall surrender their preferences," will not be so construed as to require a creditor to surrender partial payments received by him on account in the usual course of business, where the transactions covered by the account between them, taken together, resulted in increasing the net indebtedness to the creditor, and correspondingly increasing the bankrupt's estate. *In re Dickson*, (C. C. A. 1st Cir. 1901) 111 Fed. 726, 7 Am. Bankr. Rep. 186.

But even an increase of the bankrupt's estate, as a net result of the transactions between the bankrupt and a creditor within four months prior to filing the petition in bankruptcy, where the last transaction was a payment on account of the indebtedness, is not sufficient to relieve the creditor from surrendering this last payment as preferential before he is permitted to prove the balance of his claim against the bankrupt's estate, when the account runs far back beyond the four months before the petition was presented and the transactions between them end with a large payment on account of the whole indebtedness. *In re Watkinson*, (E. D. Pa. 1906) 17 Am. Bankr. Rep. 56.

**Payment followed by new credits.**— "The receipt by a creditor of payments upon an account current, in the usual course of business, which are followed by new credits for property delivered to the debtor, which becomes a part of his estate, for which the creditor has not been paid, and which equals or exceeds in amount and value the payments, does not constitute a preference under section 60a." *Kimball v. E. A. Rosenham Co.*, (C. C. A. 1902) 114 Fed. 85. But see *In re Arndt*, (1900) 104 Fed. 234, where partial payments were made by a bankrupt to a creditor on account, in the usual course of business, within four months of the filing of the petition and in order to obtain more goods on credit, which credit was given, the payments being received without knowledge of the debtor's insolvency, and it was held that, as preferences, they must be surrendered before the creditor could prove his claim.

**Payment of valid lien.**—The payment by a partnership, within four months prior to its bankruptcy, of a sum of money to the mother of the partners, on account of accrued interest on her statutory dower in real estate, owned by the partners through descent from their father, but upon which the mother had a lien for her dower and interest, cannot be assailed as a preference. *In re Riddle*, (E. D. Pa. 1903) 122 Fed. 559.

**Banking transactions—In general.**— "There is nothing in the statute which deprives a bank, with whom an insolvent is doing business, of the rights of any other creditor taking money without reasonable cause to believe that a preference

will result from the payment. The Bankruptcy Act contemplates that by remaining in business and at work, an insolvent may become able to pay off his debts. It does not prevent him from continuing in trade, depositing money in bank, drawing checks and paying debts as they mature, either to his own bank or any other creditor. It does provide, however, that if bankruptcy ensues, all payments thus made, within the four months period, may be recovered by the trustee, if the creditor had reasonable cause to believe that a preference would be thereby effected." *Studley v. Boylston Nat. Bank of Boston*, (1913) 229 U. S. 523, 33 S. Ct. 806, 57 U. S. (L. ed.) 1313, *affirming* (1st Cir. 1912) 200 Fed. 249, 118 C. C. A. 435, the latter case holding that where a bankrupt, within four months prior to bankruptcy, paid some notes he had discounted at the bank by check on his general account, and the bank within the same period charged some notes of the depositor against his account, the transaction all being in good faith and in the general course of business, there was no voidable preference.

The Bankruptcy Act does not take away from a banker the right to transact business with his customer in the ordinary way. He may take renewal notes in extension of credit and receive partial payment of his debt, and has the right during the continuance of their relations to presume that his debtor is solvent and carrying on business in the usual way; and if it turns out that the debtor was insolvent the creditor may receive payment without incurring the liability of having to restore such payment when bankruptcy intervenes. The Bankruptcy Act requires a restoration of preferential payments only when the creditor has reasonable cause to believe that a preference will result from such payments made within four months of the bankruptcy. *Grandison v. Robertson*, (W. D. N. Y. 1915) 220 Fed. 985.

Where it appeared that a bank, which held a note against a depositor, on threat of setting off the note against the depositor's account, obtained from the depositor a post-dated check to apply on the note, which check was afterwards cashed by the bank out of subsequent deposits, made within five months of bankruptcy, the depositor at the time being insolvent, and the bank had reasonable cause to know of his insolvency, it was held that a voidable preference was created. *In re Starkweather*, (W. D. Mo. 1913) 206 Fed. 797.

"A deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates, at the same time, on the part of the bank, an obligation to pay the amount of the deposit

as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security. . . . In the Pirie Case [*Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171], the turning question was whether the payment of money was a transfer within the meaning of the law, and it was held that it was. There the payment of the money within the time named in the Bankrupt Law was a parting with so much of the bankrupt's estate, for which he received no obligation of the debtor but a credit for the amount on his debt. This was held to be a transfer of property within the meaning of the law. It is not necessary to depart from the ruling made in that case, that such payment was within the operation of the law, while a deposit of money upon an open account subject to check, not amounting to a payment, but creating an obligation upon the part of the bank to repay upon the order of the depositor, would not lie." *New York County Nat. Bank v. Massey*, (1904) 192 U. S. 138, 24 S. Ct. 199, 48 U. S. (L. ed.) 380.

*Contra*, in the earlier case of *In re Stege*, (C. C. A. 1902) 116 Fed. 342, a bank was required, as a condition to proving other claims, to surrender money deposited by an insolvent depositor.

The deposit of money in bank by an insolvent within four months prior to his bankruptcy, on open account, subject to check, does not constitute a transfer of property amounting to a preference, although the bank may be at the time a creditor, and, under section 68a, have the right to set off so much of its claim as equals the balance in such account. *In re George M. Hill Co.*, (C. C. A. 7th Cir. 1904) 130 Fed. 315, 12 Am. Bankr. Rep. 221, 12 Am. Bankr. Rep. 451; *Tomlinson v. Lexington Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 824, 16 Am. Bankr. Rep. 632; *McDonald v. Clearwater Shortline R. Co.*, (C. C. Idaho 1908) 164 Fed. 1007; *Mason v. National Herkimer County Bank*, (C. C. A. 2d Cir. 1909) 172 Fed. 529, 22 Am. Bankr. Rep. 733; *In re Wright-Dana Hardware Co.*, (N. D. N. Y. 1913) 207 Fed. 636; *In re Elsasser*, (E. D. Pa. 1901) 7 Am. Bankr. Rep. 215; *West v. Lahoma Bank*, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 328, 85 Pac. 469. See also the annotation under sections 68 a and b, as to the right of set-off.

*Thus where an insolvent person borrows money from a bank*, and executes his note therefor, and deposits the money in said bank subject to his check, such transaction does not constitute a preferential transfer under the Bankruptcy Act; and the bank may, before the depositor is declared a bankrupt, credit the amount of his deposit upon his debt due the bank, and such transaction will not entitle the

trustee in bankruptcy to recover the amount of such deposit as a preference. *West v. Lahoma Bank*, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 328, 85 Pac. 469.

*The application by a bank of the amount standing to the credit of a depositor in his general account*, subject to check on a note of the depositor, although within four months prior to his bankruptcy, and while he was insolvent, does not constitute a preference. *In re Scherzer*, (N. D. Ia. 1904) 130 Fed. 631, 12 Am. Bankr. Rep. 451.

*Payment of overdraft*.—So, also, where a bank allowed a customer to overdraw on the express agreement that the customer should assign good accounts for collection to pay the overdraft, it was held that the subsequent assignment of the accounts, although the customer was insolvent, did not constitute the giving of a preference. *Tomlinson v. Lexington Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 824, 16 Am. Bankr. Rep. 632.

But see *In re Kellar*, (N. D. Ia. 1901) 110 Fed. 348, wherein it was held that deposits in a bank made by an insolvent within four months prior to his bankruptcy, and applied by the bank to the payment of an overdraft previously made, constitute a preference.

*Deposit in pursuance of creditors' agreement*.—A trustee in bankruptcy has no interest which he can enforce for the benefit of general creditors in an arrangement between the bankrupt and certain creditors by which money deposited with one, which was a bank, was to be held in trust and distributed *pro rata* between them, and which was not prohibited by the bankruptcy statute. *Lowell v. International Trust Co.*, (C. C. A. 1st Cir. 1907) 158 Fed. 781, 19 Am. Bankr. Rep. 853.

*Preferential payment to bank*.—But a bank is not relieved from liability to refund, as a preference, a payment received on notes from a bankrupt while insolvent, under such circumstances that it had reasonable grounds to believe that a preference was intended, by the fact that the payment was made by a check on the debtor's deposit in the same bank, which, if it had remained until the debtor's bankruptcy, the bank might have retained as a set-off. *Ridge Ave. Bank v. Studheim*, (C. C. A. 3d Cir. 1906) 145 Fed. 798, 16 Am. Bankr. Rep. 863. And see to the same effect *Pratt v. Columbia Bank*, (S. D. N. Y. 1907) 157 Fed. 137, 18 Am. Bankr. Rep. 406; *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501.

*Payment of its officer by insolvent bank*.—Where a day or two before the open insolvency of a bank its receiving and paying teller, with full knowledge of its insolvency, drew his check against the fund and paid himself \$3,100 which he

claimed as a creditor of the bank, it was held that such transaction constituted a preference which was recoverable by the bank's trustee in bankruptcy. *In re Plant*, (S. D. Ga. 1906) 148 Fed. 37, 17 Am. Bankr. Rep. 272.

*Where a bank takes title to merchandise purchased on credit furnished by itself and delivers the same on consignment to the bankrupt, taking a trust receipt under which the merchandise was to be held for the bank until paid for, an agreement within four months of the bankruptcy to return the merchandise to the bank is not a preference, as the bank starts with the full ownership of the goods and that ownership is never lost.* *In re Killian Mfg. Co.*, (E. D. Pa. 1913) 209 Fed. 498.

*Securities delivered by a broker to a bank immediately preceding his bankruptcy to secure a loan made by the bank held under the circumstances shown to be a preference.* *National City Bank of New York v. Hotchkiss*, (1913) 231 U. S. 50, 34 S. Ct. 20, 58 U. S. (L. ed.) 115; *Mechanics' & Metals Nat. Bank of New York v. Ernst*, (1913) 231 U. S. 50, 34 S. Ct. 20, 58 U. S. (L. ed.) 115.

*The assignment, by an insolvent, of accounts receivable, for the benefit of a bank, resulting in the indorsement of renewal notes and the subsequent collection of the accounts receivable, is a transfer within the prohibition of the Bankruptcy Act.* *Grandison v. National Bank of Commerce*, (W. D. N. Y. 1915) 220 Fed. 981, wherein the court said: "It makes no difference that the bankrupt paid the bank through the assignment to its president of the accounts receivable, as long as the arrangement resulted in disposing of the accounts receivable in such a way as to deplete the assets. The Bankruptcy Act does not forbid the taking of money by a bank in payment of a debt in the ordinary course of business, even if it should transpire that at the time of payment the debtor was insolvent; but in this case we are dealing with a different situation. Here, as said, the bank had reasonable cause to believe it was being favored, and nevertheless received payment of its debt, amounting to fifteen thousand two hundred sixteen dollars and ninety cents, by an arrangement made particularly for its benefit."

*The acceptance of a check, from a depositor, by a bank, which holds an overdue note of the latter, operates as a forfeiture of the right of the bank to set off the note against the deposit in event of the bankruptcy of the depositor within four months from the date of the transaction.* *Knoll v. Commercial Trust Co.*, (1915) 249 Pa. St. 197, 94 Atl. 750, L. R. A. 1916A 683.

## II. CONSTITUENT ELEMENTS.

**In general.**—A preference is recoverable by a trustee when the following elements exist: (1) The insolvency of the debtor. (2) A preference obtained within four months prior to the filing of the petition in bankruptcy. (3) The debtor has suffered or procured a judgment to be entered against himself, or had made a transfer of any of his property, which operates as a preference. (4) The person receiving such preference, or to be benefited thereby, or his agent acting therein, has reasonable cause to believe that the enforcement of such judgment or transfer will effect a preference. *Galbraith v. Whitaker*, (1912) 119 Minn. 447, 138 N. W. 772, 43 L. R. A. (N. S.) 427.

**Must be act of bankrupt.**—To constitute a preference the transfer or payment must have been the act of the bankrupt. *Western Tie, etc., Co. v. Brown*, (1905) 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571. But the act of a duly authorized agent within the scope of his authority is the act of the bankrupt. *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 26 S. Ct. 289, 50 U. S. (L. ed.) 527.

**Insolvency.**—It is elementary to the definition of a forbidden preference, considered under any section of the Bankruptcy Law, and for any purpose, that it must have been made by the debtor "while insolvent." A solvent debtor cannot make a preference. *Kaufman v. Tredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190, 12 Am. Bankr. Rep. 682; *In re Baumann*, (W. D. Tenn. 1899) 96 Fed. 946; *In re Lange*, (S. D. N. Y. 1899) 97 Fed. 197, 3 Am. Bankr. Rep. 231; *In re Alexander*, (N. D. Ga. 1900) 102 Fed. 464, 4 Am. Bankr. Rep. 376; *Duncan v. Landis*, (C. C. A. 3d Cir. 1901) 106 Fed. 839, 5 Am. Bankr. Rep. 675; *In re Bloch*, (C. C. A. 2d Cir. 1901) 109 Fed. 790, 6 Am. Bankr. Rep. 300; *In re Chappell*, (E. D. Va. 1901) 113 Fed. 545, 7 Am. Bankr. Rep. 608; *McDonald v. Daskam*, (C. C. A. 7th Cir. 1902) 116 Fed. 276, 8 Am. Bankr. Rep. 543, *affirming* (E. D. Wis. 1901) 6 Am. Bankr. Rep. 271; *In re Doscher*, (E. D. N. Y. 1902) 120 Fed. 408; *In re Docker-Foster Co.*, (E. D. Pa. 1903) 123 Fed. 190, 10 Am. Bankr. Rep. 584; *In re Mandel*, (S. D. N. Y. 1903) 127 Fed. 863, 10 Am. Bankr. Rep. 774, *affirmed* (2d Cir. 1905) 135 Fed. 1021, 68 C. C. A. 546; *Lansing Boiler, etc., Works v. Ryerson*, (C. C. A. 6th Cir. 1904) 128 Fed. 701, 11 Am. Bankr. Rep. 558; *Troy Wagon Works v. Vastbinder*, (M. D. Pa. 1904) 130 Fed. 232, 12 Am. Bankr. Rep. 352; *In re Goodhile*, (N. D. Ia. 1904) 130 Fed. 782, 12 Am. Bankr. Rep. 374; *In re Shoemith*, (C. C. A. 7th Cir. 1905) 135 Fed. 684, 13 Am. Bankr. Rep. 645; *In re Clifford*, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 281; *J. W. Butler*

Paper Co. v. Goembel, (C. C. A. 7th Cir. 1905) 143 Fed. 295, 15 Am. Bankr. Rep. 26; *In re Hines*, (D. C. Ore. 1906) 144 Fed. 142, 16 Am. Bankr. Rep. 296; Ridge Ave. Bank v. Studheim, (C. C. A. 3d Cir. 1906) 145 Fed. 798; Calhoun County Bank v. Cain, (C. C. A. 4th Cir. 1907) 152 Fed. 983, 18 Am. Bankr. Rep. 509; *In re Pfaffinger*, (W. D. Ky. 1907) 154 Fed. 528, 18 Am. Bankr. Rep. 807; Rutland County Nat. Bank v. Graves, (D. C. Vt. 1907) 156 Fed. 168, 19 Am. Bankr. Rep. 446; Huttig Mfg. Co. v. Edwards, (C. C. A. 8th Cir. 1908) 160 Fed. 619, 20 Am. Bankr. Rep. 349; *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; *In re Farmers' Supply Co.*, (S. D. Ohio 1909) 170 Fed. 502, 22 Am. Bankr. Rep. 460; Worrell v. Whitney, (E. D. Pa. 1910) 179 Fed. 1014; *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962; Paper v. Stern, (C. C. A. 8th Cir. 1912) 198 Fed. 642; Ogden v. Reddish, (E. D. Ky. 1912) 200 Fed. 977; Mayes v. Palmer, (C. C. A. 8th Cir. 1913) 208 Fed. 97; Sebring v. Wellington, (N. Y. 1901) 6 Am. Bankr. Rep. 671; Matter of Linton, (E. D. Pa. 1902) 7 Am. Bankr. Rep. 676; Matter of Rung Furniture Co., (W. D. N. Y. 1903) 10 Am. Bankr. Rep. 51; Halbert v. Pranke, (1904) 11 Am. Bankr. Rep. 621, 91 Minn. 204, 97 N. W. 976; John S. Brittain Dry Goods Co. v. Bertenshaw, (1904) 11 Am. Bankr. Rep. 630, 68 Kan. 734, 75 Pac. 1027; Cullinane v. State Bank, (1904) 12 Am. Bankr. Rep. 776, 123 Ia. 340, 98 N. W. 887; Hackney v. Hargreaves, (1904) 13 Am. Bankr. Rep. 164, 68 Neb. 634, 94 N. W. 822, 99 N. W. 675, reversing (1903) 10 Am. Bankr. Rep. 213; Chicago Motor Vehicle Co. v. American Oak Leather Co., (1905) 15 Am. Bankr. Rep. 808; Harder v. Clark, (1910) 23 Am. Bankr. Rep. 756, 66 Misc. 584, 123 N. Y. S. 1102; DeGraff v. Lang, (1904) 92 App. Div. 564, 87 N. Y. S. 78; Russell v. Mayfield Lumber Co., (1914) 158 Ky. 219, 164 S. W. 783.

"The inhibitions of section 60 apply only to preferences given when the debtor is insolvent in fact," and, where fire insurance policies are assigned as collateral security for an antecedent debt, such assignment is not avoided as preferential by the bankruptcy of the insured within four months thereafter, if the insured was solvent at the time of the assignment, and became insolvent only as a result of the fire by which the property so insured was destroyed. *In re Wittenberg Veneer, etc., Co.*, (1901) 108 Fed. 593.

The instances where any one has a moral or ethical standing to attack a security given by a perfectly solvent debtor are rare, although they may sometimes occur, and such exceptional instances do not justify straining the statute. *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962.

What constitutes insolvency has been considered under section 1a (15).

Intention to give a preference is not material since the amendment of section 60b in 1910. See the first paragraph of the note to section 60b. Prior to that amendment there was some diversity of opinion on the question. See *Kimmerle v. Farr*, (1911) 189 Fed. 295, 111 C. C. A. 27, and cases there cited; *Alexander v. Redmond*, (1910) 180 Fed. 92, 103 C. C. A. 446; *In re Bashline*, (1901) 109 Fed. 965; *Strobel, etc., Co. v. Knost*, (1900) 99 Fed. 409; *In re Henry C. King Co.*, (1902) 113 Fed. 110; *In re Ed. W. Wright Lumber Co.*, (1902) 114 Fed. 1011; *Wilson v. Nelson*, (1901) 183 U. S. 191.

Under the Bankruptcy Act of 1867, the courts held that intent was an essential element of a preference. *Wilson v. City Bank of St. Paul*, (1873) 17 Wall. 473, 21 U. S. (L. ed.) 723; *Clark v. Iselin*, (1874) 21 Wall. (U. S.) 360, 22 U. S. (L. ed.) 568; *New York City Tenth Nat. Bank v. Warren*, (1877) 96 U. S. 539, 24 U. S. (L. ed.) 640; *Sage v. Wyncoop*, (1881) 104 U. S. 319, 26 U. S. (L. ed.) 740.

Preference must be given to creditor.—

It is essential, in order to constitute a preference under section 60a, that a creditor obtain some portion of the bankrupt's property; otherwise there can be no preference. *Richardson v. Shaw*, (1908) 209 U. S. 365, 381, 28 S. Ct. 512, 52 U. S. (L. ed.) 835, 14 Ann. Cas. 981; *Van Idersstine v. National Discount Co.*, (1913) 227 U. S. 575, 33 S. Ct. 343, 57 U. S. (L. ed.) 652; *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648; *Swarts v. Siegel*, (E. D. Mo. 1902) 114 Fed. 1001, 8 Am. Bankr. Rep. 220; *In re Steam Vehicle Co.*, (E. D. Pa. 1903) 121 Fed. 939, 10 Am. Bankr. Rep. 385; *In re Clifford*, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 281; *Benjamin v. Chandler*, (M. D. Pa. 1905) 142 Fed. 217, 15 Am. Bankr. Rep. 439; *Wood v. U. S. Fidelity, etc., Co.*, (D. C. Mass. 1905) 143 Fed. 424, 16 Am. Bankr. Rep. 21; *In re Hines*, (D. C. Ore. 1906) 144 Fed. 147, 16 Am. Bankr. Rep. 538; *Ludvigh v. Umstadter*, (S. D. N. Y. 1906) 148 Fed. 319, 17 Am. Bankr. Rep. 774; *Kobusch v. Hand*, (C. C. A. 8th Cir. 1907) 156 Fed. 660, 19 Am. Bankr. Rep. 379; *Huttig Mfg. Co. v. Edwards*, (C. C. A. 8th Cir. 1908) 160 Fed. 619, 20 Am. Bankr. Rep. 349; *Mason v. National Herkimer County Bank*, (2d Cir. 1909) 172 Fed. 529, 97 C. C. A. 155; *Mattley v. Wolfe*, (D. C. Neb. 1909) 175 Fed. 619, 23 Am. Bankr. Rep. 673; *In re Kayser*, (C. C. A. 3d Cir. 1910) 177 Fed. 383, 24 Am. Bankr. Rep. 174; *Catchings v. Chatham Nat. Bank*, (C. C. A. 2d Cir. 1910) 180 Fed. 103; *Clarke v. Rogers*, (C. C. A. 1st Cir. 1910) 183 Fed. 518; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931;

*Ogden v. Reddish*, (E. D. Ky. 1912) 200 Fed. 977; *Aiello v. Crampton*, (C. C. A. 8th Cir. 1912) 201 Fed. 891; *Keystone Warehouse Co. v. Bissell*, (C. C. A. 2d Cir. 1913) 203 Fed. 651; *Russell v. Mayfield Lumber Co.*, (1914) 158 Ky. 219, 164 S. W. 783; *Jump v. Bernier*, (1915) 221 Mass. 241, 108 N. E. 1027; *Hackney v. Hargreaves*, (1904) 13 Am. Bankr. Rep. 164, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675.

There can be no preference under the Bankruptcy Act where the relationship of debtor and creditor does not exist. *Ellet-Kendall Shoe Co. v. Martin*, (C. C. A. 8th Cir. 1915) 222 Fed. 851, wherein the court held that as a consignee of property for sale on commission acquired no title to the unsold property received under such contract, a purchaser from, or creditor of, the consignee could not hold the same as against the consignor, and that consequently a contract for the consignment of merchandise for sale was not a preference to the consignor, avoidable by the bankruptcy of the consignee less than four months thereafter.

**Payment benefiting accommodation maker of note.**—Where a payment is made by an insolvent debtor, within four months of bankruptcy, of notes on which the debtor is liable as principal, the trustee in bankruptcy cannot recover the amount of payments so made to the creditor, from an accommodation maker of the notes who was jointly liable to the creditor for their payment, but who neither participated in, nor knew of, the payment when made to the creditor, on the sole ground that the necessary result of such obligation was not to relieve the accommodation maker from his obligation to pay the same. *Swarts v. Siegel*, (1902) 114 Fed. 1001, *distinguishing Bartholow v. Bean*, (1873) 18 Wall. 635, 21 U. S. (L. ed.) 866, and holding that "it is only a creditor of the bankrupt who may receive any preference," and that an accommodation maker of a note is in no sense a creditor of the principal debtor, within the meaning of the Act, until he has paid the obligation, or some part of it, for which he has become surety.

**Must have provable claim.**—It seems to be an accepted doctrine that preferences are within the same subject-matter as claims provable; and that it is only with reference to claims provable that preferences can be declared. *Richardson v. Shaw*, (1908) 209 U. S. 365, 381, 28 S. Ct. 512, 52 U. S. (L. ed.) 835; *Clarke v. Rogers*, (C. C. A. 1st Cir. 1910) 183 Fed. 518, *affirmed* (1913) 228 U. S. 534, 33 S. Ct. 587, 57 U. S. (L. ed.) 953; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931.

Thus where a creditor of a bankrupt files a petition in the court of bankruptcy, setting up a claim to the ownership of a fund which has been paid into court sub-

ject to the rights of conflicting claimants, but does not seek to prove a claim as a general creditor of the estate, the amount of a preference received by such creditor cannot be deducted from such fund. *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648.

It is undoubtedly the general construction of the statute that nothing is within its purview so far as preferences are concerned, except with reference to debts which can be proved for a dividend. On the other hand, it must be accepted that anything which can be proved for a dividend is within the purview of those portions of the statute which relate to preferences, whether or not they are strictly shadowed out by the words "creditor" and "debt," as especially defined in the statute, or as otherwise reasonably understood. *Clarke v. Rogers*, (C. C. A. 1st Cir. 1910) 183 Fed. 518, *affirmed* (1913) 228 U. S. 534, 33 S. Ct. 587, 57 U. S. (L. ed.) 953.

**Two individuals are not indispensable to consummate a preference.** For example, a forbidden preference may be effected by a defaulting trustee, who, with knowledge of his insolvency, and within four months of the filing of a petition in bankruptcy against him, transfers his individual property from himself individually to one of such trusts and to himself as trustee thereof, to make good a shortage. *Clarke v. Rogers*, (1913) 228 U. S. 534, 33 S. Ct. 587, 57 U. S. (L. ed.) 953, *affirming* (1st Cir. 1910) 183 Fed. 518, 106 C. C. A. 64.

**Transfer made to another for creditor's benefit.**—To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuitry of arrangement will not avail to save it. It is not the mere form or method of the transaction that the Act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors. The "accounts receivable" of the debtor, that is, the amounts owing to him on open account, are of course as susceptible of preferential disposition as other property; and if an insolvent debtor arranges to pay a favored creditor through the disposition of such an account, to the depletion of his estate, it must be regarded as equally a preference whether he procures the payment to be made on his behalf by the debtor in the account—the same to constitute a payment in whole or part of the latter's debt—or he collects the amount

and pays it over to his creditor directly. This implies that, in the former case, the debtor in the account, for the purpose of the preferential payment, is acting as the representative of the insolvent and is simply complying with the directions of the latter in paying the money to his creditor. *National Bank of Newport v. National Herkimer County Bank*, (1912) 225 U. S. 178, 32 S. Ct. 633, 56 U. S. (L. ed.) 1042.

A surety or indorser for a bankrupt is a "creditor" within the meaning of the statute. *Kobusch v. Hand*, (C. C. A. 8th Cir. 1907) 156 Fed. 660, 19 Am. Bankr. Rep. 379; *Huttig Mfg. Co. v. Edwards*, (C. C. A. 8th Cir. 1908) 160 Fed. 619, 20 Am. Bankr. Rep. 349; *In re George M. Hill Co.*, (1904) 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68; *Lazarus v. Eagen*, (M. D. Pa. 1912) 206 Fed. 518.

A guarantor, an indorser, an accommodation maker, or a surety, on the obligation of a bankrupt, is a "creditor" and the fact that the guarantor or indorser did not pay or induce the payment of the debt, but the payment was made by the bankrupt, does not except the case from the operation of the rule. *Paper v. Stern*, (C. C. A. 8th Cir. 1912) 198 Fed. 642.

An accommodation indorser before the notes are paid is a creditor; his claim is provable as a contingent claim founded on contract; and therefore, such an indorser must refund to the estate any preferential part payments made by the maker to the holder on account of the notes before he can prove his own claim for payments as indorser. *Platt v. Ives*, (1913) 86 Conn. 690, 86 Atl. 579.

Where a broker buys stock for a customer on a margin, the title to such stock is in the customer, and not in the broker, who holds the same merely as pledgee to secure the advances made by him in the purchase; hence the customer is not a creditor of the broker with respect to the transaction, and the transfer of the stock to the customer on the settlement of his account cannot be considered the giving of a preference by the broker on his bankruptcy within four months thereafter. *Richardson v. Shaw*, (C. C. A. 2d Cir. 1906) 147 Fed. 659, 16 Am. Bankr. Rep. 842, affirmed (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835.

*Delivery of stock by broker to customer.*—When a broker agrees to carry stock for a customer he may buy stocks to fill several orders in a lump; he may increase his single purchase by stock of the same kind that he wants for himself; he may pledge the whole block thus purchased for what sum he likes, or deliver it all in satisfaction of later orders, and he may satisfy the earlier customer with any stock that he has on hand or that he buys when the time for delivery comes. Yet he is bound to keep stock enough to satisfy his contracts; the customer is held to have

such an interest that a delivery to him by an insolvent broker is not a preference. *Sexton v. Kessler*, (1912) 225 U. S. 90, 32 S. Ct. 657, 56 U. S. (L. ed.) 995.

If a broker buys shares of stock for a customer, the customer is entitled to a transfer of these shares even though the broker has since become insolvent, and if the identical shares purchased for him have been disposed of, he is entitled to other shares of the same stock in the hands of the broker. *Gorman v. Littlefield*, (1913) 229 U. S. 19, 33 S. Ct. 690, 57 U. S. (L. ed.) 1047, following *Richardson v. Shaw*, (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835, 14 Ann. Cas. 981.

*Time of obtaining preference.*—In order to constitute a preference within the meaning of the Bankruptcy Law, it is necessary that the transaction take place, or become effective as to creditors, within the four months preceding the filing of the petition in bankruptcy, or at some time thereafter and before the adjudication. *Page v. Rogers*, (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332, 21 Am. Bankr. Rep. 496; *In re Folb*, (E. D. N. C. 1898) 91 Fed. 107, 1 Am. Bankr. Rep. 22; *In re Stevenson*, (D. C. Del. 1899) 94 Fed. 110, 2 Am. Bankr. Rep. 66; *In re Dupree*, (E. D. N. C. 1899) 97 Fed. 28; *In re Sheridan*, (E. D. Pa. 1899) 98 Fed. 406; *Sabin v. Camp*, (C. C. Ore. 1900) 98 Fed. 974; *In re Terrill*, (D. C. Vt. 1900) 100 Fed. 778, 4 Am. Bankr. Rep. 145; *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 122 Fed. 355, 10 Am. Bankr. Rep. 641; *In re Girard Glazed Kid Co.*, (E. D. Pa. 1904) 129 Fed. 841, 12 Am. Bankr. Rep. 295; *Ryttenberg v. Schefer*, (S. D. N. Y. 1904) 131 Fed. 313, 11 Am. Bankr. Rep. 652; *Long v. Farmers' State Bank*, (C. C. A. 8th Cir. 1906) 147 Fed. 360, 17 Am. Bankr. Rep. 103; *Merchant's Nat. Bank v. Cole*, (C. C. A. 6th Cir. 1907) 149 Fed. 708, 18 Am. Bankr. Rep. 44; *Manning v. Evans*, (D. C. N. J. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217; *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; *Lowell v. International Trust Co.*, (C. C. A. 1st Cir. 1907) 158 Fed. 781, 19 Am. Bankr. Rep. 853; *Mattley v. Wolfe*, (D. C. Neb. 1909) 175 Fed. 619; *In re Salvator Brewing Co.*, (S. D. N. Y. 1910) 183 Fed. 910; *Jackson v. Sedgwick*, (E. D. N. Y. 1911) 189 Fed. 508; *Sturdivant Bank v. Schade*, (C. C. A. 8th Cir. 1912) 195 Fed. 188; *Mayes v. Palmer*, (C. C. A. 8th Cir. 1913) 208 Fed. 97; *In re Lewis*, (S. D. N. Y. 1899) 1 Am. Bankr. Rep. 458; *In re Tonawanda St. Planing Mill Co.*, (W. D. N. Y. 1901) 6 Am. Bankr. Rep. 38; *Whitley Grocery Co. v. Roach*, (1902) 8 Am. Bankr. Rep. 505, 115 Ga. 918, 42 S. E. 282; *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 10 Am. Bankr. Rep. 641;

*Pratt v. Christie*, (1904) 12 Am. Bankr. Rep. 1, 95 App. Div. 282, 88 N. Y. S. 585; *Matter of U. S. Food Co.*, (E. D. Mich. 1906) 15 Am. Bankr. Rep. 329; *Matter of Wilson*, (D. C. Hawaii 1910) 23 Am. Bankr. Rep. 814; *Shuets v. Walter Boyt Saddlery Co.*, (1914) 166 Ia. 523, 147 N. W. 897.

*The time is to be computed* in accordance with section 31. The term "four months" means within four months from the commencement of the bankruptcy proceedings. *Whitley Grocery Co. v. Roach*, (1902) 8 Am. Bankr. Rep. 505, 115 Ga. 918, 42 S. E. 282. See also the cases cited under section 31.

Thus it has been held that although a petition in involuntary bankruptcy was insufficient on its face to authorize the court to make an adjudication, because it showed less than the required number of legally qualified petitioners, but other creditors afterwards joined therein, the four months' period within which transfers of property may be avoided as preferential runs back from the time when such joinder made the petition sufficient, which for such purpose must be considered as the date of filing. *Manning v. Evans*, (D. C. N. J. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217.

In calculating the four months the proper way is to count backward from the date of filing the petition in bankruptcy, excluding the day of such filing, section 31a having no application, as it deals with days, not months. *Kelly v. Skaggs*, (1900) 90 Ill. App. 543.

The four months' limitation upon the right of the trustee to recover money or property transferred by insolvent debtors in payment of *bona fide* debts has no application to the right of creditors to pursue and reclaim property transferred fraudulently by an insolvent debtor as a voluntary gift. *In re Schenck*, (1902) 116 Fed. 554.

It has been held that the four months does not begin to run until the creditors have in some form received actual or constructive notice of the transfer. *Gill v. Ely-Norris Safe Co.*, (1913) 170 Mo. App. 478, 156 S. W. 811.

*An inchoate lien by garnishment* cannot be tacked to the lien of an execution on the judgment against the defendant, and levied upon the indebtedness owing by the garnishee, so as to make up the period of four months. *Marsh v. Wilson*, (1914) 124 Minn. 254, 144 N. W. 959. In that case it appeared that the defendant brought suit against one Grossman on April 27, 1912, and garnished one Galbraith. Nothing further was done with the garnishment. On June 15, 1912, it took judgment against Grossman, and levied upon the debt due him by the garnishee. Grossman filed his petition in bankruptcy on Sept. 14, 1912. It was held, that the four months specified

by the Bankrupt Act commenced to run in June, not in April, and that the trustee in bankruptcy could recover as a preference the money collected by the defendant on its execution.

*All liens acquired four months before the filing of the petition* remain valid liens under the Bankrupt Laws, and are not disturbed by any bankruptcy proceedings. *Williams v. Bosworth*, (1912) 102 Miss. 160, 59 So. 6.

*A pledge of bank stock* given to and received by a bank more than four months before bankruptcy cannot be held to be a preference, though given to secure a pre-existing unsecured debt, and sale within four months, pursuant to the pledge, would not affect this result. *First Nat. Bank of Lake Charles v. Lanz*, (C. C. A. 5th Cir. 1913) 202 Fed. 117.

*An assignment for the benefit of creditors* executed by the bankrupt a year before the filing of his voluntary petition to be declared a bankrupt, though not valid as a general assignment, if fully executed in good faith does not render the assignee liable to the trustee in bankruptcy for money received by him by virtue of the assignment. *In re Martinez*, (N. D. N. Y. 1915) 223 Fed. 433.

*The title of one who purchases property from an embarrassed debtor* cannot be impeached by the latter's trustee in bankruptcy subsequently appointed, on the ground that the purchase was made for the purpose of enabling the debtor to pay some of his creditors in preference to others, in fraud of the Bankruptcy Law, the proceeds having been so used, when the sale and the payments to creditors occurred more than four months before the filing of the petition in bankruptcy. *In re Kindt*, (S. D. Ia. 1900) 101 Fed. 107, 3 Am. Bankr. Rep. 443.

*Renewal of old indebtedness*.—A pledge of property to secure notes executed within four months prior to proceedings in bankruptcy against the pledgor is not voidable as an illegal preference, where the notes so secured were renewals of prior notes also secured by a pledge of the same property; the original indebtedness having been created and the original pledge made prior to the four months' period. *Chattanooga Nat. Bank v. Rome Iron Co.*, (N. D. Ga. 1900) 102 Fed. 755, 4 Am. Bankr. Rep. 441.

*Effect of previous negotiation*.—Where a transaction has resulted in a preference within the four months' period, it will not be deprived of its preferential character by the fact that it was effected in the performance of a contract, or other negotiation, executed or agreed upon at a time antedating the bankruptcy proceedings by more than four months. *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142; *Humphrey v. Tatman*, (1905) 198 U. S. 91, 25 S. Ct. 567, 49 U. S. (L. ed.)



956, 14 Am. Bankr. Rep. 74; Page v. Rogers, (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332, 21 Am. Bankr. Rep. 496; *In re Sheridan*, (E. D. Pa. 1899) 98 Fed. 406, 3 Am. Bankr. Rep. 554; *Sabin v. Camp*, (C. C. Ore. 1900) 98 Fed. 974; *In re Klingaman*, (S. D. Ia. 1900) 101 Fed. 691, 4 Am. Bankr. Rep. 254; *In re Ronk*, (D. C. Ind. 1901) 111 Fed. 154, 7 Am. Bankr. Rep. 931; *Pollock v. Jones*, (C. C. A. 4th Cir. 1903) 124 Fed. 166, 10 Am. Bankr. Rep. 616, *affirming* (D. C. S. C. 1902) 9 Am. Bankr. Rep. 262; *Anniston Iron, etc., Co. v. Anniston Rolling Mill Co.*, (N. D. Ala. 1903) 125 Fed. 974, 11 Am. Bankr. Rep. 200; *In re Dismal Swamp Contracting Co.*, (E. D. Va. 1905) 135 Fed. 415, 14 Am. Bankr. Rep. 175; *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 645; *In re Great Western Mfg. Co.*, (C. C. A. 8th Cir. 1907) 152 Fed. 123, 18 Am. Bankr. Rep. 259; *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; *Vitzthum v. Large*, (N. D. Ia. 1908) 162 Fed. 685, 20 Am. Bankr. Rep. 666; *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864. See also *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962; *In re Barrett*, (S. D. N. Y. 1901) 6 Am. Bankr. Rep. 48; *Matthews v. Hardt*, (1903) 9 Am. Bankr. Rep. 373, *affirming* (1902) 37 Misc. 653, 76 N. Y. S. 134; *Holdrege First Nat. Bank v. Johnson*, (1903) 10 Am. Bankr. Rep. 208, 68 Neb. 641, 94 N. W. 837; *Matter of Mandel*, (S. D. N. Y. 1903) 10 Am. Bankr. Rep. 774; *Torrance v. Winfield Nat. Bank*, (Kan. 1903) 11 Am. Bankr. Rep. 185; *Long v. Farmers' State Bank*, (C. C. A. 8th Cir. 1906) 17 Am. Bankr. Rep. 103.

*The fact that the transfer of securities was made pursuant to a prior agreement made more than four months before the bankruptcy is not sufficient to deprive the taking of the security, within the four months before the bankruptcy, of its character as a voidable preference.* *Citizens' Trust Co. of Paterson, N. J. v. Tilt*, (C. C. A. 3d Cir. 1912) 200 Fed. 410, *affirming* (1911) 191 Fed. 441.

An agreement was made, more than four months before the filing of the petition in bankruptcy, that certain personal property should be pledged by the debtor as security for a debt; but the goods were not set apart or delivered to the creditor, or treated as his property. The creditor took possession of them only a few days before the filing of the petition. The transaction was held voidable as a preference, notwithstanding the lapse of more than four months from the date of the agreement. *In re Sheridan*, (1899) 98 Fed. 406.

A general promise to give security on demand puts the creditor in no better

position than an agreement to pay money. *Sexton v. Kessler*, (1912) 225 U. S. 90, 32 S. Ct. 657, 56 U. S. (L. ed.) 995.

*Ratification of corporation agent's unauthorized act.*—A transfer of property by a corporation as security for a past indebtedness, within four months prior to its bankruptcy, when it was insolvent and the creditor had reason to believe it to be so, is a preference, even though such transfer was made in ratification of an unauthorized transfer made by an officer of the corporation before the four months' period. *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501.

*Delivery of pledge pursuant to prior agreement.*—An agreement to pledge personal property as security for a debt is not executed where the goods are not delivered to the creditor, nor set apart and treated as his property; and, where the creditor takes possession of the property a few days before the filing of a petition in bankruptcy against the debtor, the transaction is voidable as a preference, notwithstanding that the original agreement was made more than four months before that time. *In re Sheridan*, (E. D. Pa. 1899) 98 Fed. 406.

*But when an assignment of accounts is made more than four months prior to the bankruptcy*, the fact that the accounts are not collected by the creditor until within four months does not make the transaction a preference. *Lowell v. International Trust Co.*, (1st Cir. 1907) 158 Fed. 781, 86 C. C. A. 137, 19 Am. Bankr. Rep. 853.

So, also, it has been held that a bankrupt cannot be held to have given a preference, recoverable by his trustee, because of sums collected by a creditor, after the bankruptcy, from third persons under a contract which had been in force between the bankrupt and the creditor for a number of years. *Ryttenberg v. Schefer*, (S. D. N. Y. 1904) 131 Fed. 313, 11 Am. Bankr. Rep. 652.

*Where recording required.*—The purpose and effect of the amendment of 1903 was to change the rule applied to the original and prior acts, under which not only the requirement of recording but the effect of a failure to record was controlled by the state law, by making instruments of transfer required by the state law to be recorded, in the sense in which such phrase is ordinarily used, speak from the date of recording, and not the date of execution, upon the question of voidable preferences. *In re Mandel*, (S. D. N. Y. 1903) 127 Fed. 863, 10 Am. Bankr. Rep. 774; *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, (C. C. A. 5th Cir. 1905) 136 Fed. 396, 14 Am. Bankr. Rep. 477; *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Hunt*, (N. D. N. Y. 1905) 139 Fed. 283, 14 Am. Bankr. Rep. 416; *English v. Ross*, (M. D. Pa.

1905) 140 Fed. 630, 15 Am. Bankr. Rep. 370; *In re Chadwick*, (N. D. Ohio 1905) 140 Fed. 674, 15 Am. Bankr. Rep. 528; Buchanan County First Nat. Bank v. Connett, (C. C. A. 8th Cir. 1905) 142 Fed. 33, 15 Am. Bankr. Rep. 662; *In re Montague*, (E. D. Va. 1905) 143 Fed. 428, 16 Am. Bankr. Rep. 18; *Loeser v. Savings Deposit Bank, etc., Co.*, (C. C. A. 6th Cir. 1906) 148 Fed. 975, 17 Am. Bankr. Rep. 628; *Fisher v. Zollinger*, (C. C. A. 6th Cir. 1906) 149 Fed. 54, 17 Am. Bankr. Rep. 618, *affirming* (N. D. Ohio 1905) 15 Am. Bankr. Rep. 524; *In re McIntosh*, (C. C. A. 9th Cir. 1907) 150 Fed. 546, 18 Am. Bankr. Rep. 169; *In re Great Western Mfg. Co.*, (C. C. A. 8th Cir. 1907) 152 Fed. 123, 18 Am. Bankr. Rep. 263; *In re McKane*, (E. D. N. Y. 1907) 155 Fed. 674, 19 Am. Bankr. Rep. 103; *Manning v. Evans*, (D. C. N. J. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217; *In re Fish Bros. Wagon Co.*, (C. C. A. 8th Cir. 1908) 164 Fed. 553, 21 Am. Bankr. Rep. 149; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *In re Burlage*, (N. D. Ia. 1909) 169 Fed. 1006, 22 Am. Bankr. Rep. 410; *In re Mission Fixture, etc., Co.*, (W. D. Wash. 1910) 180 Fed. 263; *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962; *L. A. Becker Co. v. Gill*, (C. C. A. 8th Cir. 1913) 206 Fed. 36; *In re Boyd*, (C. C. A. 2d Cir. 1914) 213 Fed. 774; *Torrance v. Winfield Nat. Bank*, (Kan. 1903) 11 Am. Bankr. Rep. 185; *Matthews v. Hardt*, (1903) 9 Am. Bankr. Rep. 373, 37 Misc. 653, 76 N. Y. S. 134, *affirmed* 79 App. Div. 570, 80 N. Y. S. 462. See also *In re Donnelly*, (N. D. Ohio 1912) 193 Fed. 755.

"Under the Bankrupt Law as originally enacted, a transfer dated as of the time it was actually made without regard to the date of filing or recording. Cases consequently arose in which preferential transfers, though fraudulent and constituting acts of bankruptcy, could not be successfully assailed, even though the instruments evidencing them were filed or recorded, as the case might be, within four months of the filing of the petition in bankruptcy, because the transfers were made prior to the beginning of the four months' period. The withholding of such transfers from the files or record thus operated to defeat the benefit contemplated by the establishment of such period. To correct this defect in the law, the amendment of February 5, 1903, was made, whereby the words 'within four months before the filing of the petition, or, after the filing of the petition and before adjudication,' were eliminated from section 60b and inserted in section 60a, and also the words, 'Where the preference consists of a transfer, such period of four months shall not expire until four months after the date of recording or registering the transfer, if by law

such recording or registering is required,' were added at the end of section 60a. The purpose of section 60a, as originally enacted, was to define what judgments and what transfers are preferential, and it still performs that office. The added sentence prolonging the four months' period until four months after the date of recording or registering the transfer applies only to cases 'where the preference consists in a transfer,' and the conditional clause, 'if by law such recording or registering is required,' we interpret to mean, if by the law of the state by which the validity of the mortgage against contesting creditors is determined, such recording or registering is required. The purpose of the amendment was, we think, as stated in *Re Sturtevant*, to prevent preferential fraudulent transfers from escaping the four months' provision, unless they were filed or recorded, as the case may be, before that period began to run. It did not change the date as to which such transfers are to be judged in determining their voidable character." *In re Klein*, (C. C. A. 6th Cir. 1912) 197 Fed. 241.

The law would be a nullity if a person on the verge of bankruptcy could have outstanding secret, unrecorded conveyances, of which his general creditors had no notice, and, by simply executing such conveyances more than four months prior to his going into bankruptcy, escape the penalty imposed by the Act for failure to record. *Dulany v. Morse*, (1913) 39 App. Cas. (D. C.) 523, wherein the court held that the withholding of a deed from record until the day before the petition in bankruptcy was filed created a preference. The court said: "The deed had no more effect than a mortgage. Until recorded it was void as to the creditors of [the bankrupt] without notice, and the filing of it for record the day before the petition in bankruptcy was filed did not validate it as to the creditors, or affect their rights."

But in *Debus v. Yates*, (1910) 193 Fed. 427, it was held that, prior to the amendment of section 60b in 1910, a "transfer was to be judged, in determining the question whether or not it constituted a voidable preference, as of the time when it was made and not at the time of its registration, and that, unless when it was made the debtor was insolvent and actually intended a preference, and the creditor then had reasonable cause to believe it was so intended, it is not voidable." *Followed* in *Davis v. Hanover Sav. Fund Soc.*, (C. C. A. 4th Cir. 1913) 210 Fed. 768, where it was said that "the amendment of 1910 makes a radical change in the law in this respect."

And in *Little v. Holley Brooks Hardware Co.*, (C. C. A. 1904) 133 Fed. 874, it was held that section 3b, relating to the limit of time for filing a petition in

involuntary bankruptcy after acts of bankruptcy committed, is not to be read in connection with sections 60a, 60b, as amended in 1903, and in the case of a transfer which was neither fraudulent nor required to be registered, the four months' limitation begins to run from the date of the transfer and not from "the date when the beneficiary takes notorious, exclusive, or continuous possession" or the creditors have actual notice thereof.

A transfer by an instrument required by the state law to be recorded speaks from the time of the recording, and not from the date of its execution, and may be void as a preference, regardless of the effect of the failure to record it under the state law. *Mattley v. Giesler*, (C. C. A. 8th Cir. 1911) 187 Fed. 970.

A chattel mortgage which under the state laws does not need to be recorded to render it valid as between the parties and general creditors need not be recorded under the Bankruptcy Act, and if made more than four months before the bankruptcy, it need not be recorded within such time to save its being held a preferential transfer under the Bankruptcy Act. *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, (C. C. A. 1905) 136 Fed. 396.

The word "required," as used in the amendment, refers to the character of the instrument giving the preference or making the transfer, without reference to the fact that as to certain persons or classes of persons it may be good or bad according to circumstances. If to be valid against certain classes of persons, the law of the state "requires" the constructive notice of registration it is a transfer which under the amendment is "required" to be recorded. This takes account of the purpose and policy of recording acts, remedies the evil which flourished under the law before the amendment, gives effect to the plain purpose of Congress, and gives some effect and force to a provision which would otherwise be meaningless, and brings sections 3 and 60a and 60b into harmony of purpose and meaning. *Ragan v. Donovan*, (N. D. Ohio, 1911) 189 Fed. 138, following *Loeser v. Savings Deposit Bank & Trust Co.*, (C. C. A. 6th Cir. (1906) 148 Fed. 975, 18 L. R. A. (N. S.) 1233. To the same point see *Buchanan County First Nat. Bank v. Connett*, (C. C. A. 8th Cir. 1905) 142 Fed. 33, 15 Am. Bankr. Rep. 662.

"Whether the local statute be construed to 'require' or 'permit' recording, when construed in connection with the Bankruptcy Act, it, in either instance, becomes a legal requirement." *Dulany v. Morse*, (1913) 39 App. Cas. (D. C.) 523.

In *In re Floyd*, (E. D. N. C. 1907) 156 Fed. 206, it appeared that a member of an insolvent partnership executed to a third person a mortgage on the firm's goods to secure money to purchase the

share of another member. The mortgage was not filed until a few days before the assignment for the benefit of creditors, and within four months of the institution of bankruptcy proceedings, and it was held that the transaction was void as a preference.

It seems that the weight of authority, and reason as well, is to the effect that the recording or registering of a transfer is not deemed to be required, unless, under the state law, the same is essential to validate the transfer as against the creditors represented by the trustee, though some of the cases seem to go considerably beyond this. *Telford v. Hendrickson*, (1913) 120 Minn. 427, 139 N. W. 941.

In *Pew v. Price*, (1913) 251 Mo. 614, 158 S. W. 338, a contention that if recording or registering was required for any purpose though not for all it was to be deemed as "required" within the meaning of this section, was rejected.

A state statute providing that "every assignment of a debt, unless the same be in writing and be filed with the clerk of the town or municipality in which the assignor resides, shall be presumed to be fraudulent and void as against his creditors, unless those claiming thereunder make it appear that it was made in good faith and for a valuable consideration," does not "require" a "recording or registering," and hence, where a written assignment of a claim was actually made more than four months prior to the filing of a petition in bankruptcy by the assignor, it could not be avoided by the trustee in bankruptcy as being a preference under section 60, clauses "a" and "b" though it was never filed. *Telford v. Hendrickson*, (1913) 120 Minn. 427, 139 N. W. 941.

Where by state law, as between the parties to the chattel mortgage and against all ordinary creditors the recording of the mortgage is immaterial such mortgage is not one that is "required" to be recorded within the meaning of this section. *In re Jacobson*, (N. D. Ga. 1912) 200 Fed. 812.

In a state where an unrecorded deed of trust is valid as between the parties and as against general creditors it is not such an instrument within the meaning of the section, as is required by the laws of the state to be recorded, and its recordation within four months of the filing of the petition of bankruptcy is immaterial. *Laurel Oil & Fertilizer Co. v. Horne*, (1911) 101 Miss. 629, 67 So. 624, 58 So. 652.

In *Benner v. Scandinavian American Bank*, (1913) 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914D 702, a contention that no instrument was required to be recorded by the Bankruptcy Act in order to be valid, unless such instrument was invalid without recording as against all

persons, was overruled. The court said: "We cannot accept this construction of the statute. It will be remembered that section 60 of the Bankruptcy Act as originally enacted did not contain the last sentence now in the section above quoted. This was added by the amendment of 1903 and had as its purpose the prevention of giving secret preferences made possible under the law as it was originally enacted by withholding from record instruments creating liens. It is plain that, if the appellant's construction of the statute is adopted, the amendment is rendered nugatory, as no statute of the United States or of any state, in so far as we are aware, requires instruments conveying or creating liens upon property to be recorded in order to be valid as against all persons. Usually, and universally in so far as our examination goes, they are valid between the parties and some classes of persons having actual notice without recording. These facts were known at the time the amendment was enacted, and it will hardly do to say that it was the purpose of Congress to do an idle thing. There is no necessity that requires the construction contended for. The act can be held operative as to those persons whom the recording statutes favor without doing violence to any of its terms."

In *Debus v. Yates*, (E. D. Ky. 1910) 193 Fed. 427, the court said: "We have seen that the meaning is that, in case a preferential transfer is recordable, it shall remain a preference as long as it is not recorded, or, if recorded, four months has not elapsed from its recordation. Has it any further significance? Is the effect of it that, in case the transfer has been recorded, the question as to whether it is a preferential transfer—i. e., whether in other respects it is a preference, and as to whether in such respect it is a voidable and obstructive preference—is to be determined as if it had been made at the date of recording; i. e., had then first come into being?" This question was answered in the negative.

The provision of the statute that where the preference consists in a transfer, such period of four months shall not expire until four months after the recording or registering of the transfer, if, by law, such recording or registering is required, was intended to postpone the time within which a transfer is open to attack as a preference until four months after the date of the recording of the transfer, where such recording is required by the local law; but while the statute postpones the time within which the transfer can be attacked the statute cannot properly be so applied as to materially alter the essential character of the transaction. If the transfer is one which is required to be recorded, the four months' period during which it may be attacked

does not begin to run until the conveyance is recorded, but if the transfer when made was based upon a present consideration, a delay in recording the instrument does not warrant treating the conveyance as if it were made as security for an antecedent debt, because to do so would be to create by construction a transaction different from the actual one. *In re Jackson Brick & Tile Co.*, (S. E. D. Mo. 1911) 189 Fed. 636.

What is or is not required to be recorded is to be determined by the law of the state. See the cases cited to this effect under section 67a.

*Instrument valid under state law.*—A chattel mortgage given by a bankrupt when solvent, in good faith and for a present consideration, does not become a preference because not recorded until within four months prior to the bankruptcy, where under the state law as construed by its Supreme Court, the failure to record does not affect the validity of the mortgage as between the parties nor as against general creditors of the mortgagor, and it takes effect as of the date of its execution. *In re Sturtevant*, (C. C. A. 7th Cir. 1911) 188 Fed. 196; *In re Klein*, (C. C. A. 8th Cir. 1912) 197 Fed. 241.

*Greater percentage.*—Even though a transaction falls within the language of section 60a in all other respects, it must, in order to constitute a preference, be such as will enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class. *In re Flick*, (S. D. Ohio 1900) 105 Fed. 503, 5 Am. Bankr. Rep. 465; *In re Keller*, (N. D. Ia. 1901) 109 Fed. 118, 6 Am. Bankr. Rep. 334; *In re Abraham Steers Lumber Co.*, (S. D. N. Y. 1901) 110 Fed. 738, 6 Am. Bankr. Rep. 315, *affirmed* (C. C. A. 2d Cir. 1901) 112 Fed. 406, 7 Am. Bankr. Rep. 332; *Peterson v. Nash*, (C. C. A. 8th Cir. 1901) 112 Fed. 311, 7 Am. Bankr. Rep. 181; *In re Union Feather, etc., Mfg. Co.*, (C. C. A. 7th Cir. 1902) 112 Fed. 774, 7 Am. Bankr. Rep. 472; *In re Denning*, (D. C. Mass. 1902) 114 Fed. 219, 8 Am. Bankr. Rep. 135; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *C. S. Morey Mercantile Co. v. Schiffer*, (C. C. A. 1902) 114 Fed. 447; *Kimball v. E. A. Rosenham Co.*, (C. C. A. 1902) 114 Fed. 85; *Swarts v. Siegel*, (1902) 114 Fed. 1001; *In re Harpke*, (C. C. A. 1902) 116 Fed. 295; *Livingstone v. Heineman*, (C. C. A. 6th Cir. 1903) 120 Fed. 786, 10 Am. Bankr. Rep. 39; *In re Colton Export, etc., Co.*, (C. C. A. 2d Cir. 1903) 121 Fed. 663, 10 Am. Bankr. Rep. 14; *In re Belknap*, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326; *In re Douglas Coal, etc., Co.*, (E. D. Tenn. 1904) 131 Fed. 769, 12 Am. Bankr. Rep. 539; *In re Bloch*, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748;

*Parker v. Black*, (W. D. N. Y. 1906) 143 Fed. 560, 16 Am. Bankr. Rep. 205; *Gomila v. Wilcombe*, (C. C. A. 5th Cir. 1907) 151 Fed. 470; *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; *Mills v. Fisher*, (C. C. A. 6th Cir. 1908) 159 Fed. 897, 20 Am. Bankr. Rep. 237; *Rogers v. Fidelity Sav. Bank, etc., Co.*, (W. D. Ark. 1909) 172 Fed. 735, 23 Am. Bankr. Rep. 1; *In re Crafts-Riordan Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931; *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962; *Ogden v. Reddish*, (E. D. Ky. 1912) 200 Fed. 977; *Maves v. Palmer*, (C. C. A. 8th Cir. 1913) 208 Fed. 97; *Crooks v. People's Nat. Bank*, (1899) 3 Am. Bankr. Rep. 238, 46 App. Div. 335, 61 N. Y. S. 604; *In re Read*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 111; *In re Feuerlicht*, (S. D. N. Y. 1902) 8 Am. Bankr. Rep. 550; *John S. Brittain Dry-Goods Co. v. Bertenshaw*, (1904) 11 Am. Bankr. Rep. 629, 68 Kan. 734, 75 Pac. 1027; *Hackney v. Hargreaves*, (Neb. 1904) 13 Am. Bankr. Rep. 164; *West v. Lahoma Bank*, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 328, 85 Pac. 469; *Richmond Standard Steel Spike, etc., Co. v. Allen*, (C. C. A. 4th Cir. 1906) 17 Am. Bankr. Rep. 583; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 123 Ia. 432, 99 N. W. 121.

*The test of a preference* is the payment, out of the bankrupt's estate, of a larger percentage of the claim of a creditor than other creditors of the same class receive from that estate. *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *In re Bloch*, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748.

It is a necessary condition precedent to a preference that there has been a transfer of property by the bankrupt, whereby a creditor is enabled to obtain a greater percentage of his debt than other creditors of the same class. If, therefore, the conveyances in question were originally, and remained, a nullity as against the grantor's trustee in bankruptcy, there was no transfer within this definition. *Rosenbluth v. De Forest & Hotchkiss Co.*, (1911) 85 Conn. 40, 81 Atl. 955.

The levy of a landlord's distress warrant for rent does not constitute a preference within the meaning of this section, as it does not enable the landlord "to obtain a greater percentage of his debt than any other of such creditors of the same class," as there is no other creditor of the same class, and the landlord is simply enforcing a priority given him by law, and an act of bankruptcy cannot be founded thereon. *In re Belknap*, (1904) 129 Fed. 646.

*The meaning of the term "class"* should be derived, and the classification

of creditors thereunder should be made, from the provisions of the Bankruptcy Act. *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673.

*The test of the classification of creditors* is the percentage of their claims which they are entitled to draw out of the estate of the bankrupt, and not the relations of the creditors to parties other than the bankrupt. If they are entitled to receive the same percentage they are in the same class; if different percentages they are in different classes. *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673.

*There are two general classes:* first, those who have priority and are to be paid in full; and, second, general or unsecured creditors, among whom the balance remaining after paying creditors of the first class is to be distributed equally in proportion to the amount of their respective claims. *Livingstone v. Heine-man*, (C. C. A. 6th Cir. 1903) 120 Fed. 786, 10 Am. Bankr. Rep. 39.

*Purchase by partner from copartner.*—In *In re Rudnick*, (1900) 102 Fed. 750, it was held that the sale by one partner to the other, who was not a creditor, of his whole interest in the firm property was not a preference avoidable under section 60b, as the effect of the transaction was a loss to all the firm creditors, and was strictly impartial.

*Necessity of diminishing estate.*—A transaction the result of which does not diminish the general fund does not constitute a preference. *Western Tie, etc., Co. v. Brown*, (1905) 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571, 13 Am. Bankr. Rep. 447; *Bailey v. Baker Ice Mach. Co.*, (1915) 239 U. S. 268, 36 S. Ct. 50, affirming (C. C. A. 8th Cir. 1913) 209 Fed. 603; *Root Mfg. Co. v. Johnson*, (C. C. A. 7th Cir. 1914) 219 Fed. 397; *In re Moark-Nemo Consol. Mining Co.*, (W. D. Mo. 1915) 219 Fed. 340; *In re Wolf*, (N. D. Ia. 1899) 98 Fed. 74, 3 Am. Bankr. Rep. 555; *Chattanooga Nat. Bank v. Rome Iron Co.*, (N. D. Ga. 1900) 102 Fed. 755, 4 Am. Bankr. Rep. 441; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648; *McDonald v. Daskam*, (C. C. A. 7th Cir. 1902) 116 Fed. 276, 8 Am. Bankr. Rep. 543; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 1, 8 Am. Bankr. Rep. 673; *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541; *In re Steam Vehicle Co.*, (E. D. Pa. 1903) 121 Fed. 939, 10 Am. Bankr. Rep. 385; *In re Manning*, (D. C. S. C. 1903) 123 Fed. 181, 10 Am. Bankr. Rep. 500; *New Kensington First Nat. Bank v. Pennsylvania Trust Co.*, (C. C. A. 3d Cir. 1903) 124 Fed. 968, 10 Am. Bankr. Rep.

782; *Ryttenberg v. Schefer*, (S. D. N. Y. 1904) 131 Fed. 313, 11 Am. Bankr. Rep. 652; *In re Clifford*, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 281; *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; *Richardson v. Shaw*, (C. C. A. 2d Cir. 1906) 147 Fed. 659, 16 Am. Bankr. Rep. 842, *affirmed* (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835; *Ludvig v. Umstadter*, (S. D. N. Y. 1906) 148 Fed. 319, 17 Am. Bankr. Rep. 774; *Lowell v. International Trust Co.*, (C. C. A. 1st Cir. 1907) 158 Fed. 781, 19 Am. Bankr. Rep. 853; *Mills v. Fisher*, (C. C. A. 6th Cir. 1908) 159 Fed. 897, 20 Am. Bankr. Rep. 237; *Vitzthum v. Large*, (N. D. Ia. 1908) 162 Fed. 685, 20 Am. Bankr. Rep. 666; *Mills v. Virginia-Carolina Lumber Co.*, (C. C. A. 4th Cir. 1908) 164 Fed. 168, 20 Am. Bankr. Rep. 750, *modifying* (E. D. N. C. 1907) 18 Am. Bankr. Rep. 218; *McDonald v. Clearwater Shortline R. Co.*, (D. C. Idaho 1908) 164 Fed. 1007, 21 Am. Bankr. Rep. 182; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *Mason v. National Herkimer County Bank*, (C. C. A. 2d Cir. 1909) 172 Fed. 529, 22 Am. Bankr. Rep. 733; *In re Bailey*, (D. C. Utah 1910) 176 Fed. 990, 24 Am. Bankr. Rep. 201; *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962; *Furth v. Stahl*, (1903) 10 Am. Bankr. Rep. 442, 205 Pa. St. 439, 55 Atl. 29.

Unless the creditor takes by virtue of a disposition by the insolvent debtor of his property for the creditor's benefit, so that the estate of the debtor is thereby diminished, the creditor cannot be charged with receiving a preference by transfer. *Western Tie & Timber Co. v. Brown*, (1905) 196 U. S. 502, 509, 25 S. Ct. 339, 49 U. S. (L. ed.) 571; *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 419, 26 S. Ct. 289, 50 U. S. (L. ed.) 527; *Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co.*, (1913) 229 U. S. 435, 33 S. Ct. 829, 57 U. S. (L. ed.) 1268. "These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor and the consequent diminution of the bankrupt's estate." *National Bank of Newport, N. Y. v. National Herkimer County Bank of Little Falls*, (1912) 225 U. S. 178, 32 S. Ct. 633, 56 U. S. (L. ed.) 1042.

Where property is transferred to a person on his promise to give security and after giving the security he becomes a bankrupt the general creditors cannot defeat the security given in good faith, when but for the promise of it the person would never have come into possession of the property. *Greay v. Dockendorff*, (1913) 231 U. S. 513, 34 S. Ct. 166, 58 U. S. (L. ed.) 339.

*Exchange*.—There is nothing in the Bankruptcy Law which forbids an exchange of securities, and if a person, even while insolvent, makes such an exchange as will not diminish the value of his estate, it is unimpeachable; but the court is bound, when such a transaction is reviewed, to satisfy itself that the securities exchanged are of undoubtedly equal value. *In re Manning*, (D. C. S. C. 1903) 123 Fed. 181, 10 Am. Bankr. Rep. 500; *Ludvig v. Umstadter*, (S. D. N. Y. 1906) 148 Fed. 319, 17 Am. Bankr. Rep. 774; *In re Reese-Hammond Fire Brick Co.*, (C. C. A. 3d Cir. 1910) 181 Fed. 641.

It is not every transfer by an insolvent within the four months period that is voidable by the trustee. It must be on account of a pre-existing debt. When one gives an insolvent present value for a transfer of property or when he makes an exchange of property, there is no preference. *Ernst v. Mechanics*, etc., *Nat. Bank of City of New York*, (C. C. A. 2d Cir. 1912) 201 Fed. 664.

An exchange of securities was not a fraudulent preference under the Bankruptcy Act of 1867. *Sawyer v. Turpin*, (1875) 91 U. S. 114, 23 U. S. (L. ed.) 235, where the court said: "The reason is, that the exchange takes nothing away from the other creditors." See also *Burnhisel v. Firman*, (1874) 22 Wall. 170, 22 U. S. (L. ed.) 766; *Player v. Lippincott*, (1877) 4 Dill. (U. S.) 125; *Ashuelot Sav. Bank v. Frost*, (1884) 19 Fed. 237; *Clark v. Iselin*, (1874) 21 Wall. 360, 22 U. S. (L. ed.) 568.

*Transfer for present consideration*.—The purpose of section 60a is to prohibit the giving of a preference by a bankrupt to existing creditors, and it does not apply to transactions whereby the bankrupt receives a present consideration for the transfer. *Chattanooga Nat. Bank v. Rome Iron Co.*, (N. D. Ga. 1900) 102 Fed. 755, 4 Am. Bankr. Rep. 441; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648; *Young v. Upson*, (1902) 115 Fed. 192; *McDonald v. Daskam*, (C. C. A. 7th Cir. 1902) 116 Fed. 276, 8 Am. Bankr. Rep. 543; *In re Clifford*, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 281; *In re Blount*, (E. D. Ark. 1906) 142 Fed. 263, 16 Am. Bankr. Rep. 97; *Richardson v. Shaw*, (C. C. A. 2d Cir. 1906) 147 Fed. 659, 16 Am. Bankr. Rep. 842, *affirmed* (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835; *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962. See also *In re Cobb*, (1899) 96 Fed. 821; *Darby v. Boatman's Sav. Inst.*, (1871) 1 Dill. (U. S.) 141; *Es p. Ames*, (1871) 1 Lowell (U. S.) 561; *Gaffney v. Signaigo*, (1871) 1 Dill. (U. S.) 158.

At the time a debt is created the creditor has the right to dictate the terms

under which he will part with his money or property; he may therefore demand that he shall first be secured to such an extent as satisfies him; and with this the Bankruptcy Act does not interfere. *In re Busby*, (M. D. Pa. 1903) 124 Fed. 469, 10 Am. Bankr. Rep. 650.

"This paragraph [section 60 b] refers to existing debts as distinguished from a security or lien given upon the bankrupt estate to raise ready money whereby the value of the estate is increased to the extent of the amount raised." *City Nat. Bank v. Bruce*, (C. C. A. 1901) 109 Fed. 69.

A *chattel mortgage* on a stock of goods was held to be void as an illegal preference as to the goods previously owned, but not as to goods that came from the mortgage, the sale and mortgage of which were parts of one transaction. *In re Hull*, (1902) 115 Fed. 858. See also *Brett v. Carter*, (1875) 2 Lowell 458, 4 Fed. Cas. No. 1,844; *Catlin v. Hoffman*, (1874) 2 Sawy. 486, 5 Fed. Cas. No. 2,521.

*Pledge for money lent.*—A person "in failing circumstances, but hoping to overcome his business embarrassments, violates no principle of any bankrupt law by pledging his property for money lent him in good faith, provided the money is lent at the time the pledge is made, and the lender has reason to suppose that the purpose of the loan is to give encouragement to the hopes of the party borrowing." *Sebring v. Wellington*, (1901) 63 App. Div. 498, 71 N. Y. S. 788.

*Delivery of property paid for.*—Where a bankrupt, who operated a lumber mill, made a contract for the sale of the entire output of his mill and secured from the purchaser advance payments thereon, it was held that the purchaser, by insisting on and obtaining the delivery of sufficient lumber, which was then on hand, to cover the advances, within four months prior to the bankruptcy, and when the seller was insolvent, did not thereby secure a preference. *Mills v. Virginia-Carolina Lumber Co.*, (C. C. A. 4th Cir. 1908) 164 Fed. 168, 20 Am. Bankr. Rep. 750.

*Return of fund under agreement.*—Where a bank advanced money on a check drawn by a corporation, which afterwards became a bankrupt, with the express agreement that the money was to be used only for a particular purpose, and it was not so used, and was later returned to the bank in payment of the check, it was held that such transaction did not constitute a preferential payment. *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541.

*Claim disallowed as set-off.*—The purchase of outstanding claims against an insolvent with a view to using such claims as a set-off, in the event of the insolvent being adjudged a bankrupt, is not a voidable preference where the claim of set-off, though pressed, is not allowed. *Western*

*Tie, etc., Co. v. Brown*, (1905) 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571, 13 Am. Bankr. Rep. 447.

*Mere fictitious book entries*, although made through collusion between the creditor and the bankrupt for the purpose of deceiving others, but which were unsuccessful, and did not affect the rights of other creditors, do not constitute a preference, nor estop the creditor from denying the *prima facie* effect of such entries. *In re Steam Vehicle Co.*, (E. D. Pa. 1903) 121 Fed. 939, 10 Am. Bankr. Rep. 385.

A *payment received by a creditor of a bankrupt from a third party*, and which did not come out of the assets of the bankrupt, does not constitute a preference. *Dressel v. North State Lumber Co.*, (E. D. N. C. 1902) 119 Fed. 531, 9 Am. Bankr. Rep. 541.

A *mortgage on both exempt and non-exempt property*, constituting an unlawful preference, is only voidable by the mortgagor's trustee in bankruptcy as to the nonexempt property. *In re Bailey*, (D. C. Utah 1910) 176 Fed. 990, 24 Am. Bankr. Rep. 201.

*Policies of insurance against fire* are mere personal contracts of indemnity, which do not attach to the property insured as an incident, and do not take its place when the property is destroyed, so as to entitle any one having a lien on the property to any interest therein; and, being so entirely separate from the property, the proceeds of a policy which has been pledged by the owner of the property to secure a debt exceeding the amount of such proceeds are no part of the debtor's estate, but belong to the pledgee; and other creditors can claim no interest therein, either by virtue of liens on the property or otherwise. *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648; *McDonald v. Daakam*, (C. C. A. 7th Cir. 1902) 116 Fed. 276, 8 Am. Bankr. Rep. 543.

Ordinarily, of course, the proceeds of a fire insurance policy, upon property which has been mortgaged by the owner are no part of the debtor's estate but belong to the mortgagee as his interest may appear, but it has been held that where the mortgagee relinquishes a portion of the proceeds of a fire insurance policy to the mortgagor who has become a bankrupt in order that it might be repaid to the mortgagee in settlement of an unsecured debt, the amount so relinquished becomes the absolute property of the mortgagor and when repaid by him to the mortgagee it constitutes a preference voidable by the mortgagor's trustee in bankruptcy. *Stearns Salt, etc., Co. v. Hammond*, (C. C. A. 6th Cir. 1914) 217 Fed. 559.

The payment of the proceeds realized from a policy of fire insurance on a homestead does not constitute a preference in violation of this section. *Cleveland First*

Nat. Bank v. Orten, (1914) 43 Okla. 325, 142 Pac. 1096, wherein it appeared that "for more than six months immediately before the filing of the petition in bankruptcy the bankrupt was a resident of the state, the head of a family, and the owner of a lot in a city and a two-story building thereon, on the lower floor of which he did business and lived on the upper floor, and the value thereof did not exceed five thousand dollars, and that prior to his adjudication in bankruptcy, said building

was destroyed by fire, and that certain insurance money realized therefrom, within four months of the filing of the petition in bankruptcy, was paid by him to one of his creditors." The court held that as said lot and building under the state laws were exempt to him as a homestead, neither the title to said property nor the insurance money realized therefrom passed to the trustee in bankruptcy and that the payment did not constitute a preference.

**b [Preferences voidable.]** If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. [(Amended 1903 and 1910, both acts excepting pending cases) 32 Stat. L. 800, 36 Stat. L. 842.]

As originally enacted section 60b read as follows:

"b If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition or before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." [30 Stat. L. 562.]

It was amended in 1903 "so as to read" as follows:

"b If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." [32 Stat. L. 799.]

In 1910 it was amended "so as to read" as in the text.

As to

Recovery of property transferred in fraud within the four months' period, see section 67e.

Recovery of property transferred generally in fraud of creditors, see section 70e.

I. Elements of voidability, 1026.

II. Recovery of voidable preferences, 1038.

#### I. ELEMENTS OF VOIDABILITY.

**In general.**—At no time did the Bankrupt Act of 1898 give to the trustee the right to recover property transferred within four months prior to proceedings in bankruptcy, unless the elements prescribed by section 60b were shown to exist. *In re Carlile*, (D. C. N. C. 1912) 199 Fed. 612.

**Construction of section in connection**

**with section 67f.**—This section presupposes that the judgment or transfer specifically referred to has been so far effected or realized upon as to amount to a preference, because it is expressly provided that they are voidable by the trustee, and that the *property or its value* may be recovered from the person receiving, or benefited by, the preference. In other words, section 60b applies to executed preferences, section 67f to liens unrealized upon. *In re Peterson*, (C. C. A. 7th Cir. 1912) 200 Fed. 739.

A transaction obnoxious to the provisions of section 67e may be attacked under this section if reprehended by it as well.



*Walters v. Zimmerman*, (N. D. Ohio 1913) 208 Fed. 62.

For the definition of the word "preference," as used in section 60b, recourse must be had to section 60a. *In re Carlile*, (D. C. N. C. 1912) 199 Fed. 612.

**Preferential and fraudulent conveyance distinguished.**—See cases under this black-letter heading in division I of note to section 60a. Transfers with intent to prefer a creditor are often referred to as "fraudulent preferences." While fraud, in one sense, is no doubt involved in all such transfers, it is fraud of a different kind from that involved in transfers "with intent to hinder, delay, or defraud creditors" according to the ordinary meaning of those words. In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors which it is the policy of the law to enforce when all cannot be fully paid. In fraudulent transfer the fraud is actual, the bankrupt has secured an advantage for himself out of what in law should belong to his creditors and not to him. *In re Maher*, (D. C. Mass. 1906) 144 Fed. 503, 16 Am. Bankr. Rep. 340.

"Section 60a defines a 'preference,' section 60b a 'voidable preference,' section 67e a 'fraudulent preference,' under the Bankrupt Act, and section 70e a 'transfer of property' fraudulent under the state law." *In re Carlile*, (D. C. N. C. 1912) 199 Fed. 612, 617.

**Recovery confined to preferences.**—The trustee is not entitled to recover all payments received with knowledge of insolvency, but only preferences so received. *In re Henry C. King Co.*, (1902) 113 Fed. 110, holding that "if by reason of increase of net indebtedness, a certain payment does not constitute a preference, then a creditor who, with knowledge of insolvency, receives such a payment, receives no preference, and so, in spite of his knowledge of insolvency, may retain the payment against the trustee, and need not surrender it before proving the rest of his claim. Bankruptcy Act, section 60b, does not provide that the trustee may recover all payments received with knowledge of insolvency, but only preferences so received."

**Reasonable cause to believe transaction would effect preference.**—Section 60b, as amended by the Act of June 25, 1910, makes voidable all preferences wherein "the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe" that the transaction would effect a preference. Prior to that amendment it was necessary to show that there was reasonable cause to believe that a preference was intended. It is evident, therefore, that the amendment has substituted the effect of the transaction for the intention of the parties. *Heyman v. Jersey City Third*

*Nat. Bank*, (D. C. N. J. 1914) 211 Fed. 638, where the court said the cases decided prior to the amendment in 1910 "are still authority for the tests to be applied in determining whether a reasonable ground for belief has been established."

Under the Act of 1867, a preference was voidable if the creditor had reasonable cause to believe the debtor to be insolvent; but it has been frequently held that the principles of construction laid down by the courts in determining the force and effect to be given to the phrase "reasonable cause to believe," as found in the former Act, are equally applicable in considering the meaning of this phrase in the Act of 1898. *Pratt v. Columbia Bank*, (1907) 157 Fed. 137; *Arkansas Nat. Bank v. Sparks*, (1907) 83 Ark. 324, 103 S. W. 626; *Stevenson v. Milliken*, *Tomlinson Co.*, (1904) 99 Me. 320, 59 Atl. 472; *Sirrine v. Stover-Marshall Co.*, (1902) 64 S. C. 457, 42 S. E. 432.

Under the former law there are numerous cases to the effect that, notwithstanding the fact that a transaction resulted in a preference within the meaning of section 60a, and would have to be surrendered under section 57g before the person benefited could prove his debt, nevertheless such preference was not voidable so as to be recoverable by the trustee, within the meaning of section 60b, unless the preference was intended; and although the mental attitude of the debtor is eliminated by the amendment of 1910, a preference within the terms of section 60a is not within the terms of section 60b in the absence of "reasonable cause to believe," etc. *In re Carlile*, (D. C. N. C. 1912) 199 Fed. 612. Essentially each case, both before and since the amendment, turns on its own circumstances. *Pyle v. Texas Transport, etc., Co.*, (1915) 238 U. S. 90, 35 S. Ct. 667, 59 U. S. (L. ed.) 1215, *affirming* (C. C. A. 5th Cir. 1913) 203 Fed. 1023; *Sheppard-Strassheim Co. v. Black*, (C. C. A. 7th Cir. 1914) 210 Fed. 643; *In re Chicago Car Equipment Co.*, (C. C. A. 7th Cir. 1914) 211 Fed. 638; *Heyman v. Jersey City Third Nat. Bank*, (D. C. N. J. 1914) 216 Fed. 685; *In re Edwards*, (N. D. Ga. 1914) 217 Fed. 102; *Beall v. Bank of Bowden*, (N. D. Ga. 1915) 219 Fed. 316; *Butterfield v. Woodman*, (C. C. A. 1st Cir. 1915) 223 Fed. 956; *Soule v. Ashton First Nat. Bank*, (1914) 26 Idaho 66, 140 Pac. 1098; *Shuetz v. Walter Boyt Saddlery Co.*, (1914) 166 Ia. 523, 147 N. W. 897; *Russell v. Mayfield Lumber Co.*, (1914) 158 Ky. 219, 164 S. W. 783; *Voorheis v. National Shawmut Bank*, (1914) 218 Mass. 69, 105 N. E. 382; *Patterson v. Baker Grocery Co.*, (1914) 73 Ore. 433, 144 Pac. 673; *Friend v. Rosenfeld-Rovig Co.*, (1915) 87 Wash. 329, 151 Pac. 776; *Kimmerle v. Farr*, (C. C. A. 6th Cir. 1911) 189 Fed. 295; *In re Varley, etc.*, *Clothing Co.*, (N. D. Ala. 1911) 191 Fed. 459; *In re Gibson*, (D. C. S. D. 1911) 191

Fed. 665; *Alter v. Clark*, (D. C. Nev. 1911) 193 Fed. 153; *Merklein v. Hurley*, (E. D. N. Y. 1912) 197 Fed. 183; *Grant v. National Bank of Auburn*, (N. D. N. Y. 1912) 197 Fed. 581; *Benner v. Blumauer-Frank Drug Co.*, (W. D. Wash. 1912) 198 Fed. 362; *Fowler State Bank v. White*, (C. C. A. 8th Cir. 1912) 198 Fed. 631; *In re Hirshowitz*, (M. D. Pa. 1912) 199 Fed. 202; *Ogden v. Reddish*, (E. D. Ky. 1912) 200 Fed. 977; *In re Sam Z. Lorch & Co.*, (W. D. Ky. 1912) 199 Fed. 944; *Young v. Burley*, (C. C. A. 6th Cir. 1912) 200 Fed. 258; *In re Trazin*, (C. C. A. 2d Cir. 1912) 201 Fed. 86; *Burnes v. Epstein*, (D. C. Conn. 1913) 201 Fed. 393; *Balcomb v. Old Nat. Bank*, (C. C. A. 7th Cir. 1912) 201 Fed. 679; *In re Harrison*, (M. D. Pa. 1912) 202 Fed. 243; *Boden v. Lovell*, (C. C. A. 5th Cir. 1913) 203 Fed. 234; *Moore v. Smith* (W. D. N. Y. 1913) 205 Fed. 431; *In re Herman*, (N. D. Ia. 1913) 207 Fed. 594; *Mayes v. Palmer*, (C. C. A. 8th Cir. 1913) 208 Fed. 97; *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171; *Kaufman v. Tredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190, 12 Am. Bankr. Rep. 685; *In re Davidson*, (S. D. Ia. 1901) 109 Fed. 882; *McNair v. McIntyre*, (4th Cir. 1902) 113 Fed. 113, 51 C. C. A. 89; *In re Wyly*, (N. D. Tex. 1902) 116 Fed. 38, 8 Am. Bankr. Rep. 604; *In re Bullock*, (E. D. N. C. 1902) 116 Fed. 667, 8 Am. Bankr. Rep. 646; *In re Manning*, (D. C. S. C. 1903) 123 Fed. 181, 10 Am. Bankr. Rep. 500; *Ryttenberg v. Schefer*, (S. D. N. Y. 1904) 131 Fed. 313, 11 Am. Bankr. Rep. 652; *In re Nassau*, (E. D. Pa. 1905) 140 Fed. 912, 15 Am. Bankr. Rep. 793; *Off v. Hakes*, (C. C. A. 7th Cir. 1905) 142 Fed. 364, 15 Am. Bankr. Rep. 696; *Hardy v. Gray*, (1st Cir. 1906) 144 Fed. 922, 75 C. C. A. 562; *Long v. Farmers' State Bank*, (C. C. A. 8th Cir. 1906) 147 Fed. 360, 17 Am. Bankr. Rep. 103; *Pittsburgh Plate Glass Co. v. Edwards*, (C. C. A. 8th Cir. 1906) 148 Fed. 377; *Hussey v. Richardson-Roberts Dry Goods Co.*, (8th Cir. 1906) 148 Fed. 598, 602, 78 C. C. A. 370; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513; *In re Tindal*, (E. D. S. C. 1907) 155 Fed. 456; *Rutland County Nat. Bank v. Graves*, (D. C. Vt. 1907) 156 Fed. 168, 19 Am. Bankr. Rep. 446; *In re Mayo Contracting Co.*, (D. C. Mass. 1907) 157 Fed. 469, 19 Am. Bankr. Rep. 551; *Brewster v. Goff Lumber Co.*, (M. D. Pa. 1908) 164 Fed. 124, 21 Am. Bankr. Rep. 239; *In re Burlage*, (N. D. Ia. 1909) 169 Fed. 1006, 22 Am. Bankr. Rep. 410; *In re Leech*, (C. C. A. 6th Cir. 1909) 171 Fed. 622, 22 Am. Bankr. Rep. 599; *In re Busby*, (M. D. Pa. 1903) 124 Fed. 469, 10 Am. Bankr. Rep. 650; *J. W. Butler Paper Co. v. Goembel*, (C. C. A. 7th Cir. 1905) 143 Fed. 295, 16 Am. Bankr. Rep. 26; *Gomila v. Wilcombe*, (C. C. A. 5th Cir. 1907) 151 Fed. 470, 18 Am. Bankr. Rep. 143; *Wright v. Sampter*, (S.

D. N. Y. 1907) 152 Fed. 196, 18 Am. Bankr. Rep. 355; *In re Louisville First Nat. Bank*, (C. C. A. 6th Cir. 1907) 155 Fed. 100, 18 Am. Bankr. Rep. 766; *In re Wolf Co.*, (M. D. Pa. 1908) 164 Fed. 448, 21 Am. Bankr. Rep. 73; *Tumlin v. Bryan*, (C. C. A. 5th Cir. 1908) 165 Fed. 166, 21 Am. Bankr. Rep. 319; *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *In re Neill-Pinckney-Maxwell Co.*, (E. D. Pa. 1909) 170 Fed. 481, 22 Am. Bankr. Rep. 401; *In re Farmers' Supply Co.*, (S. D. Ohio 1909) 170 Fed. 502, 22 Am. Bankr. Rep. 460; *Sharpe v. Allender*, (C. C. A. 3d Cir. 1909) 170 Fed. 589, 22 Am. Bankr. Rep. 431; *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136; *Smith v. Hewlett Robin Co.*, (C. C. A. 2d Cir. 1910) 178 Fed. 271; *Powell v. Gate City Bank*, (8th Cir. 1910) 178 Fed. 609, 102 C. C. A. 55; *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228; *Reber v. Shulman*, (C. C. A. 3d Cir. 1910) 183 Fed. 564; *In re Houghton Web Co.*, (D. C. Mass. 1910) 185 Fed. 213; *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487; *McAtee v. Shade*, (C. C. A. 8th Cir. 1910) 185 Fed. 442; *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962; *In re Ebert*, (W. D. Wis. 1898) 1 Am. Bankr. Rep. 340; *Crooks v. People's Nat. Bank*, (1899) 3 Am. Bankr. Rep. 238, 46 App. Div. 335, 61 N. Y. S. 604; *North v. Taylor*, (1901) 6 Am. Bankr. Rep. 233, 62 App. Div. 631, 71 N. Y. S. 1143; *Levor v. Seiter*, (1902) 8 Am. Bankr. Rep. 469, 69 App. Div. 33, 74 N. Y. S. 499; *Peck v. Connell*, (Pa. 1902) 8 Am. Bankr. Rep. 500, *affirming* (1901) 6 Am. Bankr. Rep. 93; *Babbitt v. Kelley*, (1902) 9 Am. Bankr. Rep. 335, 96 Mo. App. 529, 70 S. W. 384; *Matter of Bartheleme*, (W. D. N. Y. 1903) 11 Am. Bankr. Rep. 67; *Baden v. Bertenshaw*, (Kan. 1903) 11 Am. Bankr. Rep. 308; *Deland v. Miller, etc., Bank*, (1903) 11 Am. Bankr. Rep. 744, 119 Ia. 368, 93 N. W. 304; *Pratt v. Christie*, (1904) 12 Am. Bankr. Rep. 1, 95 App. Div. 282, 88 N. Y. S. 585; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 12 Am. Bankr. Rep. 781, 123 Ia. 432, 99 N. W. 121; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148; *Whitwell v. Wright*, (1910) 23 Am. Bankr. Rep. 747, 136 App. Div. 246, 120 N. Y. S. 1065; *Blyth, etc., Co. v. Kastor*, (1908) 17 Wyo. 180, 97 Pac. 921.

*In Cauthorn v. Burley State Bank*, (1914) 26 Idaho 532, 144 Pac. 1108, the court said: "Under the Bankruptcy Act as amended in 1903, an essential element to a preference was that the creditor 'had reasonable cause to believe that it was intended thereby to give a preference,' and in a number of cases it was held that the debtor must also intend the transfer as a preference, because such intention might be presumed from the necessary result of

the transaction; and much refinement of argument as to the meaning of the word 'intended,' as used in this section, was indulged in by the courts in construing it. Probably on this account the language of this section was changed by the amendment of 1910, as will be noticed in the foregoing quotation, so as to eliminate the question of intention as to either creditor or debtor. As the law now is, if the creditor had reasonable cause to believe the enforcement of the transfer would effect a preference, it shall be voidable by the trustee. And, as already stated, this makes the intent of the debtor immaterial and predicates this element of a preference upon the belief of the creditor. And this belief must be based upon reasonable cause."

In *Dean v. Davis*, (C. C. A. 4th Cir. 1914) 212 Fed. 88, the court declared a deed of trust invalid under this section, where it appeared that the grantee acted merely as the agent of the debtor with the distinct purpose of aiding him to prefer a particular debt for his own benefit.

In *Covington v. Brigman*, (E. D. N. C. 1914) 210 Fed. 499, the question arose as to whether a mortgage registered some time after its execution was a voidable preference. The court said: "Whether the mortgage is a voidable preference at the suit of the trustee is dependent upon whether defendant, at the date of its registration, had reasonable cause to believe that the mortgagors were insolvent, and that the mortgage registered, at that time, would effect a preference within the definition of that term as used in the Bankrupt Act. It will be well to keep in mind the fact that, since the amendment of 1903 to section 60b, it is not necessary to allege or show, either that the debtor, in making the transfer or executing the mortgage which operates as a preference, intended to make a preference, or, if in fact he had such intention, that the creditor receiving such preference had reasonable cause to believe that such intention existed."

The temporary failure of a debtor to discharge his obligations promptly when they fall due is not in itself sufficient to prove that a creditor who is aware of such a default has reasonable cause to believe that it was intended to give a preference by means of a transfer which he obtains. *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436. See also *J. W. Butler Paper Co. v. Gombel*, (C. C. A. 7th Cir. 1905) 143 Fed. 295, 16 Am. Bankr. Rep. 26.

*As including debtor's insolvency.*—"As a voidable preference within this section of the Bankruptcy Act cannot exist without the debtor's insolvency at the time of the transfer (a solvent debtor having the right to prefer a creditor) it follows that the facts constituting 'reasonable cause' from which the potent belief is to be imputed to

the creditor, include the element of insolvency. *In re Chicago Car Equipment Co.*, (1914) 211 Fed. 638, 128 C. C. A. 142, 31 Am. Bankr. Rep. 617; *Rogers v. American Halibut Co.*, (1914) 31 Am. Bankr. Rep. 576." *Heyman v. Jersey City Third Nat. Bank*, (1914) 216 Fed. 685.

Before one could be said to have "reasonable cause to believe that a preference was intended," it was necessary that the creditor alleged to have been preferred had reasonable cause to believe that the debtor was insolvent at the time of the alleged preference. *In re The Leader*, (W. D. Ark. 1911) 190 Fed. 624. See also *Shelton v. First Nat. Bank of Mannsville*, (1912) 31 Okla. 217, 120 Pac. 959; *In re Eggert*, (1900) 98 Fed. 843, petition for review denied, (1900) 102 Fed. 735, 43 C. C. A. 1; *In re Pfaffinger*, (1906) 154 Fed. 523; *Curtiss v. Kingman*, (1908) 159 Fed. 880; *Huttig Mfg. Co. v. Edwards*, (1908) 160 Fed. 619, 87 C. C. A. 521; *Brewster v. Goff Lumber Co.*, (1908) 164 Fed. 124; *Blankenbaker v. Charlestown State Bank*, (1903) 111 Ill. App. 393; *Boudinot v. Hamann*, (1902) 117 Ia. 22, 90 N. W. 497; *Deland v. Miller, etc., Bank*, (1903) 119 Ia. 368, 93 N. W. 304; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 123 Ia. 432, 99 N. W. 121; *Edwards v. Carondelet Milling Co.*, (1904) 108 Mo. App. 275, 83 S. W. 764; *Mackel v. Bartlett*, (1907) 36 Mont. 7, 91 Pac. 1064; *Wright v. Cotten*, (1905) 140 N. C. 1, 52 S. E. 141; *Taft v. Fourth Nat. Bank*, (1900) 10 Ohio Dec. 405; *Gamble v. Elkin*, (1903) 205 Pa. St. 226, 54 Atl. 682.

In *Grant v. Monmouth First Nat. Bank*, (1877) 97 U. S. 80, 24 U. S. (L. ed.) 971, Mr. Justice Bradley said: "Some confusion exists in the cases as to the meaning of the phrase [in the Bankruptcy Act of 1867] 'having reasonable cause to believe such a person is insolvent.' Dicta are not wanting which assume that it has the same meaning as if it had read 'having reasonable cause to suspect such person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debts. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the Act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the Act requires may be wanting. Obtaining

additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. . . . The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is, in fact, desperate, and his creditors, if they knew anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the Bankrupt Law an engine of oppression and injustice."

The fact alone that a creditor knows his debtor to be financially embarrassed, and is pressing for payment of his claim, is not sufficient to charge him with having reasonable cause to believe his debtor to be insolvent. *Sharpe v. Allender*, (C. C. A. 3d Cir. 1909) 170 Fed. 589, 22 Am. Bankr. Rep. 431; *Page v. Moore*, (E. D. Pa. 1910) 179 Fed. 988.

The intention to give a preference cannot be presumed from the fact alone that the debtor knew himself to be insolvent. *Hardy v. Gray*, (C. C. A. 1st Cir. 1906) 144 Fed. 922, 16 Am. Bankr. Rep. 387.

"Then" as used in the following clause: "If at the time of the transfer, or of the entry of judgment, the bankrupt be insolvent, and the judgment or transfer then operate as a preference, and the person receiving it, or to be benefited thereby, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable," etc., apparently refers to the time the judgment was entered. It would seem that a creditor may enforce a judgment entered at a time when he has not cause to believe the debtor is insolvent, though at the time he enforces it he has such cause to believe or has actual knowledge that the enforcement of his judgment will give him a preference. *Galbraith v. Whitaker*, (1912) 119 Minn. 447, 138 N. W. 772, 43 L. R. A. (N. S.) 427.

The "reasonable cause," etc., must be concurrent in point of time with the alleged preference. *Toof v. Martin*, (1871) 13 Wall. 40, 20 U. S. (L. ed.) 481; *Dow v. Sargent*, (1844) 15 N. H. 115, 41 Am. Dec. 684; *Haughey v. Albin*, (1869) 2 Bond (U. S.) 244; *Clark v. Iselin*, (1874) 21 Wall. 360, 22 U. S. (L. ed.) 568.

*Reasonable cause to believe that a mortgage would effect a preference is reasonable cause to believe that it would operate as a preference.* *Ogden v. Reddish*, (E. D. Ky. 1912) 200 Fed. 977, wherein the court said: "Effect a preference and operate as a preference I understand to be the same thing. The requirement in terms is not that the mortgagee or his agent should

have reasonable cause to believe that the bankrupt was insolvent and the mortgage would effect a preference, but only that it should have had reasonable cause to believe that the mortgage would effect a preference. Belief that the mortgage would effect a preference—i. e., that the property covered thereby was a greater percentage of the bankrupt's property than on a distribution thereof amongst his creditors would be received by his other creditors of the same class—necessarily involved belief that the bankrupt was insolvent, for not otherwise could the mortgagee have had such belief. The requirement, therefore, is not only that the bankrupt was insolvent and that the mortgage covered such greater percentage of his property, but that the defendant company, the mortgagee, had reasonable cause to believe both these things. It had such reasonable cause if it had that, the reasonable effect of having which was such a belief. To have such a thing was to know such a thing. The requirement, therefore, is that the mortgagee knew that, the reasonable effect of knowing which was such belief. It seems to point to knowledge of something short of insolvency, and that the mortgage covered such greater percentage. And it would seem that, to comply therewith, it is not necessary that it appear just what the mortgagee knew. If he acted as if he so believed, the reasonable inference therefrom should be that he had the required knowledge, even though it may not appear just what that knowledge was. The burden was on the plaintiff to establish each one of these three essentials."

#### *Payment under compromise agreement.*

—Where the agent of a debtor made a compromise agreement with creditors of the debtor by which they were to accept sixty cents on the dollar, the money to be raised in part by a loan from the debtor's relatives, and in part by a sale of the debtor's property, and pursuant to such agreement the property was sold and the debts of one of the creditors paid according to the compromise, and thereafter the debtor became insane whereupon his relatives refused to carry out their part of the agreement, it was held that the payment to the creditor referred to did not constitute a voidable preference. *Templeton v. Wollens*, (C. C. A. 2d Cir. 1912) 200 Fed. 257.

*Question of fact.*—It was held prior to the amendment of 1910 that the question whether a preference was intended was one of fact. *Kaufman v. Tredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190, 12 Am. Bankr. Rep. 692; *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228. And see to the same effect *Turner v. Fisher*, (N. D. Cal. 1904) 133 Fed. 594, 13 Am. Bankr. Rep. 243; *Wetstein v. Francisco*, (C. C. A. 2d Cir.

1904) 133 Fed. 900, 13 Am. Bankr. Rep. 326; *In re Andrews*, (D. C. Mass. 1905) 135 Fed. 599, 14 Am. Bankr. Rep. 247; *Thomas v. Adelman*, (E. D. N. Y. 1905) 136 Fed. 973, 14 Am. Bankr. Rep. 510; *Hackney v. Raymond Bros. Clarke Co.*, (Neb. 1903) 10 Am. Bankr. Rep. 213; *Laundy v. Junction City First Nat. Bank*, (Kan. 1903) 11 Am. Bankr. Rep. 223; *Deland v. Miller, etc., Bank*, (1903) 11 Am. Bankr. Rep. 744, 119 Ia. 368, 93 N. W. 304; *Upson v. Mt. Morris Bank*, (1905) 14 Am. Bankr. Rep. 6, 103 App. Div. 367, 92 N. Y. S. 1101.

Thus where payments were made by bankrupts to one creditor within four months prior to the institution of bankruptcy proceedings, and the other creditors had no reasonable cause to believe that it was thereby intended to give a preference, it was held that the payments were not voidable by the trustee, nor was the creditor paid bound to surrender the same as a condition of his right to prove his debt in the bankruptcy proceedings. *In re Maher*, (D. C. Mass. 1906) 144 Fed. 503, 16 Am. Bankr. Rep. 340.

Whether a transaction with the bankrupt will, if carried out, effect a preference, is necessarily controlled by the facts and circumstances of the particular case. Thus it is a general rule that mere suspicion on the part of the creditor that his debtor is insolvent or that the effect of a given transaction with him would amount to a preference is not enough, for in the absence of substantial evidence in that behalf, his suspicions are fairly consistent with the ordinary desire of the creditor to assure himself of safety respecting the debt. On the other hand, general reputation for solvency of a debtor is not always a safe test of the good faith of his creditor who obtains or receives from him a transfer of property, because the relations between them and the circumstances of the transaction itself may satisfy every impartial mind that the particular creditor had abundant reason to believe that his debtor's financial reputation was false, while this might not be true at all in the debtor's transactions or an ordinary character with other persons. One way of testing the belief that should be imputed to the creditor receiving either a payment in money or a transfer of property in discharge of a past-due debt, is to inquire whether reasonable cause to believe actually existed. *Carey v. Donohue*, (C. C. A. 6th Cir. 1913) 209 Fed. 328.

Where a creditor presents his claim and contests the preference alleged to have been received by him before the referee and abides by the findings and decision, he is concluded by the adverse decision of the referee. *Breit v. Moore*, (C. C. A. 9th Cir. 1915) 220 Fed. 97.

A referee's conclusion on the question

whether or not there was reasonable cause to believe that a preference was intended will not be disturbed where it is founded on sufficient evidence. *In re Tindal*, (E. D. S. C. 1907) 155 Fed. 556, 18 Am. Bankr. Rep. 773.

If there is no reasonable ground to believe that a preference would result from the transaction, either on the part of the person benefited or his agent, then of course the transaction would not fall within the language of section 60b as a voidable one. To this effect it was held, prior to the amendment of 1910, that where there was no reasonable ground to believe that a preference was intended the transaction was not voidable. *In re Busby*, (M. D. Pa. 1903) 124 Fed. 469, 10 Am. Bankr. Rep. 650; *Off v. Hakes*, (C. C. A. 7th Cir. 1905) 142 Fed. 364, 15 Am. Bankr. Rep. 696; *J. W. Butler Paper Co. v. Goembel*, (C. C. A. 7th Cir. 1905) 143 Fed. 295, 16 Am. Bankr. Rep. 26; *Hardy v. Gray*, (C. C. A. 1st Cir. 1906) 144 Fed. 922, 16 Am. Bankr. Rep. 387; *Gomila v. Wilcombe*, (C. C. A. 5th Cir. 1907) 151 Fed. 470, 18 Am. Bankr. Rep. 143; *Wright v. Sampter*, (S. D. N. Y. 1907) 152 Fed. 196, 18 Am. Bankr. Rep. 355; *In re Louisville First Nat. Bank*, (C. C. A. 6th Cir. 1907) 155 Fed. 100, 18 Am. Bankr. Rep. 766; *In re Wolf Co.*, (M. D. Pa. 1908) 164 Fed. 448, 21 Am. Bankr. Rep. 73; *Tumlin v. Bryan*, (C. C. A. 5th Cir. 1908) 165 Fed. 166, 21 Am. Bankr. Rep. 319; *Philadelphia First Nat. Bank v. Abbott*, (C. C. A. 8th Cir. 1908) 165 Fed. 853, 21 Am. Bankr. Rep. 436; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *In re Neill-Pinckney-Maxwell Co.*, (E. D. Pa. 1909) 170 Fed. 481, 22 Am. Bankr. Rep. 401; *In re Farmers' Supply Co.*, (S. D. Ohio 1909) 170 Fed. 502, 22 Am. Bankr. Rep. 460; *Sharpe v. Allender*, (C. C. A. 3d Cir. 1909) 170 Fed. 539, 22 Am. Bankr. Rep. 431; *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136; *Smith v. Hewlett Robin Co.*, (C. C. A. 2d Cir. 1910) 178 Fed. 271; *Powell v. Gate City Bank*, (8th Cir. 1910) 178 Fed. 609, 102 C. C. A. 55; *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228; *Reber v. Shulman*, (C. C. A. 3d Cir. 1910) 183 Fed. 564; *In re Houghton Web Co.*, (D. C. Mass. 1910) 185 Fed. 213.

**Reason to suspect insufficient.**—The phrase "reasonable cause to believe" has not the same meaning as "reasonable cause to suspect;" and reasonable cause to believe cannot be held to be proved by circumstances that would merely excite suspicion. There must be proof of reasonable grounds for such a belief. The creditor must have a knowledge of some fact or facts calculated to produce in the mind of an ordinary man a belief. *Grant v. Monmouth First Nat. Bank*, (1877) 97 U. S. 80, 24 U. S. (L. ed.) 971; *Barbour*

*v. Priest*, (1880) 103 U. S. 293, 26 U. S. (L. ed.) 478; *Stucky v. Masonic Sav. Bank*, (1883) 108 U. S. 74, 2 S. Ct. 219, 27 U. S. (L. ed.) 641; *Claridge v. Kulmer*, (1880) 1 Fed. 399; *May v. Le Claire*, (1882) 18 Fed. 164; *Turner v. Fisher*, (1904) 133 Fed. 594; *Tumlin v. Bryan*, (1908) 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. 960; *Philadelphia First Nat. Bank v. Abbott*, (1908) 165 Fed. 952, 91 C. C. A. 538; *Sharpe v. Allender*, (1909) 170 Fed. 589, *affirming In re Wolf Co.*, (1908) 164 Fed. 448; *Blankenbaker v. Charleston State Bank*, (1903) 111 Ill. App. 393; *Atherton v. Emerson*, (1908) 199 Mass. 199, 85 N. E. 530; *Johnston v. George D. Witt Shoe Co.*, (1905) 103 Va. 611, 50 S. E. 153; *Suffel v. McCartney Nat. Bank*, (1906) 127 Wis. 208, 106 N. W. 837, 115 A. S. R. 1004; *Cannon v. James M. Bell Co.*, (1901) 34 Misc. 734, 70 N. Y. S. 1024; *Forbes v. Howe*, (1869) 102 Mass. 427, 3 Am. Rep. 475; *Taft v. Fourth Nat. Bank*, (1900) 10 Ohio Dec. 405.

Proof of knowledge or notice of facts which give a creditor, or a person to be benefited by a preference, reasonable cause to believe at the time of the transfer that it is intended to give a preference thereby, is indispensable to the establishment of a voidable preference. Suspicion, fear, and facts that arouse suspicion and fear in the mind of the creditor, or the party to be benefited, but give no reasonable ground for him to believe that a preference is intended by the transfer, do not make such a preference voidable. *Paper v. Stern*, (C. C. A. 8th Cir. 1912) 198 Fed. 642.

"Reasonable cause to suspect" that a person is insolvent is not equivalent to "reasonable cause to believe" that a person is insolvent, and a case of preferential payment is not made out by the procuring of payment by a creditor bank of notes discounted by a merchant customer of long standing on discovery that they had been forged by him, though the money was raised by a sale of the debtor's entire property to his brother-in-law. *Gnichtel v. Hightstown First Nat. Bank*, (N. J. 1904) 57 Atl. 508.

But if a party has knowledge of facts which cause him to fear or suspect that a transaction into which he is entering will work a preference, that knowledge as a rule will at least be sufficient to put him upon an inquiry which if prosecuted would disclose the real character of the transaction. *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228.

**Financial embarrassment.**—The fact alone that a creditor, knowing his debtor to be financially embarrassed, presses for the payment of his claim, is not sufficient to charge him with having reasonable cause to believe his debtor to be insolvent, or that the payment thus obtained is intended as a preference. *In re Dorr*, (C. C. A. 9th Cir. 1912) 196 Fed. 292.

**Positive knowledge unnecessary.**—In order that a preferential transaction should be deemed voidable under the provisions of section 60b, it is not necessary that the person to be benefited thereby should know positively that the result of the transaction would be the effecting of a preference, but it will be sufficient if the person preferred, or his agent therein, have knowledge or notice of such facts and circumstances as would incite a person of reasonable prudence under similar circumstances to make inquiry, where such inquiry would have developed the facts essential to a knowledge of the situation. *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171; *In re Dunavant*, (W. D. N. C. 1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41; *In re Fixen*, (9th Cir. 1900) 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605; *In re Eggert*, (C. C. A. 7th Cir. 1900) 102 Fed. 735, 4 Am. Bankr. Rep. 449; *In re Henry C. King Co.*, (D. C. Mass. 1902) 113 Fed. 110, 7 Am. Bankr. Rep. 619; *Thomas v. Adelman*, (E. D. N. Y. 1905) 136 Fed. 973, 14 Am. Bankr. Rep. 510; *Sundheim v. Ridge Ave. Bank*, (1905) 138 Fed. 951; *In re Hines*, (1906) 144 Fed. 543; *Pratt v. Columbia Bank*, (1907) 157 Fed. 137; *In re Virginia Hardwood Mfg. Co.*, (W. D. Ark. 1905) 139 Fed. 209; *Off v. Hakes*, (C. C. A. 7th Cir. 1905) 142 Fed. 364, 15 Am. Bankr. Rep. 696; *In re Bloch*, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748; *In re Knopf*, (D. C. S. C. 1906) 146 Fed. 109, 16 Am. Bankr. Rep. 432; *Dokken v. Page*, (C. C. A. 8th Cir. 1906) 147 Fed. 438, 17 Am. Bankr. Rep. 228; *In re Plant*, (S. D. Ga.) 1906) 148 Fed. 37, 17 Am. Bankr. Rep. 272; *Pittsburgh Plate Glass Co. v. Edwards*, (8th Cir. 1906) 148 Fed. 377, 78 C. C. A. 191; *Hussey v. Richardson-Roberts Dry Goods Co.*, (1906) 148 Fed. 598, 78 C. C. A. 370; *In re Bailey*, (1909) 166 Fed. 982; *In re Neill-Pinckney-Maxwell Co.*, (1909) 170 Fed. 481; *Wright v. Sampter*, (S. D. N. Y. 1907) 152 Fed. 196, 18 Am. Bankr. Rep. 355; *Houck v. Christy*, (8th Cir. 1907) 152 Fed. 612, 81 C. C. A. 602; *Coder v. McPherson*, (8th Cir. 1907) 152 Fed. 951, 82 C. C. A. 99; *In re Pfaffinger*, (W. D. Ky. 1907) 154 Fed. 528, 18 Am. Bankr. Rep. 807; *Allen v. McManes*, (W. D. Wis. 1907) 156 Fed. 615, 19 Am. Bankr. Rep. 276; *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; *Wright v. William Skinner Mfg. Co.*, (C. C. A. 2d Cir. 1908) 162 Fed. 315, 20 Am. Bankr. Rep. 527; *Getts v. Janesville Wholesale Grocery Co.*, (W. D. Wis. 1908) 163 Fed. 417, 21 Am. Bankr. Rep. 5; *In re Wolf Co.*, (M. D. Pa. 1908) 164 Fed. 448, 21 Am. Bankr. Rep. 73; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *In re McDonald*, (D. C. S. C. 1910)

178 Fed. 487; *Burgoynes v. McKillip*, (C. C. A. 8th Cir. 1910) 182 Fed. 452; *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228; *Gering v. Leyda*, (C. C. A. 8th Cir. 1911) 186 Fed. 110; *Coleman v. Decatur Egg Case Co.*, (C. C. A. 8th Cir. 1911) 186 Fed. 136; *Tilt v. Citizens' Trust Co.*, (D. C. N. J. 1911) 191 Fed. 441; *McGirr v. Humphreys Grocery Co.*, (N. D. Ohio 1911) 192 Fed. 55; *L. A. Becker Co. v. Gill*, (C. C. A. 8th Cir. 1913) 206 Fed. 36; *Lazarus v. Eagen*, (M. D. Pa. 1912) 206 Fed. 518; *Walters v. Zimmerman*, (N. D. Ohio 1913) 208 Fed. 62; *Arthur v. Harrington*, (N. D. N. Y. 1914) 211 Fed. 215; *In re Ebert*, (W. D. Wis. 1898) 1 Am. Bankr. Rep. 340; *Hackney v. Raymond Bros. Clarke Co.*, (Neb. 1903) 10 Am. Bankr. Rep. 213; *In re Coffey*, (W. D. N. Y. 1907) 19 Am. Bankr. Rep. 148; *Matter of Rosenberg*, (S. D. N. Y. 1909) 22 Am. Bankr. Rep. 900; *Harder v. Clark*, (1910) 23 Am. Bankr. Rep. 756, 66 Misc. 584, 123 N. Y. S. 1102; *Crawford v. Rumpf*, (1903) 205 Pa. St. 154, 54 Atl. 709; *Toof v. Martin*, (1871) 13 Wall. 40, 20 U. S. (L. ed.) 481, *affirming* (1870) 1 Dill. 203, 16 Fed. Cas. No. 9,167; *Wager v. Hall*, (1872) 16 Wall. 584, 21 U. S. (L. ed.) 504, *affirming* (1871) 3 Biss. 28, 11 Fed. Cas. No. 5,951; *Merchants' Nat. Bank v. Cook*, (1877) 95 U. S. 342, 24 U. S. (L. ed.) 412; *Graham v. Stark*, (1869) 3 Ben. 520, 10 Fed. Cas. No. 5,676; *Scammon v. Cole*, (1871) 3 Cliff. 472, 21 Fed. Cas. No. 12,432; *Swan v. Robinson*, (1881) 5 Fed. 287; *Forbes v. Howe*, (1869) 102 Mass. 427, 3 Am. Rep. 475; *Lampkin v. Peoples' Nat. Bank*, (1902) 98 Mo. App. 239, 71 S. W. 715; *Crittenden v. Barton*, (1901) 59 App. Div. 555, 69 N. Y. S. 559; *Guernsey v. Miller*, (1880) 80 N. Y. 181; *Christopherson v. Oleson*, (1905) 19 S. D. 176, 102 N. W. 685.

**Duty of inquiry.**—Where such facts and circumstances are known to the creditor as are clearly sufficient to put a person of ordinary prudence and discretion upon inquiry, it is the creditor's duty to make all reasonable inquiries to ascertain the true state of the case. *Wager v. Hall*, (1872) 16 Wall. 584, 21 U. S. (L. ed.) 504; *Dutcher v. Wright*, (1876) 94 U. S. 553, 24 U. S. (L. ed.) 130.

Therefore, if facts in respect to the debtor's financial condition are brought home to the creditor, or such information is brought home to him as would put an ordinarily prudent man upon inquiry, then the creditor is chargeable with knowledge of the facts which an inquiry would be reasonably expected to disclose. *Dutcher v. Wright*, (1876) 94 U. S. 553, 24 U. S. (L. ed.) 130; *Scammon v. Cole*, (1871) 3 Cliff. 472, 21 Fed. Cas. No. 12,432; *Buchanan v. Smith*, (1872) 16 Wall. 277, 21 U. S. (L. ed.) 280, *affirming* (1871) 8 Blatchf. 53, 22 Fed. Cas.

No. 13,016; *Burpee v. Janesville First Nat. Bank*, (1873) 5 Biss. 405, 4 Fed. Cas. No. 2,185; *In re McDonough*, (1869) 3 Nat. Bankr. Rep. 221, 16 Fed. Cas. No. 8,775; *Webb v. Sachs*, (1877) 4 Sawy. 158, 29 Fed. Cas. No. 17,325; *In re Jacobs*, (1899) 1 Am. Bankr. Rep. 518; *Crandall v. Coats*, (1905) 133 Fed. 965; *Coder v. McPherson*, (1907) 152 Fed. 951, 82 C. C. A. 99; *Stevens v. Oscar Holway Co.*, (1907) 156 Fed. 90; *In re W. W. Mills Co.*, (1908) 162 Fed. 42; *Andrews v. Kellogg*, (1907) 41 Colo. 35, 92 Pac. 222; *Capital Nat. Bank v. Wilkerson*, (1905) 36 Ind. App. 467, 75 N. E. 837, *affirming* (Ind. 1904) 72 N. E. 248; *Capital Nat. Bank v. Wilkerson*, (1905) 36 Ind. App. 550, 76 N. E. 258; *Rice v. Melendy*, (1875) 41 Ia. 395, *affirmed* (1876) 94 U. S. 796, 23 U. S. (L. ed.) 143; *Hackney v. Raymond Bros. Clarke Co.*, (1903) 68 Neb. 624, 94 N. W. 822, 99 N. Y. 675, *reversed* on rehearing on other grounds 68 Neb. 633, 99 N. W. 676 (wherein *Hackney v. Hargreaves*, [1902] 3 Neb. [unofficial] Rep. 676, 92 N. W. 626, was adhered to); *Hargreaves v. Hackney*, (1905) 74 Neb. 700, 104 N. W. 855, *followed* in *Hackney v. Raymond Bros. Clarke Co.*, (1906) 75 Neb. 793, 106 N. W. 1016; *Johnson v. Cohn*, (1902) 39 Misc. 189, 79 N. Y. S. 139; *Walker v. Tenison Bros. Saddlery Co.*, (Tex. 1906) 94 S. W. 166. See also *Singer v. Sloan*, (1875) 3 Dill. 110, 22 Fed. Cas. No. 12,898.

In the case of *In re Miller*, (N. D. Ohio 1915) 221 Fed. 471, the court said: "The law is well settled, when the circumstances are of such a character as to put an ordinarily prudent man on inquiry, the beneficiary of such a one-sided transaction as this is held to the duty of making a real inquiry to ascertain if the facts justify the favor to him, and, making no real inquiry, he is charged with just such knowledge as an inquiry of the character indicated would have produced, had it been truthfully answered. What the court means by the term a 'real inquiry' is that investigation which a reasonably prudent and honest man would make after the circumstances known to him suggested that an inquiry ought to be made."

In *Rogers v. American Halibut Co.*, (1913) 216 Mass. 227, 103 N. E. 669, the court said: "It is unnecessary to show actual knowledge or belief by the creditor. If the circumstances are such as would lead the ordinarily prudent man of affairs to the conclusion that his debtor is insolvent, he obtains a preferential payment within the meaning of the statute, by accepting payment in whole or in part of the debt, where the transaction takes place within four months prior to adjudication; and other creditors of the same class, because of the greater percentage received, must accept decreased dividends." See also *Utah Ass'n of Credit Men v.*

Boyle Furniture Co., (1911) 39 Utah 518, 117 Pac. 800.

Where there is reasonable cause to believe that at the date of transfer within the statutory period the debtor is insolvent, and payment is accepted of a debt overdue, it is immaterial whether the creditor actually believes what may have been disclosed as to the true state of affairs. If he prefers to draw inferences favorable to himself, and to ignore information which would have led to knowledge that his debtor was in failing circumstances, he cannot set up his own judgment to the contrary even if honestly entertained, as a reason why he should be permitted to retain a prohibited advantage. *Hewitt v. Boston Straw Board Co.*, (1913) 214 Mass. 260, 101 N. E. 424.

Reasonable cause to believe that a transfer and the effect of its enforcement will operate as a preference does not exist where the creditor examines the debtor's books, which do not reveal insolvency. *In re Klein*, (C. C. A. 6th Cir. 1912) 197 Fed. 241.

In determining whether the creditor had reasonable cause to believe a transfer by the debtor would effect a preference, facts which are sufficient to put an ordinarily prudent man upon inquiry as to his debtor's solvency charge such person with all the knowledge he could have acquired by the exercise of reasonable diligence. *Galbraith v. Whitaker*, (1912) 119 Minn. 447, 138 N. W. 772, 43 L. R. A. (N. S.) 427.

The mere nonpayment of a debt is not sufficient to put the creditor upon inquiry of his debtor's inability to pay all his debts in general, although, coupled with the facts and circumstances, it might be sufficient. The test is whether such facts and circumstances are brought home to the creditor in reference thereto as would put an ordinarily prudent man upon inquiry, the creditor being chargeable with knowing what such inquiry would naturally lead to. *In re Eggert*, (C. C. A. 1900) 102 Fed. 735. See also *Wager v. Hall*, (1872) 16 Wall. 584, 21 U. S. (L. ed.) 504; *Ex p. Mendell*, (1870) 1 Lowell (U. S.) 506; *Dunning v. Perkins*, (1871) 2 Biss. (U. S.) 421; *Rice v. Melendy*, (1875) 41 Ia. 399; *Swan v. Robinson*, (1881) 5 Fed. 287; *Scammon v. Cole*, (1871) 3 Cliff. (U. S.) 472; *In re Clarke*, (1874) 2 Hughes 405, 5 Fed. Cas. No. 2,843; *Post v. Corbin*, (1871) 5 Nat. Bankr. Reg. 11, 19 Fed. Cas. No. 11,299; *In re Wright*, (1869) 2 Nat. Bankr. Reg. 490, 30 Fed. Cas. No. 18,071.

**Circumstances sufficient.**—Positive proof of collusion between debtor and creditor, by which one may be preferred, is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as the means of ascertaining the truth; and the rule of evidence is well settled that circumstances,

inconclusive if separately considered, may by their joint operation, especially when corroborated by moral coincidences, be sufficient. *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487.

"Reasonable cause to believe," under section 60b of the Bankruptcy Act, covers substantially the same field as "notice" in determining whether a person is a *bona fide* purchaser of property. *Coder v. McPherson*, (8th Cir. 1907) 152 Fed. 951, 82 C. C. A. 99; *Stern v. Paper*, (D. C. N. D. 1910) 183 Fed. 228.

A creditor is required to exercise ordinary prudence, and, if he fails to investigate, he is chargeable with all the knowledge which it is reasonable to suppose he would have acquired if he had performed his duty in that regard. *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487.

Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop. *Coder v. McPherson*, (C. C. A. 8th Cir. 1907) 152 Fed. 951, 18 Am. Bankr. Rep. 523.

Where the circumstances of a transaction are such as to indicate that a preference is intended, the representatives of a creditor seeking security cannot stop their ears and close their eyes to the obvious significance of things, and then say they did not hear or see, or did not understand. *Burgoyne v. McKillip*, (C. C. A. 8th Cir. 1910) 182 Fed. 452.

**Creditor not chargeable with knowledge which inquiry would not have developed.**—A creditor of a bankrupt, who at the time of receiving a preference is put on inquiry as to the solvency of the debtor, is not for that reason charged with notice of facts which could only be learned from intimate and inaccessible sources of information, such as the books of the bankrupt; but he is bound only by such information as could be obtained by open observation and reasonable inquiry. *In re Wolf Co.*, (M. D. Pa. 1908) 164 Fed. 448, 21 Am. Bankr. Rep. 73.

So, also, it has been held that a creditor cannot be said to have had reasonable cause to believe that a preference was intended, unless the evidence shows that it knew, or ought to have known, the substantial truth as to the bankrupt's financial condition. *In re Houghton Web Co.*, (D. C. Mass. 1910) 185 Fed. 213.

**When an offer to compromise is made, creditors are not bound to investigate the debtor's ability to pay the amount offered,** and whether it is his intent to pay it to all creditors alike, but are entitled to believe that the offer is made in good faith to all creditors, unless something occurs to put them on inquiry. *Smith v. Hewlett Robin Co.*, (C. C. A. 2d Cir. 1910) 178 Fed. 271.

**Knowledge presumed.**—Where a person benefited by a preferential transfer, or his



agent therein, has, or is chargeable with, knowledge of such facts and circumstances as would indicate clearly to a man of ordinary intelligence that the transaction from which the preference resulted would naturally effect a preference, it will be deemed voidable under section 60b. Thus, prior to the amendment of 1910, it was held that where the facts and circumstances which were known or should have been known to the party benefited by a preference, or his agent therein, were sufficient to indicate to a man of ordinary intelligence that a preference must have been intended, the transaction would be presumed to be preferential. *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123; *Stern v. Louisville Trust Co.*, (C. C. A. 6th Cir. 1901) 112 Fed. 501, 7 Am. Bankr. Rep. 305; *In re Busby*, (M. D. Pa. 1903) 124 Fed. 469, 10 Am. Bankr. Rep. 650; *Thomas v. Adelman*, (E. D. N. Y. 1905) 136 Fed. 973, 14 Am. Bankr. Rep. 510; *English v. Ross*, (M. D. Pa. 1905) 140 Fed. 630, 15 Am. Bankr. Rep. 370; *In re Nassau*, (E. D. Pa. 1905) 140 Fed. 912, 15 Am. Bankr. Rep. 793; *Hardy v. Gray*, (C. C. A. 1st Cir. 1906) 144 Fed. 922, 16 Am. Bankr. Rep. 387; *Dokken v. Page*, (C. C. A. 8th Cir. 1906) 147 Fed. 438, 17 Am. Bankr. Rep. 228; *Allen v. McMannes*, (W. D. Wis. 1907) 156 Fed. 615, 19 Am. Bankr. Rep. 276; *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; *Brewster v. Goff*, (M. D. Pa. 1908) 164 Fed. 127, 21 Am. Bankr. Rep. 239; *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487; *Alexander v. Redmond*, (C. C. A. 2d Cir. 1910) 180 Fed. 92; *In re Deuschle*, (M. D. Pa. 1910) 182 Fed. 435; *Ernst v. Mechanics' & Metals Nat. Bank of New York*, (S. D. N. Y. 1911) 200 Fed. 295; *Collett v. Bronx Nat. Bank*, (D. C. N. Y. 1912) 200 Fed. 111; *Hackney v. Raymond Bros. Clarke Co.*, (Neb. 1903) 10 Am. Bankr. Rep. 213; *Matter of Rosenberg*, (S. D. N. Y. 1909) 22 Am. Bankr. Rep. 900; *Hess v. Theodore Hamm Brewing Co.*, (1909) 106 Minn. 22, 121 N. W. 232.

Where the inevitable effect of a transfer is to give a preference, it will be conclusively presumed that it was so intended. *In re W. W. Mills Co.*, (E. D. N. C. 1908) 162 Fed. 42, 20 Am. Bankr. Rep. 501; *Brewster v. Goff Lumber Co.*, (M. D. Pa. 1908) 164 Fed. 124, 21 Am. Bankr. Rep. 106; *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487; *Alexander v. Redmond*, (C. C. A. 2d Cir. 1910) 180 Fed. 92; *Lazarus v. Eagen*, (M. D. Pa. 1912) 206 Fed. 518. See to the same effect *Kimmerle v. Farr*, (C. C. A. 6th Cir. 1911) 189 Fed. 295, wherein the court said: "The intention to give a preference may be shown not merely by proof of actual intent, but by its equivalent in law—that is, by proof that the necessary result of the transaction was to create a preference—in which case the intention to give

a preference will be presumed. Where the inevitable result of a transaction between a debtor and creditor is to create a preference, the law will conclusively impute to the debtor the intention to bring about the result necessarily arising from the nature of the act which he does. However, a presumption of law that the debtor intended to give a preference does not arise from the fact alone that he knew himself to be insolvent. It will often, if not generally, happen that a person, though in fact insolvent, will, while continuing his business in the usual way, make payments without a thought of disparagement to other creditors and with confidence in his ability to pay them all."

*The sale by a retail merchant of his entire stock of goods* puts the purchaser on inquiry to learn whether the seller is not in financial difficulty, and casts upon him the burden of proving that he used such means of knowledge as were at hand to ascertain the facts, in order to sustain his title as against creditors of the seller. *Thomas v. Adelman*, (E. D. N. Y. 1905) 136 Fed. 973, 14 Am. Bankr. Rep. 510; *English v. Ross*, (M. D. Pa. 1905) 140 Fed. 630, 15 Am. Bankr. Rep. 370; *Dokken v. Page*, (C. C. A. 8th Cir. 1906) 147 Fed. 438, 17 Am. Bankr. Rep. 228; *Allen v. McMannes*, (W. D. Wis. 1907) 156 Fed. 615, 19 Am. Bankr. Rep. 276; *In re McDonald*, (D. C. S. C. 1910) 178 Fed. 487; *Matter of Rosenberg*, (S. D. N. Y. 1909) 22 Am. Bankr. Rep. 900. See also *English v. Ross*, (M. D. Pa. 1905) 140 Fed. 630, 15 Am. Bankr. Rep. 370.

So, also, it has been held that a mortgage given by an insolvent firm within four months of bankruptcy proceedings, to secure a past indebtedness, and which conveys all the firm property, is void as giving to the creditor a preference. *In re Jones*, (D. C. S. C. 1902) 118 Fed. 673.

*A creditor who indirectly repurchased goods from a debtor who was insolvent, and sold the same again at a loss, is presumed to have had reasonable cause to believe that a preference was intended.* *Hardy v. Gray*, (C. C. A. 1st Cir. 1906) 144 Fed. 922, 16 Am. Bankr. Rep. 387.

*Knowledge of insolvency.*—It has been held that a creditor has reasonable cause to believe that a preference was intended so as to render it voidable, where he admitted that he knew the debtor was hard pressed and without credit, and that he had himself been persistently pressing his own claim for several months. *Wright v. William Skinner Mfg. Co.*, (C. C. A. 2d Cir. 1908) 162 Fed. 315, 20 Am. Bankr. Rep. 527.

*Knowledge of fraudulent scheme.*—Where, before bankruptcy proceedings, a bankrupt made a general assignment for the benefit of creditors, and afterward conspired with certain creditors that his estate should be sold to their agent for less than half its value, who should resell,

and out of the profits pay such creditors a part of their claims and return the surplus to the bankrupt, it was held that such application of the insolvent debtor's property to the payment of such creditors constituted an unlawful preference. *Stern v. Louisville Trust Co.*, (C. C. A. 6th Cir. 1901) 112 Fed. 501, 7 Am. Bankr. Rep. 305.

**Knowledge of agent.**—By section 60b, knowledge possessed by his agent binds the creditor, but this provision is to be taken with the qualification that, where the agent is acting in furtherance of his own adverse interest or fraudulently, his principal is not bound. *Rogers v. American Halibut Co.*, (1913) 216 Mass. 227, 103 N. E. 689. See also *Hewitt v. Boston Straw Board Co.*, (1913) 214 Mass. 260, 101 N. E. 424, wherein the court said: "By the express words of the amendatory act, which are merely declaratory of the rule of law, that knowledge possessed by an agent may be imputed to his principal, the defendant is bound by information acquired by its attorney."

Where it appeared that the claimant purchased the note on which the claim was founded and after maturity and non-payment gave it to the payees who intrusted it to their "credit man" to take to the makers, who secured some payments on the notes, and who was informed of such facts concerning the makers as must have given him reasonable grounds to believe that insolvency existed, it was held that knowledge by the claimant of the insolvency of the maker of the note must be presumed. *Constam v. Haley*, (C. C. A. 6th Cir. 1913) 206 Fed. 260.

**Knowledge of a town trustee of the insolvency of his brother charges the town with knowledge.** *Painter v. Napoleon Tp.*, Henry County, Ohio, (N. D. Ohio 1910) 190 Fed. 637.

Where the agent of a creditor, when taking mortgages to secure the indebtedness to his principal within four months prior to the debtor's bankruptcy, had knowledge of facts which should have put him on inquiry as to the debtor's solvency, he and his principal are legally chargeable with knowledge of such facts as the inquiry would have disclosed. *In re Nassau*, (E. D. Pa. 1905) 140 Fed. 912, 15 Am. Bankr. Rep. 793.

As to imputing knowledge of an agent or a subagent to the principal under similar provisions in earlier bankruptcy acts, see *Rogers v. Palmer*, (1880) 102 U. S. 263, 23 U. S. (L. ed.) 392; *Sage v. Wyncoop*, (1881) 104 U. S. 319, 26 U. S. (L. ed.) 740; *Hoover v. Wise*, (1875) 91 U. S. 308, 26 U. S. (L. ed.) 164; *Nesbit v. Macon Bank, etc. Co.*, (1882) 12 Fed. 686; *Markson v. Hobson*, (1871) 2 Dill. (U. S.) 327; *Mayer v. Hermann*, (1872) 10 Blatchf. (U. S.) 256; *Ungewitter v. Von Sachs*, (1870) 4 Ben. (U. S.) 167;

*In re Meyer*, (1869) 2 Nat. Bankr. Reg. 422; *Vogle v. Lathrop*, (1870) 4 Nat. Bankr. Reg. 439.

**Knowledge of officer of corporation.**—When a corporation becomes insolvent, or in failing condition, its officers and directors no longer represent the stockholders, but become trustees of the corporate property and assets for the benefit of all the creditors, and cannot then prefer themselves or other creditors out of the money, funds or property of the corporation. And all payments or preferences so made within four months of adjudication in bankruptcy are voidable and recoverable by the trustee in bankruptcy after adjudication on like principles of trusteeship. A managing officer and director of an insolvent corporation receiving such priority of payment and preference will not be heard to plead ignorance of the insolvency of his corporation existing at the time of such preference, so as to avoid recovery thereof by the trustee in bankruptcy. *Arnold v. Knapp*, (W. Va. 1915) 84 S. E. 895.

**Knowledge of bank president.**—A bank is chargeable with notice of the insolvency of a debtor from whom it receives a payment, and that such payment constitutes an unlawful preference under the Bankruptcy Act, where its president had knowledge of such insolvency, gained while acting for the bank in the matter of such indebtedness. *In re Gillette*, (W. D. N. Y. 1900) 104 Fed. 769, 5 Am. Bankr. Rep. 123; *Conners v. Bucksport Nat. Bank*, (D. C. Me. 1914) 214 Fed. 847.

*In Marsh v. Walters*, (C. C. A. 6th Cir. 1915) 220 Fed. 805, the court held that the mere fact that the bank's president used his own money as a means of effecting a preferential transfer did not relieve his security from the ban of section 60b.

**Intent to prefer.**—It is no longer necessary, in order to establish a preference, to prove the existence of the debtor's intent to prefer. It is sufficient if it is shown that the creditor receiving the alleged preference payment had, at the time when it was made, reasonable cause to believe that the bankrupt was insolvent, and that in accepting and retaining the same he would receive a larger per cent. of his debt than the other creditors of the same class. *R. H. Herron Co. v. Moore*, (C. C. A. 9th Cir. 1913) 208 Fed. 134; *Rogers v. American Halibut Co.*, (1913) 216 Mass. 227, 103 N. E. 689. Compare *Debus v. Yates*, (E. D. Ky. 1910) 193 Fed. 427.

If the transferee has a reasonable cause to believe that a preference was intended it is sufficient to constitute a preference within this section although the debtor had no intention to give a preference. *Hotchkiss v. National City Bank of New York*, (S. D. N. Y. 1911) 200 Fed. 287.

In the case of *In re Dorr*, (C. C. A.

9th Cir. 1912) 196 Fed. 292, the court said: "The intent of the debtor, in the absence of other proof, may be shown by its equivalent in law, proof of the inevitable result of the transaction which in the case at bar was to give a preference and create an unequal distribution of the bankrupt's estate. The bankrupt not only knew that he was insolvent but he knew that he was so irretrievably so that he could not hope to continue his business, and he knew that he could not make the payment which he did make without disparity in his payments to his other creditors. If the effect of the act was to create a preference and such was its natural consequence, he must be presumed to have intended to do that which was the necessary result of his act."

Where the position of the officer of the bankrupt corporation, through whom it is alleged that the preference was made, was such that it was his duty to know the bankrupt's financial condition, and where his conduct indicates a thorough knowledge of its embarrassment and general business conditions, and where a conveyance of property is made to a creditor not in the ordinary course of business, but under extraordinary conditions which render imperative the result that other creditors shall be hindered, delayed or prevented in the payment of their claims, the inference of an intent on the part of the debtor to prefer becomes inevitable. The inference follows as matter of law from circumstances of overwhelming probative force, even though the buoyant hopefulness of the particular individual may be so great as to prevent him from having a settled and clear-cut purpose to prefer one creditor over others. *Wilson v. Mitchell-Woodbury Co.*, (1913) 214 Mass. 514, 102 N. E. 119.

**Instances of reasonable cause of belief.**—In a case where a creditor knew that his debtor was insolvent at the time he took a mortgage to secure his debt, and that the mortgage covered substantially all of the debtor's assets, and that the debtor owed other creditors many thousands of dollars, it was held that the conclusion was irresistible that he must have known that the mortgage, if enforced, must necessarily operate to give him a preference over other creditors, and therefore he must have known that the mortgage was intended to give him such a preference. *In re Virginia Hardwood Mfg. Co.*, (1905) 139 Fed. 209.

In each of the following cases decided prior to the amendment of 1910, it was held that the facts in evidence gave the creditor reasonable cause to believe that a preference was intended: *In re Graham*, (1901) 110 Fed. 133; *In re Mandel*, (1903) 127 Fed. 863; *Western Tie, etc., Co. v. Brown*, (1904) 129 Fed. 728, 64 C. C. A. 256, reversed on other grounds, (1905) 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571; *Crandall v. Coats*,

(1905) 133 Fed. 965; *Thomas v. Adelman*, (1905) 136 Fed. 973; *In re Nassau*, (1905) 140 Fed. 912; *Hardy v. Grav*, (1906) 144 Fed. 922, 75 C. C. A. 562, affirming (1905) 135 Fed. 599; *Pittsburgh Plate Glass Co. v. Edwards*, (1906) 148 Fed. 377, 78 C. C. A. 47; *Coder v. McPherson*, (1907) 152 Fed. 951, 82 C. C. A. 99; *Stevens v. Oscar Holway Co.*, (1907) 156 Fed. 90; *In re Lynden Mercantile Co.*, (1907) 156 Fed. 713; *Pratt v. Columbia Bank*, (1907) 157 Fed. 137; *In re Mayo Contracting Co.*, (1907) 157 Fed. 469; *Huttig Mfg. Co. v. Edwards*, (1908) 160 Fed. 619, 87 C. C. A. 521; *In re W. W. Mills Co.*, (1908) 162 Fed. 42; *Brewster v. Goff Lumber Co.*, (1908) 164 Fed. 124; *Andrews v. Kellogg*, (1907) 41 Colo. 35, 92 Pac. 222; *Matthews v. Joannes Bros. Co.*, (1909) 156 Mich. 663, 121 N. W. 272; *Pepperdine v. National Exch. Bank*, (1901) 88 Mo. App. 81; *Crittenden v. Barton*, (1901) 59 App. Div. 555, 69 N. Y. S. 559; *Sebring v. Wellington*, (1901) 63 App. Div. 498, 71 N. Y. S. 788; *Crooks v. People's Nat. Bank*, (1902) 72 App. Div. 331, 76 N. Y. S. 92, 495 (reversing in part and affirming in part, (1901) 34 Misc. 450, 70 N. Y. S. 271), affirmed (1903) 177 N. Y. 68, 69 N. E. 228; *Whitwell v. Wright*, (1910) 136 App. Div. 246, 120 N. Y. S. 1065, affirming (1909) 115 N. Y. S. 48; *Cannon v. James M. Bell Co.*, (1901) 34 Misc. 734, 70 N. Y. S. 1024; *State Bank of Williamson v. Fish*, (1909) 120 N. Y. S. 365; *Wright v. Cotten*, (1905) 140 N. C. 1, 52 S. E. 141; *Harris v. Jackson Second Nat. Bank*, (1903) 110 Tenn. 239, 75 S. W. 1053.

In each of the following cases, decided under the Bankruptcy Act of 1867, it was held that the creditor had reasonable cause to believe that the debtor was insolvent: *Graham v. Stark*, (1869) 3 Ben. 520, 10 Fed. Cas. No. 5,676; *In re Armstrong*, (1877) 9 Ben. 212, 1 Fed. Cas. No. 539; *Campbell v. Traders' Nat. Bank*, (1871) 2 Biss. 423, 4 Fed. Cas. No. 2,370; *Golson v. Niehoff*, (1871) 2 Biss. 434, 10 Fed. Cas. No. 5,524; *Mayer v. Hermann*, (1872) 10 Blatchf. 256, 16 Fed. Cas. No. 9, 344; *Haughey v. Albin*, (1869) 2 Bond 244, 11 Fed. Cas. No. 6,222; *Vanderhoof v. City Bank of St. Paul*, (1871) 1 Dill. 476, 28 Fed. Cas. No. 16,842, (1873) 17 Wall. 473, 21 U. S. (L. ed.) 723; *Hurley v. Smith*, (1870) Hask. 308, 12 Fed. Cas. No. 6,920; *Scammon v. Hobson*, (1872) 1 Hask. 406, 21 Fed. Cas. No. 12,434; *Robinson v. Tuttle*, (1876) 2 Hask. 76, 20 Fed. Cas. No. 11,968; *Anonymous*, (1839) 1 Fed. Cas. No. 446; *Alderdice v. State Bank of Virginia*, (1875) 1 Hughes 47, 1 Fed. Cas. No. 154; *In re Clarke*, (1874) 2 Hughes 405, 5 Fed. Cas. No. 2,843; *Catlin v. Hoffman*, (1874) 2 Sawy. 486, 5 Fed. Cas. No. 2,521; *Stranahan v. Gregory*, (1871) 4 Nat. Bankr. Reg. 427, 23 Fed. Cas. No. 13,522; *Post v. Corbin*, (1871) 5 Nat.

Bankr. Reg. 11, 19 Fed. Cas. No. 11,299; Stobaugh v. Mills, (1873) 8 Nat. Bankr. Reg. 361, 23 Fed. Cas. No. 13,461; Lloyd v. Strobbridge, (1877) 3 Nat. Bankr. Reg. 197, 15 Fed. Cas. No. 8,435. See Otis v. Hadley, (1873) 112 Mass. 100; Upham v. New York Loan, etc., Co., (1879) 76 N. Y. 1; *In re Dempster*, (1880) 14 Phila. 447, 38 Leg. Int. 25.

**Instances of lack of reasonable cause of belief.**—It was held in each of the following cases decided prior to the amendment of 1910, that the facts in evidence were insufficient to show that the creditor had reasonable cause to believe that a preference was intended to be given him: *In re Soudan Mfg. Co.*, (1902) 113 Fed. 804, 51 C. C. A. 476; *Stedman v. Monroe Bank*, (1902) 117 Fed. 237, 54 C. C. A. 269; *Jacobs v. Van Sickle*, (1903) 123 Fed. 340, *affirmed* (1903) 127 Fed. 62, 61 C. C. A. 598; *Ryttenberg v. Schefer*, (1904) 131 Fed. 313; *In re Oppenheimer*, (1905) 140 Fed. 51; *Hussey v. Richardson-Roberts Dry Goods Co.*, (1906) 148 Fed. 598, 78 C. C. A. 370; *Coder v. Arts*, (1907) 152 Fed. 943, 82 C. C. A. 91 (*modifying* (1906) 145 Fed. 202), *affirmed* (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772; *In re Pfaffinger* (1906) 154 Fed. 523; *In re Tindal*, (1907) 155 Fed. 456; *Irish v. Citizens' Trust Co.*, (1908) 163 Fed. 880; *McDonald v. Clearwater Shortline R. Co.*, (1908) 164 Fed. 1007; *Bacon v. Merchants' Bank*, (1906) 146 Ala. 521, 40 So. 413; *Hawes v. Elberton Bank*, (1905) 124 Ga. 567, 52 S. E. 922; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, (1904) 123 Ia. 432, 99 N. W. 121; *Stevenson v. Milliken, etc., Co.*, (1904) 99 Me. 320, 59 Atl. 472; *Harmon v. Feldheim*, (1902) 131 Mich. 470, 91 N. W. 744; *Hackney v. Lincoln First Nat. Bank*, (1903) 68 Neb. 588, 94 N. W. 805, 98 N. W. 412; *Empire State Trust Co. v. William F. Fisher Co.*, (1904) 67 N. J. Eq. 8, 57 Atl. 502, *reversed* on other grounds (1905) 67 N. J. Eq. 602, 60 Atl. 940, 3 Ann. Cas. 393; *Congleton v. Schreihofner*, (N. J. 1903) 54 Atl. 144; *Gnichtel v. Hightstown First Nat. Bank*, (N. J. 1904) 57 Atl. 508; *Perry v. Booth*, (1901) 67 App. Div. 235, 73 N. Y. S. 216; *Pearsall v. Nassau Nat. Bank*, (1902) 74 App. Div. 89, 77 N. Y. S. 11; *Brown v. Guichard*, (1902) 37 Misc. 78, 74 N. Y. S. 735, *affirmed* without opinion (1902) 77 App. Div. 642, 79 N. Y. S. 1127; *Starbuck v. Gebbo*, (1905) 48 Misc. 333, 96 N. Y. S. 781; *Taft v. Fourth Nat. Bank*, (1900) 10 Ohio Dec. 405; *Keith v. Gettysburg Nat. Bank*, (1903) 23 Pa. Super. Ct. 14; *Townes v. Alexander*, (1903) 69 S. C. 23, 48 S. E. 214; *Thompson v. Fairbanks*, (1903) 75 Vt. 361, 56 Atl. 11, 104 A. S. R. 899, *affirmed* on other grounds (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577; *Stratton v. Lawson*, (1902) 27 Wash. 310, 67

Pac. 562; *Dunlop v. Thomas*, (1902) 28 Wash. 521, 68 Pac. 909.

*It was held in each of the following cases, decided under the Act of 1867, that the facts were insufficient to show that the creditor had reasonable cause to believe that the debtor was insolvent.* *Clark v. Iselin*, (1874) 21 Wall. 360, 22 U. S. (L. ed.) 568, *reversing* (1872) 10 Blatchf. 204, 5 Fed. Cas. No. 2,825; *Watson v. Taylor*, (1874) 21 Wall. 378, 22 U. S. (L. ed.) 576; *In re Clarke*, (1874) 2 Hughes 405, 5 Fed. Cas. No. 2,843; *Lakin v. Jamestown First Nat. Bank*, (1875) 13 Blatchf. 83, 14 Fed. Cas. No. 7,999; *Warren v. New York Tenth Nat. Bank*, (1871) 5 Ben. 395, 29 Fed. Cas. No. 17,200, *reversed* (1873) 10 Blatchf. 493, 29 Fed. Cas. No. 17,202, and *affirmed* (1877) 96 U. S. 539, 24 U. S. (L. ed.) 640; *In re Wright*, (1869) 2 Nat. Bankr. Reg. 490, 30 Fed. Cas. No. 18,071; *Shaffer v. Fritchery*, (1871) 4 Nat. Bankr. Reg. 548, 21 Fed. Cas. No. 12,697; *Barbour v. Priest*, (1880) 103 U. S. 293, 26 U. S. (L. ed.) 478; *Swartz v. Frank*, (1904) 183 Mo. 438, 82 S. W. 60; *Hastings v. Fithian*, (1905) 71 N. J. L. 311, 60 Atl. 350.

## II. RECOVERY OF VOIDABLE PREFERENCES.

### Trustee vested with rights of creditor.

—Since the enactment of the amendment of 1910, trustees, as to all property in the custody or coming into the custody of the Bankruptcy Court are vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the Bankruptcy Court, they are vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. See section 47a (2).

### Necessity of recovering preferences.

A preferential transfer is not void, it is only voidable; the title of the recipient is good unless it is avoided; therefore, in order that a preference may become a part of the assets for distribution among the creditors, it is essential that the property be recovered by the trustee. *Boonville Nat. Bank v. Blakey*, (C. C. A. 7th Cir. 1901) 107 Fed. 891, 6 Am. Bankr. Rep. 13; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513; *Van Iderstine v. National Discount Co.*, (2d Cir. 1909) 174 Fed. 519, 98 C. C. A. 300; *Belding-Hall Mfg. Co. v. Mercer, etc., Lumber Co.*, (C. C. A. 6th Cir. 1909) 175 Fed. 335, 23 Am. Bankr. Rep. 595; *Frost v. Latham*, (S. D. Ala. 1910) 181 Fed. 866.

**Recovery of voidable preferences.**—*The trustee may recover property which has been preferentially obtained, or the value thereof, from the person receiving it or benefited thereby, where it is shown that*

all the elements of a voidable preference, as defined by section 60b, exist. *Boonville Nat. Bank v. Blakey*, (C. C. A. 7th Cir. 1901) 107 Fed. 891, 6 Am. Bankr. Rep. 13; *In re Manning*, (D. C. S. C. 1903) 123 Fed. 181, 10 Am. Bankr. Rep. 500; *Benjamin v. Chandler*, (M. D. Pa. 1905) 142 Fed. 217, 15 Am. Bankr. Rep. 439; *In re Nechamkus*, (E. D. N. Y. 1907) 155 Fed. 867, 19 Am. Bankr. Rep. 189; *Painter v. Napoleon Tp.*, (N. D. Ohio 1907) 156 Fed. 289, 19 Am. Bankr. Rep. 412; *Mason v. National Herkimer County Bank*, (N. D. N. Y. 1908) 163 Fed. 920, 21 Am. Bankr. Rep. 98; *In re Fish Bros. Wagon Co.*, (C. C. A. 8th Cir. 1908) 164 Fed. 553, 21 Am. Bankr. Rep. 149; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *In re Blake*, (E. D. N. Y. 1909) 171 Fed. 298, 22 Am. Bankr. Rep. 612; *Ommen v. Talcott*, (S. D. N. Y. 1909) 175 Fed. 259, 23 Am. Bankr. Rep. 572; *Belding-Hall Mfg. Co. v. Mercer, etc.*, *Lumber Co.*, (C. C. A. 6th Cir. 1909) 175 Fed. 335, 23 Am. Bankr. Rep. 595; *Brown v. Streicher*, (D. C. R. I. 1910) 177 Fed. 473, 24 Am. Bankr. Rep. 267; *Campbell v. Balcomb*, (C. C. A. 7th Cir. 1910) 183 Fed. 766; *Lovell v. Latham*, (S. D. Ala. 1911) 186 Fed. 602; *In re Adams*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 94; *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618; *In re Rothschild*, (S. D. Ga. 1901) 5 Am. Bankr. Rep. 587; *In re Mersman*, (W. D. N. Y. 1901) 7 Am. Bankr. Rep. 46; *Breit v. Moore*, (C. C. A. 9th Cir. 1915) 220 Fed. 97; *Block v. Academy Ball Room*, (S. D. N. Y. 1915) 221 Fed. 1004; *Rosenthal v. Bronx Nat. Bank*, (S. D. N. Y. 1915) 222 Fed. 83, holding that the trustee was not bound by a judgment foreclosing a chattel mortgage in a state court, and could conduct litigation to declare the mortgage an unlawful preference and recover the value thereof.

A mortgage given before but not recorded until within four months prior to the beginning of the bankruptcy proceedings and which operated at the date of its registration to give the mortgagee a preference over other creditors may be avoided by the trustee in bankruptcy under a state law which declares every mortgage or deed of trust to be invalid as against creditors until its registration. *Brigman v. Covington*, (C. C. A. 4th Cir. 1915) 219 Fed. 500.

*Trustee's discretion.*—The trustee as the representative, and in the interest, of all the creditors, and not of the petitioning creditors alone, is to determine in the first instance whether the transaction was undertaken with a view to give a preference, and whether the creditor had reasonable cause to believe that it was so, and if proof is forthcoming. He is to ascertain the facts, and to determine the probability of successful litigation,

and whether the creditor sought to be pursued is responsible, so that the estate should not be mulcted in unnecessary litigation and costs. *Boonville Nat. Bank v. Blakey*, (C. C. A. 7th Cir. 1901) 107 Fed. 891, 6 Am. Bankr. Rep. 13.

*Trustee only may sue.*—Security, which is only voidable under the Bankruptcy Law, can be avoided only at the instance of the trustee and for the benefit of the creditors. It cannot be attacked by the bankrupt. *Laurel Oil, etc., Co. v. Horne*, (1912) 101 Miss. 629, 57 So. 624, 58 So. 652; *Lovell v. Latham*, (S. D. Ala. 1914) 211 Fed. 374, in which the court said: "A preference is avoidable by the trustee, and he may recover the property or its value. There is no authority in any other person to maintain the required action. Any other rule, even were the statute not clear on this point, would lead to confusion. It is only through the instrumentality of the trustee that creditors can recover, and subject to the payment of their claims, the property which the bankrupt fraudulently transferred prior to the adjudication in bankruptcy. Creditors can have no remedy which will reach property fraudulently conveyed, except through the trustee. All such property, by the express words of the Bankrupt Act, vest in the trustee by virtue of the adjudication and of his appointment."

A trustee in bankruptcy cannot assign to another his right to avoid a preferential transfer of property. *Belding-Hall Mfg. Co. v. Mercer, etc., Lumber Co.*, (C. C. A. 6th Cir. 1909) 175 Fed. 335, 23 Am. Bankr. Rep. 595.

The statute does not sanction the bringing of a suit by a receiver to recover a voidable preference. *Boonville Nat. Bank v. Blakey*, (C. C. A. 7th Cir. 1901) 107 Fed. 891, 6 Am. Bankr. Rep. 13.

*Leave to sue.*—The trustee has the right, without authority from the Bankruptcy Court, to bring an action to recover a preferential payment. *Chism v. Citizens' Bank*, (1900) 77 Miss. 599, 27 So. 637; *Chism v. Friers Point Bank*, (Miss. 1900) 27 So. 610.

*Trustee may prosecute action begun by creditors.*—A pending action brought by creditors of an insolvent partnership to avoid, as an unlawful preference, a sale by an individual partner of his individual property, may be prosecuted to final judgment by the trustee in bankruptcy of the partnership estate, even though the cause of action arose from the state law, and the application of that law is essential to secure the relief sought. *Miller v. New Orleans Acid, etc., Co.*, (1909) 211 U. S. 496, 29 S. Ct. 176, 53 U. S. (L. ed.) 300, 21 Am. Bankr. Rep. 416, *affirming* (1906) 117 La. 821, 42 So. 329.

*Demand or notice before suit.*—"Whether the election by a trustee to avoid a preference should be exercised by a demand

before suit or can be exercised by the suit itself might be difficult to determine if it were necessary on the record," was said in *Eau Claire Nat. Bank v. Jackman*, (1907) 204 U. S. 522, 27 S. Ct. 391, 51 U. S. (L. ed.) 596, *affirming* on independent grounds (1905) 125 Wis. 465, 104 N. W. 98, 115 A. S. R. 955, where a demand was held unnecessary if the defendant by conversion of the property involved before suit brought had put it out of his power to restore it. To the point that the action itself is a demand see *Kaufman v. Fredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190. Demand was held unnecessary in *Bowler v. Pipestone First Nat. Bank*, (1907) 21 S. D. 449, 113 N. W. 618, 130 A. S. R. 725.

Where the trustee when appointed demands the property alleged to have been transferred as a preference it is sufficient notice to the creditor that he elects to treat the transaction as a preference. *Grant v. National Bank of Auburn*, (N. D. N. Y. 1912) 197 Fed. 581.

*On recovery preference becomes part of estate.*—Where an alleged preferential transfer is avoided, and the trustee recovers the fund sued for, it then becomes a part of the assets of the bankrupt estate in the possession of, and in the course of administration by, the Bankruptcy Court. *Lovell v. Latham*, (S. D. Ala. 1911) 186 Fed. 602.

All persons entitled to participate in the assets, or claiming a lien thereon, may come into that court, and, under the jurisdiction acquired by the proceeding in bankruptcy, have their rights adjudicated. *Lovell v. Latham*, (S. D. Ala. 1911) 186 Fed. 602. See also *Allen v. McMannes*, (W. D. Wis. 1907) 156 Fed. 615, 19 Am. Bankr. Rep. 276.

But the validity of all other claims against the bankrupt, and the question whether others have received voidable preferences and have not been required to surrender them, cannot be litigated in a suit in a state court to avoid an alleged unlawful preference, since this would, in effect, transfer the administration of the bankrupt's estate from the federal District Court to the state court. *Eau Claire Nat. Bank v. Jackman*, (1907) 204 U. S. 522, 27 S. Ct. 391, 51 U. S. (L. ed.) 596, 17 Am. Bankr. Rep. 675.

*Jurisdiction.*—*The state and federal courts have concurrent jurisdiction of an action brought by a trustee in bankruptcy to avoid a preference.* *Bowman v. Alpha Farms*, (N. D. N. Y. 1907) 153 Fed. 380, 18 Am. Bankr. Rep. 700; *Teague v. Anderson Hardware Co.*, (N. D. Ga. 1908) 161 Fed. 765; *McElvain v. Hardesty*, (C. C. A. 8th Cir. 1909) 169 Fed. 31, 22 Am. Bankr. Rep. 320; *Bryan v. Madden*, (N. Y. 1905) 15 Am. Bankr. Rep. 388; *Drew v. Myers*, (1908) 22 Am. Bankr. Rep. 656, 81 Neb. 750, 116 N. W. 781; *Davis v. Planters' Trust Co.*, (W. D. Ky. 1912) 196

Fed. 970. See also the annotation following section 23b.

*Ancillary jurisdiction.*—A federal District Court, of a district other than that in which a bankruptcy proceeding is pending, may entertain a suit by the bankrupt's trustee, to set aside an alleged fraudulent or preferential transfer by the bankrupt to parties residing in such district. *Teague v. Anderson Hardware Co.*, (N. D. Ga. 1908) 161 Fed. 765. And see section 2 (20), which was added by the amendment of 1910, and which especially provides for the exercise of ancillary jurisdiction.

*Recovery by bill in equity.*—A trustee in bankruptcy may maintain a suit in equity to recover property which has been preferentially transferred; such action being in the nature of a creditor's suit to set aside a fraudulent conveyance. *Pond v. New York Nat. Exch. Bank*, (S. D. N. Y. 1903) 124 Fed. 992; *Wright v. Skinner*, (S. D. N. Y. 1905) 136 Fed. 694, 14 Am. Bankr. Rep. 500; *Parker v. Black*, (W. D. N. Y. 1906) 143 Fed. 560, 16 Am. Bankr. Rep. 202, *affirmed* (2d Cir. 1907) 151 Fed. 18, 80 C. C. A. 484; *Morris v. Small*, (D. C. Mass. 1908) 160 Fed. 142, 20 Am. Bankr. Rep. 138; *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673. See also the annotation following section 23b.

Equity has jurisdiction at the suit of a trustee in bankruptcy of an insolvent corporation to recover from a stockholder dividends unlawfully declared and paid him, and to recover from officers and directors of such corporation money paid them as creditor within four months of the adjudication in bankruptcy, in violation of the federal Bankruptcy Act, and to follow the funds so improperly paid into any property or rights into which the same have been invested and to charge the same therewith. *Arnold v. Knapp*, (W. Va. 1915) 84 S. E. 895.

Federal courts, both when exercising general jurisdiction and also when exercising the special one conferred by the Bankruptcy Act in this particular, require suits to set aside deeds and contracts as fraudulent to be instituted in equity. *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673.

It is to be borne in mind that the equity practice of the federal courts is independent of, and unaffected by, state laws as to procedure in state courts. *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673.

A bill by a trustee in bankruptcy to recover a payment of money made by a bankrupt within four months prior to bankruptcy, by alleging that the transaction amounted to a preference or a fraudulent payment, and that in either case he was entitled to its return, does not unite inconsistent causes of action. *Wright v.*

Skinner, (S. D. N. Y. 1905) 136 Fed. 694, 14 Am. Bankr. Rep. 500.

The decree of a state court, granting registration of title to land under the law of the state, does not bar a suit in equity by a trustee in bankruptcy to enforce a reconveyance of the land, alleged to have been conveyed by the bankrupt as a preference, against a defendant who was not a *bona fide* purchaser in good faith in reliance on the registered title. *Morris v. Small*, (C. C. Mass. 1908) 160 Fed. 142, 20 Am. Bankr. Rep. 138.

But where the trustee has an adequate remedy at law he cannot maintain a bill in equity in any court for the recovery of a preference. *Warmath v. O'Daniel*, (C. C. A. 6th Cir. 1908) 159 Fed. 87, 20 Am. Bankr. Rep. 101; *Sessler v. Nemcof*, (E. D. Pa. 1910) 183 Fed. 656; *Milliken First State Bank v. Spencer*, (C. C. A. 9th Cir. 1915) 219 Fed. 503, wherein the trustee in bankruptcy sought by a bill in equity to recover an alleged preference consisting of a payment of money only. Sustaining a demurrer to the bill of complaint for the reason that on its face it showed no grounds of equitable relief and that the equity side of the court had no jurisdiction of the matters contained in the bill, the court said: "The question before us is not whether a court of equity could grant the relief prayed for, but whether the trial court erred in not following the command of section 267 of the Judicial Code [in title JUDICIARY herein]. No reason can be suggested why the remedy at law to recover the money in question was not plain, adequate, and complete. If this be so, then the appellant was not only deprived of a substantial right, including a trial by jury, but the plain command of the statute was not followed. It would seem from some of the decisions that courts have fallen into the habit of treating the requirement of the statute lightly where relief can be given in equity. If, in a particular case, the remedy at law is plain, adequate, and complete, then under the statute in such case there can be no concurrent jurisdiction between a court of equity and a court of law, if objection is seasonably made. The statute quoted declared no new principle, but the principle itself which has always ruled courts of equity was of such importance that Congress crystallized it by legislation and placed the matter beyond dispute. It would therefore seem to be the duty of courts to give force and effect to the statute whenever it is applicable. 'This enactment certainly means something.' *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205-214, 2 S. Ct. 279, 27 U. S. (L. ed.) 484."

*Jurisdiction not determined on demurrer.*—Though equity has cognizance of constructive and actual fraud, whether a bill in equity lies by a trustee in bankruptcy to set aside a preferential payment

to a creditor of a bankrupt will not be determined on demurrer to the bill, but the demurrer will be overruled, reserving the right to raise the question of jurisdiction at final hearing. *Johnson v. Hanley, etc., Co.*, (D. C. R. I. 1911) 188 Fed. 752. Demurrers in equity are abolished by Equity Rule 29 promulgated by the Supreme Court Nov. 4, 1912.

*Recovery in assumpsit.*—A trustee in bankruptcy may sue in assumpsit for the value of a preferential transfer of goods by the bankrupt to a creditor, for the reason that the creditor takes the goods impressed with the obligation created by the Bankruptcy Act to restore or pay on the trustee's electing to sue. *Reber v. Ellis*, (E. D. Pa. 1911) 185 Fed. 313.

*Jury trial.*—Recovery of the "property or its value" is expressly provided for by this section (*Ernst v. Mechanics' & Metals Nat. Bank of City of N. Y.*, (C. C. A. 2d Cir. 1912) 201 Fed. 664), and for the purpose of recovering the value the trustee may bring an action at law, in which case the parties are entitled to a jury trial. *Warmath v. O'Daniel*, (1908) 159 Fed. 87, 86 C. C. A. 277, 16 L. R. A. (N. S.) 414; *Allen v. Gray*, (1911) 201 N. Y. 504, 94 N. E. 652, Ann. Cas. 1912B 123; *Stern v. Mayer*, (1904) 99 App. Div. 427, 91 N. Y. S. 292. See also *Boonville Nat. Bank v. Blakey*, (1906) 166 Ind. 427, 76 N. E. 529.

But where the relief sought is of an equitable nature, there is no absolute right to a jury trial. *Vollkommer v. Frank*, (1905) 107 App. Div. 594, 95 N. Y. S. 324, judgment affirmed (1907) 205 U. S. 521, 27 S. Ct. 596, 51 U. S. (L. ed.) 911; *Evans v. National Broadway Bank*, (1903) 88 App. Div. 549, 85 N. Y. S. 101. See also *In re Plant*, (1906) 148 Fed. 37.

*Remedy by injunction pending recovery.*—Under the rule that where equity will enforce a claim to specific property, an injunction may issue *pendente lite* to prevent a transfer that would interfere with or prejudice the ultimate relief to which a claimant may be entitled, it has been held that a court of bankruptcy will, on proper showing, grant an injunction to restrain the disposition of property preferentially transferred. *In re Kimball*, (W. D. Pa. 1899) 97 Fed. 29, 3 Am. Bankr. Rep. 161; *In re Mills*, (E. D. N. Y. 1910) 179 Fed. 409; *Pyle v. Texas Transport, etc., Co.*, (E. D. La. 1911) 185 Fed. 309.

*Defenses in general.*—*Expense in connection with preference.*—It is no defense to an action for the recovery of a preference that the person receiving it has expended money thereon; a claim of that character must be presented for allowance against the estate. *In re Nechamkus*, (E. D. N. Y. 1907) 155 Fed. 867, 19 Am. Bankr. Rep. 189; *Ommen v. Talcott*, (S. D. N. Y. 1909) 175 Fed. 259, 23 Am. Bankr. Rep. 572.

**Misconduct of creditor's agent.**—The statute contains no exceptions to the effect that a preferred creditor may hold his advantage provided his agent and the insolvent have confidential relations, or provided his agent has self-interests antagonistic to a disclosure to his principal. To interpolate such exceptions is beyond the proper sphere of statutory construction and violative of the spirit of the Act wherein equality of distribution of the bankrupt's inadequate assets is a prime object. *Campbell v. Balcomb*, (C. C. A. 7th Cir. 1910) 183 Fed. 766.

**Cross bill for recovery of dividend.**—A court of equity, in a suit by a trustee in bankruptcy to recover a preference, will not entertain a cross bill for the recovery by defendant of the amount of the dividend to which he claims to be entitled from the bankrupt's estate, but will require him to prove his claim in the Bankruptcy Court; but it may permit him, on the giving of security, to retain in his hands enough of the amount complainant is entitled to recover, to cover his dividend in case his claim shall be allowed. *Ommen v. Talcott*, (S. D. N. Y. 1909) 175 Fed. 259, 23 Am. Bankr. Rep. 572.

**The statute of limitations for the institution of actions on open accounts, express or implied, as set forth in the Georgia Civil Code, 1910, §§ 4362, 4368, does not apply to an action by a trustee in bankruptcy, under section 60b, against a transferee for value of goods received from the bankrupt in payment of a pre-existing debt less than four months prior to the filing of the petition in bankruptcy.** *Arnold Grocery Co. v. Shackelford*, (1913) 140 Ga. 585, 79 S. E. 470.

**Res judicata.**—An adjudication of involuntary bankruptcy upon a petition alleging a preferential transfer as an act of bankruptcy does not conclude the transferee from contesting the fact in a subsequent suit against him by the trustee under section 60b. *Silvey v. Tift*, (1905) 123 Ga. 804, 51 S. E. 748, 1 L. R. A. (N. S.) 386; *Pepperdine v. Bank of Seymour*, (1903) 100 Mo. App. 387, 73 S. W. 890.

**Finding on creditors' petition not res judicata as to trustee.**—A finding on a creditors' petition that a charge of preferential transfer of property by the alleged bankrupts was not sustained, is not an adjudication which can bind a trustee, subsequently appointed on an adjudication made by another court, in a suit brought by him against the alleged preferred creditor to recover the property. *In re Sears*, (C. C. A. 2d Cir. 1904) 128 Fed. 275.

But where the defendant in the trustee's suit had filed a proof of debt with the referee and the trustee had filed objections thereto on the ground that defendant had received a preference, the findings and judgment in the proceedings before the referee constituted an adjudication of the facts as to whether a payment was a void-

able preference, and the question could not thereafter be litigated in the District Court. While the referee cannot assume jurisdiction over the question in the first instance, yet if a claim is submitted to the Bankruptcy Court, the question as to whether or not it was a preference is included in such submission when the question is thereafter raised and litigated before the referee in passing upon the claim. *In re Davidson*, (N. D. Cal. 1914) 211 Fed. 687.

**Pleadings.**—The pleadings must show all the essential elements of a voidable transfer in order to warrant a recovery. *Deland v. Miller, etc., Bank*, (1903) 11 Am. Bankr. Rep. 744, 119 Ia. 368, 93 N. W. 304; *West v. Lahoma Bank*, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 508, 86 Pac. 59; *Drew v. Myers*, (1908) 81 Neb. 750, 116 N. W. 781.

To entitle a trustee in bankruptcy to recover back money collected by a creditor of the bankrupt by means of a judgment recovered within four months of the filing of the petition in bankruptcy, on the ground that it created a preference voidable under section 60 of the federal Bankruptcy Act, it is his duty to aver and prove that the bankrupt was insolvent at the time the judgment was obtained. No presumption arises from the adjudication in bankruptcy that the debtor was insolvent at the time the judgment was obtained. *McNeel v. Folk*, (W. Va. 1914) 83 S. E. 192.

In an action by a trustee to recover a payment constituting a voidable preference, an averment that the payment was fraudulently made is unnecessary. *Chism v. Friars Point Bank*, (Miss. 1900) 27 So. 610.

An allegation in a complaint by a trustee in an action to set aside as a voidable preference a mortgage made by the bankrupt, which describes the insolvent at the time of the alleged preference as "in failing circumstances and unable to pay all his debts in full," is not a sufficient allegation of his insolvency. *Martin v. Bigelow*, (1901) 36 Misc. 298, 73 N. Y. S. 443.

It is essential to allege in the complaint that the transfer or payment complained of will have the effect of giving the creditor to whom it was made a greater percentage of his claim out of the bankrupt's estate than other creditors of the same class will obtain. *Utah Ass'n of Creditmen v. Boyle Furniture Co.*, (1913) 43 Utah 523, 136 Pac. 572.

The pleadings, in an action to recover a voidable preference, should contain a direct averment of the exact amount of the unsecured claims and should also show the amount of preferred debts, or debts entitled to priority, if any, as well as the amount of several debts. *Grant v. National Bank of Auburn*, (N. D. N. Y. 1912) 197 Fed. 581.

In *Kraver v. Abrahams*, (E. D. Pa.



1913) 203 Fed. 782, a statement of claim which sought to recover upon the grounds of an unlawful preference under section 60b, and a transfer for the purpose of hindering, delaying, and defrauding creditors under section 67e, was held not demurrable because a payment may have been made at the same time a preference, and a payment made with intent to hinder, delay, and defraud creditors.

In order to allege a voidable preference where the act complained of is the procuring of or suffering a judgment to be entered against the bankrupt in favor of any person, it is necessary, among other averments, to allege that at the time of the rendition of the judgment the judgment debtor was insolvent, and that by suffering said judgment to be entered against him he intended thereby to give a preference, and that the judgment creditor had reasonable cause to believe that the judgment debtor so intended, and that the judgment creditors benefiting thereby would receive a greater percentage of their debt than other creditors of the same class. *Rodolf v. First Nat. Bank of Tulsa*, (1912) 30 Okla. 631, 121 Pac. 629, 41 L. R. A. (N. S.) 204.

A petition drawn under the provisions of sections 60a and 60b, which fails by proper averments to charge that the creditor receiving or benefiting by the alleged voidable preferences at the time had reasonable cause to believe, etc., as expressed in section 60b, fails to state a cause of action. *Rodolf v. First Nat. Bank of Tulsa*, (1912) 30 Okla. 631, 121 Pac. 629, 41 L. R. A. (N. S.) 204.

It is not necessary, in an action by the trustee to set aside certain transfers under section 60b, to set out in detail the proof of the allegations, it being sufficient to allege that the transfers had the effect referred to in the section, and that the creditor had a reasonable ground for believing that a preference would be effected. *Crooks v. People's Nat. Bank*, (1899) 46 App. Div. 335, 61 N. Y. S. 604.

*Pleadings must comply with practice where suit is brought.*—It is well settled that a proceeding instituted by a bankrupt's trustee to set aside illegal preferences is not a proceeding in bankruptcy, but, while ancillary to such proceeding and authorized by the Bankruptcy Act to be instituted in either the federal District Court or in a state court of competent jurisdiction, it must be governed, so far as pleading and practice is concerned, by the laws and rules of the court wherein it is instituted. *Westall v. Avery*, (C. C. A. 4th Cir. 1909) 171 Fed. 626, 22 Am. Bankr. Rep. 673; *Exler v. American Box Co.*, (1910) 226 Pa. St. 384, 75 Atl. 661, 134 A. S. R. 1067.

*Restoration of purchase money.*—In *Stern v. Louisville Trust Co.* (C. C. A. 1901) 112 Fed. 501, it was held, under the circumstances, that the trustee might

recover the value (less the amount received by him) of the property of the bankrupt, fraudulently purchased by certain creditors, without first returning the purchase money.

*Evidence.*—"The burden of proof is on the trustee in bankruptcy, seeking to avoid as a preference a transfer of property made by a bankrupt, to prove by sufficient evidence all of the essential elements of a voidable preference." *Per Connor, J.*, in *In re Carlile*, (D. C. N. C. 1912) 199 Fed. 612. To the same point see *Tumlin v. Bryan*, (1908) 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960; *Kimmerle v. Farr*, (1911) 189 Fed. 295, 111 C. C. A. 727; *In re Klein*, (C. C. A. 6th Cir. 1912) 197 Fed. 241; *In re Pfaffinger*, (W. D. Ky. 1906) 154 Fed. 523; *Getts v. Janesville Wholesale Grocery Co.*, (W. D. Wis. 1908) 163 Fed. 417, 21 Am. Bankr. Rep. 5; *Powell v. Gate City Bank*, (C. C. A. 8th Cir. 1910) 178 Fed. 609; *Reber v. Shulman*, (E. D. Pa. 1910) 179 Fed. 574; *Hackney v. Raymond Bros. Clarke Co.*, (Neb. 1903) 10 Am. Bankr. Rep. 213; *Barbour v. Priest*, (1880) 103 U. S. 293, 26 U. S. (L. ed.) 478; *Crane v. Penny*, (1880) 2 Fed. 187; *Parsons v. Topliff*, (1876) 14 Nat. Bankr. Reg. 547.

The burden of proof of the existence of the reasonable cause of belief that the transaction would effect a preference is upon the trustee. *Soule v. Ashton First Nat. Bank*, (1914) 26 Idaho 66, 140 Pac. 1098.

*Affirmative defense.*—But the defendant assumes the burden of proving an affirmative defense set up by him. *Ommen v. Talcott*, (C. C. A. 2d Cir. 1911) 188 Fed. 401.

*Proof of insolvency in partnership cases.*—A trustee in bankruptcy may not recover a conveyance of partnership property as a preference, unless it is shown that the partners, as individuals, were insolvent at the time of the conveyance. *Worrell v. Whitney*, (E. D. Pa. 1910) 179 Fed. 1014; *Rodolf v. First Nat. Bank of Tulsa*, (1912) 30 Okla. 631, 121 Pac. 629, 41 L. R. A. (N. S.) 204. See also the annotation under section 5a.

*Establishing the existence of other individual creditors is not essential* to the prosecution, by the trustee of a bankrupt partnership, of a pending suit to avoid, as constituting a preference under the state law, a sale by an individual partner of his individual property, where, under such law, partnership and individual creditors have a coequal right to payment out of his individual estate. *Miller v. New Orleans Acid, etc., Co.*, (1909) 211 U. S. 496, 29 S. Ct. 176, 53 U. S. (L. ed.) 300, 21 Am. Bankr. Rep. 416, *affirming* (1906) 117 La. 821, 42 So. 329.

A decree of a court of bankruptcy, adjudicating a person an involuntary bankrupt, conclusively establishes his

insolvency as of the date of the alleged act of insolvency so as to make all payments to creditors after that date voidable as preferences. *Lazarus v. Eagen*, (M. D. Pa. 1912) 206 Fed. 518.

**Determining amount of preference.**—In *In re Chaplin*, (1902) 115 Fed. 162, where recovery by the trustee of a fraudulent and voidable preference was allowed on general equitable principles, the court, in determining the amount of the preference deemed fraudulent, charged the creditor with the amount of a note at its face value regardless of the amount actually received.

**As to measure of damages in suits by the trustee**, see the following cases under earlier Bankruptcy Acts: *Clarion Bank v. Jones*, (1874) 21 Wall. 325, 22 U. S. (L. ed.) 542; *Traders' Nat. Bank v. Campbell*, (1871) 14 Wall. 87, 20 U. S. (L. ed.) 832; *Cookingham v. Morgan* (1870) 7 Blatchf. (U. S.) 480; *Street v. Dawson*, (1870) 4 Nat. Bankr. Reg. 207, 23 Fed. Cas. No. 13,533; *Shuman v. Fleckenstein*, (1877) 4 Sawy. (U. S.) 174.

**Recovery of interest.**—Judgment in favor of the trustee in his action to recover a preference may properly include interest on the claim from the commencement of the action, for such commencement is itself a demand. *Kaufman v.*

*Tredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190.

**Decree in suit in Bankruptcy Court.**—If the trustee's suit against a creditor to recover a preference is brought in the Bankruptcy Court itself, the decree against the defendant may avoid circuity of proceeding and direct him to pay over the full amount of his preference, with interest, less the amount of the dividend found coming to him. *Page v. Rogers*, (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332.

**Hearing on appeal.**—Findings of fact in a state court upon which a judgment in favor of the trustee in bankruptcy to recover an alleged unlawful preference was based are binding upon the federal Supreme Court reviewing by writ of error the judgment of the state court. *Fau Claire Nat. Bank v. Jackman*, (1907) 204 U. S. 522, 27 S. Ct. 391, 51 U. S. (L. ed.) 596, *affirming* (1905) 125 Wis. 465, 104 N. W. 98, 115 A. S. R. 955.

Whether the bankrupt was insolvent at the time of the transaction attacked, and whether the creditor had "reasonable cause to believe," etc., are questions of fact on which the verdict of a jury in a state court is conclusive on the federal Supreme Court on a writ of error. *Kaufman v. Tredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190.

c [Set-off of new credit after preference.] If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him. [(1898) 30 Stat. L. 562].

**Right of set-off.**—Where a creditor who has been preferred, afterwards, in good faith, extends further credit without security, for property which becomes a part of the debtor's estate, the unpaid amount of such new credit may be set off against the amount which would otherwise be recoverable from the creditor by reason of his having obtained a voidable preference. *Kaufman v. Tredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190, 12 Am. Bankr. Rep. 685; *In re Morrow*, (S. D. Ohio 1901) 134 Fed. 686, 13 Am. Bankr. Rep. 392; *Price v. Derbyshire Coffee Co.*, (1908) 21 Am. Bankr. Rep. 280, 128 App. Div. 472, 112 N. Y. S. 830. See also the annotation to section 682.

**"Good faith" and "part of debtor's estates."**—The requirement of "good faith" excludes any arrangement by which the creditor, seeking to escape liability occasioned by the preference he has received, passes money or property over to the debtor with a view to its secretion until after the bankruptcy proceedings

have terminated, or with some other wrongful purpose. It means that the creditor must not act in such a way as intentionally to defeat the Bankruptcy Act, but shall let the debtor have the money or property for some honest purpose. And the requirement that it shall become a part of the debtor's estate excludes cases in which the creditor delivered the property to a third person on the credit of the debtor, or delivered it to him with instructions to pass it on to some third party. But the use of the words "debtor" and "debtor's" in the statute instead of "bankrupt" and "bankrupt's" indicates that it is the nonpayment, and not the fact that the property remains a part of the estate until the time of bankruptcy, which entitles the creditor to a set-off. And if the creditor has acted in good faith, has extended credit without security, and the money or property has actually passed into the debtor's possession, the creditor need not show what disposition thereof was made by the debtor. *Kaufman v.*

Tredway, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190.

"Without security of any kind."—It has been held that where the new credit has passed the limit of a security given therefor, the credit in excess of the security will be held to be "without security of any kind" and entitled to be set off against the amount recoverable. *In re Tanner*, 6 Am. Bankr. Rep. 196.

"New credit."—Before there can be a set-off within the foregoing section there must have been a preference prior to the extension of the new credit. *In re Bailey*, (1901) 110 Fed. 928. See also *In re Ratliff*, (1901) 107 Fed. 80; *Price v. Derbyshire Coffee Co.*, (1908) 128 App. Div. 472, 112 N. Y. S. 830, 21 Am. Bankr. Rep. 280.

Where a check given in part payment of a debt for goods sold goes to protest and remains unpaid, and subsequently the vendor sells other goods to the debtor on credit, and the debtor makes a payment on account, this payment constitutes a preference, and the debt for the goods last sold is not a "new credit" as it would be if the check constituted the preference. *In re Bailey*, (1901) 110 Fed. 928.

Word "recoverable" means recoverable under section 60b.—Prior to the simultaneous amendment in 1903 of sections 57g and 60b it was held in some cases that the right of set-off under section 60c must be restricted to cases wherein the trustee recovers the amount of the preference from the creditor under the provisions of section 60b. *In re Christensen*, (1900) 101 Fed. 802; *In re Oliver*, (1901) 109 Fed. 784; *In re Jones*, (1903) 123 Fed. 128; *In re Keller*, (1901) 109 Fed. 118; *In re Abraham Steers Lumber Co.*,

(1901) 110 Fed. 738; *In re Ratliff*, (1901) 107 Fed. 80; *In re Rosenberg*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 316.

But there were authorities to the contrary, these holding that the right to a set-off under section 60c applied to the case of an innocent preference which the creditor must surrender under section 57g in order to have his claim allowed. *In re Seckler*, (1901) 106 Fed. 484; *McKey v. Lee*, (C. C. A. 1901) 105 Fed. 923; *In re Topliff*, (1902) 114 Fed. 323; *Gans v. Ellison*, (C. C. A. 1902) 114 Fed. 734; *C. S. Morey Mercantile Co. v. Schiffer*, (C. C. A. 1902) 114 Fed. 447 [approving *Peterson v. Nash*, (C. C. A. 1901) 112 Fed. 311; *In re Dickson*, (C. C. A. 1901) 111 Fed. 726]. See also *In re Ryan*, (1900) 105 Fed. 760; *In re Thompson*, (1902) 112 Fed. 651; *In re Soldosky*, (1901) 111 Fed. 511; *In re Southern Overalls Mfg. Co.*, (1901) 111 Fed. 518, *affirmed sub nom. Kahn v. Cone Export, etc., Co.*, (C. C. A. 1902) 115 Fed. 290. But section 57g having been subsequently amended (in 1903) by expressly connecting it with section 60b, it seems to be unquestionable that section 60c is likewise connected with section 60b, as held in the cases above cited in the preceding paragraph. See also the note to section 57g.

Paragraph g of section 57, and paragraphs a, b, and c of section 60 are closely related. They are parts of the system which aims at equality between creditors of the same class. They should be read together and in such manner as to harmonize the several clauses of each other and to promote the general scheme of the Act. *Gans v. Ellison*, (C. C. A. 1902) 114 Fed. 737.

d [Payments to attorneys—examination.] If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reexamined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate. [(1898) 30 Stat. L. 562.]

As to

Attorney fees as expenses, see section 62.

Attorney fees as entitled to priority, see section 64b (3).

A payment or transfer to counsel is valid to the extent that it is reasonable. It is neither a preference under section 60b, nor a fraudulent transfer under section 67c. *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

"What is meant by the statute is that a debtor, under the circumstances therein

described, may fully pay an attorney reasonable compensation for services to be rendered, and it is immaterial whether the payment is made at or after the professional engagement is entered into. Upon the re-examination provided for by the statute, it should not be difficult to determine either the *bona fides* or the reasonableness of the charge. In this case, the attorney acted in strict accord with his professional obligations, and, indeed, his fee was noticeably moderate." *In re Cummins*, (S. D. N. Y. 1912) 196 Fed. 224.

**Previous services.**—A payment made by a bankrupt to his attorney immediately prior to the bankruptcy for services previously rendered, so far as the question of its being preferential is concerned, stands upon the same ground as a payment to any other creditor. *In re Shiebler*, (E. D. N. Y. 1908) 163 Fed. 545, 20 Am. Bankr. Rep. 777.

Section 64b (3) probably bears some relation to section 60d as to the character of the services contemplated by the latter. See *In re Kross*, (S. D. N. Y. 1899) 96 Fed. 816, holding that both paragraphs "are to be construed together"; *In re Habegger*, (8th Cir. 1905) 139 Fed. 623, 71 C. C. A. 607, 3 Ann. Cas. 276. See therefore the note to section 64b (3).

"In contemplation of the filing of a petition."—"Contemplation thus means more than the knowledge that a bankruptcy proceeding either by or against the debtor is impending. It means that in making the transfer the debtor is influenced by the possibility or imminence of such a proceeding. There must be some relation as of cause and effect between knowledge of his condition and the transfer. The latter must to some extent at least be attributable to his financial condition. This may be illustrated by gifts in contemplation of death. Such are not simply gifts made in light of the possibility that one may soon die. They are made because of a consciousness of this fact. In the case both of contemplation of death and in contemplation of bankruptcy proceedings, the possibility in each case must be upon the mind as an element leading to the result, to wit, the transfer. In a case under section 60d the debtor must of course be confronted with the possibility of a bankruptcy proceeding. But there must be more. There must be a transfer induced at least to some extent by such a situation." *Tripp v. Mitschrich*, (C. C. A. 8th Cir. 1914) 211 Fed. 424, holding that a contract by the debtor, three days after a fire, with an attorney to collect insurance policies held on a stock of goods destroyed and upon which liability was being questioned by the insurance companies, is a proceeding in the usual course of business having no necessary relationship to bankruptcy, and such a contract cannot of itself justify the conclusion that it was made in contemplation of the filing of a bankruptcy petition either by or against the debtor; and that the additional fact that five days after the transfer certain creditors filed proceedings in bankruptcy against the debtor does not of itself raise the presumption that the debtor in making the transfer was acting in contemplation of bankruptcy.

**Fees paid to an attorney by the assignees under a general assignment** made by the bankrupt for services performed before proceedings in bankruptcy were in-

stituted do not fall within the purview of this section. *In re Geller*, (D. C. N. J. 1914) 216 Fed. 558.

**Services rendered after institution of proceedings.**—"Section 60d relates to services to be rendered while the debtor is in 'contemplation of bankruptcy' and not to services to be rendered after bankruptcy proceedings are commenced;" it does not cover services rendered in resisting the creditor's petition for an adjudication of bankruptcy. *Pratt v. Bothe*, (C. C. A. 6th Cir. 1904) 130 Fed. 670, 12 Am. Bankr. Rep. 529.

Section 60d refers solely to services germane to the purposes of the Bankruptcy Act which were to be and were in fact rendered prior to the bankruptcy. *In re Stolp*, (E. D. Wis. 1912) 199 Fed. 488.

**Only for services beneficial to estate.**—The payments or transfer to which section d gives qualified protection are only for services such as are in their nature beneficial to the estate of the bankrupt, or such as are required to be performed by the bankrupt under the provisions of the Bankruptcy Act. They would not extend to services in attempting to settle the financial difficulties of the bankrupt out of the Bankruptcy Court and in opposition to bringing the estate before the court, nor to services performed on behalf of the bankrupt in defending him from criminal prosecutions. *In re Habegger*, (8th Cir. 1905) 139 Fed. 623, 71 C. C. A. 607, 3 Ann. Cas. 276 and note. See also *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165.

**Re-examination of payment or transfer made to attorney.**—Section 60d "recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And, in view of the circumstances, the Act makes provision that the Bankruptcy Court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness." *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1. And see to the same effect *In re Humphreys*, (E. D. N. C. 1915) 221 Fed. 997; *In re Kross*, (S. D. N. Y. 1899) 96 Fed. 816, 3 Am. Bankr. Rep. 187; *In re Lewin*, (D. C. Vt. 1900) 103 Fed. 850, 4 Am. Bankr. Rep. 632; *Pratt v. Bothe*, (C. C. A. 6th Cir. 1904) 130 Fed. 670, 12 Am. Bankr. Rep. 529; *In re Habegger*, (8th Cir. 1905) 139 Fed. 623, 71 C. C. A. 607, 15 Am. Bankr. Rep. 198;

*In re Shiebler*, (E. D. N. Y. 1908) 163 Fed. 545, 20 Am. Bankr. Rep. 777; *Furth v. Stahl*, (1903) 10 Am. Bankr. Rep. 442, 205 Pa. St. 439, 55 Atl. 29.

**Determination of reasonableness.**—The provisions of section 60d, although aimed at the recovery of undue payments for "services to be rendered," are analogous in so far as they give the court an opportunity to determine what allowance shall be made, with the provisions of section 64b (3); hence, proceedings to test the propriety of payments to an attorney for all services, namely, those rendered before the payment as well as those services to be rendered in the bankruptcy proceeding itself, should be taken in the form of a motion to fix the allowance, and for an order directing the return of the balance, unless an issue is raised. *In re Shiebler*, (E. D. N. Y. 1908) 163 Fed. 545, 20 Am. Bankr. Rep. 777.

**Jurisdiction.**—For an attorney's fee for services to be rendered in contemplation of bankruptcy the Act makes specific provision in the subdivision, and the amount thus attempted to be used in contemplation of bankruptcy proceedings is subject to revision in the court of original jurisdiction and not elsewhere. *Lazarus v. Prentice*, (1914) 234 U. S. 263, 34 S. Ct. 851, 58 U. S. (L. ed.) 1305.

In summary proceedings instituted by the trustees in bankruptcy the District Court has jurisdiction to fix and determine the petitioner's compensation for professional services rendered and to be rendered to the bankrupt. *Lazarus v. Harding*, (C. C. A. 5th Cir. 1915) 223 Fed. 50.

**A state court has no jurisdiction** to re-examine the reasonableness of an attorney's compensation under section 60d. *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1; *Swartz v. Frank*, (1904) 183 Mo. 439, 82 S. W. 60.

**Jurisdiction extends to nonresident attorneys.**—The jurisdiction of the Bankruptcy Court extends to a case where the counsel concerned are nonresidents of the state and district, and where the transaction occurred, and the notice of the proceeding was served, outside the district. *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

**Ancillary jurisdiction.**—It has been held that a trustee in bankruptcy cannot maintain a plenary suit in a court of bankruptcy to recover, in another jurisdiction, excessive payments or transfers to counsel made by a bankrupt, in contemplation of bankruptcy proceedings, for services to be rendered, where that court has made no order in the proceeding authorized by section 60d to re-examine and reduce such payments or transfers. *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

See section 2 (20), which was added by the amendment of 1910, providing for the exercise of ancillary jurisdiction.

**Where the attorney claims a lien for the amount held by him**, and it is found as a fact that the money was not transferred to him "in contemplation of the filing of a petition," within the meaning of section 60d, and neither the bankrupt nor his trustee ever had possession of the money in dispute, it constitutes a controversy in which the attorney claims adversely and in which he is entitled to have his rights tested by plenary proceedings, and the Bankruptcy Court has no jurisdiction to proceed summarily under section 60d. *Tripp v. Mitschrich*, (8th Cir. 1914) 211 Fed. 424, 128 C. C. A. 96.

**Notice.**—Such notice, by mail or otherwise, as the court shall direct, of the proceeding taken, under section 60d, is sufficient, provided an opportunity is given to appear and contest the reasonableness of the charges. *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

"On petition of the trustee" the transaction may be re-examined by a referee, to whom the petition has been referred for that purpose, without formal service of process on the attorney concerned; reasonable notice given by mail is sufficient, and the attorney cannot demand, as of right, a copy of the petition and the order of court thereon. *In re Lewin*, (1900) 103 Fed. 850.

It is plain that it was in the mind of Congress to make the adjustment of attorney's fees, as covered by section 60d, no elaborate or plenary proceeding. The Bankruptcy Court alone in the first instance has jurisdiction to pass upon the justice of the fee, and it has such jurisdiction only when the matter is presented in such a manner as to fully advise the respondent of the investigation. *In re Raphael*, (C. C. A. 7th Cir. 1911) 192 Fed. 874.

**The right to trial by jury** in suits at common law, secured by U. S. Const., 7th Amend., is not infringed by the proceeding authorized by section 60d. *In re Wood*, (1908) 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

**Summary order for restoration to trustee.**—After the filing of a petition by creditors for involuntary bankruptcy the attorney for the bankrupt stated that he would take for his services the goods upon certain shelves in the store, the bankrupt either assenting or not refusing, and advised the filing of a voluntary petition in bankruptcy. Such petition was filed by the bankrupt, with schedules wherein the goods so selected by the attorney were invoiced as of the value of \$100, and held for attorney's fees,—and adjudication was entered thereupon. The goods were not removed until after the adjudication, but

before the appointment of a trustee. It was held that there had been no "transfer" within the meaning of section 60d and that the property having been removed when *in custodia legis*, the trustee was entitled, on the authority of *White*

*v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183, to an order for the immediate restoration thereof. *In re Corbett*, (1900) 104 Fed. 872.

## CHAPTER VII.

### ESTATES.

**SEC. 61. DEPOSITORIES FOR MONEY.**—*a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories. [(1898) 30 Stat. L. 562.]

As to duties of trustee with reference to deposits and disbursements of funds, see section 47a (3) and (4).

**Duty to designate depositories.**—Section 61 of the Bankruptcy Act makes it the duty of courts of bankruptcy to designate, by order, banking institutions as depositories of funds of bankrupt estates, and to require of them bonds for the safekeeping and forthcoming thereof. *Huttig Mfg. Co. v. Edwards*, (C. C. A. 8th Cir. 1908) 160 Fed. 619, 20 Am. Bankr. Rep. 349.

**Deposit creates relation of debtor and creditor with depository.**—Where a receiver or other officer of a court of bankruptcy deposits money in a designated depository, the same relation of debtor and creditor is created as in the case of an ordinary bank deposit; so that the Bankruptcy Court no longer has the same jurisdiction over it as it has over funds or property in the possession of a receiver or trustee. *In re Bologh*, (S. D. N. Y. 1911) 185 Fed. 825, 25 Am. Bankr. Rep. 726.

**Deposits in other institutions renders officer liable.**—To deposit the funds of a bankrupt estate in any bank other than a designated depository renders the officers making such deposit liable. *In re Hoyt*, (E. D. N. C. 1903) 119 Fed. 987, 9 Am. Bankr. Rep. 574.

**Effect of failure of depository.**—Where

a state trust company, prior to failure, had been appointed a depository for bankruptcy funds, the question whether deposits made by trustees in bankruptcy were entitled to preference, under R. S. sec. 3466, title CLAIMS, giving preference to debts due the United States, is solely within the jurisdiction of the state Supreme Court, and cannot be determined on a motion in bankruptcy for an order requiring the superintendent of banks to pay out such deposits. *In re Bologh*, (S. D. N. Y. 1911) 185 Fed. 825, 25 Am. Bankr. Rep. 726.

Thus, where a depository of bankruptcy funds executed a bond to the United States to pay out all moneys deposited with it in such depository only as provided by the Acts of Congress and the rules of court applicable thereto, and to abide by all lawful orders and decrees of the court, it was held that such provisions applied only to the depository while in possession of its own assets and conducting its ordinary business, and did not confer on the Bankruptcy Court power to make summary orders for the payment of deposits made with the trust company by receivers and trustees in bankruptcy, after the trust company had passed into the hands of the state superintendent of banks for liquidation. *In re Bologh*, (S. D. N. Y. 1911) 185 Fed. 825, 25 Am. Bankr. Rep. 726.

**SEC. 62. EXPENSES OF ADMINISTERING ESTATES.**—*a* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred. [(1898) 30 Stat. L. 562.]

**As to**

Cost of preserving estate, see section 64b (1).

Cost of administration, etc., see section 64b (3).

Expense on application to take possession of assets, see section 3e.

Expense of creditors in preserving estate when transferred or concealed, see section 64b (2).

Re-examination of payment made to attorney, see section 60d.

**Economical administration.**—"The obvious policy of the present Act, manifest throughout all its provisions respecting fees and commissions, is to reduce to the lowest minimum the expenses of administration." *In re J. W. Harrison Mercantile Co.*, (1899) 95 Fed. 123.

**Necessary expenses allowed.**—The actual and necessary expenses incurred by officers in the administration of the estate are, subject to the approval of the court, allowable. *In re Stotts*, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641; *In re J. W. Harrison Mercantile Co.*, (W. D. Mo. 1899) 95 Fed. 123, 2 Am. Bankr. Rep. 420; *In re Carolina Cooperage Co.*, (E. D. N. C. 1899) 96 Fed. 604, 3 Am. Bankr. Rep. 154; *In re Adams Sartorial Art Co.*, (D. C. Colo. 1900) 101 Fed. 215, 4 Am. Bankr. Rep. 107; *In re Smith*, (E. D. N. C. 1901) 108 Fed. 39, 5 Am. Bankr. Rep. 559; *In re Wiessner*, (E. D. N. Y. 1902) 115 Fed. 421, 8 Am. Bankr. Rep. 415; *In re Lang*, (W. D. Tex. 1904) 127 Fed. 755, 11 Am. Bankr. Rep. 794; *In re Hatcher*, (W. D. Tex. 1906) 145 Fed. 658, 16 Am. Bankr. Rep. 722; *In re Ketterer Mfg. Co.*, (M. D. Pa. 1907) 155 Fed. 987, 19 Am. Bankr. Rep. 646; *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1907) 159 Fed. 73, 20 Am. Bankr. Rep. 73; *In re Faulhaber Stable Co.*, (C. C. A. 2d Cir. 1909) 170 Fed. 68, 22 Am. Bankr. Rep. 381; *In re Fidler*, (M. D. Pa. 1909) 172 Fed. 632, 23 Am. Bankr. Rep. 16; *In re Vulcan Foundry, etc., Co.*, (C. C. A. 3d Cir. 1910) 180 Fed. 671; *In re Havens*, (E. D. N. Y. 1910) 182 Fed. 367; *Wilson v. Pennsylvania Trust Co.*, (C. C. A. 3d Cir. 1902) 114 Fed. 742, 8 Am. Bankr. Rep. 169; *Matter of National Mercantile Agency*, (S. D. N. Y. 1903) 11 Am. Bankr. Rep. 451; *Matter of Meis*, (W. D. Ky. 1907) 18 Am. Bankr. Rep. 104; *Matter of Marks*, (S. D. Ga. 1909) 22 Am. Bankr. Rep. 54.

**Necessary traveling expenses, hotel bills, amounts paid stenographers and for other expenses** may be allowed by special order of the judge, when a detailed account thereof, verified by the referee that they were necessarily and actually incurred, and showing the amount paid by him therefor, is returned to the Bankruptcy Court (with proper vouchers when they can be procured), as provided by the General Orders Nos. 10, 16, and 35. *In re Daniels*, (N. D. Ia. 1904) 130 Fed. 597, 12 Am. Bankr. Rep. 446.

**The cost of the publication of notices** is properly chargeable to the bankrupt or his estate under the General Order No. 35 (2). *In re Dixon*, (D. C. Cal. 1902) 114 Fed. 675.

A bankrupt who advances the money necessary to pay for the issuance and publication of notices of his application for discharge is entitled, under General Order No. 10, to repayment of the same out of the estate as part of the costs of administration. *In re Daniels*, (N. D. Ia. 1904) 130 Fed. 597, 12 Am. Bankr. Rep. 446; *In re Hatcher*, (W. D. Tex. 1906) 145 Fed. 658, 16 Am. Bankr. Rep. 722.

**Unavoidable loss.**—The trustee may properly be allowed for unavoidable losses of small sums, to the estate, through his inability to collect from purchasers. *In re Dimm*, (M. D. Pa. 1906) 146 Fed. 402, 17 Am. Bankr. Rep. 119.

**Trustee's attendance at sales.**—A trustee in bankruptcy is entitled to an allowance in his accounts for personal services rendered by him in attending and assisting in continuous auction sales, by means of which the bankrupt's stock of goods was disposed of to the substantial advantage of the estate; and for his necessary personal expenses while so doing. *In re Dimm*, (D. C. Pa. 1906) 146 Fed. 402, 17 Am. Bankr. Rep. 119.

**Appraiser's fees.**—In the ordinary case appraisers of a bankrupt's estate are entitled to but five dollars a day for three days; the trustee being required to justify any greater allowance. *In re Fidler*, (M. D. Pa. 1909) 172 Fed. 632, 23 Am. Bankr. Rep. 16.

**Expense of carrying out bankrupt's contract.**—Expenditures made by a receiver and trustee of a bankrupt's estate for the sole benefit of general creditors, in carrying out contracts of the bankrupt which were thought to be profitable, are not costs of administration. *In re Bourlier Cornice, etc., Co.*, (W. D. Ky. 1905) 133 Fed. 958, 13 Am. Bankr. Rep. 585.

**Expense of creditor attending on re-examination of claim.**—Where an order is made on petition of a trustee for the re-examination of a claim previously allowed to a creditor who resides at a distance, and he is required to appear before the referee for examination, he may properly be allowed his expenses if his claim is finally allowed. *In re Watkinson*, (E. D. Pa. 1904) 130 Fed. 218, 12 Am. Bankr. Rep. 370.

**Money loaned to a receiver** in excess of the sum authorized by the court will bind the estate only upon a showing that the proceeds were used in conducting its business, and then only ratably with the claims of other creditors of the receiver. *In re Burkhalter*, (N. D. Ala. 1910) 182 Fed. 353.

**Unnecessary expense.**—Items of expense incurred by accountants for entertainment and unusual hotel bills and Pullman fares

are not properly chargeable against the estate of a bankrupt, and will be disallowed. *Matter of Marka*, (S. D. Ga. 1909) 22 Am. Bankr. Rep. 54.

**Expense for rent.**—Necessary expense for rent, incurred by the trustee, receiver, or marshal, is included in the expense of administering the estate and properly payable therefrom. *Wilson v. Pennsylvania Trust Co.*, (C. C. A. 3d Cir. 1902) 114 Fed. 742, 8 Am. Bankr. Rep. 169; *In re Hinckel Brewing Co.*, (N. D. N. Y. 1903) 123 Fed. 942, 10 Am. Bankr. Rep. 484; *In re Luckenbill*, (E. D. Pa. 1904) 127 Fed. 984, 11 Am. Bankr. Rep. 455; *In re Grignard Lith. Co.*, (E. D. N. Y. 1907) 155 Fed. 699, 19 Am. Bankr. Rep. 101; *In re Youdelman-Walsh Foundry Co.*, (E. D. N. Y. 1909) 166 Fed. 381, 21 Am. Bankr. Rep. 509.

The landlord of premises leased by the bankrupt and afterward occupied by the trustee for the storage of estate goods until they can be sold is entitled to compensation for the use of the premises, such compensation forming part of the costs of preserving and administering the estate, and, if the trustee has no cash on hand to pay the same, the court will order him to sell sufficient personal property therefor, this claim of the landlord taking priority over that of the bankrupt to his exemptions. *In re Grimes*, (1899) 96 Fed. 529. See also *In re Jefferson*, (1899) 93 Fed. 948.

**Rent allowed on quantum meruit.**—Where the receiver or trustee continues to occupy premises leased by the bankrupt without agreement as to rent, the landlord is entitled to rent on a *quantum meruit*. *In re Grignard Lith. Co.*, (E. D. N. Y. 1907) 155 Fed. 699, 19 Am. Bankr. Rep. 101; *In re Youdelman-Walsh Foundry Co.*, (E. D. N. Y. 1909) 166 Fed. 381, 21 Am. Bankr. Rep. 509. See also *In re Lukenbill*, (E. D. Pa. 1904) 127 Fed. 984, 11 Am. Bankr. Rep. 455.

**Clerk hire for referee.**—A referee is justified in hiring a clerk to help him on his work, and may charge his hire against the various estates which come before him. *In re Tebo*, (1900) 101 Fed. 419. But see *In re Carolina Cooperage Co.*, (1899) 96 Fed. 950, where it was held that there is no authority for the hire of a clerk by the referee, and the item for "clerical aid" was disallowed.

**Referee's accounts.**—The referee having, as required by General Order No. 26, duly kept and returned his account under oath to the court, with proper vouchers, and the account having been approved, and the estate distributed before exceptions to the referee's account were presented, it was held that the exceptions would not be heard by the court. *In re Tebo*, (1900) 101 Fed. 419. And see as to referee's expenses the note to section 40a.

**The expenses of an assignee for the benefit of creditors**, in so far as they have

been incurred for the preservation or for the benefit of the bankrupt estate, may be allowed. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165; *Summers v. Abbott*, (8th Cir. 1903) 122 Fed. 36, 58 C. C. A. 352; *In re Byerly*, (M. D. Pa. 1904) 128 Fed. 637, 12 Am. Bankr. Rep. 186.

**Expense incurred in state court.**—The federal court will decline to recognize the authority of the state court to encumber the assets of a bankrupt estate for the fees and expenses of its officers after the proceedings therein were suspended by the bankruptcy proceedings; especially when accompanied by a ruling that such assets will not be delivered to the trustee until the allowances thus made are paid. *In re Rogers*, (S. D. Ga. 1902) 116 Fed. 435, 8 Am. Bankr. Rep. 723.

But it has been held that the state court may, prior to surrendering assets in its custody, charge such assets with the costs and expenses incurred in bringing the same into that court. *Wilson v. Parr*, (1902) 8 Am. Bankr. Rep. 230, 115 Ga. 629, 42 S. E. 5. See also *Matter of Cameron*, (E. D. Mich. 1908) 20 Am. Bankr. Rep. 790.

**Attorney fees**—*In general.*—In the allowance of attorney fees as expenses of the administration of a bankrupt's estate, the general rule is that such fees will be allowed where counsel has been retained by a proper person, and the services performed were actually beneficial; where the services are not beneficial no counsel fee will be allowed. The amount allowed must be reasonable in consideration of the services performed, and is to be fixed by the court on the proof adduced, or, in the absence of such proof, from a knowledge of its value. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1; *Page v. Rogers*, (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332, 21 Am. Bankr. Rep. 496; *In re Stotts*, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641; *In re J. W. Harrison Mercantile Co.*, (W. D. Mo. 1899) 95 Fed. 123, 2 Am. Bankr. Rep. 419; *In re Michel*, (E. D. Wis. 1899) 95 Fed. 803, 1 Am. Bankr. Rep. 665; *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 955, 2 Am. Bankr. Rep. 692; *In re Kross*, (S. D. N. Y. 1899) 96 Fed. 816, 3 Am. Bankr. Rep. 187; *In re Carolina Cooperage Co.*, (E. D. N. C. 1899) 96 Fed. 950, 3 Am. Bankr. Rep. 154; *In re Burrus*, (W. D. Va. 1899) 97 Fed. 926, 3 Am. Bankr. Rep. 296; *In re O'Connell*, (S. D. N. Y. 1899) 98 Fed. 83, 3 Am. Bankr. Rep. 422; *In re Curtis*, (C. C. A. 7th Cir. 1900) 100 Fed. 784, 4 Am. Bankr. Rep. 17; *In re Dreeben*, (N. D. Tex. 1900) 101 Fed. 110, 4 Am. Bankr. Rep. 146; *In re Rozinsky*, (S. D. N. Y. 1900) 101 Fed. 229, 3 Am. Bankr. Rep. 831; *In re Tebo*, (D. C. W. Va. 1900) 101 Fed. 419, 4 Am. Bankr. Rep. 235; *In re Little River Lumber Co.*, (W. D. Ark.



1900) 101 Fed. 558, 3 Am. Bankr. Rep. 685; *In re Mayer*, (E. D. Wis. 1900) 101 Fed. 695, 4 Am. Bankr. Rep. 239; *In re T. L. Kelly Dry-Goods Co.*, (E. D. Wis. 1900) 102 Fed. 747, 4 Am. Bankr. Rep. 528; *In re Abram*, (N. D. Cal. 1900) 103 Fed. 272, 4 Am. Bankr. Rep. 575; *In re Terrill*, (D. C. Vt. 1900) 103 Fed. 781, 4 Am. Bankr. Rep. 625; *In re Lewin*, (D. C. Vt. 1900) 103 Fed. 850, 4 Am. Bankr. Rep. 632; *In re Anderson*, (D. C. S. C. 1900) 103 Fed. 854, 4 Am. Bankr. Rep. 640; *In re Smith*, (E. D. N. C. 1901) 108 Fed. 39, 5 Am. Bankr. Rep. 559; *In re Brundin*, (D. C. Minn. 1901) 112 Fed. 306, 7 Am. Bankr. Rep. 298; *In re Evans*, (E. D. N. C. 1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730; *In re Carr*, (E. D. N. C. 1902) 117 Fed. 572, 8 Am. Bankr. Rep. 635; *Smith v. Cooper*, (C. C. A. 5th Cir. 1903) 120 Fed. 230, 9 Am. Bankr. Rep. 755; *In re Connell*, (M. D. Pa. 1903) 120 Fed. 846, 9 Am. Bankr. Rep. 474; *In re Rosenthal*, (E. D. Mo. 1902) 120 Fed. 848, 9 Am. Bankr. Rep. 626; *In re Goldville Mfg. Co.*, (D. C. S. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 552; *In re Morris*, (E. D. N. C. 1903) 125 Fed. 841, 11 Am. Bankr. Rep. 145; *In re Lang*, (W. D. Tex. 1904) 127 Fed. 755, 11 Am. Bankr. Rep. 794; *In re Byerly*, (M. D. Pa. 1904) 128 Fed. 637, 12 Am. Bankr. Rep. 188; *In re Covington*, (E. D. N. C. 1904) 132 Fed. 884, 13 Am. Bankr. Rep. 150; *Liddon v. Smith*, (C. C. A. 5th Cir. 1905) 135 Fed. 43, 14 Am. Bankr. Rep. 204; *In re Talton*, (E. D. N. C. 1905) 137 Fed. 178, 14 Am. Bankr. Rep. 617; *In re McKenna*, (N. D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4; *In re Felson*, (N. D. N. Y. 1905) 139 Fed. 275, 15 Am. Bankr. Rep. 185; *In re Zier*, (C. C. A. 7th Cir. 1905) 142 Fed. 102, 15 Am. Bankr. Rep. 646; *Page v. Rogers*, (C. C. A. 6th Cir. 1906) 149 Fed. 194, 17 Am. Bankr. Rep. 854; *In re Martin Borgeson Co.*, (E. D. N. Y. 1907) 151 Fed. 780, 18 Am. Bankr. Rep. 179; *In re Huddleston*, (S. D. Ga. 1908) 167 Fed. 428, 21 Am. Bankr. Rep. 669; *In re Fischer*, (C. C. A. 2d Cir. 1910) 175 Fed. 531, 23 Am. Bankr. Rep. 427; *Caten v. Eagle Bldg., etc., Assoc.*, (W. D. Pa. 1909) 177 Fed. 996, 23 Am. Bankr. Rep. 130; *Matter of Smith*, (N. D. N. Y.) 1 Am. Bankr. Rep. 37; *In re Mitchell*, (W. D. Pa. 1899) 1 Am. Bankr. Rep. 687; *In re Frick*, (N. D. Ohio 1899) 1 Am. Bankr. Rep. 719; *In re Smith*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 648; *In re Silverman*, (S. D. N. Y. 1899) 3 Am. Bankr. Rep. 227; *Matter of Fletcher*, (S. D. N. Y. 1903) 10 Am. Bankr. Rep. 400; *Matter of Stratemeyer*, (D. C. Hawaii 1905) 14 Am. Bankr. Rep. 121; *Matter of Niman*, (E. D. Mich. 1905) 14 Am. Bankr. Rep. 515; *In re Oppenheimer*, (M. D. Pa. 1906) 17 Am. Bankr. Rep. 60.

*The power to allow attorney's fees is a judicial, not an arbitrary, discretion vested in the court. When the fee asked for is*

*exorbitant, even when recommended by the referee, no fee will be allowed. In re Carr*, (E. D. N. C. 1902) 116 Fed. 556, 8 Am. Bankr. Rep. 635.

*Referee may determine right to fees.*—The question of allowing counsel fees as part of the cost of administering a bankrupt's estate may be determined by the referee *ex parte*. *In re Stotts*, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641.

*Notice to creditors is not required before the referee can settle proper attorney's fees. In re Stotts*, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641.

*Services must be beneficial in fact.*—Attorneys' compensation is allowable only on equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that they were beneficial in fact. *In re Zier*, (C. C. A. 7th Cir. 1905) 142 Fed. 102, 15 Am. Bankr. Rep. 646. See also *In re Covington*, (E. D. N. C. 1904) 132 Fed. 884, 13 Am. Bankr. Rep. 150.

*While the amount paid for services in administering the Bankruptcy Act should never be lavish or extravagant, and should always be rigidly scrutinized, it should be reasonable and adequate. In re Sully*, (S. D. N. Y. 1905) 142 Fed. 895, 15 Am. Bankr. Rep. 304; *Matter of Berkowitz*, (D. C. N. J. 1908) 22 Am. Bankr. Rep. 236.

*Attorney retained by stakeholder.*—Where the defendant, in an action by a trustee in bankruptcy, answered that it had in its hands a sum belonging to the bankrupt, but which was claimed as assignee by his wife, who thereupon intervened, and the only issue tried was between her and the plaintiff, it was held that the defendant, which occupied the position of a mere stakeholder, was not liable for costs, and was entitled to the allowance of a reasonable attorney's fee. *Caten v. Eagle Bldg., etc., Assoc.*, (W. D. Pa. 1909) 177 Fed. 996, 23 Am. Bankr. Rep. 130.

*Fees of trustee's attorney — In general.*—A trustee in bankruptcy may employ counsel when the situation of the estate is such that he requires legal assistance; and the fees of such counsel, to a reasonable amount, for services properly and actually rendered to the trustee, may be allowed as part of the cost of administering the estate. *In re Stotts*, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641; *In re Burrus*, (W. D. Va. 1899) 97 Fed. 926, 3 Am. Bankr. Rep. 296; *In re Rude*, (D. C. Ky. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319; *In re Arnett*, (W. D. Tenn. 1901) 112 Fed. 770, 7 Am. Bankr. Rep. 522; *In re Lang*, (W. D. Tex. 1904) 127 Fed. 755, 11 Am. Bankr. Rep. 794; *In re Byerly*, (M. D. Pa. 1904) 128 Fed. 637, 12 Am. Bankr. Rep. 186; *In re Talton*, (E. D. N. C. 1905) 137 Fed. 178, 14 Am. Bankr. Rep. 617; *In re McKenna*, (N. D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr.

Rep. 4; *Davidson v. Friedman*, (6th Cir. 1906) 140 Fed. 853, 72 C. C. A. 553; *In re Dimm*, (D. C. Pa. 1906) 146 Fed. 402, 17 Am. Bankr. Rep. 119; *Page v. Rogers*, (C. C. A. 6th Cir. 1906) 149 Fed. 194, 17 Am. Bankr. Rep. 854; *In re Mitchell*, (W. D. Pa. 1899) 1 Am. Bankr. Rep. 687; *In re Smith*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 648; *In re Knight*, (N. D. Ohio) 5 Am. Bankr. Rep. 560 note; *Matter of Burke*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 502; *Keyes v. McKirrow*, (Mass. 1902) 9 Am. Bankr. Rep. 322; *In re Niman*, (E. D. Mich. 1905) 14 Am. Bankr. Rep. 515. See also the cases cited under section 64b (3) to the same effect.

Unless the attorney first reports in detail his attorneys' fees for services, such fees should not be allowed. *In re Smith*, (1901) 108 Fed. 39. See also *In re Carr*, (1902) 116 Fed. 556, and further as to allowances for services of counsel for trustees, notes to section 64b (3).

A trustee who is an attorney is not bound to perform legal services, but if he does so he cannot have compensation therefor from the estate. *In re George Halbert Co.*, (C. C. A. 2d Cir. 1904) 134 Fed. 236, 13 Am. Bankr. Rep. 399; *In re McKenna*, (N. D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4; *In re Felson*, (N. D. N. Y. 1905) 139 Fed. 275, 15 Am. Bankr. Rep. 185. See also *In re Evans*, (E. D. N. C. 1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730.

A trustee, who happens to be an attorney, cannot, under sections 48 and 72, be allowed a fee as compensation for legal services performed by him. *In re Van Denburg*, (N. D. Ohio 1914) 221 Fed. 475, wherein the court said: "In addition to the reasoning of the courts cited, it should be considered that while, of course, under section 62 of the Bankruptcy Act, necessary legal services are items of administration which should be paid for out of the assets, still, when a claim is presented in behalf of the attorney for the trustee for fees, there is in the situation something tantamount to the recommendation of the trustee himself that not only the services were necessarily rendered, but that the fees claimed were proper compensation, and with reference to such recommendation, actual or constructive, both the referee and the court on final allowance must act. The weakness of a recommendation offered by a trustee to support officially his professional claims is apparent."

Where the attorneys for the trustees were also the attorneys for the receiver and were allowed a large fee for services during the receivership, it was held that such allowance should be considered in fixing the fees for services rendered trustees. *In re Fiske*, (S. D. N. Y. 1913) 209 Fed. 982.

The reasonable fee of counsel employed by the trustee to recover a voidable or fraudulent preference made by the bankrupt constitutes a part of the trustee's

expenses; and, as such, a part of the costs and expenses of administration, which is entitled to preferential payment. *Davidson v. Friedman*, (6th Cir. 1906) 140 Fed. 853, 72 C. C. A. 553; *Page v. Rogers*, (C. C. A. 6th Cir. 1906) 149 Fed. 194, 17 Am. Bankr. Rep. 854. See also the annotation following section 64b (2).

While the fact that an attorney had acted for the bankrupt may affect the propriety of his employment to act for the trustee, it does not deprive him of the right to compensation for services after he has been so employed. *In re Dimm*, (D. C. Pa. 1906) 146 Fed. 402, 17 Am. Bankr. Rep. 119.

Where attorneys for a bankrupt's trustee took a position antagonistic to the creditors, and in favor of the bankrupts, they will be allowed only a nominal sum for their services. *In re Fidler*, (M. D. Pa. 1909) 172 Fed. 632, 23 Am. Bankr. Rep. 16.

Claimant cannot be compelled to pay trustee's counsel a fee as part of the cost. — Where, on re-examination of the allowance of certain claims against a bankrupt's estate, it was found on sufficient evidence that the claims were unsustainable, it was held that while the referee properly required the claimant to pay the costs of the hearing, he was not authorized to require that the claimant also pay an attorney's fee to the trustee's attorney. *In re Rome*, (D. C. N. J. 1908) 162 Fed. 971, 19 Am. Bankr. Rep. 820.

Fees of attorney for receiver. — Attorney's fees for services rendered to a receiver in bankruptcy should be allowed from the estate, only to the extent that the services were rendered for the direct benefit of the entire estate, and not of any particular creditor. *In re Zier*, (C. C. A. 7th Cir. 1905) 142 Fed. 102, 15 Am. Bankr. Rep. 646; *In re Oppenheimer*, (M. D. Pa. 1906) 146 Fed. 140, 17 Am. Bankr. Rep. 59; *In re Ketterer Mfg. Co.*, (M. D. Pa. 1907) 155 Fed. 987, 19 Am. Bankr. Rep. 646; *In re Ketterer Mfg. Co.*, (M. D. Pa. 1907) 156 Fed. 719; *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1907) 159 Fed. 73, 20 Am. Bankr. Rep. 73.

Ordinarily, the duties of a statutory receiver for an alleged bankrupt neither require nor justify the employment of an attorney; and hence, no claim for the services of an attorney so employed is chargeable *per se* against the estate where it is predicated alone on the fact of employment and service rendered. *In re T. E. Hill Co.*, (C. C. A. 7th Cir. 1907) 159 Fed. 73, 20 Am. Bankr. Rep. 73.

No fee will be allowed to an attorney who acts for the receiver, if he is also acting for either party in the bankruptcy litigation, as "it is the well-recognized rule in equity that the receiver shall engage counsel who stands independent of the parties to the litigation." *In re T. L. Kelly Dry-Goods Co.*, (1900) 102 Fed. 747.

**Fees of bankrupt's attorney.—***In involuntary proceedings.*—The compensation to be paid to the attorney for the bankrupt is confined to the services necessary to enable the bankrupt to comply with the duties required of him by the statute. *In re Michel*, (E. D. Wis. 1899) 95 Fed. 803, 1 Am. Bankr. Rep. 665; *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 955, 2 Am. Bankr. Rep. 692; *In re Kross*, (S. D. N. Y. 1899) 96 Fed. 816, 3 Am. Bankr. Rep. 187; *In re Anderson*, (D. C. S. C. 1900) 103 Fed. 854, 4 Am. Bankr. Rep. 640; *In re Rosenthal*, (E. D. Mo. 1902) 120 Fed. 848, 9 Am. Bankr. Rep. 626; *In re Goldville Mfg. Co.*, (D. C. S. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 552; *In re Payne*, (E. D. N. Y. 1907) 151 Fed. 1018, 18 Am. Bankr. Rep. 192; *Matter of Eschwege*, (S. D. N. Y. 1902) 8 Am. Bankr. Rep. 282; *Matter of Stratemeyer*, (D. C. Hawaii 1905) 14 Am. Bankr. Rep. 120.

Where, after the discharge of certain bankrupts and their trustee, their attorney, as the result of considerable effort in examining records, etc., and the accounts relating to the estate of the bankrupts' father, and certain titles to mortgaged property, discovered additional assets amounting to \$2,000 to the credit of the estate of each of the bankrupts, it was held that an allowance to the attorney of \$37.50 for fees was inadequate, and should be increased to \$100 in each estate. *In re Irwin*, (W. D. Pa. 1909) 177 Fed. 284, 22 Am. Bankr. Rep. 165 (*modifying C. C. A. 3d Cir. 1909*) 174 Fed. 642, *affirmed in this respect* 23 Am. Bankr. Rep. 487.

Fees of a bankrupt's attorney for services in prosecuting a petition for the bankrupt's discharge cannot be charged against objecting creditors. *In re Gillardon*, (E. D. Pa. 1911) 187 Fed. 289.

*In voluntary proceedings.*—The attorney for a voluntary bankrupt may be allowed fees from the estate for such services as were actually rendered in assisting the bankrupt to comply with the statute in the preparation of his schedules, etc. *In re Terrill*, (D. C. Vt. 1900) 103 Fed. 781, 4 Am. Bankr. Rep. 625.

*Entitled to priority.*—It has been held that the services of an attorney rendered to a voluntary bankrupt in the necessary performance of the bankrupt's statutory duties are entitled to priority of payment under section 64b (3). *In re Kross*, (S. D. N. Y. 1899) 96 Fed. 816, 3 Am. Bankr. Rep. 187; *Matter of Hitchcock*, (D. C. Hawaii 1906) 17 Am. Bankr. Rep. 664. See also the cases cited under section 64b (3).

But it has also been held that, except as to services tending to preserve the estate, an attorney for the bankrupt in voluntary proceedings can only submit his claim for compensation as a general debt of the estate. *In re Beck*, (S. D. Ia. 1899) 92 Fed. 889, 1 Am. Bankr. Rep. 535.

*Claiming exemption.*—Legal services rendered to a bankrupt in having his exemption allowed is a matter between the bankrupt and his attorneys. *In re Castleberry*, (N. D. Ga. 1905) 143 Fed. 1018, 16 Am. Bankr. Rep. 159.

*Where an attorney has been paid*, by the bankrupt or any one else, before the bankruptcy, a sufficient compensation for his services, no further sum will be allowed out of the estate. *In re O'Connell*, (S. D. N. Y. 1899) 98 Fed. 83, 3 Am. Bankr. Rep. 422; *In re Smith*, (E. D. N. C. 1901) 108 Fed. 39, 5 Am. Bankr. Rep. 559.

*Proof required.*—No attorney's fee can be allowed in voluntary bankruptcy proceedings except upon proof of services actually rendered to the bankrupt in doing the things which the law requires of him. *In re Terrill*, (D. C. Vt. 1900) 103 Fed. 781, 4 Am. Bankr. Rep. 625.

**Fees of creditors' attorneys.**—The Bankruptcy Act does not allow, as a claim against the estate, compensation for the services of attorneys employed by creditors in their own interest. *In re Silverman*, (S. D. N. Y. 1899) 97 Fed. 325, 3 Am. Bankr. Rep. 227; *In re Smith*, (E. D. N. C. 1901) 108 Fed. 39, 5 Am. Bankr. Rep. 559; *In re Watkinson*, (E. D. Pa. 1904) 130 Fed. 218, 12 Am. Bankr. Rep. 370; *In re Worth*, (N. D. Ia. 1904) 130 Fed. 927, 12 Am. Bankr. Rep. 566; *In re Felson*, (N. D. N. Y. 1905) 139 Fed. 275, 15 Am. Bankr. Rep. 185; *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; *In re Allert*, (W. D. N. Y. 1908) 173 Fed. 691, 23 Am. Bankr. Rep. 101; *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463; *Matter of Fletcher*, (S. D. N. Y. 1903) 10 Am. Bankr. Rep. 398.

Attorneys elected by creditors to represent them in bankruptcy proceedings must look to them for compensation, not to the bankrupt estate or to the court. *In re Evans*, (E. D. N. C. 1902) 116 Fed. 909, 8 Am. Bankr. Rep. 730.

Claimants having claims against the estates of bankrupts must establish them at their own expense, and will not be allowed their costs and expenses from the estate, where it does not appear that the defense made by the trustee was captious or unwarranted. *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

Thus it has been held that a court of bankruptcy will not allow costs or attorney's fees from an estate to a creditor whose claim was unsuccessfully contested. *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623.

*Where trustee refuses to act.*—Where one of the creditors of a bankrupt, by his attorney, objects to the allowance of a claim filed by another creditor, the trustee declining to interfere, and upon

a contest and trial secures its rejection, thereby saving a considerable sum for distribution among the creditors generally, the attorney for such contesting creditor may be allowed a fee for his professional services rendered, to be paid out of the estate. *In re Little River Lumber Co.*, (W. D. Ark. 1900) 101 Fed. 558, 3 Am. Bankr. Rep. 682. See also the cases cited under section 64b (2).

*Claims for fees by attorneys for objecting creditors* should be filed with the referee in the first instance, so that any party aggrieved by the referee's ruling thereon may have the same reviewed by appropriate proceedings. *In re Stoddard Bros. Lumber Co.*, (D. C. Idaho 1909) 169 Fed. 190, 22 Am. Bankr. Rep. 435.

*Expense incurred for benefit of creditors generally.*—The only statutory allowance of attorney's fees is, under section 3e, upon a withdrawal or dismissal of a petition to take possession of the estate, or, as authorized by section 64b (3), to the attorneys for petitioning creditors. But it will be noticed that, under section 64b (2), creditors themselves may be allowed for the reasonable expense incurred in recovering any part of the estate which has been transferred or concealed; and such expense may, of course, include necessary attorney fees. See the cases cited under the sections above specified. And see also *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863.

SEC. 63. DEBTS WHICH MAY BE PROVED.—a Debts of the bankrupt may be proved and allowed against his estate which are [(1898) 30 Stat. L. 562.]

"Debts."—"Debts which may be proved" being the enacted title of section 63, and this designation being confirmed in the introductory words of the section, it is evident that the classification in the several numbered paragraphs following is only a means of describing "debts" of the bankrupt which may be proved and allowed against his estate. Hence, before any claim can be pronounced provable against the estate the court must determine that it is a "debt." *Wetmore v. Markoe*, (1904) 196 U. S. 68, 25 S. Ct. 172, 49 U. S. (L. ed.) 390, 2 Ann. Cas. 265.

*Stock in a corporation*, received in exchange for a stock of merchandise, is not a provable claim against the corporation after bankruptcy; the holder of the stock is not a creditor. *In re Le Sueur County Co-Operative Co.*, (C. C. A. 8th Cir. 1912) 195 Fed. 926.

Section 63a must be read in connection with section 17 limiting the operation of discharges. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659, *reversing* (1903) 201 Ill. 581, 66 N. E. 833. See also *In re United Button Co.*, (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390; *In re Havens*, (E. D. N. Y. 1910) 182 Fed. 367.

It is a leading rule in the construction of statutes that "the exception of a particular thing from the general words proves that in the opinion of the lawgiver the thing excepted would be within the general clause had the exception not been made." *Per* Chief Justice Marshall in *Brown v. Maryland*, (1827) 12 Wheat. 419, 6 U. S. (L. ed.) 678. See also the article on "Statutes and Statutory Construction," *ante*, this volume, p. 156. Applying that principle to section 17a appears to leave no room for doubt that a claim within the enumerated exceptions in 17a, as originally enacted—see the intro-

ductory words of that section—was a provable claim. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, *reversing* (1903) 201 Ill. 581, 66 N. E. 833, *reaffirmed*, without mentioning the subsequent amendments in *Friend v. Talcott*, (1913) 228 U. S. 27, 33 S. Ct. 505, 57 U. S. (L. ed.) 718. Whether a claim not provable under the Bankruptcy Act as originally enacted has become provable by being included in an amendment creating additional exceptions in section 17a seems not to have been decided. 3 R. C. L. 237. See *Wetmore v. Markoe*, (1904) 196 U. S. 68, 25 S. Ct. 172, 49 U. S. (L. ed.) 390, 2 Ann. Cas. 265.

It has been conceded that there is a want of harmony between section 63a and section 17a (2) as the latter stands after the amendment of 1903, and the suggestion has been made that in adopting the amendment Congress may have overlooked its possible effect upon other parts of the Bankruptcy Act—that perhaps clause (2) of section 17a now includes some claims that are not provable debts, despite the affirmation in the general words at the beginning of that section. *Brown v. United Button Co.*, (1906) 149 Fed. 48, 79 C. C. A. 70, 9 Ann. Cas. 445, 8 L. R. A. (N. S.) 961, in which case it was held, however, that, in any event, if it should be contended that a particular claim is provable solely because it belongs to the same species as other claims specifically excepted in section 17a, the contention ought not to prevail against a reasonable construction of section 63a demanding that the claim be rejected; that is to say, the section (63a) declaring what debts are provable should control the one (17a) relating to the operation of a discharge, the latter section not declaring specifically what debts shall be released, but specifically what shall not be.

The date of filing the petition in bankruptcy marks the line of separation between debts that are provable and those that are not provable against the bankrupt's estate. Those that are not provable remain subsisting obligations of the bankrupt, and he is not released therefrom by his discharge. *Colman Co. v. Withoft*, (C. C. A. 9th Cir. 1912) 195 Fed. 250; *British, etc., Mortgage Co. v. Stuart*, (C. C. A. 5th Cir. 1914) 210 Fed. 425.

Only such debts as existed at the time of the filing of the petition in bankruptcy are provable. This was said with reference to section 63a (4) in *Zavelo v. Reeves*, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676, Ann. Cas. 1914D 664, but it was there pointed out that this construction was adopted by the court in the language presented for a form of discharge (Form No. 59) and in forms for proof of debts (Forms 31 to 36 inclusive), and it is to be observed that these forms make no distinction among the debts described in the several clauses of section 63a.

"The status of a claim must depend upon its provability at the time the bankrupt petition was filed. At that time it

must come within the definition of section 63 of the Bankrupt Act; it cannot be benefited by its status at a later date." *Per Lurton, J.*, in *In re Neff*, (1907) 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349.

The several subdivisions of section 63a are not to be regarded as an enumeration of a group of characteristics all of which are essential to a provable claim, but as a classification, each specifying a separate class of provable claims independently of the others; thus the provision of subdivision (1), which limits the claims provable thereunder to those which were a fixed liability absolutely owing at the time of the filing of the petition, does not impose the same limitation upon claims within other classes. *In re Smith*, (D. C. R. I. 1906) 146 Fed. 923, 17 Am. Bankr. Rep. 112.

The general intent of Congress in the enactment of the statute was to make every debt and demand existing against the bankrupt at the time of his adjudication, which was recoverable either at law or in equity, provable in bankruptcy. *In re Mahler*, (E. D. Mich. 1900) 105 Fed. 428.

(1) [**Fixed liability.**] a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; [(1898) 30 Stat. L. 562.]

The status of a claim, as a fixed liability absolutely owing, is determined at the time of the filing of the petition in bankruptcy; and if a claim is then a provable debt, it comes within the language of the statute; otherwise it does not. *Synnott v. Tombstone Consol. Mines Co.*, (C. C. A. 8th Cir. 1913) 208 Fed. 251; *In re Neff*, (1907) 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349; *In re D. C. Clark Shoe Co.*, (D. C. Mass. 1913) 211 Fed. 341; *Cotting v. Hooper*, (1915) 220 Mass. 273, 107 N. E. 931; *In re Bingham*, (D. C. Vt. 1899) 94 Fed. 796, 2 Am. Bankr. Rep. 223; *In re Reliance Storage, etc., Co.*, (E. D. Pa. 1900) 100 Fed. 619, 4 Am. Bankr. Rep. 49; *In re Roche*, (5th Cir. 1900) 101 Fed. 956, 42 C. C. A. 115; *In re Burka*, (E. D. Mo. 1900) 104 Fed. 326, 5 Am. Bankr. Rep. 12; *Cobb v. Overman*, (C. C. A. 4th Cir. 1901) 109 Fed. 65; *In re Swift*, (1st Cir. 1901) 112 Fed. 316, 50 C. C. A. 270, 7 Am. Bankr. Rep. 374; *Phillips v. Dreher Shoe Co.*, (M. D. Pa. 1902) 112 Fed. 404; *In re Garlington*, (N. D. Tex. 1902) 115 Fed. 999, 8 Am. Bankr. Rep. 602; *Swarts v. St. Louis Fourth Nat. Bank*, (8th Cir. 1902) 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673;

*Swarts v. Siegel*, (8th Cir. 1902) 117 Fed. 13, 54 C. C. A. 399; *In re Pennewell*, (C. C. A. 6th Cir. 1902) 119 Fed. 139, 9 Am. Bankr. Rep. 490; *Merchants' Bank v. Thomas*, (5th Cir. 1903) 121 Fed. 306, 57 C. C. A. 374; *In re Coburn*, (D. C. Mass. 1903) 126 Fed. 218, 11 Am. Bankr. Rep. 212; *In re Keeton*, (W. D. Tex. 1903) 126 Fed. 426, 11 Am. Bankr. Rep. 367; *Hibberd v. Bailey*, (C. C. A. 3d Cir. 1904) 129 Fed. 575, 12 Am. Bankr. Rep. 104; *In re Adams*, (D. C. Mass. 1904) 139 Fed. 381; *In re Miller*, (D. C. Vt. 1904) 132 Fed. 414, 13 Am. Bankr. Rep. 87; *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728; *In re Rome*, (D. C. N. J. 1908) 162 Fed. 971, 19 Am. Bankr. Rep. 820; *Shawnee County v. Hurley*, (C. C. A. 8th Cir. 1909) 169 Fed. 92, 22 Am. Bankr. Rep. 209; *In re Roth*, (C. C. A. 2d Cir. 1910) 181 Fed. 667; *Slocum v. Soliday*, (C. C. A. 1st Cir. 1910) 183 Fed. 410; *Phenix Nat. Bank v. Waterbury*, (1908) 20 Am. Bankr. Rep. 140, 123 App. Div. 453, 108 N. Y. S. 391; *Phenix Nat. Park Bank v. Waterbury*, (1910) 23 Am. Bankr. Rep. 250, 197 N. Y. 161, 90 N. E. 435. See also cases cited under the black-letter caption, "The date of filing the petition,"

in the preceding note to section 63a and the cases cited to the same effect, under section 59a, as to the creditors who may file a petition in bankruptcy.

**Liability coincident with proceedings in bankruptcy.**—A liability may ripen simultaneously with the beginning of the proceedings in bankruptcy. 3 R. C. L. 238. For example, it is well settled that if, before the time of performance of a contract, a party thereto unequivocally disavows a purpose ever to perform it the other party may treat such repudiation, at his election, as a breach of the agreement and sue for his damages. The same right to sue accrues in a legally equivalent situation when he puts performance of the contract out of his power. Bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation. Therefore it has been held that where one who has promised to return the amount paid for stock of a corporation if it should be surrendered within a certain time is adjudicated a bankrupt before the time arrives, the promisee by offering to file his claim manifests his election to treat the contract as broken and his claim thereon becomes a "fixed liability" provable under section 63a (1). *In re Neff*, (1907) 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349.

In the case of the sale of stock, however, it would seem that the claim should be regarded as provable under section 63a (4), instead of under section 63a (1), since the damages accruing from breach of an agreement to purchase the stock cannot be determined by mere computation. See cases cited in note to section 63a (4), *infra*, p. 1069, under catch line *Breach Occasioned by Bankruptcy*.

**Claim accruing after bankruptcy.**—An officer of a corporation is not entitled to prove a claim for salary, accruing after the bankruptcy of the corporation. *In re Dr. Voorhees Awning Hood Co.*, (M. D. Pa. 1911) 187 Fed. 611.

**Claim payable after bankruptcy.**—But where an obligation is absolutely due and owing, it is immaterial when it is payable. *In re Buzzini*, (S. D. N. Y. 1910) 183 Fed. 827. See also *Cobb v. Overman*, (C. C. A. 4th Cir. 1901) 109 Fed. 65.

**Effect of composition agreement.**—A voluntary composition between a debtor and his creditors, after proceedings in involuntary bankruptcy had been instituted, by which the creditors agreed to accept forty per cent. of their claims in full satisfaction, one-half to be paid in cash and the remainder to be evidenced by the notes of the bankrupt, does not operate as an accord and satisfaction until full payment has been made; and where the debtor is subsequently adjudged a bankrupt on his own petition, not having paid the notes, the creditors joining in the agreement are entitled to

prove their original debts, giving credit for the cash payments received. *In re Carton*, (S. D. N. Y. 1906) 148 Fed. 63, 17 Am. Bankr. Rep. 343.

The statutory liability of a director of a savings bank corporation, whose funds have been embezzled or misappropriated by its officers, to depositors in such bank, is a fixed liability absolutely owing within the meaning of section 63a (1). *In re Brown*, (C. C. A. 9th Cir. 1908) 164 Fed. 673, 21 Am. Bankr. Rep. 123; *Walker v. Woodside*, (C. C. A. 9th Cir. 1908) 164 Fed. 680, 21 Am. Bankr. Rep. 132.

**Judgments—Debts**, evidenced by a judgment, are expressly provided for in the Act; and, as a general rule, judgments existing and enforceable at the time of the filing of the petition may be proved in bankruptcy proceedings against the estate of the defendant. *In re Putman*, (N. D. Cal. 1911) 193 Fed. 464; *People's Nat. Bank of Independence v. Maxson*, (Ia. 1915) 150 N. W. 601; *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659, *reversing* (1903) 201 Ill. 581, 66 N. E. 833; *Tindle v. Birkett*, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121; *In re Alderson*, (D. C. W. Va. 1899) 98 Fed. 538, 3 Am. Bankr. Rep. 544; *Beers v. Hanlin*, (D. C. Ore. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re McCauley*, (E. D. N. Y. 1900) 101 Fed. 223, 4 Am. Bankr. Rep. 122; *In re Columbia Real-Estate Co.*, (D. C. Ind. 1900) 101 Fed. 965, 4 Am. Bankr. Rep. 411; *In re Scully*, (E. D. Pa. 1901) 108 Fed. 372, 5 Am. Bankr. Rep. 716; *In re Fife*, (W. D. Pa. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258; *In re Rebman*, (C. C. A. 9th Cir. 1906) 150 Fed. 759, 17 Am. Bankr. Rep. 767; *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25; *In re Havens*, (E. D. N. Y. 1910) 182 Fed. 367; *In re Pease*, (N. D. N. Y.) 4 Am. Bankr. Rep. 547; *Doyle v. Heath*, (R. I. 1900) 4 Am. Bankr. Rep. 705; *Finnegan v. Hull*, (N. Y. 1901) 6 Am. Bankr. Rep. 648; *Claister v. Soble*, (1903) 10 Am. Bankr. Rep. 446, 22 Pa. Super. Ct. 631; *In re Lorde*, (E. D. N. Y. 1906) 16 Am. Bankr. Rep. 201.

A judgment against the surety on an appeal bond is provable in bankruptcy proceedings subsequently instituted against him. *Coe v. Waters*, (1901) 16 Colo. App. 311, 64 Pac. 1054.

**Judgment for tort.**—Judgments rendered before bankruptcy, whether based upon liability for tort or contract, are expressly provable under section 63a, and there is nothing in section 17 of the Act which affects this rule. *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25. And see cases cited under section 63a (4).

**Decree of Orphans' Court.**—In *Hibberd v. Bailey*, (C. C. A. 3d Cir. 1904) 129

Fed. 575, 12 Am. Bankr. Rep. 104, *reversing* (E. D. Pa. 1903) 123 Fed. 185, 10 Am. Bankr. Rep. 545, it was held that a decree in the Orphans' Court is a fixed liability absolutely owing.

Where the renewal of a judgment is, because of a statutory requirement, necessary to make it a fixed obligation at the time of the filing of the petition, the absence of such renewal prevents proof of the judgment. *In re Farmer*, (E. D. N. C. 1902) 116 Fed. 763, 9 Am. Bankr. Rep. 19.

Judgments rendered on a debt which is not discharged in bankruptcy are not in any proper sense provable claims. See *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139.

The mere fact that a judgment has been rendered does not prevent a court from looking into the proceedings with a view of determining the nature of the liability which has been reduced to judgment, and to ascertain whether or not the judgment was for any "debt" of the bankrupt. *Wetmore v. Markoe*, (1904) 196 U. S. 68, 25 S. Ct. 172, 49 U. S. (L. ed.) 390, 2 Ann. Cas. 265. See also the first paragraph in the first note to section 63a. The case last above cited is irreconcilable with the earlier case of *McKittrick v. Cahoon*, (1903) 89 Minn. 383, 95 N. W. 223, 99 A. S. R. 606, 62 L. R. A. 757, holding that a judgment on a nonprovable claim was provable, on the ground that a judgment "fixes the nature of the obligation without reference to the character of the claim upon which it is founded," and that "where a precedent liability is made the basis of a final judgment, the rights of the parties are merged in what the law treats as the higher obligation."

Thus, a claim for alimony, even though evidenced by a judgment, decree, or order, has been held not to be a provable or dischargeable debt in bankruptcy. See *Audubon v. Shufeldt*, (1901) 181 U. S. 575, 21 S. Ct. 735, 45 U. S. (L. ed.) 1009, 5 Am. Bankr. Rep. 829; *Wetmore v. Markoe*, (1904) 196 U. S. 68, 25 S. Ct. 172, 49 U. S. (L. ed.) 390, 13 Am. Bankr. Rep. 1; *In re Shepard*, (S. D. N. Y. 1899) 97 Fed. 187; *In re Anderson*, (S. D. N. Y. 1899) 97 Fed. 321; *In re Nowell*, (D. C. Mass. 1900) 99 Fed. 931, 3 Am. Bankr. Rep. 837; *Turner v. Turner*, (D. C. Ind. 1901) 108 Fed. 785, 6 Am. Bankr. Rep. 289; *In re Smith*, (N. D. N. Y. 1899) 3 Am. Bankr. Rep. 67; *Maisner v. Maisner*, (N. Y. 1901) 6 Am. Bankr. Rep. 295; *Young v. Young*, (N. Y. 1901) 7 Am. Bankr. Rep. 171. See also the annotation to section 17a (2).

So, also, liabilities for the support and maintenance of children, even though reduced to judgment, are not provable in bankruptcy. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L.

ed.) 1084, 10 Am. Bankr. Rep. 139. See also *In re Baker*, (D. C. Kan. 1899) 96 Fed. 954, 3 Am. Bankr. Rep. 101; *In re Hubbard*, (N. D. Ill. 1899) 98 Fed. 710, 3 Am. Bankr. Rep. 528. And see the annotation to section 17a (2), as to the dischargeability of such liabilities.

**Judgment for fines.**—It has also been held that Congress did not intend to permit the discharge of any judgment rendered by a state or federal court imposing a fine in the enforcement of criminal laws, as such, of either jurisdiction. *In re Moore*, (W. D. Ky. 1901) 111 Fed. 145, 6 Am. Bankr. Rep. 590, *disapproving In re Alderson*, (D. C. W. Va. 1899) 98 Fed. 588, 3 Am. Bankr. Rep. 544. And see section 57j, *supra*, as to debts owing for penalties or forfeitures.

**A fine imposed for a civil contempt of a state court** is not a provable debt under this section. *People v. Sheriff of Kings County*, (E. D. N. Y. 1913) 206 Fed. 566.

A verdict allowing damages for personal injuries, when no judgment is entered thereon before intervention of bankruptcy proceedings, is not a "fixed liability" allowable in bankruptcy proceedings. *In re Ostrom*, (D. C. Minn. 1911) 185 Fed. 988.

**Bond for payment of annuity.**—A bankrupt having, prior to his adjudication as such, given a bond in a penal sum, to secure the payment of an annuity during the obligee's life, there is created by such instrument a fixed liability, *debitum in presenti, solvendum in futuro*, provable against the bankrupt's estate for the amount of the penalty, such amount being less than the value of the annuity as found from life tables. *Cobb v. Overman*, (C. C. A. 1901) 109 Fed. 65. See also *Coe v. Waters*, (Colo. App. 1901) 64 Pac. 1054; *Goding v. Rosenthal*, (Mass. 1901) 61 N. E. 222; *Dunbar v. Dunbar*, (Mass. 1901) 62 N. E. 248.

**Notes.**—Claims due and owing on notes given by the bankrupt may be proven against his estate, as a claim evidenced by an instrument in writing. *Merchants' Bank v. Thomas*, (C. C. A. 5th Cir. 1903) 121 Fed. 306, 10 Am. Bankr. Rep. 299; *In re New York Car Wheel Works*, (W. D. N. Y. 1905) 141 Fed. 430, 15 Am. Bankr. Rep. 571, 139 Fed. 421, 14 Am. Bankr. Rep. 595; *In re Speer*, (D. C. Ore. 1906) 144 Fed. 910, 16 Am. Bankr. Rep. 524; *In re Kyte*, (M. D. Pa. 1908) 21 Am. Bankr. Rep. 110.

**Nonnegotiable judgment note.**—Where by the state law the assignee of a nonnegotiable judgment note takes it subject to all equities and defenses that would have been available against the assignor, the assignee's claim thereon against the bankrupt maker's estate is open to the same equities and defenses. *In re Wiener*, etc., *Shoe Co.*, (1899) 96 Fed. 949.

Trade certificates, issued by a corporation under a state statute, are provable

debts against the estate of such corporation in bankruptcy. *In re Spot Cash Hooper Co.*, (W. D. Tex. 1911) 188 Fed. 861.

**Bondholders** who are promised only repayment of the amount of money loaned, with interest, it being further provided that at maturity, if after the corporation shall have paid all its debts and also five per cent per annum on the stock, there shall be any surplus left, such surplus shall be divided between the stockholders and the bondholders, are entitled to prove as general creditors for principal and interest. *In re Interborough Realty Co.*, (C. C. A. 2d Cir. 1915) 223 Fed. 646, holding that the bonds are not to be treated as stock.

**Indorsements.**—A claim against the bankrupt as an indorser of commercial paper which, at the time of the filing of the petition, was a fixed liability, is provable against his estate in bankruptcy. *Moch v. Market St. Nat. Bank*, (C. C. A. 3d Cir. 1901) 107 Fed. 897, 6 Am. Bankr. Rep. 11; *In re Stout*, (W. D. Mo. 1900) 109 Fed. 794, 6 Am. Bankr. Rep. 505; *In re Philip Semmer Glass Co.*, (C. C. A. 2d Cir. 1905) 135 Fed. 77, 14 Am. Bankr. Rep. 25; *Gorman v. Wright*, (C. C. A. 4th Cir. 1905) 136 Fed. 184, 14 Am. Bankr. Rep. 135; *In re Smith*, (D. C. R. I. 1906) 146 Fed. 923, 17 Am. Bankr. Rep. 112; *In re Graves*, (D. C. Vt. 1910) 182 Fed. 443; *In re Buzzini*, (S. D. N. Y. 1910) 183 Fed. 827; *Whitwell v. Wright*, (1910) 23 Am. Bankr. Rep. 747, 136 App. Div. 246, 120 N. Y. S. 1065.

The holder of a note taken as collateral security, on which the bankrupt is an indorser, must, as against the bankrupt's estate, make due allowance for the value of any property taken by virtue of the principal security. *In re Graves*, (D. C. Vt. 1910) 182 Fed. 443.

**Surety debts.**—A fixed liability due by the bankrupt, as a surety, at the time of the institution of the proceedings, is provable against his estate. *Hibberd v. Bailey*, (C. C. A. 3d Cir. 1904) 129 Fed. 575, 12 Am. Bankr. Rep. 104, *reversing* (E. D. Pa. 1903) 123 Fed. 185, 10 Am. Bankr. Rep. 545; *Loeser v. Alexander*, (C. C. A. 6th Cir. 1910) 176 Fed. 265, 24 Am. Bankr. Rep. 75; *United Surety Co. v. Iowa Mfg. Co.*, (C. C. A. 8th Cir. 1910) 179 Fed. 55; *In re Randolph*, (N. D. W. Va. 1911) 187 Fed. 186; *Williams v. U. S. Fidelity, etc., Co.*, 236 U. S. 549, 35 S. Ct. 289, 59 U. S. (L. ed.) 713, *reversing* 11 Ga. App. 635, 75 S. E. 1067; *Murphy v. Nicholson*, (1915) 87 N. J. L. 278, 94 Atl. 62.

*In Loeser v. Alexander*, (C. C. A. 6th Cir. 1910) 176 Fed. 265, 24 Am. Bankr. Rep. 75, it appears that the bankrupt was surety on a bond given by a deputy collector of taxes, and that prior to his bankruptcy the deputy had become a defaulter by reason of the failure of a bank in

which he deposited his collections; and it was held that the liability of the bankrupt on the bond was not contingent, but was a fixed liability provable against his estate, and that the right to prove the claim against the estate was not affected by the pendency of an action at law on the bond, nor by the fact that the public authorities had recovered a portion of the shortage from the receiver of the bank in which the fund was deposited, as these matters went only in reduction of the claim.

*Where the right to put an administrator's bond in suit had become complete*, and he dies prior to the filing of a petition in bankruptcy by a surety on the bond, the claim for breach of the bond is provable against the estate of the surety, as there can be no future breaches. *Harmon v. McDonald*, (1905) 187 Mass. 578, 73 N. E. 883, 3 Ann. Cas. 64.

*The remedies against a bankrupt principal*, by filing a claim against his estate, and the action against such bankrupt's surety, on a surety bond, are separate and distinct, and may be simultaneously pursued. *U. S. v. Schofield Co.*, (E. D. Pa. 1910) 182 Fed. 240. See also *Loeser v. Alexander*, (C. C. A. 6th Cir. 1910) 176 Fed. 265, 24 Am. Bankr. Rep. 75.

*The fact that a surety has made a part payment* on the debt does not affect the right of the creditor to prove for the entire amount. *In re Heyman*, (S. D. N. Y. 1899) 95 Fed. 800.

**Indemnity of another as surety.**—Where trust deeds were executed by a bankrupt to secure the beneficiaries as sureties, it was held that such beneficiaries were not entitled to be paid personally the amounts of the debts for which they were sureties out of the bankrupt's estate, but were only entitled to have such debts paid to the creditors out of the proceeds of the property included in the deeds, and to a release of their liability as sureties. *In re Randolph*, (N. D. W. Va. 1911) 187 Fed. 186.

**Stipulation for attorney fees.**—In many instances the obligation by which a bankrupt's indebtedness is evidenced contains a stipulation for an attorney fee for the collection therefor; and in such cases, if the claim has been placed with an attorney for collection prior to bankruptcy, and collection proceedings were actually instituted, so that the attorney's fee was a fixed liability at the time of the filing of the petition in bankruptcy, such fee will constitute a provable debt against the estate of the debtor. *Merchants' Bank v. Thomas*, (5th Cir. 1903) 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299; *In re Edens Co.*, (D. C. S. C. 1907) 151 Fed. 940, 18 Am. Bankr. Rep. 643; *In re V. & M. Lumber Co.*, (N. D. Ala. 1910) 182 Fed. 231; *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576; *In re Jenkins*, (W. D. S. C. 1912) 192 Fed. 1000.



Thus where notes given by a firm provided that if they were placed in the hands of an attorney for collection the makers and indorsers agreed to pay the holder an attorney fee of ten per cent., on the amount due, and the maker thereafter became bankrupt, and the notes were placed in the hands of an attorney for collection, it was held that the attorney's fee provided for was properly provable as a claim against the bankrupt's estate. *Merchants' Bank v. Thomas*, (5th Cir. 1903) 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299.

So, also, where a mortgage executed by a bankrupt provided for the payment of the attorney's fees of the mortgagee in case he was required to employ counsel, it was held that the mortgagee was entitled to an allowance for a reasonable attorney's fee for services required in proving his claim and lien against the bankrupt's estate. *In re Ferreri*, (E. D. La. 1911) 188 Fed. 675.

A state rule to the effect that an attorney's commission, stipulated for in bond and mortgage in case of foreclosure, is subject to the control of the court, which may reduce the amount of such commission in its discretion, will be followed by a court of bankruptcy in that state. *In re Wendel*, (E. D. Pa. 1907) 152 Fed. 672, 18 Am. Bankr. Rep. 665.

Where, however, the obligation has not been given to an attorney to collect, or no effort has been made to realize thereon such as would authorize the collection of the fee as part of the claim, the stipulated fee, in such cases, has not become such a fixed liability as to make it available as a provable debt in bankruptcy. *In re Roche*, (5th Cir. 1900) 101 Fed. 956, 42 C. C. A. 115, 4 Am. Bankr. Rep. 369; *In re Garlington*, (N. D. Tex. 1902) 115 Fed. 999, 8 Am. Bankr. Rep. 602; *In re Keeton*, (W. D. Tex. 1903) 126 Fed. 426, 11 Am. Bankr. Rep. 367; *In re Keeton*, (W. D. Tex. 1903) 126 Fed. 429, 11 Am. Bankr. Rep. 370; *In re Gebhard*, (M. D. Pa. 1905) 140 Fed. 571, 15 Am. Bankr. Rep. 381; *In re T. H. Thompson Milling Co.*, (W. D. Tex. 1906) 144 Fed. 314, 16 Am. Bankr. Rep. 454; *McCabe v. Patton*, (C. C. A. 3d Cir. 1909) 174 Fed. 217, 23 Am. Bankr. Rep. 335; *In re V. & M. Lumber Co.*, (N. D. Ala. 1910) 182 Fed. 231.

Thus where judgments were entered against a bankrupt by confession, without suit, and included an allowance for attorney's fees, it was held that the bankrupt was entitled at the first opportunity, when such judgments were presented for allowance as claims against his estate, to object to the allowance of the attorney's fee because no testimony was offered as to the value of the services or the amount of the commissions which should be allowed, and his trustee in bankruptcy was entitled to raise the same ob-

jection. *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576.

*Attorney's fees stipulated for in a note which has not matured* are not provable against the estate of the maker. *In re Garlington*, (1902) 115 Fed. 999.

**Rent.**—Where a lease provides that on default in the payment of any rent, the rent for the entire term shall at once become due and payable, it has been held that, on the bankruptcy of the lessee while so in default, the rent for the term, so far as definitely fixed by the lease, is a "fixed liability absolutely owing." *In re Pittsburg Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482. See also *In re Goldstein*, (1899) 2 Am. Bankr. Rep. 603. *Compare Wilson v. Pennsylvania Trust Co.*, (1902) 114 Fed. 742, 52 C. C. A. 374; *In re Winfield Mfg. Co.*, (1905) 137 Fed. 984, 140 Fed. 185.

Where a penal bond executed by a person who thereafter became bankrupt, provided, *inter alia*, for the payment of certain rent for life, it was held that the liability was fixed and absolutely owing at the time of the filing of the petition. *Cobb v. Overman*, (1901) 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369, *reversing Bray v. Cobb*, (1900) 100 Fed. 270.

In the case of a lease of a store service apparatus especially adapted to the premises in which it was placed, where the so-called lease was substantially an arrangement for payment by instalments, and the contract provided that in case of default the whole rental should become due "without demand," and that "in case the lessee becomes bankrupt, the balance of the rental for the entire term of this lease shall be considered at once due and payable *without notice or demand on the part of the lessor*," and a default occurred prior to the filing of the petition in bankruptcy, it was held that the whole amount as stipulated became a "fixed liability" within the meaning of section 63a (1). *In re Miller Bros. Grocery Co.*, (N. D. Ohio 1913) 208 Fed. 573, *reversed* on other grounds (1915) 219 Fed. 851, 135 C. C. A. 521, Ann. Cas. 1916A 946, L. R. A. 1916B 1099; *In re Caswell-Massey Co.*, (S. D. N. Y. 1910) 208 Fed. 571.

But the lessor cannot both prove his claim for the total rent and retake the property. *Lamson Consol. Store Service Co. v. Bowland*, (1902) 114 Fed. 639, 52 C. C. A. 335; *In re Quaker Drug Co.*, (1913) 204 Fed. 689; *In re Merwin, etc., Co.*, (1913) 206 Fed. 116; *In re Miller Bros. Grocery Co.*, (6th Cir. 1915) 219 Fed. 851, 135 C. C. A. 521, Ann. Cas. 1916A 946, L. R. A. 1916B 1099.

See note to section 63a (4) as to claims for rent in general.

**Equitable claims.**—"There is nothing in the Bankruptcy Act which indicates any intention on the part of Congress to discriminate against equitable claims. In

section 2 of that Act all courts of bankruptcy are invested 'with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . to (1) adjudge persons bankrupt; . . . (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates.' It has always been the law in England that equitable demands can be proven in bankruptcy, and such claims are provable under our present Bankruptcy Law if within the purview of the general rules of equity, even though they have no status in courts of law." *In re Putman*, (N. D. Cal. 1911) 193 Fed. 464.

An equitable claim which, at the time of the filing of the petition in bankruptcy, was a fixed liability on the part of the bankrupt may be proved against his estate. *James v. Gray*, (C. C. A. 1st Cir. 1904) 131 Fed. 401, 12 Am. Bankr. Rep. 573; *In re Arnold*, (E. D. Mo. 1904) 133 Fed. 789, 13 Am. Bankr. Rep. 320; *In re Peasley*, (D. C. N. H. 1905) 137 Fed. 190, 14 Am. Bankr. Rep. 496, reversed on other grounds (C. C. A. 1st Cir. 1906) 148 Fed. 374; *Carpenter v. Southworth*, (C. C. A. 2d Cir. 1908) 165 Fed. 428, 21 Am. Bankr. Rep. 390.

But see *In re E. T. Kenney Co.*, (D. C. Ind. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611, wherein it was said that only such claims are provable in bankruptcy as are made provable by section 63, and it does not include equitable claims unless they are included under the description of unliquidated claims which are made provable only after they are liquidated. All other claims enumerated in section 63 are legal claims, and a statutory mode of proof is prescribed for them in section 57.

*Payments made to trustee by mistake.*

—The rule that payments made under mistake of law are not recoverable does not apply to a payment made to a trustee in bankruptcy, or other officer of a court holding the funds in his hands upon trust for equitable distribution. *Carpenter v. Southworth*, (C. C. A. 2d Cir. 1908) 165 Fed. 428, 21 Am. Bankr. Rep. 390.

*Where a vendor has failed to make title* as required by his contract for the sale of land, the purchaser is in equity entitled to recover interest on any advances made on the purchase money, whether with a stakeholder or paid to the vendor, and is also entitled to a lien on the land for the amount of such deposits and the interest; and these rules apply in bankruptcy proceedings. *Everett v. Mansfield*, (C. C. A. 1st Cir. 1906) 148 Fed. 374, 8 Ann. Cas. 956, reversing (D. C. N. H. 1905) 137 Fed. 190, 14 Am. Bankr. Rep. 496.

The expenses and compensation of an assignee for the benefit of creditors may be proved in bankruptcy proceedings; and

such claims will be allowed where the services rendered were beneficial to the estate, and not in furtherance of any fraud upon creditors. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1; *In re Peter Paul Book Co.*, (W. D. N. Y. 1900) 104 Fed. 786, 5 Am. Bankr. Rep. 105; *In re Klein*, (S. D. N. Y. 1902) 116 Fed. 523, 8 Am. Bankr. Rep. 559; *Summers v. Abbott*, (C. C. A. 8th Cir. 1903) 122 Fed. 36, 10 Am. Bankr. Rep. 254; *In re Chase*, (C. C. A. 1st Cir. 1903) 124 Fed. 753, 10 Am. Bankr. Rep. 677; *In re Zier*, (D. C. Ind. 1904) 127 Fed. 399, 11 Am. Bankr. Rep. 527; *In re Congdon*, (D. C. Minn. 1904) 129 Fed. 478, 11 Am. Bankr. Rep. 219; *In re J. H. Alison Lumber Co.*, (S. D. Ga. 1905) 137 Fed. 643, 14 Am. Bankr. Rep. 78; *In re Pattee*, (D. C. Conn. 1906) 143 Fed. 994, 16 Am. Bankr. Rep. 450; *In re Pauly*, (N. D. N. Y. 1899) 2 Am. Bankr. Rep. 333; *Matter of B. H. Gladding Co.*, (D. C. R. I. 1902) 9 Am. Bankr. Rep. 171; *Matter of Harson Co.*, (D. C. R. I.) 11 Am. Bankr. Rep. 514.

Thus where a bankrupt's assignee for the benefit of creditors redeemed a pawned diamond with his own funds, and later under compulsion delivered the diamond to the bankrupt's trustee, who sold it as a part of the bankrupt's estate for more than the amount advanced to redeem it, the assignee was entitled to receive the amount so advanced from the trustee. *In re Rudd*, (E. D. N. Y. 1910) 180 Fed. 312.

So, also, it has been held that a charge for the preparation of a general deed of assignment, which was avoided by an adjudication in bankruptcy against the assignor, on a petition filed within four months after the making of the assignment, may be proved as an unsecured claim against the bankrupt's estate. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1.

But where the assignee is a party to a fraudulent assignment, compensation will not be allowed. *In re Congdon*, (D. C. Minn. 1904) 129 Fed. 478, 11 Am. Bankr. Rep. 219. See also *Stearns v. Flick*, (S. D. Ohio 1900) 103 Fed. 919, 4 Am. Bankr. Rep. 723; *Wilbur v. Watson*, (D. C. R. I. 1901) 111 Fed. 493, 7 Am. Bankr. Rep. 54.

A claim for commissions and expenses incurred by a trustee named in a deed of trust, executed by the bankrupt, in the sale of certain chattels thereunder prior to bankruptcy, is not such a claim as is provable under section 63 of the Bankruptcy Act. *In re Standard Dairy, etc., Co.*, (D. C. 1908) 20 Am. Bankr. Rep. 321.

Provability as affected by person holding claim—*Claim by bankrupt's wife.*—If, under the state law, the claim of a

wife against her husband is recognized as valid, such claim will constitute a provable debt in the Bankruptcy Court. *In re Novak*, (N. D. Ia. 1900) 101 Fed. 800, 4 Am. Bankr. Rep. 311; *In re Neiman*, (E. D. Wis. 1901) 109 Fed. 113, 6 Am. Bankr. Rep. 329; *In re Nickerson*, (D. C. Mass. 1902) 116 Fed. 1003, 8 Am. Bankr. Rep. 707; *In re Miner*, (D. C. Ore. 1902) 117 Fed. 953, 9 Am. Bankr. Rep. 100; *In re Domenig*, (E. D. Pa. 1904) 128 Fed. 146, 11 Am. Bankr. Rep. 552; *James v. Gray*, (C. C. A. 1st Cir. 1904) 131 Fed. 401, 12 Am. Bankr. Rep. 573; *Neumann v. Blake*, (C. C. A. 8th Cir. 1910) 178 Fed. 916; *In re Carpenter*, (D. C. S. C. 1910) 179 Fed. 743; *In re Kyte*, (M. D. Pa. 1908) 21 Am. Bankr. Rep. 110; *In re Crumling*, (E. D. Pa. 1914) 214 Fed. 503, where, however, the court said: "Claims are presented against the bankrupt's estate by his wife and other members of his family for services rendered to him in such numbers and for such amounts as if allowed would make of these bankruptcy proceedings nothing but a means of transferring his estate from his creditors to himself under the guise of a dividend on debts contracted by him. It is common sense, common justice, and hornbook law that all such claims should be closely scrutinized. These have failed to pass the scrutiny of the referee. For this the referee is to be commended."

A claim of the bankrupt's wife will not be disallowed merely because of laches in enforcing it. *In re Remmerde*, (N. D. Ia. 1913) 206 Fed. 826.

But where the claim is one that could not be recovered under the state laws, it cannot be proved in bankruptcy. *In re Talbot*, (1901) 110 Fed. 924; *In re Winkels*, (W. D. Wis. 1904) 132 Fed. 590, 12 Am. Bankr. Rep. 696; *In re Tucker*, (D. C. Mass. 1905) 148 Fed. 928, 17 Am. Bankr. Rep. 247; *In re Suckle*, (E. D. Ark. 1910) 176 Fed. 828, 23 Am. Bankr. Rep. 821; *Teter v. Viquesney*, (C. C. A. 4th Cir. 1910) 179 Fed. 655; *In re Kaufmann*, (E. D. N. Y. 1900) 5 Am. Bankr. Rep. 104.

Thus where a wife furnishes money to her husband, who subsequently becomes a bankrupt, under such circumstances that it would be deemed a gift under the state law, the wife cannot sustain a claim for the money, so given, as against her husband's estate in bankruptcy. *Teter v. Viquesney*, (C. C. A. 4th Cir. 1910) 179 Fed. 655.

A daughter of the bankrupt may prove a claim against his estate. *Matter of Brewster*, (N. D. N. Y. 1902) 7 Am. Bankr. Rep. 486.

A son-in-law to the bankrupt may prove a claim against his estate. *In re Crumling*, (E. D. Pa. 1914) 214 Fed. 503.

*The fact that the stockholders of two*

*separately chartered corporations are identical*, that one owns shares in the other, and that they have mutual dealings, will not in general merge them into one corporation, or prevent the enforcement by one of an otherwise valid claim against the other. *In re Watertown Paper Co.*, (C. C. A. 2d Cir. 1909) 169 Fed. 252, 22 Am. Bankr. Rep. 190.

A director of a corporation may maintain a claim against its estate in bankruptcy. *In re Salvator Brewing Co.*, (S. D. N. Y. 1911) 188 Fed. 522.

*Partners*.—As to the claims of partners against the partnership estate, and as against each other, see section 5g.

A county may prove its claim against the bankrupt. *In re Wright*, (D. C. Mass. 1899) 95 Fed. 807.

The interest due on a fixed liability is provable in bankruptcy under the express terms of the statute. See *Everett v. Mansfield*, (C. C. A. 1st Cir. 1906) 148 Fed. 374, 8 Ann. Cas. 956, *reversing* (D. C. N. H. 1905) 137 Fed. 190, 14 Am. Bankr. Rep. 406; *In re Stevens*, (D. C. Ore. 1909) 173 Fed. 842, 23 Am. Bankr. Rep. 239.

A creditor of a bankrupt who has taken a mortgage is entitled to interest on the mortgage debt, where the estate is ample for that purpose. *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 22 Am. Bankr. Rep. 15.

*Allowed claims in bankruptcy* are to be treated as judgments and bear interest from maturity, although the contracts do not provide therefor, and this rule is not affected by the acceptance by the creditor from the trustee of the principal of the claim without stipulating for interest, but the trustee is entitled to retain possession of the assets until he has accumulated funds enough to satisfy such interest. *In re Osborn*, (1910) 177 Fed. 184, 100 C. C. A. 392, 29 L. R. A. (N. S.) 887.

*Interest ceases to run on a secured claim* when the money is realized from the security. The estate ought not to be burdened with the payment of interest subsequent to that time. *In re Stevens*, (D. C. Ore. 1909) 173 Fed. 842, 23 Am. Bankr. Rep. 239.

In *Sexton v. Dreyfus*, (1911) 219 U. S. 339, 31 S. Ct. 256, 55 U. S. (L. ed.) 244, it was said: "For more than a century and a half the theory of the English bankrupt system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission. *Ex p. Bennet*, 2 Atk. 527. This rule was applied to mortgages as well as to unsecured debts, *Ex p. Wardell* (1787); *Ex p. Hercy* (1702); 1 Cooke Bankrupt Laws (4th ed.) 181 (1st ed. appendix); and notwithstanding occasional doubts, it has been so applied with prevailing assent of the English judges

ever since, *Ex p. Badger*, 4 Ves. Jr. 165; *Ex p. Ramsbottom*, 2 Mont. & A. 79; *Ex p. Penfold*, 4 De G. & S. 282; *Ex p. Lubbock*, 9 Jur. N. S. 854; *In re Savin*, L. R. 7 Ch. 760, 764; *Ex p. Bath*, 22 Ch. D. 450, 454; *In re London, etc., Hotel Co.*, [1892] 1 Ch. 639; *In re Bonacino*, 1 Manson 59. As appears from *Cooke*, *supra*, the rule was laid down, not because of the words of the statute, but as a fundamental principle. We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another state. No one doubts that interest on unsecured debts stops. See section 63 (1). *Shawnee County v. Hurley*, (8th Cir. 1909) 94 C. C. A. 362, 169 Fed. 92, 94."

**Contingent claims.**—Claims which are of so contingent a character as to make proof of them substantially impossible are not provable in bankruptcy proceedings, because they are not such a fixed liability as is contemplated by section 63a (1). *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed) 1084, 10 Am. Bankr. Rep. 139; *In re Jefferson*, (D. C. Ky. 1899) 93 Fed. 948; *In re Ellis*, (D. C. Mass. 1900) 98 Fed. 967, 3 Am. Bankr. Rep. 564; *In re Arnstein*, (S. D. N. Y. 1899) 101 Fed. 706; *Hawk v. Hawk*, (W. D. Ark. 1900) 102 Fed. 679, 4 Am. Bankr. Rep. 463; *In re Mahler*, (E. D. Mich. 1900) 105 Fed. 428; *Atkins v. Wilcox*, (5th Cir. 1900) 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118; *In re Hays, etc., Co.*, (W. D. Ky. 1902) 117 Fed. 879; *Watson v. Merrill*, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 454; *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728; *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131; *In re Hartman*, (M. D. Pa. 1909) 166 Fed. 776, 21 Am. Bankr. Rep. 610; *In re Inman*, (N. D. Ga. 1909) 171 Fed. 185; *In re Roth*, (C. C. A. 2d Cir. 1910) 181 Fed. 667; *In re Merrill*, (C. C. A. 2d Cir. 1911) 186 Fed. 312; *Clemmons v. Brinn*, (N. Y. 1901) 7 Am. Bankr. Rep. 714; *In re Gallacher Coal Co.*, (N. D. Ala. 1913) 205 Fed. 183.

The liability of the bankrupt is to be ascertained solely as of the date of filing the petition. If the existence of the debt or claim, whether liquidated or unliquidated, is then contingent, it is not provable. *Cotting v. Hooper*, (1915) 220 Mass. 273, 107 N. E. 931.

Under a statute providing that a wife who is granted a divorce from her husband "shall be entitled to one-third of the husband's personal property absolutely," it has been held that the interest of a wife in the personal property of her husband after the commencement of an action for divorce, but before decree, is

not such a claim as is provable against the husband's estate in bankruptcy. *Hawk v. Hawk*, (W. D. Ark. 1900) 102 Fed. 679, 4 Am. Bankr. Rep. 463.

The liability of a bankrupt on a guaranty, executed by him, of the payment by a corporation of dividends at a certain rate on its stock, owned by another, with respect to dividends not due or payable at the time of the filing of the petition in bankruptcy, is so far contingent that a claim based thereon is not a provable debt. *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728.

A defendant's liability on a replevin bond, given to reclaim property, has been held to be of such a contingent nature as not to be provable in bankruptcy. *Clemmons v. Brinn*, (N. Y. 1901) 7 Am. Bankr. Rep. 714.

**Claims barred by limitation.**—A claim which, at the time of the filing of a petition in bankruptcy against the debtor, was barred by the statute of limitations of the state where the debtor resides, and where the proceedings in bankruptcy are instituted, is not a provable debt against his estate in bankruptcy. *In re Lipman*, (S. D. N. Y. 1899) 94 Fed. 353, 2 Am. Bankr. Rep. 46; *In re Realer*, (D. C. Minn. 1899) 95 Fed. 804; *In re Wooten*, (E. D. N. C. 1902) 118 Fed. 670, 9 Am. Bankr. Rep. 247; *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (C. C. A. 8th Cir. 1903) 122 Fed. 232, 10 Am. Bankr. Rep. 225; *In re Lafferty*, (E. D. Pa. 1903) 122 Fed. 558, 10 Am. Bankr. Rep. 290; *In re Watkinson*, (E. D. Pa. 1906) 143 Fed. 602, 16 Am. Bankr. Rep. 245; *In re Putman*, (N. D. Cal. 1911) 193 Fed. 464. For cases arising under earlier Bankruptcy Acts involving the effect of the statute of limitations and of the scheduling of debts barred, see *Matter of Ray*, (1897) 2 Ben. 53, 20 Fed. Cas. No. 11,589; *In re Eldridge*, (1875) 2 Hughes (U. S.) 259; *In re Perry*, (1868) 1 Nat. Bankr. Reg. 220, 19 Fed. Cas. No. 10,998; *In re Hardin*, (1868) 11 Fed. Cas. No. 6,048; *In re Sheppard*, (1868) 1 Nat. Bankr. Reg. 439, 21 Fed. Cas. No. 12,753; *Nicholas v. Murray*, (1878) 5 Sawy. (U. S.) 320; *In re Hertzog*, (1878) 18 Nat. Bankr. Reg. 526, 12 Fed. Cas. No. 6,433; *In re Reed*, (1874) 6 Biss. (U. S.) 250; *In re Doty*, (1877) 16 Nat. Bankr. Reg. 202, 7 Fed. Cas. No. 4,017; *In re Norton*, (1875) 6 Biss. (U. S.) 443; *In re Wright*, (1872) 3 Biss. (U. S.) 359; *Re Kingsley*, (1868) 1 Lowell 216, 14 Fed. Cas. No. 7,819; *In re Cornwall*, (1871) 9 Blatchf. (U. S.) 114; *Wofford v. Unger* (1880) 53 Tex. 634.

In *In re Wooten*, (E. D. N. C. 1902) 118 Fed. 670, the court said that it is the duty of a trustee in bankruptcy to plead the statute of limitations, especially when required by creditors whom he represents.

The trustee in bankruptcy may plead the statute of limitations to outlawed ob-

ligations, and the statute is properly pleaded, although the bankrupt, after the filing of the petition in bankruptcy, acknowledges the indebtedness, for after that time he is without power to waive the statute. *In re George Zorn & Co.*, (E. D. Pa. 1912) 193 Fed. 299.

Where a bankrupt claims property as a homestead, and proceedings are taken before the referee to subject it to the payment of a prior debt, the bankrupt should be allowed an opportunity to set up the statute of limitations against such debt. *In re Bean*, (D. C. Vt. 1900) 100 Fed. 262, 4 Am. Bankr. Rep. 53.

But the bar of the statute does not affect the bankrupt's right to be discharged. *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (C. C. A. 8th Cir. 1903) 122 Fed. 232, 10 Am. Bankr. Rep. 225. And see the annotation under sections 14 and 17 generally.

A new promise to pay may, however, be proved in the bankruptcy proceedings, notwithstanding the fact that the original debt was barred by limitation. *Dacovich v. Schley*, (C. C. A. 5th Cir. 1905) 134 Fed. 72, 13 Am. Bankr. Rep. 752.

But a claim barred by the statute of limitations is not revived or made provable by the fact that the bankrupt includes it in his schedule of debts filed in the bankruptcy proceedings. *In re Resler*, (D. C. Minn. 1899) 95 Fed. 804; *In re Wooten*, (E. D. N. C. 1902) 118 Fed. 670.

**Usurious claim.**—A claim tainted as usurious cannot be proved in bankruptcy. *In re Robinson*, (D. C. Mass. 1905) 136 Fed. 994, 14 Am. Bankr. Rep. 626.

The defense of usury is available to the trustee in bankruptcy against a mortgage given by the bankrupt. *In re Kellogg*, (C. C. A. 2d Cir. 1903) 121 Fed. 333, 10 Am. Bankr. Rep. 7.

But this objection is not available if the claim is proved apart from the usurious obligation. *In re Wilde*, (S. D. N. Y. 1904) 133 Fed. 562, 13 Am. Bankr. Rep. 217; *In re Robinson*, (D. C. Mass. 1905) 136 Fed. 994, 14 Am. Bankr. Rep. 626.

Thus where certain claimants against a bankrupt were shown by the schedules to have been creditors for goods sold, for which notes had been given and later an alleged usurious mortgage delivered, it was held that they were entitled, if they had not estopped themselves, or limitations had not run against them, to prove such amount as a general claim against the estate, though their liens were defeated. *In re Vogt*, (E. D. N. Y. 1911) 188 Fed. 764.

Where, under the state laws, the defense of usury can be pleaded only by the borrower, it has been held that creditors of a bankrupt cannot set it up as a defense to the claim of another cred-

itor. *In re Worth*, (N. D. Ia. 1904) 130 Fed. 927, 12 Am. Bankr. Rep. 566.

**Fraud—Of claimant.**—A claim will be disallowed in bankruptcy where it appears to have been based on a transaction in fraud of the rights of the general creditors. *In re Lansaw*, (D. C. Mo. 1902) 118 Fed. 365, 9 Am. Bankr. Rep. 167; *In re S. P. Smith Lumber Co.*, (N. D. Tex. 1904) 132 Fed. 618, 13 Am. Bankr. Rep. 123. See also *In re Holbrook Shoe, etc., Co.*, (D. C. Mont. 1908) 165 Fed. 973, 21 Am. Bankr. Rep. 511.

But a preferential transferee may, on the setting aside of the conveyance as fraudulent, participate in the proceeds of a sale of the property as to a debt not involved in the fraudulent conveyance, and incurred before its execution. *In re Hurst*, (N. D. W. Va.) 188 Fed. 707.

**Bankrupt's fraud.**—Creditors in bankruptcy proceedings may invoke the principle that money procured by fraud may be recovered back, by proving a demand for money had and received by the bankrupt to their use. *In re Arnold*, (E. D. Mo. 1904) 133 Fed. 789, 13 Am. Bankr. Rep. 320.

**Claim of unregistered foreign corporation.**—Where duebills issued by a bankrupt corporation for money lent to it by a foreign corporation were adjudged invalid in the hands of an assignee, and refused allowance against the bankrupt estate, on the ground that in lending the money the foreign corporation was doing business in the state without having registered as required by the state law, it was held that such corporation could not prove the same indebtedness as a claim against the estate on the theory that, the duebills being void, the lender was entitled to recover on an implied contract as for money had and received; such contracts being equally within the statute. *In re Montello Brick Works*, (E. D. Pa. 1909) 174 Fed. 498, 23 Am. Bankr. Rep. 375.

**Effect of ultra vires and illegality.**—*Bonds issued by a corporation which are ultra vires* and void under the law of the state are not allowable against the corporation's estate in bankruptcy. *In re Waterloo Organ Co.*, (C. C. A. 2d Cir. 1904) 134 Fed. 341, 13 Am. Bankr. Rep. 466.

**Corporation's agreement to pay debts of third persons.**—Where a corporation gave its promissory note to a bank for the indebtedness of third parties for which it was in no way responsible, and also for its own debt, it was held that, to the extent of the amount of the debts of the third parties, the note was invalid in the hands of the bank, which knew these facts, and that the claim of the bank against the estate of the bankrupt corporation must be reduced to the amount which the corporation owed the bank when the note was given, and the interest

thereon. *Mapes v. German Bank*, (C. C. A. 8th Cir. 1910) 176 Fed. 89, 23 Am. Bankr. Rep. 713.

So, also, it has been held that renewal notes, executed by a corporation to a bank, covering notes given for an indebtedness of another corporation, without any new consideration, are not enforceable in bankruptcy, under the rule that a corporation has no authority to pay the debts of a third person, in the absence of a binding obligation arising from an agreement to assume such third party's debts, based on a valuable consideration. *In re Stanford Clothing Co.*, (N. D. Ala. 1911) 187 Fed. 172.

A corporation has no power to purchase shares of its own stock, where the transaction renders it insolvent, and in consequence operates as a fraud on its creditors; and notes given by it in such case for a part of the purchase price are invalid, and cannot be proved against its estate in bankruptcy by the selling stockholder. *In re S. P. Smith Lumber Co.*, (N. D. Tex. 1904) 132 Fed. 618, 13 Am. Bankr. Rep. 118.

But where stock had been issued for merchandise, the value of such consideration being fairly debatable, and the corporation enjoyed, used, and did its entire corporate business for several years on the property so conveyed to it, and where such property cannot be restored or the contract rescinded, and where no person was in any way induced to act or was misled or wronged by the maintenance of that status, it was held that the corporation had no such right against the

stockholder as would prevent him from participating in the distribution of the estate to the amount of such sums as were rightfully due to him. *In re L. M. Alleman Hardware Co.*, (C. C. A. 3d Cir. 1910) 181 Fed. 810.

But if the claimant does not require the aid of the tainted transaction in order to establish his claim, it may be proved. *In re T. H. Bunch Co.*, (E. D. Ark. 1910) 180 Fed. 519.

**Gambling transactions.**—Where a claim against a bankrupt's estate was based on a note given by her in a marginal gambling transaction, it was held that the defense that it was based on an illegal consideration was available to her, and was, therefore, available to her trustee in bankruptcy. *In re Hill*, (E. D. Pa. 1911) 187 Fed. 214.

**Claim against bucket shop owner.**—Where a customer of a bankrupt who was a stockbroker filed a claim for a balance due on account of purchases and sales of stock, for the claimant's account, on the theory that the transactions were real purchases and sales, but the evidence showed that the creditor knew that the bankrupt was operating a bucket shop, and intended no real purchase or sale, it was held that the creditor was nevertheless entitled to the allowance of his claim for the amount of cash deposited with the bankrupt, and interest thereon, under a state statute which permitted such recovery as against the broker. *Streeter v. Lowe*, (C. C. A. 1st Cir. 1911) 184 Fed. 263.

(2) [Costs of suit.] due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; [(1898) 30 Stat. L. 563.]

Costs due when the petition was filed, and which were then a fixed liability, are provable. See *Aiken v. Haskins*, (1901) 6 Am. Bankr. Rep. 46, 34 Misc. 505, 70 N. Y. S. 293.

Costs adjudged against a complainant after his adjudication as a bankrupt, in a suit brought prior to such adjudication, do not constitute a provable debt

against his estate, under section 63, and he is not entitled to be protected by the Bankruptcy Court from arrest on an execution therefor. *In re Marcus*, (D. C. Mass. 1900) 104 Fed. 331, affirmed (1901) 105 Fed. 907, 45 C. C. A. 115; *Aiken v. Haskins*, (1901) 6 Am. Bankr. Rep. 46, 34 Misc. 505, 70 N. Y. S. 293.

(3) [Claim for taxable costs.] founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; [(1898) 30 Stat. L. 563.]

Costs incurred by creditors in good faith and for the benefit of the estate are usually entitled to priority of payment, and are considered under section 64b (2).

Costs incurred in an attachment suit, prior to the filing of the petition in bankruptcy, are provable. *In re Allen*, (1899)

96 Fed. 512; *In re Lewis*, (1900) 99 Fed. 935.

Costs in a suit against a surety on an appeal bond, where judgment for the plaintiff in the action is rendered prior to the institution of bankruptcy proceedings against the surety, may be proved in those proceedings. *Coe v. Waters*,

(1901) 16 Colo. App. 311, 64 Pac. 1054.

**"Good faith" of creditor—Costs incurred by creditors.**—On review of a referee's order refusing to allow a creditor to prove for costs and expenses incurred in a suit against a bankrupt on the ground that the costs were not incurred in good faith, the court said: "The record, however, which it is assumed, pursuant to the requirement of law, contains all of the relevant testimony to this review, fails to disclose this. The facts are that some time in 1911 the claimants prosecuting this review sued the bankrupt. They seasonably prosecuted their case to judgment, which was signed the early part of January, 1912. Thereafter execution was duly sued out and levied upon the stock of the bankrupt, which was taken into custody by the sheriff. The claimants were proceeding after the proper advertisement to sell the property under execution, when on April 1, 1912, Harnden filed his petition to be adjudicated a bankrupt, which was granted on the same day. It is difficult to see how these facts sustain the imputation of bad faith in incurring these costs. The claimants were simply asserting their legal rights, or, as it is expressed in *Re Beaver Coal Co.*, (D. C.) 107 Fed. 98, 101, they were simply doing what 'they had a right to do.' Under such circumstances they are entitled to their costs. . . . It is said, however, on behalf of the referee's ruling, that the claimants manifestly acted in bad faith, because they knew that Harnden was insolvent, or at least in a failing condition, when they levied their execution. There is no proof to sustain the referee's finding that

claimants knew he was insolvent. The mere fact that they believed him to be in financial straits did not preclude their proceeding to assert their legal rights. The law favors the vigilant, and certainly cannot impute bad faith because creditors, believing those indebted to them to be in close circumstances financially, proceed to attempt a collection of what is due them. Indeed, proceedings to collect a debt are usually the result of a conviction by the creditor that he is otherwise in danger of losing his claim. The referee seems also to have been influenced in his decision by the fact that these costs did not inure to the benefit of the estate. This, however, is no part of the requirements of statute making such costs a provable debt. Such a consideration is germane if there be an attempt to give such a claim priority in the administration of the assets; but here there is no such attempt. The relief sought is simply that these costs may be received as provable claims. . . . Some question is also raised by the referee as to the reasonableness of these costs. There is no proof, however, that they are unreasonable. They are all based upon charges made to the claims by officers of the law. These latter are presumed to do their duty in claiming costs. If the charges made are excessive, the burden was upon the trustee to establish this as against the assessment of costs by the clerk and the sheriff. This he made no attempt to do. Certainly the question as to the reasonableness of a few of the items is no justification for rejecting the claim entirely." *In re Harnden*, (D. C. N. M. 1912) 200 Fed. 172.

(4) [Open account or contract.] founded upon an open account, or upon a contract express or implied; and [(1898) 30 Stat. L. 563.]

**Only debts existing when petition filed.**

—The debts founded upon open account or upon contract, express or implied, that are provable under this section include only such as existed at the time of the filing of the petition in bankruptcy. *Zavelo v. Reeves*, (1913) 227 U. S. 625. 33 S. Ct. 365, 57 U. S. (L. ed.) 676, and other cases cited in the initial note to section 63a preceding clause (1).

**Debt accruing when petition is filed.**—

See *infra*, this note, p. 1069, under catch line *Breach Occasioned by Bankruptcy*, and see *supra*, p. 1056, paragraph *Liability Coincident with Proceedings in Bankruptcy*, in note to section 63a (1).

A claim against a bankrupt indorser of commercial paper, whose liability did not become absolute until after the filing of the petition in bankruptcy, may be proved against his estate after such liability has become fixed, and within the time limited for proving claims. *Moch v. Market St. Nat. Bank*, (C. C. A. 1901) 107 Fed. 897;

*In re Philip Semmer Glass Co.*, (2d Cir. 1905) 135 Fed. 77, 67 C. C. A. 551; *In re Smith*, (D. C. R. I. 1906) 146 Fed. 923, where the court said: "It has been argued that the only reasonable construction which can be given to subdivision 4 of section 63 is that it refers to claims upon which a right of action has accrued at the time of the filing of the petition, and that to construe it as permitting proof of contingent claims is to make subdivision 1 superfluous and useless. It is to be observed, however, that the claims here in question, when proved, were no longer contingent; they had become present liabilities through the fact of non-payment and protest. There is no necessary inconsistency between a class which includes and provides for liabilities owing at the time of filing the petition, whether then payable or not, and a class of liabilities which includes debts which mature after the filing of the petition. It does not follow because contingent liabilities are excluded from the first group of

the classification, that liabilities founded upon express contracts, and which are no longer contingent at the date of proof of such liabilities, are not included within subdivision 4. It does not involve logical inconsistency to hold that subdivision 4 comprehends claims which are expressly excluded from subdivision 1, or even to hold that subdivision 4 includes claims contained within subdivision 1, as well as many others. A series of broadening classes is not unusual, and inclusion of a smaller class in a broader class is not inconsistency. . . . The possibility that some inconsistency or confusion may arise from a conflict between the classifications of section 63a does not seem a sufficient reason for excluding claims which are fixed liabilities of the bankrupt at the date of proof, and which are presented for proof within the time fixed by statute." To the same effect, see *In re Gerson*, (1901) 105 Fed. 891; *In re Schaefer*, (1900) 104 Fed. 973, note at the end of the opinion.

"It may be doubted whether the liability of an indorser in that class of cases is in any true sense contingent. The extent of his liability is at all times known, for it is measured by the note itself. Upon the adjudication of bankruptcy it would seem that there is an end to the contingency that the bankrupt himself may pay the note, and that there remains between that date and the maturity of the indorser's liability nothing but a question of time." *Per* Gilbert, J., in *Colman Co. v. Withoft*, (9th Cir. 1912) 195 Fed. 250, 115 C. C. A. 222.

**Debts created after filing of petition.**—As the rights of creditors of insolvent estates relate in general to the time of the filing of the petition, debts created after such filing but before adjudication are not provable against the estate. *In re Burka*, (1900) 104 Fed. 326.

**Contracts and open accounts—In general.**—Claims founded on an express or implied contract, or on an open account, and which were a fixed liability at the commencement of the bankruptcy proceedings, are provable against the debtor's estate therein under section 63a (4). *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659, *reversing* (1903) 201 Ill. 581, 66 N. E. 833; *Tindle v. Birkett*, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121, *affirming* (N. Y. 1905) 15 Am. Bankr. Rep. 179; *In re Bingham*, (D. C. Vt. 1899) 94 Fed. 796, 2 Am. Bankr. Rep. 223; *Moch v. Market St. Nat. Bank*, (C. C. A. 3d Cir. 1901) 107 Fed. 897, 6 Am. Bankr. Rep. 12; *In re Swift*, (C. O. A. 1st Cir. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 374; *In re Stern*, (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569; *McDonald v. Fefft-Weller Co.*,

(C. C. A. 5th Cir. 1904) 128 Fed. 381, 11 Am. Bankr. Rep. 800; *In re Adams*, (D. C. R. I. 1904) 130 Fed. 788, 12 Am. Bankr. Rep. 367; *In re Arnold*, (E. D. Mo. 1904) 133 Fed. 789, 13 Am. Bankr. Rep. 320; *In re Ladue Tate Mfg. Co.*, (W. D. N. Y. 1905) 135 Fed. 910, 14 Am. Bankr. Rep. 235; *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728; *In re New York Car Wheel Works*, (W. D. N. Y. 1905) 141 Fed. 430; *In re Smith*, (D. C. R. I. 1906) 146 Fed. 923, 17 Am. Bankr. Rep. 112; *In re Edens Co.*, (D. C. S. C. 1907) 151 Fed. 940, 18 Am. Bankr. Rep. 643; *In re James Dunlap Carpet Co.*, (E. D. Pa. 1908) 163 Fed. 541, 20 Am. Bankr. Rep. 882; *In re Camelo*, (N. D. N. Y. 1912) 195 Fed. 632; *Matter of Buffalo Mirror, etc., Co.*, (W. D. N. Y. 1905) 15 Am. Bankr. Rep. 122; *In re The Copper King*, (N. D. Cal. 1906) 16 Am. Bankr. Rep. 150; *Robinson v. Pesant*, (1873) 8 Nat. Bankr. Reg. 426, 53 N. Y. 419.

A creditor indebted to the bankrupt in an amount greater than his claim cannot prove such claim against the estate so long as his debt is unpaid. *In re Gerson*, (1901) 105 Fed. 893.

"If . . . a creditor's debt against the bankrupt is less than the bankrupt's debt against him, the time for a set-off would seem to be when the creditor is sued, and the place the forum in which the suit is brought." *In re Leshner*, (E. D. Pa. 1910) 176 Fed. 650, 652.

The statute recognizes all valid contracts executed prior to the institution of bankruptcy proceedings; and, until impeached upon the ground of fraud or some other valid legal ground, courts of bankruptcy will uphold and enforce them. *In re Edens Co.*, (D. C. S. C. 1907) 151 Fed. 940, 18 Am. Bankr. Rep. 643.

An executory contract will give rise to a provable claim. *In re Stern*, (2d Cir. 1902) 116 Fed. 604, 54 C. C. A. 60; *In re Glick*, (S. D. N. Y. 1911) 184 Fed. 967.

Thus, where a bankrupt contracted to furnish livery and baggage service for a hotel association for a term of years and to pay the association a stipulated sum in monthly installments for the privilege, the court held that the association could prove a claim for damages predicated on the anticipatory breach of the executory contract. *In re Frank E. Scott Transfer Co.*, (C. C. A. 7th Cir. 1914) 216 Fed. 308.

On the proof of a claim arising from an executory contract, the measure of damages must be sought in the contract itself. *In re Glick*, (S. D. N. Y. 1911) 184 Fed. 967.

An unpaid stock subscription against the alleged bankrupt is founded upon a contract and is provable in bankruptcy. *In re Putman*, (N. D. Cal. 1911) 193 Fed. 464.

The contract of a mercantile agency whereby it agrees, in consideration of an



annual fee, to furnish a subscriber with certain books and reports, is provable in bankruptcy for the subscription fee. *Matter of Buffalo Mirror, etc., Co.*, (W. D. N. Y. 1905) 15 Am. Bankr. Rep. 122.

A loan to a bankrupt corporation is a debt provable against the bankrupt notwithstanding that it is evidenced by notes signed in the individual names of the chief officers of the company. *Flower v. Central Nat. Bank*, (C. C. A. 8th Cir. 1915) 223 Fed. 323; *Hogin v. Central Nat. Bank*, (C. C. A. 8th Cir. 1915) 223 Fed. 325.

The contract must be valid and binding; in bankruptcy, as well as elsewhere, contracts which are void or voidable for illegality, *ultra vires*, or other causes, cannot successfully form the basis of a claim. *In re Talbot*, (D. C. Mass. 1901) 110 Fed. 924, 7 Am. Bankr. Rep. 29; *In re Ervin*, (E. D. Pa. 1902) 114 Fed. 596, 7 Am. Bankr. Rep. 480; *In re S. P. Smith Lumber Co.*, (N. D. Tex. 1904) 132 Fed. 618, 13 Am. Bankr. Rep. 118; *In re Waterloo Organ Co.*, (C. C. A. 2d Cir. 1904) 134 Fed. 341, 13 Am. Bankr. Rep. 466.

Thus a contract made by a cotton mill company for the purchase of cotton for deferred delivery at different times, but which also contained a put and call clause, under which the parties had actually settled one loss by the company without any delivery, taken in connection with extrinsic testimony tending to show that no deliveries were intended by the parties, was held to be a gambling contract which the corporation had no power to make and which created no liability provable against its estate in bankruptcy. *In re Etna Cotton Mills*, (D. C. S. C. 1909) 171 Fed. 994, 22 Am. Bankr. Rep. 629.

So, also, it has been held that a contractual obligation which, under the state law, ceases to be binding, is not provable in bankruptcy. *Kenyon v. Mulert*, (C. C. A. 3d Cir. 1911) 184 Fed. 825.

*Effect of bankrupt's fraud.*—A debtor will not be allowed to secure deposits of money by false and fraudulent representations of material facts, and afterwards be heard to say that the depositors shall not recover it on the ground that the ultimate use to be made of the money was to bet on horse races; any other conclusion would permit bankrupts, after successfully swindling the community, to bid defiance to their creditors and enjoy the fruits of their iniquity unrestrained. *In re Arnold*, (E. D. Mo. 1904) 133 Fed. 789, 13 Am. Bankr. Rep. 320.

*Rescinded contract.*—A claim by the vendor of land against a bankrupt purchaser for the balance of the price due, less the value of the land, will not be allowed, where the trustee has delivered and the vendor has accepted a quitclaim deed to the land, the contract of sale to the bankrupt being thereby virtually rescinded. *In re Davis*, (W. D. Pa. 1910) 179 Fed. 871.

A good faith "representation and warranty" made by one joint purchaser of timber to his copurchasers as an inducement to the purchase, as to the quantity of lumber which could be cut from such timber, is not within the rules as to "warranties" in sales of property or insurance contracts to the extent of implying a promise to reimburse his copurchasers for loss on account of the failure of the tract to cut as much as represented, so as to create a liability therefor on an implied contract provable against his estate in bankruptcy under section 63a (4). *Switzer v. Henking*, (C. C. A. 6th Cir. 1908) 158 Fed. 784, 19 Am. Bankr. Rep. 300.

A partnership debt is provable against the bankrupt estate of a partner, though there may be nothing left for partnership creditors after the individual liabilities are paid. *In re Bates*, (1900) 100 Fed. 263.

*Partner's claim against copartner.*—One of the partners having bought up, and had assigned to him, judgments against his firm in favor of certain creditors, he became thereby a creditor of each of the other partners for their individual share of the money which he advanced for such purchase, and could prove a claim for such share against the individual estate of one of the partners. *In re Carmichael*, (1899) 96 Fed. 594.

*Advance to firm by partner.*—A partner who has sold goods or advanced money to the firm cannot, in competition with firm creditors, prove a claim therefor. *In re Ervin*, (1901) 109 Fed. 135.

*Delinquent stockholder's claim against corporation.*—A creditor of a corporation to whose stock he is a subscriber, his subscriptions not being fully paid, cannot, until he has paid what is due on his subscription, prove his claim against the bankrupt estate of the corporation. *In re Wiener, etc., Shoe Co.*, (1899) 96 Fed. 949. See also *In re L. M. Alleman Hardware Co.*, (M. D. Pa. 1909) 172 Fed. 611, reversed on other grounds (1910) 181 Fed. 810, 104 C. C. A. 320.

*Effect of ultra vires transaction.*—In *In re Ervin*, (1902) 114 Fed. 596, a corporation was allowed to prove a debt owing to it by a firm although such corporation had entered into an *ultra vires* partnership contract with such firm, the debt having been contracted before the illegal partnership was formed and by some mistake having been overlooked when the arrangement was entered into.

A creditor who has padded his account, with the intention of thereby obtaining an advantage over other creditors, is not entitled to allowance of any part of his claim. *In re Flick*, (1900) 105 Fed. 503.

*Renting contracts.*—"There can be no doubt but that rent which has accrued prior to the date of filing the petition in bankruptcy may be proved like any other debt." *In re Sherwoods*, (2d Cir. 1913)

210 Fed. 754, 127 C. C. A. 304, Ann. Cas. 1916A 940. To the same point see *In re Arnstein*, (S. D. N. Y. 1899) 101 Fed. 706; *In re Mitchell*, (1902) 116 Fed. 87; *McCann v. Evans*, (1911) 185 Fed. 93, 107 C. C. A. 313; *In re Collignon*, (N. D. N. Y. 1900) 4 Am. Bankr. Rep. 250; *In re Frischknecht*, (C. C. A. 2d Cir. 1915) 223 Fed. 417; *Colman Co. v. Withoft*, (C. C. A. 9th Cir. 1912) 195 Fed. 250; *In re Abrams*, (N. D. Ia. 1913) 200 Fed. 1005; *In re Scruggs*, (S. D. Ala. 1913) 205 Fed. 673; *In re Sapinsky*, (W. D. Ky. 1913) 206 Fed. 523; *In re Caswell-Massey Co.*, (S. D. N. Y. 1910) 208 Fed. 571. See also the cases cited under sections 64b (5) and 67d, as to the right of a landlord to a lien or preferential payment under the law of the state.

The following cases hold that a claim for rent which accrues after the filing of the petition is not a provable debt; *In re Arnstein*, (1899) 101 Fed. 706; *Watson v. Merrill*, (1905) 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719; *In re Roth*, (1910) 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270, *affirming order*, (1909) 174 Fed. 64; *In re Abrams*, (1913) 200 Fed. 1005; *In re Collignon*, (1900) 4 Am. Bankr. Rep. 250; *Shapiro v. Thompson*, (1909) 160 Ala. 363, 49 So. 391; *Scott v. Demarest*, (1912) 75 Misc. 289, 135 N. Y. S. 264. See also *Colman Co. v. Withoft*, (1912) 195 Fed. 250, 115 C. C. A. 222; *In re Scruggs*, (1913) 205 Fed. 673. This rule obtained under the Act of 1867, which provided for a proof of the proportionate part of the rent due up to the time of bankruptcy (the filing of the petition). *In re Commercial Bulletin Co.*, (1876) 2 Woods 220, 6 Fed. Cas. No. 3,060; *Bailey v. Loeb*, (1875) 2 Woods 578, 2 Fed. Cas. No. 739; *Ex p. Houghton*, (1871) 1 Lowell 554, 12 Fed. Cas. No. 6,725; *In re Hufnagel*, (1875) 12 Nat. Bankr. Reg. 554, 12 Fed. Cas. No. 6,837; *In re May*, (1874) 7 Ben. 238, 9 Nat. Bankr. Reg. 419, 16 Fed. Cas. No. 9,325, 47 How. Pr. (N. Y.) 37; *Treadwell v. Marden*, (1877) 123 Mass. 390, 25 Am. Rep. 108; *Deane v. Caldwell*, (1879) 127 Mass. 242.

In the following cases it is held that the date of the adjudication in bankruptcy limits the rent as a provable claim: *In re Jefferson*, (1899) 93 Fed. 948; *In re Mahler*, (1900) 105 Fed. 428; *Atkins v. Wilcox*, (1900) 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118; *In re Hays, etc., Co.*, (1902) 117 Fed. 879; *In re Hinckel Brewing Co.*, (1903) 123 Fed. 942; *In re Rubel*, (1908) 166 Fed. 131. The same was held under former Bankruptcy Acts in the following cases: *In re Webb*, (1872) 6 Nat. Bankr. Reg. 302, 29 Fed. Cas. No. 17,315; *Bosler v. Kuhn*, (1844) 8 Watts & S. (Pa.) 183. See also *Hendricks v. Judah*, (1804) 2 Caines (N. Y.) 25, 2 Am. Dec. 213.

A landlord having a lien or charge for

the rent due him on the property of his tenant at the time of the latter's bankruptcy, but the amount of which was adjudicated, in order to preserve his right to priority must establish his claim by proof under the Bankruptcy Act, the same as other creditors. *In re Hayward*, (E. D. Pa. 1904) 130 Fed. 720, 12 Am. Bankr. Rep. 164.

*Effect of special provisions in lease.*—Where a lease provides that in case the tenant gives up possession before the end of the term he shall pay the landlord the difference between the rent agreed and the rent obtained from another tenant, a claim founded on such provision is not provable against the estate of the tenant in case of bankruptcy. *In re Ellis*, (1900) 98 Fed. 967; *In re Shaffer*, (1903) 124 Fed. 111; *In re Roth*, (1910) 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270, *distinguishing In re Pittsburg Drug Co.*, (1908), 164 Fed. 482; *Slocum v. Soliday*, (1910) 183 Fed. 410, 106 C. C. A. 56; *In re Collignon*, (1900) 4 Am. Bankr. Rep. 50. *Compare In re Caloris Mfg. Co.*, (1910) 179 Fed. 722. The same rule obtained under the Act of 1867. *In re Cronney*, (1875) 8 Ben. 64, 6 Fed. Cas. No. 3,411; *Ex p. Lake*, (1877) 2 Lowell 544, 16 Nat. Bankr. Reg. 497, 14 Fed. Cas. No. 7,991.

Where a landlord has taken advantage of a clause in a lease allowing him to take possession for any breach of the covenants of the lease, he cannot recover rent for that part of the term subsequent to the time he retakes possession. *South Side Trust Co. v. Watson*, (C. C. A. 3d Cir. 1912) 200 Fed. 50.

*Taxes and insurance premiums* which a bankrupt covenanted to pay as a part of his rent, but which at the time of the bankruptcy were not due, nor the amount then capable of ascertainment, are not provable. *In re Pittsburg Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227.

*Damages for the breach of a contract of the bankrupt to pay rents* at times subsequent to the filing of the petition in bankruptcy do not constitute a provable claim, for the same reason that the claim for the rents is not provable. *Watson v. Merrill*, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 454. See also *In re Shaffer*, (D. C. Mass. 1903) 124 Fed. 111, 10 Am. Bankr. Rep. 633.

But see *In re Caloris Mfg. Co.*, (E. D. Pa. 1910) 179 Fed. 722 (*disapproving In re Roth*, (S. D. N. Y. 1909) 174 Fed. 64), wherein it was held that rent accruing subsequently to the filing of the petition in bankruptcy was provable when liquidated as provided in section 63b.

*Breach of contract.*—A claim for damages resulting from the breach of a contractual obligation by the bankrupt is, under section 63a (4), provable against his estate. *In re Manhattan Ice Co.*, (S.

D. N. Y. 1901) 114 Fed. 400, 7 Am. Bankr. Rep. 408, *affirmed* (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569; *In re Stoeber*, (E. D. Pa. 1904) 127 Fed. 394, 11 Am. Bankr. Rep. 345; *In re Frederick L. Grant Shoe Co.*, (C. C. A. 2d Cir. 1904) 130 Fed. 881, 12 Am. Bankr. Rep. 349; *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143; *In re Saxton Furnace Co.*, (E. D. Pa. 1905) 142 Fed. 293, 15 Am. Bankr. Rep. 445; *In re Imperial Brewing Co.*, (W. D. Mo. 1906) 143 Fed. 579, 16 Am. Bankr. Rep. 110; *In re Spittler*, (D. C. Conn. 1907) 151 Fed. 942, 18 Am. Bankr. Rep. 425; *In re National Wire Corp.*, (D. C. Conn. 1909) 166 Fed. 631, 22 Am. Bankr. Rep. 186.

**Inability to perform.**—Where a company which was furnishing its customers ice at so much per ton, payable weekly, under contracts covering a period of several years, broke such contracts, and became unable to continue them in the future, it was held that the claims of the customers for damages sustained by reason of the company's inability to fulfill the executory portions of the contracts were "provable claims" in involuntary bankruptcy proceedings against the company. *In re Stern*, (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569.

**Repudiation of contract of sale.**—Where a bankrupt became insolvent and repudiated a contract which it had entered into for the purchase of machinery, it was held that the seller was entitled to prove its claim against the bankrupt estate for the profit which it would have made on the sale, where such profit can be shown with reasonable certainty. *In re Saxton Furnace Co.*, (E. D. Pa. 1905) 142 Fed. 293, 15 Am. Bankr. Rep. 445.

**Damage accruing in future.**—Where certain claims for breaches of contract were undisputed, it was held that the mere fact that the damages therefrom were to accrue in the future did not prevent them from being provable. *In re Frederick L. Grant Shoe Co.*, (C. C. A. 2d Cir. 1904) 130 Fed. 881, 12 Am. Bankr. Rep. 349, *following In re Stern*, (2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569.

**In *In re Manhattan Ice Co.***, (S. D. N. Y. 1901) 114 Fed. 399, 7 Am. Bankr. Rep. 408, *affirmed* (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569, it appears that an ice company agreed to deliver ice to the petitioning creditors in bankruptcy for specified terms, and at a specified price, and afterwards broke the agreement, and it was held that the loss for the entire term was provable, and not merely the current damages.

**Time of performance in future.**—Where a bankrupt shortly prior to his bankruptcy gave notice to the other party to an executory contract that he would be unable to perform on his part because

of his financial condition, such other party may treat the contract as broken, although the time for performance has not arrived, and prove his claim for damages for the breach against the estate in bankruptcy under section 63a (4). *In re Spittler*, (D. C. Conn. 1907) 151 Fed. 942, 18 Am. Bankr. Rep. 425. See also *Phenix Nat. Bank v. Waterbury*, (1908) 20 Am. Bankr. Rep. 140, 123 App. Div. 453, 108 N. Y. S. 391.

**Breach occasioned by bankruptcy.**—It has been quite generally held that the bankruptcy of one of the contracting parties is, in itself, a sufficient breach of the contract to support a claim against the estate of the party who has been declared bankrupt. *In re Silverman*, (W. D. Mo. 1899) 101 Fed. 219, 4 Am. Bankr. Rep. 83; *In re Swift*, (C. C. A. 1st Cir. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 374; *In re Manhattan Ice Co.*, (S. D. N. Y. 1901) 114 Fed. 399, 7 Am. Bankr. Rep. 408, *affirmed* (C. C. A. 2d Cir. 1902) 116 Fed. 604, 8 Am. Bankr. Rep. 569; *In re Frederick L. Grant Shoe Co.*, (C. C. A. 2d Cir. 1904) 130 Fed. 881, 12 Am. Bankr. Rep. 349, *affirming* (W. D. N. Y. 1903) 125 Fed. 576, 11 Am. Bankr. Rep. 48; *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728; *In re Neff*, (C. C. A. 6th Cir. 1907) 157 Fed. 57, 19 Am. Bankr. Rep. 23; *In re Frank E. Scott Transfer Co.*, (C. C. A. 7th Cir. 1914) 216 Fed. 308, wherein the court, after referring to the diversity of opinion in the various rulings of the District Courts upon the question whether intervention of bankruptcy constitutes a breach for which damages are provable, approved the doctrine upheld in the cases of *In re Swift*, (C. C. A. 1st Cir. 1901) 112 Fed. 315, and *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, above cited, and said: "We are of opinion that these decisions are well founded, both in their definition of the general doctrine referred to and in respect of the instantaneous effect of proceedings in bankruptcy for anticipatory breach of the unperformed contract, unless the trustee in bankruptcy elects performance thereof in the interest of the estate, and that it is equally applicable whether the proceedings are voluntary or involuntary, notwithstanding the distinction in that particular suggested in one or more of the District Court citations. Provability of the claim for damages rests on this instantaneous legal effect of the proceedings, as no subsequent breach can authorize the claim."

**Equivalent of refusal to perform.**—It is not essential to the right to prove a claim against the estate of a bankrupt that it should have existed prior to the bankruptcy; but where the filing of the petition in bankruptcy itself operates as a breach of an executory contract, because equivalent to a refusal to perform,

the other party may prove his claim for damages as one existing at the time of the filing of the petition. *In re Swift*, (C. C. A. 1st Cir. 1901) 112 Fed. 315, 7 Am. Bankr. Rep. 374.

**Equivalent of disenablement and repudiation.**—If a bankrupt, at the time of bankruptcy, by disenablement himself from performing a particular contract, and by repudiating its obligation, could give the other party the right to maintain at once a suit in which damages could be assessed at law or in equity, then such party may prove as a creditor in bankruptcy, on the ground that bankruptcy is the equivalent of disenablement and repudiation. *In re Pettingill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728.

Thus where a bankrupt, prior to the appointment of receivers, had put the claimant to considerable trouble concerning a contract for the sale of wire, and the receivers and the bankruptcy adjudication accomplished a complete breach of the contract, it was held that the claimant was entitled to the allowance of an award of damages therefor in the bankruptcy proceedings. *In re National Wire Corp.*, (D. C. Conn. 1909) 166 Fed. 631, 22 Am. Bankr. Rep. 186.

So, also, it has been held that bankruptcy is such a breach of contract to purchase stock at a stated price and time, which time is subsequent to bankruptcy, that a claim for damages for the breach is a provable debt. *In re Pettigill*, (D. C. Mass. 1905) 137 Fed. 143, 14 Am. Bankr. Rep. 728; *In re Neff*, (C. C. A. 6th Cir. 1907) 157 Fed. 57, 19 Am. Bankr. Rep. 23. See also *In re Swift*, (1st Cir. 1901) 112 Fed. 315, 50 C. C. A. 264.

Where a corporation which, as part consideration for an exclusive license to manufacture under a patent, had contracted to pay the patentee a bonus or royalty on the patented articles sold, with a guaranty of a minimum number during the year, became bankrupt before the end of the year, it was held that the patentee was entitled to prove a claim for the amount of royalty which had accrued up to the time of the bankruptcy at the minimum rate, irrespective of the number of articles actually sold. *In re Dr. Voorhees Awning Hood Co.*, (M. D. Pa. 1911) 187 Fed. 611.

But where the contracting parties cannot be placed *in statu quo*, one who has defaulted in the performance thereof cannot rescind the contract and recover against the other's estate in bankruptcy. *In re Morgantown Tin Plate Co.*, (N. D. W. Va. 1911) 184 Fed. 109.

**Performance rendered impossible.**—In *In re Swift*, (1st Cir. 1901) 112 Fed. 315, 50 C. C. A. 264, it was held that bankruptcy made it impossible to fulfil an agreement to deliver stock, for the reason

that it took the stock from the bankrupt and vested it, with all his property, in his trustee.

**Injured party may prove or not at his election.**—In the case of a contract of sale to be consummated at a future date when the vendee files a petition in bankruptcy prior to that date, the vendor at his election may treat the contract as broken by anticipation and assert and prove his claim in bankruptcy for the damages for the breach, or may ignore the repudiation and wait for the date fixed for the consummation of the sale, tender the goods, and sue for the purchase price. In the latter case the claim is not discharged by a prior adjudication in bankruptcy. *Phenix Nat. Bank v. Waterbury*, (1908) 20 Am. Bankr. Rep. 140, 123 App. Div. 453, 108 N. Y. S. 391. See also *In re Spittler*, (D. C. Conn. 1907) 151 Fed. 942, 18 Am. Bankr. Rep. 425.

**Necessity of present claim for damages.**—But an adjudication of bankruptcy in an involuntary proceeding against a corporation is not of itself a repudiation by the bankrupt of an executory contract by which it agreed to take and pay for a certain quantity of a product to be grown and delivered by the seller in each of a number of future years; nor is it the equivalent of a permanent disenablement to perform the contract, so as to give the seller a present claim for damages for breach, which may be liquidated and proved as a debt of the estate, where the time for performance has not arrived and there has not in fact been any tender of performance on the one part nor refusal nor repudiation on the other. *In re Imperial Brewing Co.*, (W. D. Mo. 1906) 143 Fed. 579, 16 Am. Bankr. Rep. 110; and see to the same effect *Watson v. Merrill*, (8th Cir. 1905) 136 Fed. 363, 69 C. C. A. 185.

Nor can damages be recovered by the seller for the buyer's alleged breach of an executory contract of sale, resulting solely from the buyer's involuntary bankruptcy. *In re Inman*, (N. D. Ga. 1910) 175 Fed. 312, 23 Am. Bankr. Rep. 566.

**Claims for tort.**—"That some torts may be waived and be the basis of provable claims is decided in *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147." *Clarke v. Rogers*, (1913) 228 U. S. 534, 33 S. Ct. 587, 57 U. S. (L. ed.) 953.

Causes of action arising *ex delicto* may be proved in bankruptcy proceedings in all instances where a contractual relationship existed between the parties, and the tort results from a breach of such contract; and, in like manner, a tortious cause of action is provable where the wrong is of such a nature as to permit the waiver thereof, and a recovery in an action sounding in *assumpsit* on an implied contract, and this rule permits proof

of those claims where, on waiver of the tort involved, the law raises an implied contract upon which a recovery is based. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659, reversing (1903) 201 Ill. 581, 66 N. E. 833; *Tindle v. Birkett*, (1907) 205 U. S. 183, 27 S. Ct. 493, 51 U. S. (L. ed.) 762, 18 Am. Bankr. Rep. 121; *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591, 21 Am. Bankr. Rep. 484; *In re Lewensohn*, (S. D. N. Y. 1900) 99 Fed. 73; *In re Brinckmann*, (D. C. Ind. 1900) 103 Fed. 65, 4 Am. Bankr. Rep. 551; *In re Hirschman*, (D. C. Utah 1900) 104 Fed. 69, 4 Am. Bankr. Rep. 715; *In re Filer*, (S. D. N. Y. 1901) 125 Fed. 261, 5 Am. Bankr. Rep. 835, affirming 5 Am. Bankr. Rep. 582; *Mackel v. Rochester*, (D. C. Mont. 1905) 135 Fed. 904, 14 Am. Bankr. Rep. 431; *Barrett v. Prince*, (C. C. A. 7th Cir. 1906) 143 Fed. 302, 16 Am. Bankr. Rep. 64; *Standard Varnish Works v. Haydock*, (C. C. A. 6th Cir. 1906) 143 Fed. 318, 16 Am. Bankr. Rep. 287; *Brown v. United Button Co.*, (C. C. A. 3d Cir. 1906) 149 Fed. 48, 17 Am. Bankr. Rep. 565; *Clingman v. Miller*, (C. C. A. 8th Cir. 1908) 160 Fed. 326, 20 Am. Bankr. Rep. 360; *In re Southern Steel Co.*, (N. D. Ala. 1910) 183 Fed. 498; *In re Coe*, (C. C. A. 2d Cir. 1910) 183 Fed. 745; *Clarke v. Rogers*, (C. C. A. 1st Cir. 1910) 185 Fed. 518; *Burnham v. Pidcock*, (1901) 5 Am. Bankr. Rep. 590, 58 App. Div. 273, 68 N. Y. S. 1007, affirming (1900) 5 Am. Bankr. Rep. 42; *In re Nuttall*, (S. D. N. Y. 1912) 201 Fed. 557; *Reinhardt v. Friederick*, (Ind. 1915) 108 N. E. 258.

**Form of action immaterial.**—If a debt originates or is "founded upon an open account, or upon a contract express or implied," it is provable against the bankrupt's estate, though the creditor may elect to bring his action in trover as for a fraudulent conversion, instead of in assumpsit for a balance due upon an open account. *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659, reversing (1903) 201 Ill. 581, 66 N. E. 833.

A conversion of trust funds creates a liability provable in bankruptcy. *Clarke v. Rogers*, (1913) 228 U. S. 534, 33 S. Ct. 587, 57 U. S. (L. ed.) 953, affirming (C. C. A. 1st Cir. 1910) 183 Fed. 518.

Bankruptcy Courts allow proof of debts founded upon "a contract express or implied," a construction sufficiently broad to include a quasi contract arising upon a conversion where the tort has been waived. *Reynolds v. New York Trust Co.*, (C. C. A. 1st Cir. 1911) 188 Fed. 611.

**Right of independent action for tort immaterial.**—A claim on a warranty, as such, is necessarily a claim arising out of a contract, and is provable in bankruptcy even if, in case of actual fraud, there

might be an independent claim purely in tort. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591, 21 Am. Bankr. Rep. 484. See also *In re Coe*, (S. D. N. Y. 1909) 169 Fed. 1002, 22 Am. Bankr. Rep. 384.

A claim arising out of a conversion by stockbrokers of shares purchased and held by them on a customer's account, charging him with commission and interest, and crediting him with amounts received as margins, is provable under section 63a, as a debt "founded upon an open account, or upon a contract express or implied." *Crawford v. Burke*, (1904) 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, 12 Am. Bankr. Rep. 659.

**Conversion by partnership.**—The rule which permits the owner of property converted to waive the tort and recover the value of the property as on an implied contract is based on the ground that defendant's estate has been unjustly enriched by the conversion; and where it was by a partnership, and inured to the benefit of the firm estate, whatever implied contract arises is that of the firm, and not of an individual partner, and the owner of the property, after having proved his claim against the partnership estate as one of contract, is not entitled to prove it against the individual estate of a partner, which would have the effect of giving them an advantage over creditors having express contracts with the firm. *Reynolds v. New York Trust Co.*, (C. C. A. 1st Cir. 1911) 188 Fed. 611.

**Claimant cannot split demand.**—Where a creditor filed a claim with the trustee for goods sold and delivered under a contract, but not for the value of goods obtained by fraud, it was held that he thereby elected to affirm the contract, and that he could not subsequently split his demand so as, at the same time, to file a claim for a return of a part of the goods sold which remained in the bankrupt's possession at the time of the filing of his petition. *In re Hildebrandt*, (N. D. N. Y. 1903) 120 Fed. 992, 10 Am. Bankr. Rep. 184. See also *Silvey v. Tift*, (1905) 17 Am. Bankr. Rep. 9, 123 Ga. 804, 51 S. E. 748.

**Mere torts not provable.**—Where, however, a claim arising *ex delicto* does not involve a breach of contract, but is a mere tort which may not be waived so as to recover on an assumpsit, it is not provable in bankruptcy proceedings. *In re Hirschman*, (D. C. Utah 1900) 104 Fed. 69, 4 Am. Bankr. Rep. 715; *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25; *In re Southern Steel Co.*, (N. D. Ala. 1910) 183 Fed. 498; *Clarke v. Rogers*, (C. C. A. 1st Cir. 1910) 183 Fed. 518; *In re Friedman*, (E. D. Wis. 1908) 21 Am. Bankr. Rep. 213. And see the cases cited under subdivision b of this section 63.

*A statutory penalty for cutting trees* cannot be said to be the measure of the implied contract, and, for that reason, is not within the class of claims arising out of torts that are provable, but the actual value of the trees converted would constitute a provable claim. *In re Southern Steel Co.*, (N. D. Ala. 1910) 183 Fed. 498.

*A cause of action for deceit*, not having been reduced to "a fixed liability as evidenced by a judgment," within section 63a (1) is not a provable debt. *Talcott v. Friend*, (1909) 179 Fed. 676, 103 C. C. A. 80, 43 L. R. A. (N. S.) 649, judgment affirmed in (1913) 228 U. S. 27, 33 S. Ct. 505, 57 U. S. (L. ed.) 718.

**Contingent claims.**—The claim urged under a contract, express or implied, must have resulted in a fixed liability at the time of the filing of the petition in bankruptcy; a claim depending on a contingency is not provable. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 145; *In re Ellis*, (D. C. Mass. 1900) 98 Fed. 967, 3 Am. Bankr. Rep. 564; *In re Arnstein*, (S. D. N. Y. 1899) 101 Fed. 706, 4 Am. Bankr. Rep. 246; *In re Mahler*, (E. D. Mich. 1900) 105 Fed. 428, 5 Am. Bankr. Rep. 457; *In re Shaffer*, (D. C. Mass. 1903) 124 Fed. 111, 10 Am. Bankr. Rep. 633; *Watson v. Merrill*, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 453; *In re Ellis*, (C. C. A. 6th Cir. 1906) 143 Fed. 103, 16 Am. Bankr. Rep. 221; *In re Imperial Brewing Co.*, (W. D. Mo. 1906) 143 Fed. 579, 16 Am. Bankr. Rep. 110; *In re Pittsburgh Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227; *In re Collignon*, (N. D. N. Y. 1900) 4 Am. Bankr. Rep. 250; *Clemmons v. Brinn*, (N. Y. 1901) 7 Am. Bankr. Rep. 714; *In re Jorolemon-Oliver Co.*, (C. C. A. 2d Cir. 1914) 213 Fed. 625; *Evans v. Lincoln Co.*, (1903) 10 Am. Bankr. Rep. 401, 204 Pa. St. 448, 54 Atl. 321.

"It is held by the decided weight of authority that subdivisions 1 and 4 of section 63a of the Bankruptcy Act are *in pari materia*, and that the words 'absolutely owing at the time of the filing of the petition against him' are to be read into subdivision 4." *Colman Co. v. Withoft*, (C. C. A. 9th Cir. 1912) 195 Fed. 250.

**Contingent claims.**—A claim arising out of the contract of two lessees, jointly liable for rent, whereby one, the bankrupt, agreed to reimburse the other for all the payments which it might make in excess of one-half of the rental, and to pay it one-half of such sum as it might be required to pay in gross, not to exceed \$100 per month for the unexpired term, to obtain a rescission of the lease, was held not to be provable against the estate, where it appeared that after the petition was filed the other lessee paid the interest that had accrued and also paid a sum for the cancellation of the lease. *Colman Co. v. Withoft*, (C. C. A. 9th Cir. 1912) 195 Fed.

250, wherein the court said: "At the time when the petition was filed, not only was the bankrupt not indebted to the appellant, but it could not then be known that he ever would be indebted to it, either for money to be paid for rent or for money to be paid for the rescission of the lease. As far as the rent was concerned, there were the contingencies that the lessee might cancel the lease, or that the trustee in bankruptcy might elect to pay the rent, or that the appellant might fail to pay more than its half thereof. As to the agreement looking to a rescission of the lease, there were the contingencies that the agreement, which was without consideration, might be revoked by either party thereto before it was acted upon, or that it might be impossible to secure rescission on the terms stipulated by the bankrupt."

In the case of *In re Lyons Beet Sugar Refining Co.*, (W. D. N. Y. 1911) 192 Fed. 445, it was held that the referee should have allowed a claim of a surety on an appeal bond under the following circumstances. The bankrupt was adjudicated on June 21, 1910, and the disallowed claim was filed with the referee on September 13, 1911, more than one year subsequent to the adjudication. At the time the petition in bankruptcy was filed there was pending a suit against the bankrupt in the Supreme Court of the state, and a judgment had been affirmed by the Appellate Division, from which an appeal was taken by the bankrupt to the Court of Appeals; the claimant becoming surety for costs on the appeal bond. The decision of the Appellate Division was affirmed, and thereupon the surety filed a claim for the costs against the bankrupt estate, which he had paid as surety on the bond. The trustee objected to proving the claim, on the grounds (1) that it was not filed within one year after the adjudication, as required by section 57n; and (2) that it was not "a fixed liability absolutely owing," under section 63a. The referee was of the opinion that the claim was not liquidated by litigation, and therefore it could not be proved under section 57n. On these facts the court said: "Taking into consideration section 63, subd. 1, of the Bankruptcy Act, in connection with subdivision 4, I think that the claim was provable as one founded 'upon contract express or implied,' and the language of subdivision 1, i. e., 'fixed liability absolutely owing,' does not limit the broad term of subdivision 4."

*A claim depending on the continuance of widowhood*, because of the innate difficulty, if not impossibility, of estimating or valuing the contingency, has been rejected. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084.

"As future installments of wages are conditional in their nature, being dependent upon performance of the services to

be rendered, so no claim for such installments is provable in bankruptcy." *In re Montague*, (S. D. N. Y. 1914) 212 Fed. 452. To the same point see *D. Levy & Sons Co.*, (D. C. Md. 1913) 208 Fed. 479.

Although the Bankruptcy Act of 1841 gave the right to prove "uncertain and contingent" demands the Supreme Court held that so long as it remained uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and the uncertainty was not removable by calculation, such contract or engagement was not provable. *Riggin v. Maguire*, (1872) 15 Wall. 549, 21 U. S. (L. ed.) 232. To the same point see *Reed v. Pierce*, (1853) 36 Me. 455, 58 Am. Dec. 761; *Pogue v. Joyner*, (1845) 6 Ark. 241, 42 Am. Dec. 693. But as to the latter case see *Lipscomb v. Grace*, (1870) 26 Ark. 231, 7 Am. Rep. 607. See under the Bankruptcy Act of 1867. *Wight v. Gottschalk*, (Ann. 1897) 48 S. W. 140, 43 L. R. A. 189.

**Claim of surety on bond.**—The plaintiff in an action was, at the date of the defendant's filing his petition in bankruptcy, surety on the defendant's bond, and the defendant was under obligation to reimburse the plaintiff for any amount he might have to pay. There being no breach of the bond until some months after such

filing, the claim was not provable, and therefore was not barred by defendant's discharge. *Goding v. Rosenthal*, (1901) 180 Mass. 43, 61 N. E. 222.

A surety on an injunction bond given to secure the damages and costs occasioned by the injunction is not released by his discharge in bankruptcy before the suit for injunction is determined, for until then there is not a contingent liability but merely a contingency whether there ever will be a liability, which is incapable of liquidation in the bankruptcy court. *Eastman v. Hibbard*, (1874) 54 N. H. 504, 20 Am. Rep. 157, decided under the Bankruptcy Act of 1867, although the act expressly permitted the proof of contingent demands.

**Contingent liability subsequently made definite.**—But a contractual liability of a bankrupt, which was contingent at the time the petition was filed, but became definite and capable of liquidation within the year allowed for making proof, is provable against the estate. *In re James Dunlap Carpet Co.*, (E. D. Pa. 1908) 163 Fed. 541, 20 Am. Bankr. Rep. 882, following *Moch v. Market St. Nat. Bank*, (3d Cir. 1901) 107 Fed. 897, 47 C. C. A. 49. And see also the cases cited under subdivision b of this section.

(5) [Judgment after filing of petition.] founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments. [(1898) 30 Stat. L. 563.]

#### Judgments recovered after adjudication.

—Where a creditor holding a valid and provable debt against a bankrupt at the date of the adjudication, thereafter, and before the bankrupt's discharge, recovers judgment thereon against the bankrupt's estate, such judgment, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry thereof, may be proved in the bankruptcy proceedings under section 63a (5). *In re McBryde*, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729; *In re James Dunlap Carpet Co.*, (E. D. Pa. 1908) 163 Fed. 541, 20 Am. Bankr. Rep. 882, following *Moch v. Market St. Nat. Bank*, (3d Cir. 1901) 107 Fed. 897, 47 C. C. A. 49; *In re Kranich*, (E. D. Pa. 1910) 182 Fed. 849; *In re Pinkel*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 333. See also *Rosenthal v. Nove*, (1900) 175 Mass. 559, 58 N. E. 884, 78 A. S. R. 512.

If a suit antedate the adjudication, this section allows it to be prosecuted to judgment; and reasons may readily exist to make even a postdated suit desirable, e. g., to avoid the possible bar of the statute of

limitations, or to liquidate the claim, or to fix a secondary liability on another person. *Chase v. Farmers' & Merchants' Nat. Bank of Commerce*, (C. C. A. 3d Cir. 1913) 202 Fed. 904.

**Time for proof not extended.**—Section 63a (5) does not alter or control the time in which the debts mentioned therein must be presented for proof and allowance under section 57n; nor does the fact that, during such time, the creditor was asserting and litigating a preference preventing him from making proof, extend the time. *In re Leibowitz*, (1901) 108 Fed. 617.

**Effect of judgment after bankruptcy.**—The reduction of a claim to judgment after bankruptcy establishes the claim and stops the running of the statute of limitations, but it will not give the creditor a lien or priority nor entitle him to levy on the bankrupt's property. *In re McBryde*, (E. D. N. C. 1899) 99 Fed. 686, 3 Am. Bankr. Rep. 729.

In an action for breach of promise of marriage a judgment, recovered after the filing of the petition in bankruptcy and before the bankrupt applied for discharge,

is provable under section 63b. *In re Fife*, (W. D. Pa. 1901) 109 Fed. 880, 6 Am. Bankr. Rep. 258.

An action under an employer's liability Act to recover damages for a personal injury alleged to have been caused by the master's negligence is one sounding in

tort, and not one based upon the contract of employment; and a judgment recovered in such an action, brought after the defendant had been adjudged a bankrupt, is not provable against the estate. *In re Crescent Lumber Co.*, (S. D. Ala. 1907) 154 Fed. 724, 19 Am. Bankr. Rep. 112.

**b [Unliquidated claims.]** Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate. [(1898) 30 Stat. L. 563.]

**Claims capable of liquidation and proof**—*In general.*—Under section 63b any unliquidated claim which at the time of the filing of the petition in bankruptcy was provable as within the enumeration of provable claims set out in section 63a in its several subdivisions may be liquidated and proved against the bankrupt estate. But unliquidated claims which are not provable debts under section 63a cannot be liquidated or proved under section 63b. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139; *In re Hirschman*, (D. C. Utah 1900) 104 Fed. 69, 4 Am. Bankr. Rep. 715; *In re Marcus*, (C. C. A. 1st Cir. 1901) 105 Fed. 907, 5 Am. Bankr. Rep. 365; *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365, 8 Am. Bankr. Rep. 69; *In re United Button Co.*, (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390; *Brown v. United Button Co.*, (C. C. A. 3d Cir. 1906) 149 Fed. 48, 9 Ann. Cas. 445, 17 Am. Bankr. Rep. 565; *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25; *In re Pittsburg Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227; *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566; *In re Roth*, (C. C. A. 2d Cir. 1910) 181 Fed. 667; *In re Southern Steel Co.*, (N. D. Ala. 1910) 183 Fed. 498; *In re Filer*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 582; *Matter of John Wigmore, etc., Co.*, (S. D. Cal. 1903) 10 Am. Bankr. Rep. 664; *In re American Vacuum Cleaner Co.*, (D. C. N. J. 1911) 192 Fed. 939; *Pratt v. Auto Spring Repairer Co.*, (C. C. A. 1st Cir. 1912) 196 Fed. 495; *Cotting v. Hooper*, (1905) 220 Mass. 273, 107 N. E. 931.

Section 63b adds nothing to the class of debts which may be proved under paragraph a of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63a, to be liquidated as the court may direct. *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 23 S. Ct. 757, 47 U. S. (L. ed.) 1084, 10 Am. Bankr. Rep. 139; *In re Roth*, (1910) 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270.

As contradistinguished from the paragraph which precedes it, section 63b is

concerned with the mere matter of procedure, directing how a provable claim which is open and unsettled may be liquidated and made certain; and whether taken by itself, or with reference to the immediate context, this is the natural, if not the only, construction to be given to it. *Brown v. United Button Co.*, (C. C. A. 3d Cir. 1906) 149 Fed. 48, 9 Ann. Cas. 445, 17 Am. Bankr. Rep. 565; *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25.

An unliquidated claim by a former partner of the bankrupt, arising out of the partnership, is within this section. *In re Hirth*, (D. C. Minn. 1911) 189 Fed. 926.

Taxes and insurance premiums which a bankrupt agrees to pay as part of the rent are not such unliquidated claims against the bankrupt as can be proved under section 63b. *In re Pittsburg Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227.

Liquidation does not necessitate allowance.—But, although a claim has been liquidated, its allowance in bankruptcy does not follow as a necessary consequence. *Powell v. Leavitt*, (C. C. A. 1st Cir. 1907) 150 Fed. 89, 18 Am. Bankr. Rep. 10.

Liquidation of claims for tort.—A claim arising *ex delicto*, if founded on contract express or implied, may be proved in bankruptcy proceedings, and the cases to this effect have been collected under subdivision a (4) of this section. But a claim for tort, which does not result from the breach of a contract, or which may not be waived so as to warrant a recovery on an implied contract, cannot be liquidated or proved against a bankrupt's estate under section 63b, for the reason that such a claim is not a provable one under section 63a. *Beers v. Hanlin*, (D. C. Ore. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re Hirschman*, (D. C. Utah 1900) 104 Fed. 69, 4 Am. Bankr. Rep. 715; *In re Morales*, (S. D. Fla. 1901) 105 Fed. 761; *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365; *In re Filer*, (S. D. N. Y. 1901) 125 Fed. 261, 5 Am. Bankr. Rep. 835; *In re United Button Co.*, (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390, affirmed (C. C. A. 3d Cir. 1906) 149 Fed. 48, 9 Ann. Cas. 445, and note; *In re Cres-*



cent Lumber Co., (S. D. Ala. 1907) 154 Fed. 724, 19 Am. Bankr. Rep. 112; *In re New York Tunnel Co.*, (C. C. A. 2d Cir. 1908) 159 Fed. 688, 20 Am. Bankr. Rep. 25; *Pindel v. Holgate*, (C. C. A. 9th Cir. 1915) 221 Fed. 342. See also *In re Marcus*, (1900) 104 Fed. 331, where the court said: "Probably the unliquidated claims mentioned in subsection b are those claims already mentioned in subsection a which have not been liquidated." *In re Brinckmann*, (D. C. Ind. 1900) 4 Am. Bankr. Rep. 551; *Matter of John Wigmore, etc., Co.*, (S. D. Cal. 1903) 10 Am. Bankr. Rep. 664; *Zimmer v. Schleeauf*, (1874) 115 Mass. 52; *Gilman v. Cate*, (1884) 63 N. H. 278; *Winfree v. Jones*, (1905) 104 Va. 39, 51 S. E. 153.

*Injury to property.*—A claim for unliquidated damages resulting from injury to the property of another, not connected or growing out of any contractual relation, is not provable in bankruptcy, under the existing law. *Brown v. United Button Co.*, (C. C. A. 3d Cir. 1906) 149 Fed. 48, 9 Ann. Cas. 445, 17 Am. Bankr. Rep. 565, *affirming* (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390.

An unliquidated claim for damages against the defendant for having negligently permitted a certain house to be burned while it was in his possession as tenant to the plaintiff, is a claim *ex delicto*, and is not provable in bankruptcy. *Winfree v. Jones*, (1905) 104 Va. 39, 51 S. E. 153.

*Injury to person.*—A right of action for damages for an assault and battery, not reduced to judgment nor otherwise liquidated under direction of the court, is not a debt or demand provable in bankruptcy. *Beers v. Hanlin*, (D. C. Ore. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re Brinckmann*, (D. C. Ind. 1900) 4 Am. Bankr. Rep. 551.

A cause of action for unliquidated damages for a wilful and malicious injury to the person of the claimant is not a claim provable in bankruptcy. *In re Yates*, (N. D. Cal. 1902) 114 Fed. 365.

A cause of action for negligent injury to the person, being an unliquidated claim for damages, is not provable in bankruptcy. *Imbriani v. Anderson*, (1912) 76 N. H. 491, 84 Atl. 974.

A claim for damages alleged to have been caused by the negligence of a master in failing to furnish safe appliances has been held to be incapable of liquidation under section 63b. *Matter of John Wigmore, etc., Co.*, (S. D. Cal. 1903) 10 Am. Bankr. Rep. 661.

*Fraud.*—It has been held that where an employee, by forgery and other devices, has fraudulently secured possession of various sums of money belonging to his employer, the employer may waive the tort and treat the claim as moneys had and received for the use of the employer, which claim, although unliquidated, is provable

in bankruptcy. *In re Filer*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 582.

A claim against a government contractor for coal furnished a subcontractor, and which in effect amounts to a suit on the contractor's bond, cannot be proven in bankruptcy in view of the provisions of the Act of Congress of February 24, 1905, ch. 778, 32 Stat. L. 811, in title PUBLIC CONTRACTS, which provides for a suit on a contractor's bond to recover for labor or materials furnished a contractor in the construction of public works. *In re Hawley*, (W. D. Wash. 1912) 194 Fed. 751, where the court said: "There is no other way in which claims against the obligors can be liquidated, and an unliquidated claim is not provable against the estate of a bankrupt."

*Claim of divorced wife.*—Where, by statute, a wife who is granted a divorce from her husband "shall be entitled to one-third of her husband's personal property absolutely," such interest, after a divorce suit is begun, but before decree, is not a provable claim against her husband's estate. *Hawk v. Hawk*, (1900) 102 Fed. 679.

*Necessity of liquidation.*—An unliquidated claim of such a nature as to be provable under section 63a must, before it may be so proved, first be liquidated as provided for in section 63b. *In re Heinsfurter*, (S. D. Ia. 1899) 97 Fed. 198, 3 Am. Bankr. Rep. 113; *Beers v. Hanlin*, (D. C. Ore. 1900) 99 Fed. 695, 3 Am. Bankr. Rep. 745; *In re Silverman*, (W. D. Mo. 1899) 101 Fed. 219, 4 Am. Bankr. Rep. 83; *In re Morales*, (S. D. Fla. 1901) 105 Fed. 761; *In re Big Meadows Gas Co.*, (W. D. Pa. 1902) 113 Fed. 974, 7 Am. Bankr. Rep. 697; *In re E. T. Kenney Co.*, (D. C. Ind. 1905) 136 Fed. 451, 14 Am. Bankr. Rep. 611; *In re Pittsburg Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227; *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566; *Talcott v. Friend*, (C. O. A. 7th Cir. 1909) 179 Fed. 676.

*Claim for damages.*—A bankrupt's landlord is not entitled to file a claim for damages, sustained by an alleged unlawful taking of the premises by the bankrupt's receiver and trustee, until the damages have been liquidated by such means as the court may direct on a petition therefor. *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566.

*Claim partly unliquidated.*—Where the claim of a petitioning creditor, although made up of different elements, is based upon a single written instrument and the nonperformance of its covenants by the alleged bankrupt, it must be treated under the Bankruptcy Act as a single claim; and where some of the elements are confessedly unliquidated, the claim as a whole is an unliquidated one, and subject to the limitations incident to a claim of that character. *In re Big Meadows Gas Co.*, (W.

D. Pa. 1902) 113 Fed. 974, 7 Am. Bankr. Rep. 697.

**Manner of liquidation.**—Application to the court for an order directing the manner of liquidating the claim should be made before presenting the claim for allowance before the referee. *In re Silverman*, (1899) 101 Fed. 219; *In re Heinsfurter*, (1899) 97 Fed. 198.

Under the power conferred on the court to direct the manner in which unliquidated claims against a bankrupt may be liquidated, ample authority exists for the adoption of any procedure appropriate to the particular case, whether it be submission to a jury on an issue of fraud, or production of evidence before the referee, or some other method. *In re United Button Co.*, (D. C. Del. 1906) 140 Fed. 495, 15 Am. Bankr. Rep. 390.

A referee has power in the case of an unliquidated claim to order full specifications of the crucial item therein as one step in the proceedings for the liquidation of the amount alleged to be due.

*In re Henry Siegel Co.*, (D. C. Mass. 1914) 223 Fed. 368.

Claims may be liquidated by hearing before the referee, by a plenary suit in a court of competent jurisdiction, or by permitting an action pending in any court to proceed to judgment. *In re Buchan's Soap Corp.*, (S. D. N. Y. 1909) 169 Fed. 1017, 22 Am. Bankr. Rep. 382. See also *In re Rouse*, (N. D. Ohio 1898) 1 Am. Bankr. Rep. 393.

So, also, it has been held that a claim may be liquidated by agreement or arbitration if the trustee consents, or by suit, as the court, or the referee, if the case has been referred, shall direct. *In re Heim Milk Product Co.*, (N. D. N. Y. 1910) 183 Fed. 787.

**Disability of holder of unliquidated claim.**—One who has a claim which cannot be liquidated is not a creditor and cannot maintain an involuntary petition in bankruptcy prior to the liquidation of his claim. See cases cited in note to section 59b, *supra*, p. 992, paragraph *Creditors Holding Unliquidated Claims*.

**SEC. 64. DEBTS WHICH HAVE PRIORITY.**—**a [Taxes.]** The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court. [(1898) 30 Stat. L. 563.]

**What constitutes claim for taxes—Question for federal courts.**—Whether or not a particular claim is one for taxes within the contemplation of section 64a of the Bankruptcy Act, and, as such, entitled to priority of payment, is a question for the ultimate determination of the federal courts. *New Jersey v. Anderson*, (1906) 203 U. S. 483, 491, 27 S. Ct. 137, 140, 51 U. S. (L. ed.) 284, 17 Am. Bankr. Rep. 63; *In re Otto F. Lange Co.*, (N. D. Ia. 1908) 159 Fed. 586, 20 Am. Bankr. Rep. 478. *In re Heffron Co.*, (N. D. N. Y. 1914) 216 Fed. 642.

If the highest court of a state should decide that a given statute of that state imposed no "tax" within the meaning of the law as interpreted by it, a federal court would not compel the state to accept a preference from the bankrupt's estate, under section 64a under a different view of the law. On the other hand, a state court cannot conclusively decide that to be a tax within the meaning of section 64a, which is not so in fact. *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284.

If the legislature of a state gives the name "tax" to an exaction which is not a tax, and if the courts of the state join in the misnomer, the bankruptcy courts

are not required to disregard the substance of the thing, to the detriment of the other claimants. The state courts may authoritatively expound the substance, and the federal courts will adopt such exposition; but whether the substance constitutes a tax or not is independent of the name. And, moreover, the latter part of section 64a seems to direct the Bankruptcy Courts to determine independently of the "legality of any such tax." *In re Cosmopolitan Power Co.*, (C. C. A. 7th Cir. 1905) 137 Fed. 858, 14 Am. Bankr. Rep. 604. See also *In re Ott*, (S. D. Ia. 1899) 95 Fed. 274, 2 Am. Bankr. Rep. 637.

But the construction placed upon a state statute by the state courts is entitled to careful and weighty consideration. *In re Ott*, (S. D. Ia. 1899) 95 Fed. 274, 2 Am. Bankr. Rep. 637.

An "annual license fee or franchise tax" imposed by a state upon a domestic corporation for the privilege of existence and the continued right to exercise its franchise, may constitute a tax within the meaning of section 64a even if the corporation has no property in the state, and does no business there. *New Jersey v. Anderson*, (1906) 203 U. S.

483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284.

The word "tax," as used in the Bankruptcy Act, is not used in any restricted or narrow sense, but is used broadly to include all obligations imposed by the state and general government under their respective taxing or police powers for governmental or public purposes. That a tax so imposed may not be a general property tax does not deprive it of the character of a tax. Many taxes are imposed under the name of license fees, franchise taxes, or taxes for special purposes under some other name, and are therefore special taxes; but they are nevertheless taxes imposed for a public purpose, no matter what the name under which they are levied or imposed, and are clearly within the meaning of the term "tax" as used in the Bankruptcy Act. *In re Otto F. Lange Co.*, (N. D. Ia. 1908) 159 Fed. 586, 20 Am. Bankr. Rep. 478.

Taxes are not debts. They are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some states an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284, 17 Am. Bankr. Rep. 63.

Taxes become "legally due and owing" on the day they are assessed within the meaning of the statute. *In re Flynn*, (D. C. Mass. 1905) 134 Fed. 145, 13 Am. Bankr. Rep. 720.

Taxes assessed on returns made prior to the adjudication are legally due and owing and entitled to the preference given by section 64a although not collectible until after the adjudication. *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284, 17 Am. Bankr. Rep. 63.

"It does not follow that taxes are not due and owing from the citizen because they are not debts upon the one hand, or because the state has prescribed some method exclusive in its character for their collection." *Hecox v. Teller County*, (C. C. A. 8th Cir. 1912) 198 Fed. 634. See also *In re Wenatchee Heights Orchard Co.*, (W. D. Wash. 1914) 212 Fed. 787.

Taxes entitled to priority.—Taxes legally due and owing by the bankrupt to the United States, or to any state, county, district, or municipality, are entitled to priority of payment under the express provisions of section 64a. *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284, 17 Am. Bankr. Rep. 63; *In re Tilden*, (S. D. Ia. 1899) 91 Fed. 500, 1 Am. Bankr. Rep.

300; *In re Hollenfeltz*, (N. D. Ia. 1899) 94 Fed. 629, 2 Am. Bankr. Rep. 499; *In re Conhaim*, (D. C. Wash. 1900) 100 Fed. 268, 4 Am. Bankr. Rep. 59; *In re Keller*, (N. D. Ia. 1901) 109 Fed. 131, 6 Am. Bankr. Rep. 334; *In re Green*, (N. D. Ia. 1902) 116 Fed. 118, 8 Am. Bankr. Rep. 558; *In re Sims*, (W. D. Ga. 1902) 118 Fed. 356, 9 Am. Bankr. Rep. 162; *Swarts v. Hammer*, (C. C. A. 8th Cir. 1903) 120 Fed. 256, 9 Am. Bankr. Rep. 691; *In re Harvey*, (E. D. Pa. 1903) 122 Fed. 745, 10 Am. Bankr. Rep. 587; *In re Stalker*, (W. D. N. Y. 1903) 123 Fed. 961, 10 Am. Bankr. Rep. 709; *Waco v. Bryan*, (C. C. A. 5th Cir. 1904) 127 Fed. 79, 11 Am. Bankr. Rep. 481; *Cooper Grocery Co. v. Bryan*, (C. C. A. 5th Cir. 1904) 127 Fed. 815, 11 Am. Bankr. Rep. 734; *In re Brinker*, (W. D. N. Y. 1904) 128 Fed. 634, 12 Am. Bankr. Rep. 122; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680; *In re Flynn*, (D. C. Mass. 1905) 134 Fed. 145, 13 Am. Bankr. Rep. 720; *Chattanooga v. Hill*, (C. C. A. 6th Cir. 1905) 139 Fed. 600, 15 Am. Bankr. Rep. 195; *In re Kallak*, (D. C. N. D. 1906) 147 Fed. 276, 17 Am. Bankr. Rep. 414; *In re Fisher*, (D. C. N. J. 1906) 148 Fed. 907, 17 Am. Bankr. Rep. 404; *In re Weiss*, (S. D. N. Y. 1908) 159 Fed. 295, 20 Am. Bankr. Rep. 247; *In re Otto F. Lange Co.*, (N. D. Ia. 1908) 159 Fed. 586, 20 Am. Bankr. Rep. 478; *In re Wyoming Valley Ice Co.*, (M. D. Pa. 1908) 165 Fed. 789, 21 Am. Bankr. Rep. 1; *In re Scheidt*, (S. D. Ohio 1908) 177 Fed. 599, 23 Am. Bankr. Rep. 778; *In re Weissman*, (D. C. Conn. 1910) 178 Fed. 115; *In re Baker*, (E. D. Tex. 1899) 1 Am. Bankr. Rep. 526. And see to the same effect *In re Tilden*, (S. D. Ia. 1899) 1 Am. Bankr. Rep. 300; *Matter of Hilberg*, (W. D. Pa. 1901) 6 Am. Bankr. Rep. 714; *In re Barr Plumbing Engine Co.*, (E. D. Pa. 1904) 11 Am. Bankr. Rep. 312; *In re Flatau*, (S. D. N. Y. 1909) 21 Am. Bankr. Rep. 352. *Stanard v. Dayton*, (C. C. A. 8th Cir. 1915) 220 Fed. 441.

The significance of section 64a, as applied to a municipality, is that a claim for taxes is paramount to all other claims, because of the pecuniary needs and requirements of the municipality, and so as to relieve the general taxpayers from the payment of an unfair proportion of taxes. Some seemingly unjust features may be presented by the application of the stringent provisions relating to priorities, but as the law is plain and singularly free from ambiguity, it is obvious that Congress intended that the statute should be strictly construed and applied, unless the facts disclose unjust or prejudicial results. *In re Brinker*, (W. D. N. Y. 1904) 128 Fed. 634, 12 Am. Bankr. Rep. 122.

Tax accruing during bankruptcy.—The Bankruptcy Act does not withdraw the

estates of bankrupts from the reach of the taxing powers, and they are subject, in consequence, to the payment of taxes imposed while they are in the hands of the trustees, the same as if they were not. Even though accruing after bankruptcy, taxes must be regarded as within the meaning of the statute, and entitled to priority, the same as those which antedated it. *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675; *In re Flynn*, (D. C. Mass. 1905) 134 Fed. 145; *Stanard v. Dayton*, (C. C. A. 8th Cir. 1915) 220 Fed. 441; *In re Crowell*, (D. C. Mass. 1912) 199 Fed. 659.

The statute does not make funds in the hands of trustees in bankruptcy exempt from taxation, and the courts will order the trustees to pay all taxes which might have been assessed and collected had not bankruptcy supervened, and to which similar property in the same locality is subject. *In re Sims*, (W. D. Ga. 1902) 118 Fed. 356; *Swarts v. Hammer*, (C. C. A. 8th Cir. 1903) 120 Fed. 256, *affirmed* (1904) 194 U. S. 441, 24 S. Ct. 695, 48 U. S. (L. ed.) 1060.

In *In re Conhaim*, (D. C. Wash. 1900) 100 Fed. 268, the court said: "The manifest intent of the law is that, while the estate is in the hands of the trustee, his custody shall not constitute a barrier to prevent the collection of taxes which would be collectible under the law if the property had remained in the possession and control of the bankrupt himself."

**Necessity of property coming into trustee's possession.**—A city's claim against a bankrupt for taxes assessed against him is entitled to priority of payment by the trustee, though the property on which the taxes were levied never came into the hands of the trustee. But in such case the city is not entitled to a lien on the bankrupt's assets for the payment of such taxes. *Waco v. Bryan*, (C. C. A. 5th Cir. 1904) 127 Fed. 79, 11 Am. Bankr. Rep. 481; *Chattanooga v. Hill*, (C. C. A. 6th Cir. 1905) 139 Fed. 600, 15 Am. Bankr. Rep. 195. And see the next following paragraph.

**Tax on exempt property.**—A claim for a tax upon the bankrupt's property, even though the whole or part of the tax is upon property that is exempt by the laws of the state in which the bankrupt resides, and although, as a consequence, the property does not come into the custody of a court of bankruptcy, may be paid out of the proceeds of other property in the hands of the trustee; and the state or city to which the taxes are due is not required to collect its claim from the exempt property. *In re Baker*, (E. D. Tex. 1899) 1 Am. Bankr. Rep. 526. And see to same effect *In re Tilden*, (S. D. Ia. 1899) 91 Fed. 500, 1 Am. Bankr.

Rep. 300; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680.

**Accumulated taxes.**—All taxes which were collectible from the bankrupt prior to his bankruptcy must be paid, and it is immaterial that, through the negligence of the officers charged with their collection, taxes have accumulated until the aggregate amount with interest will absorb all or a large part of the estate. *In re Weissman*, (D. C. Conn. 1910) 178 Fed. 115.

**Assessments for local improvements.**—A city is entitled to preference in the payment of assessments levied for local improvements, as "taxes" within the meaning of section 64a. *In re Stalker*, (W. D. N. Y. 1903) 123 Fed. 961, 10 Am. Bankr. Rep. 709.

**The franchise tax or license fee imposed by a state upon corporations organized under its laws is a "tax" within the meaning of section 64a of the Bankruptcy Act.** *In re Halsey Electric Generator Co.*, (D. C. N. J. 1909) 23 Am. Bankr. Rep. 401. And see to the same effect *New Jersey v. Anderson*, (1906) 203 U. S. 483, 27 S. Ct. 137, 51 U. S. (L. ed.) 284, 17 Am. Bankr. Rep. 64; *In re Clark Coal, etc., Co.*, (W. D. Pa. 1909) 173 Fed. 658, 22 Am. Bankr. Rep. 843; *In re Mutual Mercantile Agency*, (S. D. N. Y. 1902) 8 Am. Bankr. Rep. 435.

**Water rents due to a municipality, which are levied on property annually as a tax and made a lien in like manner, are "taxes" which a trustee in bankruptcy is required to pay when levied against property of the estate in his possession.** *In re Industrial Cold Storage, etc., Co.*, (E. D. Pa. 1908) 163 Fed. 390, 20 Am. Bankr. Rep. 904.

But the contractual obligation of the bankrupt to pay water rent, primarily due by another person, cannot be regarded as within the statute as entitled to priority of payment. *In re Broom*, (W. D. N. Y. 1903) 123 Fed. 639, 10 Am. Bankr. Rep. 427.

In the case of *In re Hills*, (C. C. A. 2d Cir. 1915) 221 Fed. 260, the court held that when the petitioner, claiming that the amount due to the city for water was a tax payable by the trustee under this section before any other claims, knew by a provision in the lease that if the tenant failed to pay for water, the sum not paid would be added to the rent, the obligation, not being a tax, but merely a debt, could not be regarded as within the statute, as entitled to priority given to taxes.

**Personal tax.**—A personal tax due and owing to a municipality is a "debt" within the meaning of the Bankruptcy Act. *Matter of Flatau*, (S. D. N. Y. 1909) 21 Am. Bankr. Rep. 352.

**Partnership tax.**—Under a state statute which provides that "any individual

of a partnership is liable for the taxes due from the firm," it has been held that taxes levied against a firm become an individual debt of a partner, and, by virtue of section 64a, must be paid from his estate in bankruptcy as a preferred claim. *In re Green*, (N. D. Ia. 1902) 116 Fed. 118, 8 Am. Bankr. Rep. 553.

**Tax on cigarette dealers.**—In *In re Otto F. Lange Co.*, (N. D. Ia. 1908) 159 Fed. 586, 20 Am. Bankr. Rep. 478, it was held that a tax imposed on cigarette dealers was within the meaning of the statute, and entitled to priority of payment.

**But a liquor license**, although designated a tax, does not come within the provisions of section 64a, and is not entitled to the priority therein given to taxes. *In re Ott*, (S. D. Ia. 1899) 95 Fed. 274, 2 Am. Bankr. Rep. 637.

**Interest on tax claims.**—It has been held that interest due on tax claims is recoverable therewith. *In re Kallak*, (D. C. N. D. 1906) 147 Fed. 276, 17 Am. Bankr. Rep. 414.

But see *In re Fisher*, (D. C. N. J. 1906) 148 Fed. 907, 17 Am. Bankr. Rep. 404, where it was held that section 64a does not provide for the payment of interest on taxes.

**A penalty for the nonpayment of taxes**, recoverable under the state law in lieu of interest, is collectible as part of the tax. *In re Scheidt*, (S. D. Ohio 1908) 177 Fed. 599, 23 Am. Bankr. Rep. 778; *Stanard v. Dayton*, (C. C. A. 8th Cir. 1915) 220 Fed. 441.

**Taxes due under lease.**—A claim for taxes assessed by a municipality against property of which a bankrupt was lessee, and which by his lease he contracted to pay, is not entitled to preference of payment as taxes legally owing by the bankrupt. *In re Broom*, (W. D. N. Y. 1903) 123 Fed. 639, 10 Am. Bankr. Rep. 427.

**Tax not due by bankrupt.**—An account settled by state officers against a bankrupt corporation on account of taxes imposed on its bonds, and due by the bondholders, is not a tax due from the bankrupt entitled to priority of payment. *In re Wyoming Valley Ice Co.*, (M. D. Pa. 1906) 145 Fed. 267, 16 Am. Bankr. Rep. 594.

**Taxes erroneously claimed.**—The court of bankruptcy may disallow such part of a tax as may have been assessed on nontaxable or nonexistent property, even if regularly assessed and beyond dispute under the state law. *In re Otto Freund Arnold Yeast Co.*, (E. D. N. Y. 1910) 178 Fed. 305.

**Bonus required for increase of stock.**—A bonus exacted by a state from a corporation for the privilege of increasing its capital stock is not a tax entitled to priority, but is a debt based on a contractual relationship, provable and entitled to a *pro rata* distribution with

general creditors. *In re York Silk Mfg. Co.*, (M. D. Pa. 1911) 188 Fed. 735.

**Obligation to collect taxes.**—The statutory duty of a corporation, through its treasurer, to collect from the holders of its obligations a tax of four mills, by deducting it from the interest due them, is not a tax on the corporation, and an account settled therefor by the state officers is not entitled to a priority in the distribution under the Bankrupt Law. *In re York Silk Mfg. Co.*, (M. D. Pa. 1911) 188 Fed. 735.

**Penalties imposed on a corporation for failure to return an increase of capital stock**, file reports, etc., are not taxes within the meaning of any law, and are not entitled to priority under the Bankruptcy Act, and cannot be allowed except for the amount of the pecuniary loss sustained by the act or transaction out of which the penalty arose. A penalty is a fine or punishment or forfeiture, and does not become an obligation until imposed by lawful authority, and the penalties so imposed on the corporation are different from penalties for nonpayment of taxes, the latter being exacted in lieu of interest, while those on the corporation are by way of punishment. *In re York Silk Mfg. Co.*, (M. D. Pa. 1911) 188 Fed. 735.

**Claim against tax collector.**—An indebtedness of a bankrupt for taxes collected by him as county tax collector, and not accounted for, or which should have been collected, and for which he is liable under the law of the state, is not one for "taxes." *In re Waller*, (D. C. Md. 1905) 142 Fed. 883, 15 Am. Bankr. Rep. 753. See also *Moore v. Green*, (C. C. A. 4th Cir. 1906) 145 Fed. 480, 16 Am. Bankr. Rep. 648.

**Order of priority.**—In *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, it was said that taxes, as a class, are at the head of everything, even above the expense of preserving the estate and the cost of administration. And see to the same effect *Chattanooga v. Hill*, (C. C. A. 6th Cir. 1905) 139 Fed. 600, 15 Am. Bankr. Rep. 195; *In re Weiss*, (S. D. N. Y. 1908) 159 Fed. 295, 20 Am. Bankr. Rep. 247.

And in *In re Brinker*, (W. D. N. Y. 1904) 128 Fed. 639, 12 Am. Bankr. Rep. 122, it was said that the significance of section 64a, as applied to a municipality, is that a claim for taxes is paramount to all other claims, because of the pecuniary needs and requirements of the municipality, and so as to relieve the general taxpayers from the payment of an unfair proportion of taxes.

But it has also been held that state taxes are not entitled to priority of payment over the actual and necessary cost of preserving the estate subsequent to the filing of the petition. *New Jersey v. Lovell*, (C. C. A. 3d Cir. 1910) 179 Fed.

321; *In re Halsey Electric Generator Co.*, (D. C. N. J. 1909) 23 Am. Bankr. Rep. 401.

In the case of *In re Oxley*, (W. D. Wash. 1913) 204 Fed. 826, on the peculiar facts there shown, a referee's order, denying an application of a county for the payment of certain taxes for the years 1910 and 1911, to the exclusion of the costs of administration of the bankrupt estate, was affirmed. The court said: "The authorities on the general question of whether state and county taxes are to be preferred to the costs and expenses of administration do not appear to be uniform. . . . The bankruptcy statute directs the court, in making provision for the payment of claims, to order the trustee to pay all taxes 'legally due and owing by the bankrupt to the United States, state, county, district or municipality, in advance of the payments of dividends to creditors.' In construing this statute, no sufficient reason appears for disregarding principles of equity, which are to be applied generally in bankruptcy proceedings."

**Payment of taxes from proceeds of sale.**—Where real property belonging to a bankrupt's estate is sold by authority of the court, and produces a fund larger than the liens for municipal taxes on such property, these taxes must be paid before any dividends are allowed in favor of the general creditors. *In re Harvey*, (E. D. Pa. 1903) 122 Fed. 745, 10 Am. Bankr. Rep. 567. See also *In re Veitch*, (D. C. Conn. 1900) 101 Fed. 251, 4 Am. Bankr. Rep. 112; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 680. In *Citizens' Sav. Bank v. Paducah*, (1914) 159 Ky. 583, 167 S. W. 870, the court said: "A sale free of liens does not affect a lien in the nature of a tax assessment against the property, but in such a case the trustee should protect the purchaser by providing for the payment of taxes."

In *In re Keller*, (N. D. Ia. 1901) 109 Fed. 131, it was held that the sale of a stock of goods in bankruptcy proceedings does not affect a statutory lien for state taxes previously assessed against the same, but the court suggests that it is the duty of the trustee, in order to protect the purchaser, to provide for the payment of such taxes out of the remainder of the estate.

Where, however, the property has been sold subject to taxes, the tax claims are not entitled to priority of payment from the bankrupt's estate. *In re Stalker*, (W. D. N. Y. 1903) 123 Fed. 961, 10 Am. Bankr. Rep. 709. See also *In re Hollenfeltz*, (N. D. Ia. 1899) 94 Fed. 629, 2 Am. Bankr. Rep. 499.

Section 64a does not prevent the purchaser, as between himself and the trustee, from taking upon his own shoulders the duty of paying taxes; and liens for mu-

nicipal claims and taxes are "incumbrances" within a sale of the bankrupt's property "under and subject to the incumbrances, respectively, hereinbefore mentioned," the petition for sale referring to "unpaid taxes" and "municipal claims." *In re Gerry*, (1902) 112 Fed. 958.

But the foreclosure of an equity of redemption in certain lands by a city, under its charter provisions, to recover unpaid city taxes, in which the land was struck off to the city for less than the amount due, does not deprive the city of its right to priority of payment of the balance due on such taxes from the owner's estate in bankruptcy. *In re Stalker*, (W. D. N. Y. 1903) 123 Fed. 961, 10 Am. Bankr. Rep. 709.

**Taxes on mortgaged estate.**—Where the bankrupt's real estate was mortgaged for more than its value, and was also subject to a tax lien which, by the state laws, had priority to the claim of the mortgage, and the land was sold to the mortgagee, whose claim for deficiency was proved and allowed against the estate, the court declined to order the taxes paid out of the estate, since this would prejudice the general creditors and favor the mortgagee, and the taxes were, at any rate, secured. *In re Veitch*, (1900) 101 Fed. 251.

**Subrogation as to tax claims.**—*Purchasers* of lands on which taxes are due are not, on the payment of such taxes by them, entitled to be subrogated to the right of the municipality to priority of payment. *In re Harvey*, (E. D. Pa. 1903) 122 Fed. 745, 10 Am. Bankr. Rep. 567; *In re Broom*, (W. D. N. Y. 1903) 123 Fed. 639, 10 Am. Bankr. Rep. 427; *Cooper Grocery Co. v. Bryan*, (C. C. A. 5th Cir. 1904) 127 Fed. 815, 11 Am. Bankr. Rep. 734; *In re Brinker*, (W. D. N. Y. 1904) 128 Fed. 634, 12 Am. Bankr. Rep. 122; *In re M. I. Hibbler Mach. Supply Co.*, (W. D. N. Y. 1912) 192 Fed. 741.

Section 64a must be strictly construed when it would inure to the benefit of a particular creditor and not to a municipality. *In re Broom*, (W. D. N. Y. 1903) 123 Fed. 639, 10 Am. Bankr. Rep. 427.

**Payment of taxes by remainderman.**—It has been held that a remainderman, who was charged with and paid a tax due by the life tenant, has an equitable claim upon the funds in the trustee's hands according to the doctrine of subrogation. *In re Force*, (D. C. Mass. 1899) 4 Am. Bankr. Rep. 114.

**Proof of tax claims.**—Taxes due from a bankrupt do not constitute a claim against his estate to be proved like those of creditors; but it is the duty of the court to direct the payment of such taxes together with such penalties or interest as have accrued thereon under the laws of the state to the time of actual payment. *In re Harvey*, (E. D. Pa. 1903) 122 Fed. 745, 10 Am. Bankr. Rep. 567; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546,

12 Am. Bankr. Rep. 679; *In re Kallak*, (D. C. N. D. 1906) 147 Fed. 276, 17 Am. Bankr. Rep. 415; *In re Fisher*, (D. C. N. J. 1906) 148 Fed. 907, 17 Am. Bankr. Rep. 404; *In re Cleanfast Hosiery Co.*, (S. D. N. Y. 1900) 4 Am. Bankr. Rep. 702.

**Duty of trustee to pay taxes.**—It has been held that it is the duty of the trustee to pay, in advance of dividends, all taxes due and owing by the bankrupt, including taxes assessed upon mortgaged property which the trustee has relinquished to the mortgage creditors. *Chattanooga v. Hill*, (C. C. A. 6th Cir. 1905) 139 Fed. 600, 3 Ann. Cas. 237 (and see note at p. 238). See also *Waco v. Bryan*, (C. C. A. 5th Cir. 1904) 127 Fed. 79.

It has been held that where taxes on property sold by the trustee in bankruptcy are assessed against the purchaser, but are properly chargeable to the trustee, the court will not, on petition of the purchaser, order the trustee to pay them, but will direct the trustee to have the prop-

erty assessed in his name, as trustee, and to pay the amount to the proper official. *In re Conhaim*, (D. C. Wash. 1900) 100 Fed. 268.

**Property in hands of trustee.**—It is the duty of the trustee to pay the taxes assessed or becoming due on the property of the bankrupt while in his hands for administration, and he is not relieved from such duty by the fact that the taxes were allowed to remain unpaid until the property was sold, by consent of the court of bankruptcy, under a decree of foreclosure in a state court. *In re Fisher*, (D. C. N. J. 1906) 148 Fed. 907, 17 Am. Bankr. Rep. 404.

**Tax on exempt property.**—The trustee must pay out of the estate in his hands taxes legally assessed and due on the homestead of the bankrupt, and constituting a lien thereon at the time of the adjudication, although such homestead has been set apart to the bankrupt as exempt under the Act. *In re Tilden*, (S. D. Ia. 1899) 91 Fed. 500, 1 Am. Bankr. Rep. 300.

**b [Order of payment.]** The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be [(1898) 30 Stat. L. 563.]

(1) **[Cost of preserving estate.]** the actual and necessary cost of preserving the estate subsequent to filing the petition; [(1898) 30 Stat. L. 563.]

**Cost of preserving estate—In general.** The actual and necessary cost of preserving the estate subsequent to the filing of the petition is, under section 64b (1) entitled to priority of payment. What items shall be allowed as such cost is purely a question for the determination of the court in the exercise of a sound judicial discretion. *In re Youdelman-Walsh Foundry Co.*, (E. D. N. Y. 1909) 166 Fed. 381, 21 Am. Bankr. Rep. 609; *In re Alaska Fishing, etc., Co.*, (W. D. Wash. 1909) 167 Fed. 875, 21 Am. Bankr. Rep. 685; *In re Hughes*, (D. C. N. J. 1909) 170 Fed. 809, 22 Am. Bankr. Rep. 303; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1001, 22 Am. Bankr. Rep. 860. And see to the same effect the following earlier cases: *Sellers v. Bell*, (C. C. A. 5th Cir. 1899) 94 Fed. 801, 2 Am. Bankr. Rep. 543; *In re Allen*, (N. D. Cal. 1899) 96 Fed. 512, 3 Am. Bankr. Rep. 38; *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414; *In re Scott*, (E. D. N. C. 1900) 99 Fed. 404, 3 Am. Bankr. Rep. 625; *In re Little River Lumber Co.*, (W. D. Ark. 1900) 101 Fed. 558, 3 Am. Bankr. Rep. 682; *In re Goldville Mfg. Co.*, (D. C. S. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 557; *In re J. H. Alison Lumber Co.*, (S. D. Ga. 1905) 137 Fed. 643, 14 Am. Bankr. Rep. 78; *In re Pattee*, (D. C. Conn. 1906) 143 Fed. 994, 16 Am. Bankr. Rep. 450; *In re Gerson*, (E. D. Pa. 1899) 1 Am.

Bankr. Rep. 251; *Matter of Burke*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 502; *Matter of National Mercantile Agency*, (S. D. N. Y. 1903) 11 Am. Bankr. Rep. 451; *Matter of Harson Co.*, (D. C. R. I.) 11 Am. Bankr. Rep. 514; *Knittel v. McGowan*, (E. D. Pa. 1905) 14 Am. Bankr. Rep. 209; *Matter of Hutchinson Co.*, (E. D. Mich. 1905) 14 Am. Bankr. Rep. 518; *In re Mitchell*, (C. C. A. 2d Cir. 1914) 212 Fed. 932, holding that the trustee should have paid whatever was due the caretakers or watchmen employed in preserving the estate before making payments of debts incurred in recovering property transferred or concealed and the cost of the administration, including reasonable attorney's fees, and that where he had disbursed substantially all the assets of the estate before paying the debts incurred for such preservation, he would have to stand the loss personally for his improvident payments.

**An attaching creditor** was allowed priority for his reasonable expenses in storage of property attached prior to the qualification of the trustee. *In re Allen*, (1899) 96 Fed. 512.

**Order of priority.**—See cases cited under this caption in the note to section 64a, *supra*, p. 1079, as to priority of taxes over cost of preserving the estate.

**Priority over liens.**—Where property in custody of the Bankruptcy Court is, by its consent, turned over to the marshal in

admiralty, and sold in suits to enforce maritime liens, the proceeds are subject to the payment of the necessary cost incurred by the Bankruptcy Court in preserving the property before it was turned over and the costs of administration; and such costs are entitled to priority over the admiralty liens. *In re Hughes*, (D. C. N. J. 1909) 170 Fed. 809, 22 Am. Bankr. Rep. 303.

Secured creditors of a bankrupt, who make use of the Bankruptcy Court and its officers to realize on their security, may be required to contribute their proportion to the costs of the proceedings and for the preservation of the property during their pendency, where there is not sufficient unencumbered estate. *In re J. H. Alison Lumber Co.*, (S. D. Ga. 1905) 137 Fed. 643, 14 Am. Bankr. Rep. 78.

Trustee's commissions are necessary costs of preserving the estate, and fall under section 64b (1). *In re Weiss*, (S. D. N. Y. 1908) 159 Fed. 295, 20 Am. Bankr. Rep. 247.

Expense incurred by a trustee in bankruptcy in caring for real estate which is subject to valid mortgages is presumed to be for the protection of the supposed interest of general creditors, and unless the mortgagees expressly or by necessary implication assent to such expenditures they cannot, in general, be charged with them. *In re Vulcan Foundry, etc., Co.*, (C. C. A. 3d Cir. 1910) 180 Fed. 671.

Care of property by bankrupt.—Where a bankrupt who has an interest in growing crops omits to list the same in his schedule of assets, not from any fraudulent design, but because he was advised that they would not pass to his trustee, and completes their cultivation and harvesting after his adjudication in bankruptcy, and is then ordered to surrender the proceeds of their sale to the trustee, he will be allowed a reasonable compensation for work and care bestowed from the date of the adjudication. *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414.

But a bankrupt is not entitled to reimbursement for his expenses in taking care of exempt property pending its being set off to him. *In re Groves*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 728.

Fees of state court receiver.—A state court has no authority to encumber the assets of the bankrupt by a judgment fixing the fees of a receiver who had charge of the property and directing that the assets be not delivered to the trustee in bankruptcy until the allowances thus made are paid. *In re Rogers*, (1902) 116 Fed. 437.

The amount of receiver's certificates, authorized by a court of bankruptcy to raise money required for the purpose of preserving property of the estate, represents an expenditure for the benefit of all

parties in interest, and is entitled to priority of payment from the proceeds of such property. *In re Alaska Fishing, etc., Co.*, (W. D. Wash. 1909) 167 Fed. 875, 21 Am. Bankr. Rep. 685.

"The rejection of charges against a receiver in bankruptcy for expenses incurred under receiver's orders or contracts looking to the care or preservation of the bankrupt's estate is within the discretion of the Bankruptcy Court and no appeal lies therefrom under the Bankruptcy Law." *O'Brien v. Ely*, (C. C. A. 5th Cir. 1912) 195 Fed. 64.

An intervening creditor opposing an involuntary petition, who is unsuccessful in that proceeding and subjected to costs, should not be charged with the cost of preserving the bankrupt's estate during his contest if, under the circumstances, it is inequitable so to charge him; and such cost should be borne by the estate. *In re Carolina Cooperage Co.*, (1899) 96 Fed. 604.

Wages earned in preservation of estate.—*In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689, it was said: "Under the Bankruptcy Law of the United States every laborer who actually labors under the authority of the court for the preservation or enhancement of the fund or property *in custodia legis* is entitled as to that estate to an equitable lien equivalent in effect to that of a *bona fide* purchaser without notice. To express it otherwise, a laborer who by order of the court is employed on property in the hands of the court, as to the existent values in hand, will be paid by the court for the value of his services rendered to that property to which the liens of the creditors attach, and for the benefit of which his services were rendered."

Claim of assignee for creditors for preserving estate.—An assignment for the benefit of creditors, fairly made and intended to facilitate the equal distribution of the insolvent's property among his creditors, without any attempt to defraud or embarrass persons to whom he was indebted, is not so contrary to the policy of the Bankruptcy Act as to preclude the assignee from recovering for disbursements and services made for the benefit and preservation of the estate prior to the filing of the bankrupt's petition. See cases cited in note to section 63a (1), and see *In re Mays*, (1902) 114 Fed. 600, holding however, that the latter are not preferred claims. See also *In re Peter Paul Book Co.*, (1900) 104 Fed. 786; *In re Tatum*, (1901) 112 Fed. 50; *Stearns v. Flick*, (1900) 103 Fed. 919; *In re Stubbs*, (1870) 4 Nat. Bankr. Reg. 376, 23 Fed. Cas. No. 13,557; *Burkholder v. Stump*, (1871) 28 Leg. Int. (Pa.) 125, 4 Fed. Cas. No. 2,165; *MacDonald v. Moore*, (1876) 8 Ben. (U. S.) 579, 16 Fed. Cas. No. 8,763.



But in *In re Peter Paul Book Co.*, (W. D. N. Y. 1900) 104 Fed. 786, 5 Am. Bankr. Rep. 105, it was held that no allowance can be made by a court of bankruptcy to an assignee under a general assignment

for services rendered as custodian of the property prior to the filing of a petition in bankruptcy against the assignor, even though such services appear to have been for the benefit of the general creditors.

(2) **[Filing fees — expense of recovering concealed assets.]** the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; [(Amended 1903 excepting pending cases) 32 Stat. L. 800.]

This clause (2) as originally enacted read as follows:

"(2) The filing fees paid by creditors in involuntary cases;" [30 Stat. L. 563.] In 1903 it was amended "so as to read as" in the text.

The petitioning creditors are entitled to have returned to them from the estate the \$25 filing fee deposited by them with the clerk. *In re Silverman*, (1899) 97 Fed. 325; *In re J. W. Harrison Mercantile Co.*, (1899) 95 Fed. 123.

The expense of recovering concealed or transferred property by creditors for the benefit of the estate was provided for by the amendment of 1903. *In re Felson*, (N. D. N. Y. 1905) 139 Fed. 275, 15 Am. Bankr. Rep. 188; *In re Goldberg*, (D. C. Me. 1906) 144 Fed. 566, 16 Am. Bankr. Rep. 521; *In re Medina Quarry Co.*, (W. D. N. Y. 1910) 182 Fed. 509. See also *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815, affirmed (C. C. A. 2d Cir. 1900) 5 Am. Bankr. Rep. 320 (decided prior to the enactment of the amendment).

**Recognition of creditor's right to recover property for estate.**—Section 64b (2) of the Bankruptcy Act, as amended, clearly recognizes the right of a creditor to institute proceedings to recover, for the benefit of the estate of the bankrupt, property transferred by him either before or after the filing of the petition, and the Act makes no distinction as to the character of the transfer, whether it be one involving actual fraud, an intent to hinder, delay, or defraud the creditors of the bankrupt, which the law declares to be null and void, or a constructive fraud, which the law declares to be fraudulent without inquiring into its motive. *Frost v. Latham*, (S. D. Ala. 1910) 181 Fed. 866.

(3) **[Cost of administration — attorney's fees.]** the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; [(1898) 30 Stat. L. 563.]

As to

Expenses of administration generally, see section 62.

Payments to attorneys in contemplation of filing petition, see section 60d.

The proper expenses of the trustee and referee are entitled to priority as costs of administration. *In re Tebo*, (D. C. W. Va. 1900) 101 Fed. 419, 4 Am. Bankr. Rep. 235; *Matter of Burke*, (N. D. Ohio 1901) 6 Am. Bankr. Rep. 502. And see the annotation under section 62.

Costs of discharge proceedings.—In *In re Brundin*, (1901) 112 Fed. 306, the court

held that section 64b (3) is the only authority in the Act for the allowance of attorney's fees; and these are allowed as part of "the cost of administration," the administration ending when the estate is reduced to money, the dividends paid, and the estate closed; neither opposing creditors nor bankrupts being entitled to have the costs or expenses of the contest in respect to the discharge of the bankrupts paid from the estate administered.

Costs of reference.—In *In re Todd*, (1901) 109 Fed. 265, a claimant in an unsuccessful controversy with the trustee was taxed with the costs of the references,

including a reasonable fee for the referee, a docket fee of twenty dollars to the successful attorney, and the fee of a stenographer under section 38a (5), not exceeding, however, in the absence of any agreement, ten cents per folio for reporting and transcribing his notes.

**Costs of examination.**—In *In re Rozinsky*, (1900) 101 Fed. 229, it was held, under the circumstances, that the expenses of an examination of the bankrupt must be borne by the creditors who caused it to be held, and not by the estate.

**Fees to expert witnesses** over and above the statutory amount of one dollar and fifty cents a day for actual attendance will not be allowed in bankruptcy proceedings; nor will an agreement by counsel, especially where it is not in writing, affect the question. *In re Carolina Cooperage Co.*, (1899) 96 Fed. 604.

**Costs of attachment proceedings.**—The adjudication of the debtor as a bankrupt having dissolved the attachment lien, there is no lien upon his property for the costs and disbursements incurred by the creditor on such suit, and the court will not make an order for the payment by the trustee out of the estate of the amount thereof. *In re Young*, (1899) 96 Fed. 606. See also *In re Beaver Coal Co.*, (1901) 107 Fed. 98, and *In re Allen*, (1899) 96 Fed. 512, where it was held that the costs and expenses of attachment proceedings were not entitled to priority.

**Damages and costs in replevin suit.**—In *In re Neely*, (1901) 108 Fed. 371, it was held that the costs of a replevin suit in the state court should be paid in full from the bankrupt estate, but that the judgment for damages for detention was, under the circumstances, entitled to no preference over other claims against the bankrupt. *In re Neely*, (1901) 108 Fed. 371.

**The cost of notifying creditors** of an application for discharge is included in the cost of administration. *In re Hatcher*, (W. D. Tex. 1906) 145 Fed. 658, 16 Am. Bankr. Rep. 722.

**Cost of continuing business.**—Where a general assignee for creditors, after an adjudication of bankruptcy against his assignor, with the approval of the referee, continued in the management of the bankrupt's business until the appointment of a trustee, and conducted the same successfully, it was held that he was entitled to payment for his services rendered during such time, and the trustee should also be required to pay bills properly and legitimately contracted by him in the conduct of the business after the adjudication, but not those previously made. *In re Pattee*, (D. C. Conn. 1906) 143 Fed. 994, 16 Am. Bankr. Rep. 450.

**Expense of carrying out contracts.**—Expenditures made by a receiver and trustee of a bankrupt's estate for the sole benefit of general creditors, in carrying out

contracts of the bankrupt which were thought to be profitable, are not costs of administration within the meaning of section 64b (3). *In re Bourlier Cornice, etc., Co.*, (W. D. Ky. 1905) 133 Fed. 958, 13 Am. Bankr. Rep. 585.

**The reasonable rent** of a store containing the bankrupt's property, from the time the trustee takes possession until the settlement of the estate, may be allowed an expense of administration. *In re Abrams*, (N. D. Ia. 1913) 200 Fed. 1005.

**Attorney fees allowed.**—An attorney fee is provable and entitled to priority (1) when the services were rendered to the petitioning creditors in involuntary cases; (2) where the services are rendered to the bankrupt in involuntary cases while performing the duties prescribed by the Act; and (3) when the services of an attorney are really necessary and required by a receiver or trustee in the performance of their duties in the care and administration of the bankrupt estate. Such fees are to be allowed as part of the expense of the care and preservation of the estate, and are confined to services rendered during the bankruptcy proceedings. *In re Standard Fuller's Earth Co.*, (S. D. Ala. 1911) 186 Fed. 578. And see to the same effect *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1; *In re Stotts*, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641; *In re Scott*, (N. D. Tex. 1899) 96 Fed. 607, 2 Am. Bankr. Rep. 324; *Smith v. Cooper*, (C. C. A. 5th Cir. 1903) 120 Fed. 230, 9 Am. Bankr. Rep. 755; *In re Rosenthal*, (E. D. Mo. 1902) 120 Fed. 848, 9 Am. Bankr. Rep. 626; *In re Lang*, (W. D. Tex. 1904) 127 Fed. 755, 11 Am. Bankr. Rep. 794; *In re McCracken*, (W. D. Tenn. 1904) 129 Fed. 621, 12 Am. Bankr. Rep. 95; *In re Zier*, (C. C. A. 7th Cir. 1905) 142 Fed. 102, 15 Am. Bankr. Rep. 646, *affirming* (D. C. Ind. 1904) 127 Fed. 399, 11 Am. Bankr. Rep. 527; *In re Young*, (E. D. N. C. 1906) 142 Fed. 891, 16 Am. Bankr. Rep. 106; *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; *In re Payne*, (E. D. N. Y. 1907) 151 Fed. 1018, 18 Am. Bankr. Rep. 192, *reversed* on other grounds (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332; *In re Claussen*, (D. C. S. C. 1908) 164 Fed. 300, 21 Am. Bankr. Rep. 34; *In re Southern Steel Co.*, (N. D. Ala. 1909) 169 Fed. 702, 22 Am. Bankr. Rep. 476; *In re Christianson*, (D. C. N. D. 1910) 175 Fed. 867, 23 Am. Bankr. Rep. 710; *In re Medina Quarry Co.*, (W. D. N. Y. 1910) 182 Fed. 509; *Matter of Meis*, (W. D. Ky. 1907) 18 Am. Bankr. Rep. 104; *Matter of Berkowitz*, (D. C. N. J. 1908) 22 Am. Bankr. Rep. 236. See also note to section 62a.

**Services rendered to bankrupt.**—See also cases cited in note to section 62a.

**In voluntary cases.**—It has been held that the services of an attorney rendered

to a voluntary bankrupt in the necessary performance of the bankrupt's statutory duties are entitled to priority of payment. *In re Kross*, (S. D. N. Y. 1899) 96 Fed. 816, 3 Am. Bankr. Rep. 187; *Matter of Hitchcock*, (D. C. Hawaii 1906) 17 Am. Bankr. Rep. 664.

But no attorneys' fee can be allowed in voluntary proceedings, except upon proof of services actually rendered to the bankrupt, in doing the things which the law requires of him. *In re Terrill*, (D. C. Vt. 1900) 103 Fed. 781.

It has also been held that the attorney for a voluntary bankrupt is not entitled to priority of payment out of the estate. *In re Beck*, (S. D. Ia. 1899) 92 Fed. 889, 1 Am. Bankr. Rep. 535; *In re Stotts*, (S. D. Ia. 1899) 93 Fed. 438, 1 Am. Bankr. Rep. 641. See also *In re Anderson*, (1900) 103 Fed. 855, where an attorney's fee of \$90 was allowed.

It is presumed that the attorney for a voluntary bankrupt arranges with his client for the prepayment of the ordinary fees; but the court may give fees in addition thereto for extraordinary services, the amount to be determined by a consideration of the sum already received and the creditor's rights. *In re Smith*, (1901) 108 Fed. 39.

Where the schedules showed no assets—the only assets in the trustee's hands having been recovered by him through an action to set aside fraudulent conveyances by the bankrupt—the case presented no difficulties except of the bankrupt's own creating, the specifications in opposition to the discharge were not followed up, the discharge was finally granted by default, and it appeared that the brother of the bankrupt paid to the attorney a sum exceeding what in such a case would ordinarily be allowed by the court in addition to disbursements, the allowance of a counsel fee to the attorney was refused. *In re O'Connell*, (1899) 98 Fed. 83.

The referee not being satisfied with the evidence as to the amount of an attorney's claim for a fee, he may suspend the determination thereof for a reasonable time to get the testimony of the bankrupt; and when, by reason of the bankrupt's having left the jurisdiction, he cannot get such testimony, the referee is to find upon the evidence he has. *In re Dreeben*, (1900) 101 Fed. 110.

In a simple case in voluntary bankruptcy, \$30 was allowed the bankrupt's attorney for professional services up to the application for a discharge, and a \$20 docket fee for procuring the discharge. *In re Kross*, (1899) 96 Fed. 816.

In *In re Beck*, (1899) 92 Fed. 889, \$50 was allowed to the attorney of the bankrupt for his fee and personal expenses, his claim for services rendered the bankrupt before the filing of the petition in bankruptcy and after the appointment of the trustee not being allowed.

"The allowance to counsel rests largely in the discretion of the referee in bankruptcy;" and such allowance will not be disturbed, especially when the creditors, by their inaction or delay, waived objection, unless it is manifestly excessive. *In re Tebo*, (1900) 101 Fed. 419.

Neither under General Order No. 10 nor under section 64b (3) is the bankrupt entitled to be reimbursed out of the estate for money paid by him to his attorney before the filing of the petition for preparing the petition and schedule. *In re Matthews*, (1899) 97 Fed. 772.

"The only provision of the Bankruptcy Act regulating the amount to be allowed and paid out of the estate as an attorney's fee in cases of voluntary bankruptcy is found in section 64b. . . . This section evidently intended to and does vest solely in the sound discretion of the court the amount to be allowed under the circumstances of each case; and the character of the estate, its condition at the time of the adjudication, the injunctions or restraining orders necessary to be secured for its protection, and the corresponding amount of time and care required of the petitioner's attorney, are all matters to be considered by the court in arriving at the amount 'reasonable' under the circumstances." *In re Burrus*, (1899) 97 Fed. 927. See also *In re Beck*, (1899) 92 Fed. 889.

The fees allowable to the attorney for a voluntary bankrupt include the payment for services reasonably necessary to aid the bankrupt in performing the duties required of him by the Act, and in securing the benefit of its provisions, and obtaining his discharge, if entitled to one; the amount of such allowance to be in all cases reasonable in view of the services required and the amount of the estate. The amount of the estate, the complexity of the bankrupt's affairs, the time reasonably devoted to the service, the standing and experience of counsel—these are all proper elements to be taken into consideration in estimating the reasonableness of the attorney's fees. It would be unwise, for both creditors and bankrupts, to make the compensation so parsimonious that attorneys of standing and experience would be reluctant to act on behalf of the bankrupts. *In re Christianson*, (D. C. N. D. 1910) 175 Fed. 867, 23 Am. Bankr. Rep. 710. It seems that there is no very material or direct relation between the mere aggregate of the assets and liabilities of a bankrupt estate, as shown by the schedules, and the compensation to be allowed to the bankrupt's attorneys. *In re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780.

A referee in bankruptcy is entitled, and it is his duty, to reduce the amount named for fees of the bankrupt's attorney, if in the referee's opinion it is too high. *In re Ferreri*, (E. D. La. 1911) 188 Fed.

675. See also section 60d, as to transfer or payment made to an attorney in contemplation of bankruptcy.

*In involuntary cases.*—To warrant an allowance for an attorney's fee for professional services actually rendered to an involuntary bankrupt, it must first appear, not only that services were rendered and were valuable, but that the conditions were such that by operation of law an obligation to pay therefor is imposed upon the estate. The inquiry therefore, has three branches: Was a service performed? Was such service reasonably necessary to enable the bankrupt to discharge its duties under the law? And what was it reasonably worth? The burden is upon the claimants to make a *prima facie* showing upon each of these three heads. *In re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780.

The provision for the services of an attorney to the bankrupt in involuntary cases is confined to the preparation of schedules, attendance on compulsory examinations before the referee, and such like duties, and does not include a defense of the bankrupt in matters involving his personal civil or criminal liability. *In re Mayer*, (1900) 101 Fed. 695.

The court may allow an attorney for the bankrupt in an involuntary proceeding, for services actually rendered in good faith for the real purpose of impartially administering the estate. *In re Rosenthal*, (E. D. Mo. 1902) 120 Fed. 848, 9 Am. Bankr. Rep. 626.

Services after proceedings instituted.—This section refers to services rendered after the bankruptcy proceedings are instituted, to aid the bankrupt in performing his duties under the Act. *In re Stolp*, (E. D. Wis. 1912) 199 Fed. 488.

The "duties" referred to in this section mean the duties of the bankrupt as prescribed by section 7 of this act. *In re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780; *Whitla v. Boyd*, (C. C. A. 9th Cir. 1914) 213 Fed. 587.

Services rendered in the preparation of schedules are, in the main, such as a competent clerk or accountant might perform, and compensation should be awarded on that basis. *In re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780.

The amount allowed must be reasonable. *In re Hammel*, (S. D. N. Y. 1914) 211 Fed. 238, in which the court modifying an allowance of one hundred twenty-five dollars to fifty dollars said: "I cannot agree that a bankrupt in ordinary cases needs an attorney to attend at the hearing of his discharge or at the first meeting. *In re Kross*, (D. C.) 96 Fed. 816. His duty is only to answer truthfully, and that needs no attorney. The theory is, I suppose, that the right of examination may be abused, and that he should be protected, but the abuse of

examination can only be when it goes into such clearly irrelevant matters as need no expert legal advice to distinguish. The utmost latitude should be allowed."

Where there is no evidence that the bankrupt has performed his prescribed duties, but, on the contrary, he has been "actively engaged in trying to defeat or delay the proceedings at every stage, and making the proceedings as expensive as possible," his attorney will not be given a fee. *In re Woodard*, (1899) 95 Fed. 955.

In *In re Michel*, (1899) 95 Fed. 803, it was held that a reasonable fee might be allowed the attorney of an involuntary bankrupt for drawing schedules and making copies thereof, and for attending before the referee at an examination.

Priority of attorneys' fees is not lost because of failure to present the claim until after a first dividend has been declared and paid. *In re Scott*, (1899) 96 Fed. 607.

As a general rule, the fee of the bankrupt's attorney in involuntary proceedings for drafting schedules would be from \$25 to \$50, according to the amount of work; and, if there were no unnecessary delays caused by the bankrupt, his attorney would reasonably be given an allowance of \$25 a day. *In re Mayer*, (1900) 101 Fed. 695.

In *In re Carolina Cooperage Co.*, (1899) 96 Fed. 950, the fee of the bankrupt's attorney was cut down from \$75 to \$25.

In *In re Carr*, (1902) 116 Fed. 556, a request for the allowance of certain amounts as attorneys' fees was refused, the court considering the claims exorbitant.

*Jurisdiction.*—Assertion of a claim for attorney's fees for services rendered after the institution of the bankruptcy proceedings must be made in the court having original jurisdiction of the administration of the bankrupt's estate. Such a claim will not be determined by a court exercising ancillary jurisdiction. *Musica v. Prentice*, (C. C. A. 5th Cir. 1914) 211 Fed. 326.

*Time of presenting claim.*—The claim of the bankrupt's attorney for a fee, payable as part of the costs of administration, does not lose its right to priority of payment out of the funds on hand at the time it is presented, merely because it was not presented until after the declaration and payment of a first dividend. *In re Scott*, (N. D. Tex. 1899) 96 Fed. 607, 2 Am. Bankr. Rep. 324.

Services must be beneficial.—Compensation for an attorney's services are allowable only on equitable considerations, for services from which the estate in bankruptcy has derived benefit, and to the extent only that they were beneficial in fact. *In re Zier*, (C. C. A. 7th Cir. 1905) 142 Fed. 102, 15 Am. Bankr. Rep. 646, *affirming* (D. C. Ind. 1904) 127 Fed. 399, 11

Am. Bankr. Rep. 527; *In re Claussen*, (D. C. S. C. 1908) 164 Fed. 300, 21 Am. Bankr. Rep. 34.

The statute does not authorize the allowance of fees for all legal work the attorney may do for the bankrupt in the proceeding, but only for that which the referee or the court may consider was required by the provisions of the law and the necessities of the proceeding. *In re Payne*, (E. D. N. Y. 1907) 151 Fed. 1018, 18 Am. Bankr. Rep. 192.

The services for which the attorneys of the bankrupt may be paid out of the bankrupt's estate, as part of the costs of administration, are the preparation and filing of the petition and schedules and the attendance upon the first meeting of the creditors; and the question is, what would be a reasonable fee for their services. *Matter of Meis*, (W. D. Ky. 1907) 18 Am. Bankr. Rep. 104.

Whether fees claimed by the attorney for the bankrupt are allowable depends upon whether the services rendered were for "cost of administration;" that is, whether as rendered they conduced to the benefit of the estate and its prompt administration. Under this rule services by the attorney for the bankrupt in securing a reduction in the taxes charged against the estate are properly for compensation out of the estate, where rendered just before bankruptcy proceedings and with the view thereto, and where the effect was to reduce considerably what would otherwise have been a paramount lien upon the estate. Under this rule, and for reasons similar to those last given, services in securing a stay order against the prosecution of an attachment suit in the state court, pending at the date of adjudication, are properly considered in fixing the fee, as are services in drawing the schedules and other papers necessary to the adjudication, and services necessarily performed in attending the bankrupt before the referee. *In re Duran Mercantile Co.*, (D. C. N. Mex. 1912) 199 Fed. 961.

**Allowance confined to one fee.**—The statute authorizes the allowance of one reasonable fee only to the petitioning creditors or the bankrupt as reimbursement; and fees will not be allowed on account during the administration of an estate on petition of attorneys and without notice to parties interested. *In re Young*, (E. D. N. C. 1906) 142 Fed. 891, 16 Am. Bankr. Rep. 106.

In *In re Coney Island Lumber Co.*, (E. D. N. Y. 1912) 199 Fed. 197, the court said: "The statute provides that one allowance shall be made to the attorneys for petitioning creditors (section 64b) for 'the professional services actually rendered, irrespective of the number of attorneys employed.' This court has frequently ruled (and it has been so construed generally) this provision to mean that but

one allowance, based upon actual value, can be made for all services rendered, under the authority of the statute, to the parties whose rights are embodied in and depend upon the application of the petitioning creditors. If more than one attorney or set of attorneys render these services, there shall be a division of the fee, rather than duplication or multiplication. Hence, if one set of attorneys act for the petitioning creditors and are succeeded by others, or if the court sees fit or deems it necessary to allow some of the services on behalf of the petitioning creditors to be rendered by other attorneys, this will result in a division of the allowance, and not increase its amount. The provisions of the law must be complied with and the estate protected, and the statute is clearly broad enough to justify the court in protecting the estate, and in not allowing maladministration, through willful neglect, or through unintentional failure on the part of one set of attorneys to do what is necessary."

**Division of fee.**—The one attorney's fee allowed the petitioning creditors by section 64b (3) should be equitably divided between the attorneys representing two petitions filed and consolidated by order of the court under general order No. 7. *In re McCracken*, (W. D. Tenn. 1904) 129 Fed. 621, 12 Am. Bankr. Rep. 95.

Where two petitions in involuntary bankruptcy were filed by different creditors against a corporation, one of which did not present grounds upon which it could legally be adjudged a bankrupt, and the adjudication was made on grounds alleged in the latter, the attorneys in the subsequent petition are entitled to the fee allowed for filing the petition and procuring the adjudication. *In re Southern Steel Co.*, (N. D. Ala. 1909) 169 Fed. 702, 22 Am. Bankr. Rep. 476.

**Services of counsel for trustee.**—"The trustee may properly be allowed counsel when the situation requires such assistance, and fees of such counsel are properly allowed as part of the expense of the bankruptcy proceeding." *In re Stotts*, (1899) 93 Fed. 439. See also cases cited in note to section 62a.

The trustee must exercise "a reasonable judgment" in the employment of an attorney, and, if the court considers such employment necessary, a reasonable fee will be allowed; but the court will not undertake to give any direction in advance as to the necessity of having an attorney. *In re Abram*, (1900) 103 Fed. 272.

"The allowance of any attorney's fee is a matter within the sound judicial discretion of the court," and a fee will be refused to the attorney of the trustee when, as attorney for the petitioning creditors, he has received a fee which covers any service rendered to the trustee or to the estate.

*In re Carolina Cooperage Co.*, (1899) 96 Fed. 950.

An attorney ought to be appointed by the creditors at the first meeting, along with a trustee. If this is not done, the referee may, if he believes it to be absolutely necessary, authorize the trustee to engage an attorney, who will then be entitled to such a fee only, to be charged in administration expenses, "as will actually compensate him for services rendered." *In re Little River Lumber Co.*, (1900) 101 Fed. 558.

A trustee having been appointed on a voluntary petition, the bankrupt will not be entitled to a dismissal of the proceedings, although the petition therefor is opposed by creditors, until the trustee has been paid expenses incurred by him in employing an attorney, and found by the referee to be reasonable. *In re Salaberry*, (1901) 107 Fed. 95.

Services rendered by an attorney employed by the trustee, in conducting an examination of the bankrupt, should not be allowed out of the estate, where such services were virtually in behalf of creditors who were clients of the attorney. *In re Rozinsky*, (1900) 101 Fed. 229.

As to the necessity of a detailed report of services of attorneys for the trustee, see note to section 62a.

Though the amount allowed for fees of counsel for the trustee appears in a given case to be exorbitant, the decree of the federal district court in bankruptcy affirmed by the Circuit Court of Appeals will not be disturbed by the Supreme Court, the lower courts manifestly having much more intimate acquaintance with the value of the services. *Page v. Rogers*, (1909) 211 U. S. 575, 29 S. Ct. 159, 53 U. S. (L. ed.) 332.

**Attorneys' fees for creditors.**—See also cases cited in note to section 62a.

Where the trustee declines to employ counsel to resist an unjust claim, and counsel for a creditor intervenes and succeeds in defeating it, reasonable compensation should be allowed to the counsel as an expense of administration. *In re Little River Lumber Co.*, (1900) 101 Fed. 558.

**In involuntary cases.**—The whole theory upon which the Bankruptcy Law authorizes the allowance of fees to the attorneys for petitioning creditors is that such creditors are acting for the joint benefit of themselves and all other unsecured creditors who will, by reason of their efforts, share equally with them in the unincumbered assets of the bankrupt. It is right and just that for this reason the fund secured to common creditors should, as against such creditors equally participating in it, share the expense incurred in securing it. *In re Gillaspie*, (N. D. W. Va. 1911) 190 Fed. 88.

Technically the allowances should be made to the creditors for their expenses in employing counsel, and not to the attor-

neys themselves. *In re Medina Quarry Co.*, (C. C. A. 2d Cir. 1911) 191 Fed. 815.

An allowance may be made to creditors for attorneys' fees where property, transferred or concealed by a bankrupt, has been, through the efforts of such counsel, recovered for the benefit of the estate. *In re Medina Quarry Co.*, (C. C. A. 2d Cir. 1912) 197 Fed. 308. See also section 64b (2) and note thereto.

Fees of attorneys for the petitioning creditors in a proceeding in involuntary bankruptcy are allowable and given priority as a part of the cost of administration, and such claims rank next after the wages of laborers, taking precedence, subject to tax claims, of all liens on the funds in the hands of the court for distribution. *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689.

In *In re Curtis*, (C. C. A. 1900) 100 Fed. 784, it was held that the attorney for the petitioning creditors in involuntary bankruptcy is entitled to a reasonable fee, its allowance or disallowance not being a matter of discretion. "The amount must in all cases be reasonable," said the court, "to be determined upon evidence of the service performed and of its value, and in the absence of evidence of its value, by the court from knowledge of its worth."

When an attorney accepts the office of trustee he surrenders for the time his standing in the court of bankruptcy as an attorney for the creditors. Those who desire the exercise of the court's discretion in allowing fees must follow the rules prescribed. If a firm of attorneys is elected by the creditors it must look to its constituents, and not to the bankrupt estate or to the court, for its compensation. *In re Evans*, (1902) 116 Fed. 909.

"After the appointment of a trustee, no allowance to petitioning creditors can be made for attorney or counsel on examinations of the bankrupt, such services being either for the trustee or the creditors individually." *In re Silverman*, (1899) 97 Fed. 325.

Attorneys for the creditors in involuntary bankruptcy proceedings cannot charge a fee for sending out notice of the creditors' first meeting, as to do this is the referee's duty; but they are entitled to be repaid money advanced by them to the referee for such purpose. *In re J. W. Harrison Mercantile Co.*, (1899) 95 Fed. 123.

There is no provision in the Act "for compensating attorneys of petitioning creditors for their service in attending meetings of creditors, and resisting the allowance thereof of other claims against the estate;" nor for attending sales of the bankrupt's property and inducing buyers to be present. *In re J. W. Harrison Mercantile Co.*, (1899) 95 Fed. 123.

In *In re Curtis*, (C. C. A. 1900) 100 Fed. 784, the fee of the counsel of the petitioning creditors was cut down from \$12,500 to \$2,000.

In *In re Silverman*, (1899) 97 Fed. 325, \$75 was allowed as a reasonable attorney's fee, under the circumstances.

**In voluntary proceedings.**—There is no provision anywhere in the Act for the payment from the estate of a fee to an attorney who appears for creditors in voluntary proceedings. *In re Smith*, (1901) 108 Fed. 39.

The court may enforce the lien of a creditor's attorney on a claim allowed, and where there was no express contract fixing the amount, reasonable compensation will be awarded out of the fund due to the creditor. *In re Rude*, (1900) 101 Fed. 805.

**Amount of attorney fees, in general.**—Allowances to attorneys for services in bankruptcy cases must be made in view of the clearly disclosed policy of the law to reduce the expense of administering bankrupt estates to the minimum. *In re Lang*, (W. D. Tex. 1904) 127 Fed. 755, 11 Am. Bankr. Rep. 794.

Where the services have been important and beneficial to the estate, a liberal compensation should be allowed. *Matter of Berkowitz*, (D. C. N. J. 1908) 22 Am. Bankr. Rep. 236.

**Discretion of court.**—The amount to be allowed rests in legal judgment and judicial discretion, but not in unrestrained discretion. *In re Standard Fuller's Earth Co.*, (S. D. Ala. 1911) 186 Fed. 578.

The fees allowed are always subject to revision by the court. *In re Christianson*, (D. C. N. D. 1910) 175 Fed. 867, 23 Am. Bankr. Rep. 710.

**Attorney fee denied.**—A claim for an attorney fee will not be allowed, at least as one entitled to priority, where the services rendered were not of the character specified in the statute, or were not beneficial to the estate. *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 955, 2 Am. Bankr. Rep. 692; *In re Lewin*, (D. C. Vt. 1900) 103 Fed. 850, 4 Am. Bankr. Rep. 632; *In re Carr*, (E. D. N. C. 1902) 117 Fed. 574, 9 Am. Bankr. Rep. 58; *In re Connell*, (M. D. Pa. 1903) 120 Fed. 846, 9 Am. Bankr. Rep. 474; *In re Rosenthal*, (E. D. Mo. 1902) 120 Fed. 848, 9 Am. Bankr. Rep. 626; *Frank v. Dickey*, (C. C. A. 8th Cir. 1905) 139 Fed. 744, 15 Am. Bankr. Rep. 155; *In re Zier*, (7th Cir. 1905) 142 Fed. 102, 73 C. C. A. 326, *affirming* (D. C. Ind. 1904) 127 Fed. 399, 11 Am. Bankr. Rep. 527; *In re O'Hara*, (M. D. Pa. 1909) 166 Fed. 384, 21 Am. Bankr. Rep. 508; *In re Crave, etc., Co.*, (C. C. A. 2d Cir. 1910) 183 Fed. 769.

In the case of *In re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780, the evidence was held to be insufficient to warrant the referee in granting certain items of a bill for attorney's fees.

**Services tending to defeat and delay proceedings.**—There will be no allowance of an attorney fee in a case where it is not shown that the bankrupt has performed

the duties laid upon him by the law, but where it appears, on the contrary, that he has been actively engaged in trying to defeat or delay the proceedings. *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 955, 2 Am. Bankr. Rep. 692; *In re Zier*, (7th Cir. 1905) 142 Fed. 102, 73 C. C. A. 326.

**Services not beneficial.**—An attorney is not entitled to an allowance from the estate in bankruptcy on account of services rendered to a state receiver where, as a whole, his services cost the estate and general creditors several times its amount, in increased expenses of administration. *In re Zier*, (D. C. Ind. 1904) 127 Fed. 339, 11 Am. Bankr. Rep. 527. See also *Frank v. Dickey*, (C. C. A. 8th Cir. 1905) 139 Fed. 744, 15 Am. Bankr. Rep. 155.

**Filing defective petition.**—Attorneys who filed a petition in involuntary bankruptcy for creditors, which was defective and insufficient to warrant an adjudication, which was made on a second petition by other creditors, are not entitled to an allowance of fees from the estate. *In re Fischer*, (C. C. A. 2d Cir. 1910) 175 Fed. 531, 23 Am. Bankr. Rep. 427.

**Resisting adjudication.**—A claim for legal services rendered to the assignee in a general deed of assignment, in unsuccessfully resisting an adjudication of bankruptcy against his assignor on a petition filed within four months after the making of the assignment, is not provable against the bankrupt's estate. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1.

**Contesting application for composition.**—An involuntary bankrupt is not entitled to an allowance for counsel fees and disbursements expended on a contested application to confirm a composition, such expenditures not being a part of the costs of administration, nor for services rendered to the bankrupt while performing duties prescribed by section 64b (3). *In re Fogarty*, (C. C. A. 7th Cir. 1911) 187 Fed. 773.

**Service rendered on application for discharge.**—No allowance can be made from the estate to attorneys for services rendered in the matter of the bankrupt's application for a discharge, which has no relation to the administration of the estate, whether such services were rendered in behalf of the bankrupt or opposing creditors. *In re Brundin*, (D. C. Minn. 1901) 112 Fed. 306, 7 Am. Bankr. Rep. 296.

**Unnecessary services.**—The unnecessary filing of a second petition on behalf of creditors who did not join in the first one, does not entitle the attorney for such creditors to a fee for his services; and this is true even though the first petition is demurrable, where it is subsequently amended and an adjudication made thereon. *Frank v. Dickey*, (C. C. A. 8th Cir. 1905) 139 Fed. 744, 15 Am. Bankr. Rep. 155.

*Services in connection with claim for exemptions.*—The statute does not authorize the allowance of a fee for services in endeavoring to sustain the bankrupt's exemption claim. *In re O'Hara*, (M. D. Pa. 1909) 166 Fed. 384, 21 Am. Bankr. Rep. 508.

*Fees for opposing baseless claims.*—An attorney's fee will be denied for services in contesting baseless claims by a receiver of the bankrupt's property for services and attorney's fees as it is the trustee's function and duty, and also the right of the creditors, to oppose such claims. *In re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780.

*Fees for attending bankrupt at creditors' meeting and sessions of court.*—Ordinarily fees should not be allowed out of the bankrupt's estate for services of an attorney for attending the bankrupt at creditors' meetings, or at sessions of the court where he is required to give information or submit to examination under oath. *In re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780.

*Services rendered to voluntary trustees* prior to bankruptcy, are not services for which an attorney is entitled to compensation as against the estate in bankruptcy. *In re Marble Products Co.*, (E. D. N. Y. 1912) 199 Fed. 668.

*Services rendered a bankrupt in securing his discharge* may not be allowed for in fixing the attorney's fee. *In re Duran Mercantile Co.*, (D. C. N. Mex. 1912) 199 Fed. 961, wherein the court said: "The wording of the statute—Bankruptcy Act, § 64b (3)—is 'for cost of administration,' including an attorney's fee for one attorney for the bankrupt in voluntary cases. When, therefore, we look at the attorney's fee, we must look at it in the light of the question as to whether or not it is 'cost of administration;' that is, whether the services rendered went to the benefit of the estate or the progress of the administration of the estate. Now, the discharge of a bankrupt is a collateral matter. If he does not care to be discharged, he need

never be, and in that event the estate will nevertheless be closed. His discharge is of no relevancy to the creditors. It is a matter that concerns him and his future, not the estate. I think, therefore, that the cost for this is not to be allowed as part of the compensation of the attorney for the bankrupt, and it will be accordingly disallowed."

*Unsuccessful application for discharge.*

—In the case of *In re Keller*, (S. D. N. Y. 1913) 207 Fed. 118, the court, in commenting on whether an allowance to the bankrupt's attorneys should be allowed in proceedings brought to secure the discharge of the bankrupt, said: "Judge Brown held in *In re Kross*, (S. D. N. Y. 1899) 96 Fed. 816, that in voluntary cases the statute—Act July 1, 1898, ch. 541, § 64b (3) 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447)—permitted an allowance to the bankrupt's attorneys for procuring a discharge, though the rule is certainly different in involuntary cases. That allowance where the proceedings were not contested was the docket fee of \$20, and Judge Brown said obiter that in cases of contest the referee may allow further sums. It seems to me clear enough that the bankrupt should be allowed nothing for an unsuccessful application for discharge, but in voluntary cases, if the trustee at the instance of the creditors conducts an unsuccessful contest, I cannot see why the estate should not bear a fair allowance. Where, however, a single creditor or several creditors oppose the discharge the question should be treated as one arising *inter partes*, and the estate generally ought not to suffer from an ill-advised contest. If the creditor loses, the question of the propriety of the contest may be then decided and he may have to bear costs. Usually no costs are given against a creditor; but in any case the question is to be determined in that proceeding. In this case the trustee did not conduct the opposition, and the allowance will be limited to a docket fee of \$20."

Fourth. [Employees' wages.] Wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant. [;] [(Amended 1906) 34 Stat. L. 267.]

As originally enacted this clause read as follows:

"(4) Wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and" [30 Stat. L. 563.]

It was amended in 1906 "so as to read" as in the text.

The statute should be liberally construed.—*Ex p. Rockett*, 2 Lowell 522, 15 Nat. Bankr. Reg. 95, 20 Fed. Cas. No. 11,977; *In re Wells*, 4 Fed. 68; *In re Rouse*, 91 Fed. 514, 1 Am. Bankr. Rep. 393; *In re B. H. Gladding Co.*, 120 Fed.

709; *In re Erie Lumber Co.*, 150 Fed. 823; *In re Caldwell*, 164 Fed. 515; *Matter of Smith*, 11 Am. Bankr. Rep. 646; *Matter of McIntyre*, 21 Am. Bankr. Rep. 588. Thus in the case of *In re Erie Lumber Co.*, *supra*, it was said: "The protection of



the wages of labor is a primary duty of society and of government. The wage-earner constitutes an immense proportion of those who labor for the common welfare. So long as he remains helpful and self-sustaining, every prosperous result follows. In those unhappy epochs when the individual laborer is helpless, he and those dependent upon him become a charge upon the public. When labor en masse becomes helpless, when it is no longer possible to earn the means of subsistence, government itself is threatened, and revolution has often followed. It is therefore profoundly and philosophically true that it is the duty of government in every contingency to secure his earnings to the wage-earner. This truth is at the basis of those laws which attempt to accomplish the result upon which the existence of orderly society may itself depend. National and state legislation sedulously attempt to accomplish this, and otherwise to ameliorate the condition of the laboring man. The courts with equal solicitude strive to attain the same end."

The extent of the right of preference for wage claims was indicated in *Guarantee Title, etc., Co. v. Title Guaranty, etc., Co.*, 224 U. S. 152, 32 S. Ct. 457, 56 U. S. (L. ed.) 706, wherein the court in holding that claims for wages were entitled to priority in payment over debts due the United States said: "By the statute of 1797 (now § 3466) and 5101 of the Revised Statutes all debts due to the United States were expressly given priority to the wages due any operative, clerk or house servant. A different order is prescribed by the Act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in full. The only exception is 'taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality.' These were civil obligations, not personal conventions, and preference was given to them, but as to debts we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. The Act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants."

In *Thayer v. Mann*, (1848) 2 Cush. (Mass.) 371, liberally construing a provision in a state insolvency law for priority of claims for "labor as an operative." Chief Justice Shaw said: "We

think the policy of the statute was to secure a class of very needy and efficient laborers, who are very dependent and meritorious, but who have little means of knowing the credit of their employers, the small amount due them for very recent service. If they in fact give credit to their employers, beyond the strict time limited by statute, they take their chance of that credit with others who trust them."

A father's claim for services of a minor son was awarded priority in *In re Harthorn*, (1870) 4 Nat. Bankr. Reg. 103, 11 Fed. Cas. No. 6,162 on the authority of *Thayer v. Mann*, (1848) 2 Cush. (Mass.) 371, where, according to the headnote, it was held that a creditor of an insolvent debtor may be entitled to a preference, as an operative, in the service of such debtor, for labor performed by the creditor's wife.

Prospective operation of statute.—In the absence of express terms to the contrary, a statute giving to wages preference in bankruptcy is construed as prospective in operation. *In re Waverly Typewriter*, (1898) 1 Ch. (Eng.) 699, 87 L. J. 380, 78 L. T. N. S. 593, 46 W. R. 685, 5 Manson 269; *In re Photo Electrotype Engraving Co.*, 155 Fed. 685, 19 Am. Bankr. Rep. 94. Thus in the case last cited the petition in bankruptcy was filed before the taking effect of the amendment of June 15, 1906, giving to "traveling or city salesmen" a like preference with respect to the payment of wages due as to workmen, clerks or servants, and it was held that the rights of the claimant were not governed by the amendment.

"Wages" must be construed in its broader and more general sense as meaning compensation for services rendered, since to hold otherwise would lead to glaring inconsistencies and manifest injustice." *In re Dexter*, (C. C. A. 1st Cir. 1907) 158 Fed. 788, 20 Am. Bankr. Rep. 47, per Colt, J.

Damages occasioned by a breach of contract of employment for a fixed period are not wages within the meaning of the statute. *In re Sweetser*, (C. C. A. 2d Cir. 1905) 142 Fed. 131, 15 Am. Bankr. Rep. 650.

The damages to which an employee may be entitled because of his wrongful discharge by the bankrupt are not wages earned within the period for which a preference is given in bankruptcy. *In re Pevear*, 17 Nat. Bankr. Reg. 461, 19 Fed. Cas. No. 11,053; *In re E. B. Lewis Co.*, 12 Am. Bankr. Rep. 279. Compare *Ex p. Saunders*, 2 Mont. & A. (Eng.) 684; *Ex p. Bennett*, 3 Mont. & A. (Eng.) 669; *Ex p. Gee*, Mont. & C. (Eng.) 99; *Ex p. Allpas*, 17 L. T. N. S. (Eng.) 179, 16 W. R. 142.

An unemancipated minor son cannot claim wages against his father's estate which is in bankruptcy. *In re Riff*, (E. D. Ark. 1913) 205 Fed. 406.

Section 1a (27) as related to section 64b (4).—Section 64b of the Bankruptcy Act is not to be construed in connection with section 1, subd. 27, in determining whether a claim for wages is entitled to priority in bankruptcy. The definition of "wage-earner" in section 1, subd. 27, is intended to apply to other sections of the Act and has special reference to section 4b, declaring what persons may become bankrupts. *Blessing v. Blanchard*, (C. C. A. 9th Cir. 1915) 223 Fed. 35; *In re Carolina Cooperage Co.*, 96 Fed. 950; *In re Scanlan*, 97 Fed. 26; *In re Flick*, 105 Fed. 503, 5 Am. Bankr. Rep. 465; *In re Gurewitz*, 121 Fed. 982, 58 C. C. A. 320; *In re Crown Point Brush Co.*, 200 Fed. 882; *Matter of Smith*, 11 Am. Bankr. Rep. 646.

Relation of master and servant contemplated.—To be entitled to priority as wages of a workman, clerk or servant, the claim must be such as arises from the relation of master and servant as distinguished from a mere contractual relation. *In re Rose*, 1 Am. Bankr. Rep. 68; *Weaver v. Hugill Stone, etc., Co.*, (N. D. Ohio 1906) 16 Am. Bankr. Rep. 516. Compare *Ex p. Allsop*, 32 L. T. N. S. (Eng.) 433; *In re Lowensohn*, 100 Fed. 776.

Thus in *Weaver v. Hugill Stone, etc., Co.*, (N. D. Ohio 1906) 16 Am. Bankr. Rep. 516, it was said: "The three claimants in this case maintained shops where blacksmithing was done for whomsoever might apply to them for work of that character and for whom they were willing to do the work. The relation of employer and employee does not exist between the person taking tools or horses to a blacksmith shop for the purpose of having blacksmithing done for them and the person doing the work. They are no more employer and employee than are the person taking a watch to a watchmaker and the watchmaker who repairs the watch. . . . The most skilled mechanic may be a workman when the relation of employer and employee exists, while a trade not requiring as great skill which is carried on in an establishment independent of the employer would not make one engaged in it his workman, as defined in this Act. The test in regard to whether these men sustained the relation to the bankrupt of workmen under this section is, would the employer have been liable for the negligence of these blacksmiths causing an injury to third persons while they were performing the work upon these horses and tools for the bankrupt. If the employer would not have been liable for their negligence, then the relation of employer and employee did not exist, and the compensation which they were to receive for doing this work cannot be regarded as wages. These were contracts by which the blacksmiths were to furnish certain work and receive certain compensation, as much independent from the

relation of master and servant, employer and employee, as would be that of a tradesman who sold goods. This section is only intended to give priority to the wages of such workmen as sustain the relation of employees to the bankrupt. In other words, there must exist the relation of master and servant. That does not exist in this case, and the compensation to be paid for the work done does not come under the head of wages due to workmen, as provided in section 64b."

In the case of *In re Deutschle*, (M. D. Pa. 1910) 182 Fed. 430, it appeared that the claimant agreed to work for a certain price furnishing his own men and getting the benefit of their labor and it was held that he was not entitled to priority as a workman or laborer. See to the same effect *In re Rose*, 1 Am. Bankr. Rep. 68. And in *Tam v. Robertson*, 9 British Columbia 505, it was held that a claimant was not entitled to a preference for profits made by him by the employment of others under him, but the claimant was allowed a preference for his personal wages.

In *Matter v. Smith*, (D. C. R. I. 1903) 11 Am. Bankr. Rep. 646, it was held that one who buys goods for different people as ordered receiving his pay wholly from those persons is not a "workman, clerk or servant" entitled to preference in payment of compensation due from a bankrupt buyer.

On a somewhat similar principle was based the holding in *Spruks v. Lackawanna Dairy Co.*, (M. D. Pa. 1911) 189 Fed. 287, wherein a man who was employed to deliver milk with his team at a stated sum per month was held not to be a workman, clerk or servant entitled to priority with respect to his wages. The court said: "There is nothing in the petitioner's contract to individuate his services and the services of the team." Compare *Matter of Winton Lumber, etc., Co.*, 17 Am. Bankr. Rep. 117.

*Assistant of employee.*—It seems that a servant employed and paid as an assistant, by one who is himself employed by the bankrupt, is not an employee of the bankrupt entitled to a preference with respect to his wages. *Ex p. Ball*, 3 De G. M. & G. (Eng.) 155.

*Exclusiveness or permanency of employment* is not necessary to constitute the claimant a workman, clerk or servant whose wages are entitled to priority. *Ex p. Rockett*, 2 Lowell 522, 15 Nat. Bankr. Reg. 95, 20 Fed. Cas. No. 11,977; *In re Baumbblatt*, 156 Fed. 422. The rule in England seems to be different. *Ex p. Walter*, L. R. 15 Eq. 412; *Ex p. Grellier*, 1 Montagu (Eng.) 264; *Ex p. Crawfoot*, 1 Montagu (Eng.) 270; *Ex p. Humphreys*, 3 Deac. & C. (Eng.) 114; *Ex p. Skinner*, 3 Deac. & C. 332, 1 Mont. & B. (Eng.) 417; *Ex p. Collier*, 4 Deac. & C. (Eng.) 520.

**Who may claim wages—Clerks.**—The fact that a claimant is a director or officer of a corporation does not disable the corporation from employing him as a clerk also. If the labor performed by him is so performed under his employment as clerk, and is not performed as a part of his duties as an officer, then he is entitled to priority for his wages as a clerk. *In re H. O. Roberts Co.*, (D. C. Minn. 1912) 193 Fed. 294.

A *shipping clerk and lumber checker* was entitled to the benefit of the statute. *Bell v. Arledge*, (1912) 192 Fed. 837, 113 C. C. A. 161.

**Bookkeepers.**—The word "clerk," as it is used in section 64b (4), includes a person who regularly keeps a bankrupt's books. *In re Baumblatt*, (E. D. Pa. 1907) 153 Fed. 485, 19 Am. Bankr. Rep. 500.

A *cashier and bookkeeper* who had an indefinite agreement with the bankrupt to become a partner in the business was held to be a "clerk" entitled to priority with respect to his wages. *Ex p. Hickin*, 3 De G. & Sim. (Eng.) 662, 14 Jur. 405, 19 L. J. Bankr. 8. Compare *Ex p. Harris*, 9 De G. (Eng.) 165, 14 L. J. Bankr. 26, 9 Jur. 497.

A *messenger and bookkeeper* was held entitled to priority for his services. *Bell v. Arledge*, (1912) 192 Fed. 837, 113 C. C. A. 161.

A *teamster*, while not entitled to priority for charges for the use of his wagon and team, has a prior right of payment with respect to the services which he personally rendered. *Matter of Winton Lumber, etc., Co.*, (E. D. Ky. 1906) 17 Am. Bankr. Rep. 117.

**Musicians** employed at regular wages to play in a theatre or other place are "servants," and entitled to priority of payment from the estate of the employer in bankruptcy, for their wages earned within three months. *In re Caldwell*, (E. D. Ark. 1908) 164 Fed. 515, 21 Am. Bankr. Rep. 236.

**The mate of a ship** is a "servant" entitled to priority. *Ex p. Homber*, (1842) 6 Jur. (Eng.) 898.

A *cutler's apprentice* to whom wages were to be paid by agreement made after indenture of apprenticeship was an "operative" entitled to priority under the Bankruptcy Act of 1841. *Ex p. Steiner*, (1842) 1 Pa. L. J. 368, 22 Fed. Cas. No. 13, 354.

**Salesmen.**—In the absence of express words in the statute a traveling salesman is not a "clerk" or "servant" whose wages are entitled to priority in bankruptcy, although the rule in England and Canada seems to be otherwise. *In re Scanlan*, 97 Fed. 26, 3 Am. Bankr. Rep. 202; *In re Greenwald*, 99 Fed. 705, 3 Am. Bankr. Rep. 696; *In re Mayer*, 101 Fed. 227, 4 Am. Bankr. Rep. 119. Compare *Ex p. Neale*, 1 Mont. & M. (Eng.)

194; *In re Klein*, 22 Times L. Rep. (Eng.) 664; *Ross v. Fortin*, 8 Quebec 15; *Cohen v. Rosenstein*, 28 Quebec Super. Ct. 95; *Harris v. Hyneman*, 1 Montreal Super. Ct. 191.

But section 64b (4) was amended in 1906 so as to give to "traveling or city salesmen" the same preference for wages as that enjoyed by workmen, clerks, or servants. See *In re Photo Electrottype Engraving Co.*, 155 Fed. 684; *In re Caldwell*, 164 Fed. 515; *In re Crawford Wollen Co.*, 218 Fed. 951; *In re Gay*, (D. C. Mass. 1910) 188 Fed. 392; *In re New England Thread Co.*, (D. C. R. I. 1907) 154 Fed. 742, 18 Am. Bankr. Rep. 840, affirmed (C. C. A. 1st Cir. 1907) 158 Fed. 788, 20 Am. Bankr. Rep. 47; *In re Grignard Lith. Co.*, (E. D. N. Y. 1907) 155 Fed. 699, 19 Am. Bankr. Rep. 743; *In re Fink*, (E. D. Pa. 1908) 163 Fed. 135, 20 Am. Bankr. Rep. 897; *In re Roebuck Weather Strip, etc., Co.*, (S. D. N. Y. 1910) 180 Fed. 497.

It has been held that the fact that a traveling salesman has exclusive control of certain territory and maintains a branch office in his territory is not sufficient to take him out of the category of a traveling salesman who is entitled to priority in bankruptcy for claims for wages due. *In re Dexter*, 58 Fed. 788, 89 C. C. A. 285; *In re Gay*, (D. C. Mass. 1910) 188 Fed. 392, where the court said: "The trustee relies upon the facts disclosed by the creditor's own evidence, which is not contradicted, that the bankrupts, whose principal office was in Boston, also maintained an office at Portland, of which he had charge, besides going from place to place in Maine to sell bonds; that he conducted correspondence from that office on the bankrupts' letter head and in their name; that he had a junior salesman under him; that he received bulletins from the bankrupts, such as they issued to the managers of all their branch offices; that they recognized him in correspondence as manager of the Portland office; and that in his letter of resignation, dated August 19, 1910, he himself tendered his resignation 'as manager of the Portland office.' I am unable, however, to believe that any of these things are sufficient to prevent him from being a 'traveling salesman,' within the meaning of the Act. It seems to me, on the evidence, that everything done by him as the manager of the Portland office was subordinate to the work he did as traveling salesman, and inconsiderable in comparison with that portion of his work. Circumstances somewhat similar were relied upon for the same purpose in *In re Dexter*, above cited, [(D. C. Mass. 1910; 158 Fed. 788, 89 C. C. A. 285)], and the court held that they did not 'change in any material way the real character of the service' for which the salesman was employed."

A salesman in a store was held to be a "clerk" within the meaning of the statute. *In re Flick*, (S. D. Ohio 1900) 105 Fed. 503.

*Worker on commissions or by the piece.*—Where an employee is otherwise entitled to priority for his wages as a workman, clerk or servant, the fact that his compensation depends on commissions or piece work does not defeat his claim. In other words, the claim for wages due as a preferred claim in bankruptcy does not depend on the mode of compensation. *In re Earle's Shipbuilding, etc., Co.*, (1901) W. N. (Eng.) 78; *Ex p. Hollyoak*, 4 Mor. Bankr. Cas. (Eng.) 63; *In re Gurewitz*, 121 Fed. 982, 58 C. C. A. 320; *In re Fink*, 163 Fed. 135; *In re Roebuck Weather Strip, etc., Screen Co.*, 180 Fed. 497; *In re Deutsche*, 182 Fed. 433.

Thus in *In re Gurewitz*, (1903) 121 Fed. 982, 58 C. C. A. 320, the court said: "There is nothing ambiguous about the use of the word 'wages' in this connection. It means the agreed compensation for services rendered by the workmen, clerks or servants of the bankrupt,—those who have served him in a subordinate or menial capacity and who are supposed to be dependent upon their earnings for their present support. Whether their employer has agreed to pay them by the hour, the day, the week, the month or by the 'job' or piece, is wholly immaterial. It is incredible to suppose that Congress intended to discriminate against the vast army of laborers who, in the coal mines, the foundries, the clothing manufactories and in almost every branch of industry, are paid not according to the time consumed but according to the work accomplished."

And in *In re Dexter*, 158 Fed. 788, 89 C. C. A. 285, it was said: "The remaining question is whether the word 'wages' in any way limits the class of traveling salesmen who are included within this provision of the Bankruptcy Act. If this provision had been restricted to 'workmen' and 'servants,' it might perhaps be urged that 'wages' should be construed in its narrow and popular sense as meaning the payment of a fixed sum per day, week, or month for manual labor, or other labor of a menial or mechanical kind. But since this provision also includes 'clerks' and 'traveling or city salesmen,' if we construe 'wages' in this narrow sense we necessarily limit the operation of the statute to those clerks and traveling salesmen who happen to be paid for their services in a particular way; in other words, the question of preference is made to turn upon the mode of payment rather than upon the kind of service rendered. The result would be that a clerk who was paid a fixed sum per day, week, or month, which during the year amounted to one thousand dollars, would be entitled to a preference, while a clerk

who was paid this sum in the form of a yearly salary would be excluded; and, further, a traveling salesman who was paid a fixed sum of one hundred dollars or five hundred dollars a month would be entitled to a preference, while a traveling salesman who only earned from thirty dollars to forty dollars per month in the form of commissions would be excluded. It is plain, therefore, that 'wages' must be construed in its broader and more general sense as meaning compensation for services rendered, since to hold otherwise would lead to glaring inconsistencies and manifest injustice." See to same effect *In re New England Thread Co.*, 154 Fed. 742.

In *Thayer v. Mann*, (1848) 2 Cush. (Mass.) 371, holding that a claimant was entitled to preference under a state insolvency statute for "labor as an operative," Mr. Chief Justice Shaw said: "Nor does it, we think, make any difference, that the labor was done on the workman's own premises, by the job. In many of the large factories some of the operatives are paid by the piece, and not by the week; it is a perfectly equitable mode for both parties, and is a healthy stimulus to industry and skill on the part of the laborer. And although not done on the employer's premises, the relation of employer and workman exists; the claim is wholly for manual labor, performed within the time limited. It is within the policy, and, we think, within the operation of the law."

But commissions earned by an "incidental" agent, on whom there was no obligation to serve, are not "wages" within the meaning of the Bankruptcy Law. *In re Waxelbaum*, (N. D. Ga. 1900) 101 Fed. 228, 4 Am. Bankr. Rep. 120; *Matter of Smith*, (D. C. R. I. 1903) 11 Am. Bankr. Rep. 647.

*Whether an officer or a manager of a corporation* is entitled to a preference in bankruptcy for his salary seems to depend on whether his salary is based on his position or on his labor as a workman, servant, or clerk. The mere fact that he may do some mere clerical or manual labor is not sufficient to make his claim for salary a preferred one. *In re Newspaper Proprietary Syndicate*, (1900) 2 Ch. 349; *Ex p. Green*, 13 Jur. (Eng.) 275; *In re Grubbs-Wiley Grocery Co.*, 96 Fed. 183, 2 Am. Bankr. Rep. 442; *In re Carolina Cooperage Co.*, 96 Fed. 950, 3 Am. Bankr. Rep. 154; *In re H. O. Roberts Co.*, 193 Fed. 294; *In re Continental Paint Co.*, 220 Fed. 189; *Arnold v. Knapp*, (W. Va.) 84 S. E. 895. Compare *Cairney v. Back*, (1906) 2 K. B. (Eng.) 746. This question was discussed in *In re Crown Point Brush Co.*, (N. D. N. Y. 1912) 200 Fed. 882, where it was said: "If it should appear that a corporation employs a clerk to do or perform clerical duties at a fixed

compensation or salary, and also empowers him to exercise certain powers of direction, supervision, and control or management, without added or extra compensation, he would be a clerk, within the meaning of the law, and his claim for salary would be entitled to priority; but should it employ him as clerk to perform clerical duties and set him to perform the duties of general or assistant general manager, and have the clerical duties performed by others he would not be a clerk, and his wages would not be due to a clerk, but to a general manager, or to an assistant general manager, as the case should be. The law would not tolerate an evasion of that kind. Wages due the general manager of a business or corporation are not entitled to priority of payment. On the other hand, should a corporation employ a person to act as and perform the duties of general manager or assistant general manager at a fixed salary and, finding such services unnecessary, set him to perform the duties of clerk, floor sweeper, and furnace tender, he would be, in fact, either a workman or a servant, within the meaning of the law, and his claim for salary so earned would be entitled to priority. He would have the right to accept the inferior employment and perform its duties. But should he voluntarily, while holding the position of assistant general manager, perform manual labor assigned as part of his duty, he would not become a workman or servant, and entitled to priority. His character would be determined by what he was employed to do. . . . The general manager in a sense works, and he works 'in a department of both physical and mental labor.' But this is not the meaning to be given to 'workmen' or 'servants,' as used in the Bankruptcy Act. Section 64, subd. 4. The treasurer of a corporation is supposed to keep books; and it is his duty to do so. The corporation may employ a clerk or clerks to assist and do the mere clerical work; but if it does not, and the treasurer himself makes the entries, keeps the books, and does the necessary clerical work, he does not cease to be treasurer and become a workman, or a clerk, or a servant, within the meaning of the Bankruptcy Law."

The president of a commercial corporation is not such a workman as will be entitled to priority under the statute. *In re Grubbs-Wiley Grocery Co.*, (W. D. Mo. 1899) 96 Fed. 183; *In re Carolina Cooperage Co.*, (E. D. N. C. 1899) 96 Fed. 950, 3 Am. Bankr. Rep. 154; *In re Crown Point Brush Co.*, (N. D. N. Y. 1912) 200 Fed. 882.

A steward of a bankrupt restaurant corporation, who was also a "dummy" director, secretary, and stockholder of the corporation, was held to be entitled to priority for a claim for services as steward, no part of which was for services as

director or secretary. *In re Swain Co.*, (N. D. Cal. 1912) 194 Fed. 749.

The treasurer and general manager of a bankrupt corporation has been held not to be entitled to priority under this section. *In re Metropolitan Jewelry Co.*, (S. D. N. Y. 1914) 216 Fed. 385. See also *Arnold v. Knapp*, (W. Va. 1915) 84 S. E. 895, wherein it was held that the salary of an officer or manager of a corporation is not the debt or claim of a wage-earner protected by the Bankruptcy Act.

The personal representative of a stockholder in a bankrupt corporation, who has charge of its office in the absence of the manager, is not entitled to the priority allowed under this section. *In re Metropolitan Jewelry Co.*, (S. D. N. Y. 1914) 216 Fed. 384.

*General manager of business.*—"Servant" does not include the general manager of a business. *Blessing v. Blanchard*, (C. C. A. 9th Cir. 1915) 223 Fed. 35, where the court said: "The word 'servants' often has a broad and inclusive meaning, and in a sense it may be said to include all employes in the service of another, and also the officers of corporations. It is very clear, however, that it is not used in that sense in the section under consideration. Although the word 'servant' is broader than the term 'house servant,' as used in the Act of 1867, it was not intended by its use in the Act of 1898 to include all employes; otherwise, there would have been no necessity for a specific mention of workmen or clerks or salesmen. We think the word 'servant' should be held to mean a restricted class of subordinate helpers who work for wages, but who are not salesmen, workmen, or clerks. We do not think it includes the manager of a business, notwithstanding that he may also have rendered services as a salesman. Priority of payment was intended for the benefit only of those who are dependent upon their wages, and who, having lost their employment by the bankruptcy, would be in need of such protection. It evidently was not thought that the general manager of the business would require special protection. . . . In *Latta v. Lonsdale*, 107 Fed. 585, 57 C. C. A. 1, 52 L. R. A. 479, the Circuit Court of Appeals for the Eighth Circuit, in construing a statute of Arkansas which denied preferences among creditors of insolvent corporations 'except for wages and salaries of laborers and employes,' held that an attorney employed by a corporation at a yearly salary, payable monthly, was not entitled to the preference. The court said that statutes of the character under consideration were enacted for the protection of wage-earners proper, who had neither the position, nor the opportunity, nor the capacity to obtain payment or security for their services."

*Wife and daughter managing store.*—Where it appeared that during the illness

of the bankrupt his store was managed by his wife and daughter under a definite agreement for a stipulated weekly wage, their claim to priority for their wages was allowed. *In re Strauch*, (1913) 208 Fed. 842.

*The superintendent of a factory* has been held not to be a workman or servant, entitled to priority for sums due to him as salary, although he did a great deal of manual labor. *In re Continental Paint Co.*, (N. D. N. Y. 1915) 220 Fed. 189.

But "workman" includes the superintendent of the repair department of an automobile company who has authority to hire and discharge the men in his department but is subject to the control and direction of the general manager of the company and does the same kind of work in the shop as do the men working under him. *Blessing v. Blanchard*, (C. C. A. 9th Cir. 1915) 223 Fed. 35.

*The editor of a newspaper* was held not to be a workman, clerk or servant whose wages were entitled to priority. *Matter of Zotti*, 23 Am. Bankr. Rep. 607. But see *Ex p. Chipchase*, 7 L. T. N. S. (Eng.) 290, 11 W. R. 11.

*The manager of a branch store* is not "a workman, clerk or servant," within this section. *In re Greenberger*, (N. D. N. Y. 1913) 203 Fed. 583, wherein the court said: "The fact that, as incident to the performance of his duties as general manager of this store, he kept it clean and did some clerical duty does not change the character of his employment. He was not employed to do that work, but to manage the business, and he was paid for managing it, and not for performing such menial service as he did perform as incident to the management. The claim is for salary and for salary as manager, not for services as a clerk or general workman and compensation as such. . . . It would hardly do to hold that the general manager of the business of a corporation or individual, employed and paid as such, becomes entitled to priority, for the reason he incidentally sweeps the floor, dusts the counters, and assists in selling goods. Adopt this rule and general managers of a business would be sure to do enough menial work to bring themselves within the section of the Bankruptcy Act giving priority to workmen, clerks, salesmen, and servants."

*The claim of a manager of branch stores* was allowed as a preferred claim, but no question as to the nature of his employment seems to have been raised. *In re Andrews*, (W. D. N. C. 1907) 19 Am. Bankr. Rep. 441.

*But the manager of a branch office of a broker* in another city is not a "workman, clerk, or servant," and his claim for services is not entitled to priority on the bankruptcy of his employer. *In re Brown*, (S. D. N. Y. 1909) 171 Fed. 281, 22 Am. Bankr. Rep. 496. Compare *In re New*

*England Thread Co.*, (D. C. R. I. 1907) 154 Fed. 742, *affirmed* 158 Fed. 788, 89 C. C. A. 285.

**Assignee of wage claim.**—In *Shropshire v. Bush*, (1907) 204 U. S. 186, 27 S. Ct. 178, 51 U. S. (L. ed.) 436, 17 Am. Bankr. Rep. 77, the Circuit Court of Appeals for the Sixth Circuit certified to the Supreme Court for instructions the following question: "Is an assignee of a claim for wages earned within three months before the commencement of proceedings in bankruptcy against the bankrupt debtor entitled to priority of payment, under section 64 (4) of the Bankrupt Act when the assignment occurred prior to the commencement of such bankruptcy proceedings?" This question was answered in the affirmative, Mr. Justice Moody saying: "The question certified has never been passed upon by any Circuit Court of Appeals and in the District Courts the decisions upon it are conflicting. *In re Westlund*, (1900) 99 Fed. 399; *In re St. Louis Ice Mfg., etc., Co.*, (1906) 147 Fed. 752; *In re North Carolina Car Co.*, (E. D. N. C. 1903) 127 Fed. 178, where the right of the assignee to priority was denied; *In re Brown*, (1870) 4 Ben. 142, 4 Fed. Cas. No. 1,974 [Act of 1867]; *In re Harmon*, (S. D. W. Va. 1903) 128 Fed. 170, where, on facts slightly but not essentially different, the right of the assignee to priority was affirmed. . . . The precise inquiry is whether the right of prior payment thus conferred is attached to the person or to the claim of the wage-earner; if to the person, it is available only to him, if to the claim, it passes with the transfer to the assignee. . . . It [the statute] nowhere expressly or by fair implication says that the wages must be due to the earner at the time of the presentment of the claim, or of the beginning of the proceedings, and we find no warrant for supplying such a restriction. Regarding, then, the plain words of the statute, and no more, they seem to be merely descriptive of the nature of the debt to which priority is given. When one has incurred a debt for wages due to workmen, clerks or servants, that debt, within the limits of time and amount prescribed by the Act, is entitled to priority of payment. The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant. The Act does not enumerate classes of creditors and confer upon them the privilege of priority in payment, but, on the other hand, enumerates classes of debts as 'the debts to have priority.'"

Other cases, besides those cited in the foregoing quotation, holding that an assignee of a wage claim is entitled to the same priority as his assignor, are: *In re Dutcher*, (N. D. Wash. 1914) 213 Fed. 908; *In re Campbell*, (E. D. Wis. 1900) 102 Fed. 686, 4 Am. Bankr. Rep. 533; *In re Fuller*, (S. D. W. Va. 1907) 152 Fed. 538, 18 Am. Bankr. Rep. 443; *United*

*Surety Co. v. Iowa Mfg. Co.*, (C. C. A. 8th Cir. 1910) 179 Fed. 55; *Matter of Langley*, (W. D. Wis. 1910) 24 Am. Bankr. Rep. 69.

"The doctrine of subrogation is recognized in section 674 of the Bankruptcy Act and General Order 21, par. 4, providing for proof of the claim of a person contingently liable and his subrogation to the rights of a creditor. A preference is a right which a surety may obtain by subrogation." *In re Dutcher*, (N. D. Wash. 1914) 213 Fed. 908, holding that a surety company on a municipal contractor's bond conditioned that the wages of workmen should be paid, having obtained an assignment of workmen's claims, was not deprived of the right of subrogation on the ground that a contract of suretyship makes the surety primarily liable to the creditor, for as to the principal the surety is only collaterally liable.

A person furnishing money to pay the wages of the bankrupt's employees is not an assignee and is not entitled to be subrogated to the right of preference given to the employees unless he stands in the position of surety to the workmen. *In re North Carolina Car Co.*, 127 Fed. 178; *In re Paulson*, Betts Scr. Bk. 75, 19 Fed. Cas. No. 10,849. See also *In re General Automobile, etc., Co.*, 133 Fed. 525, 66 C. C. A. 496; *In re St. Louis Ice Mfg., etc., Co.*, 147 Fed. 752. In *United Surety Co. v. Iowa Mfg. Co.*, (C. C. A. 8th Cir. 1910) 179 Fed. 55, the court, in applying the rule, said: "In this case there was no assignment of the claims and none was intended by the parties. The transaction consisted simply in the Abadie Company borrowing money from the surety company to pay a debt which, as between the borrower and lender, was alone owed by the former, and instead of buying the claims from the laborers, and thereby securing some equitable right as against the principal debtor, the surety company took what it conceived to be ample security for the loan, turned over the money to the borrower, and with it the latter paid and extinguished its own debt to the laborers. Their claims, therefore, were not at the time bankruptcy proceedings were instituted against the borrower, 'wages due the workmen' within the meaning of section 64b (4) of the Bankruptcy Act. Neither were they assigned claims of that kind entitling the assignee to stand in the shoes of the laborers. To allow the surety company, in view of these facts, to be subrogated to the rights of the laborers against the estate of the bankrupt would give it a right which it never intended to secure. The fact that it took security for this item of \$1,071.50, as well as the advantage it gained with respect to its other dealings with its principal, renders it, in our opinion, entirely inequitable to now, when other creditors' rights have intervened, allow it to change its hold.

Subrogation is not a matter of strict right but purely equitable in its nature, dependent upon the facts and circumstances of each particular case."

Where there is an agreement between the bankrupt and a third person whereby the third person agrees to honor time checks or orders in payment for supplies furnished the workmen, the time checks or orders do not amount to such an assignment of wages as to give the holder the right as a claimant of wages entitled to a preference. *Matter of Erie Rolling Mill Co.*, 1 Fed. 585; *Browder v. Hill*, 136 Fed. 821, 69 C. C. A. 499; *Bell v. Arledge*, 192 Fed. 837, 113 C. C. A. 161; *Bell v. Arledge*, (5th Cir. 1914) 219 Fed. 675, 135 C. C. A. 347; *Stewart v. McLeod*, 222 Fed. 253, 138 C. C. A. 75; *In re McGowin Lumber Co.*, (S. D. Ala. 1915) 223 Fed. 553.

*Proof of claim by assignee.*—General Order No. 21, par. 3, provides for proof of claims by assignees. See also section 57 and note thereto.

*Order of priority—Claims of United States.*—Claims for labor have priority even over claims of the United States, other than taxes. *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, (1912) 224 U. S. 152, 32 S. Ct. 457, 56 U. S. (L. ed.) 706.

*Preference or lien under state statute.*—There is a line of cases holding that the priority given claimants under section 64b, clause 4, of the Bankruptcy Act is unaffected by any rights which may be given by section 64b, clause 5, or by section 67d, which provides that liens acquired under state laws are not affected by bankruptcy. *In re Rouse*, 91 Fed. 96, 63 U. S. App. 570, 33 C. C. A. 356; *In re Tebo*, 101 Fed. 419, 4 Am. Bankr. Rep. 235; *In re Shaw*, 109 Fed. 782, 6 Am. Bankr. Rep. 501; *In re Slomka*, 122 Fed. 630, 58 C. C. A. 222; *In re McDavid Lumber Co.*, 190 Fed. 99, affirmed 193 Fed. 647; *In re Crown Point Brush Co.*, (N. D. N. Y. 1912) 200 Fed. 889, holding that the fact that in dealing with workmen, clerks, traveling or city salesmen, and servants, the state law may be broader and more liberal than the Bankruptcy Act is not warrant for enlarging the priority given those classes by such Act. See also *In re Lewis*, 99 Fed. 935; *In re Erie Lumber Co.*, 150 Fed. 817; *In re Crawford Wollen Co.*, 218 Fed. 951; *Matter of Strickland*, (S. D. Ga.) 20 Am. Bankr. Rep. 923. Concluding a discussion of the reason for the rule above stated it was said in the case of *In re Rouse*, 91 Fed. 96, 63 U. S. App. 570, 33 C. C. A. 356: "It is not to be supposed—unless the language of the Act clearly so speaks—that the Congress intended that in the administration of the Act there should be a marked contrariety in the priority of payment of labor claims dependent upon locality. It is an elementary principle of

construction that where there are in one act or in several acts contemporaneously passed specific provisions relating to a particular subject, they will govern in respect to that subject as against general provisions contained in the same act. . . . Our conclusion is that Congress having spoken specifically to the subject of priority of payment of labor claims, what it has said upon that subject expresses the particular intent of the lawmaking power, and that provision is not to be tolled or enlarged by any general prior or subsequent provision in that Act. That which is given in particular is not affected by general words. So that the statute providing for the priority of payment of debts referred to in clause 5 must be construed to mean other debts and different debts than those specified in clause 4." See to the same effect *In re Shaw*, 109 Fed. 782; *In re Slomka*, 122 Fed. 630, 58 C. C. A. 222. In the case of *In re Tebo*, 101 Fed. 419, 4 Am. Bankr. Rep. 236, in applying this rule it was held that all wages due to workmen, clerks, or servants, which have been earned within three months before the date of the commencement of bankruptcy proceedings, not to exceed three hundred dollars to each claimant, must be allowed and paid out of the bankrupt's estate before the funds arising therefrom can be applied to the discharge of liens against the estate. See to the same effect, *In re Erie Lumber Co.*, 150 Fed. 817; *In re Blackstaff Engineering Co.*, (S. D. Ga. 1912) 200 Fed. 1019, holding that labor claims are entitled to "priority over the claims of all other creditors;" *In re Crawford Wollen Co.*, 218 Fed. 951. And in the case of *In re Crawford Wollen Co.*, 218 Fed. 951, it was held that a claim for wages was entitled to preference only to the extent of three hundred dollars regardless of state statutes to the contrary.

There is another line of cases holding that where valid liens have been obtained under state laws, the priority of claims for wages will be determined with reference to the priority given by the state statutes. This rule is based on the theory that clauses 4 and 5 of section 64b of the Bankruptcy Act relate exclusively to the subject of priority of payment arising among those claims which would in the absence of those clauses stand on terms of equality before the law as general unsecured claims and do not affect those claims which are recognized as valid by section 67d. *In re Kerby-Dennis Co.*, 95 Fed. 116, 36 C. C. A. 677, 2 Am. Bankr. Rep. 402, affirming 94 Fed. 818, 2 Am. Bankr. Rep. 218; *In re Emslie*, 102 Fed. 291, 42 C. C. A. 350; *In re Laird*, 109 Fed. 550, 48 C. C. A. 538, 6 Am. Bankr. Rep. 1; *In re Lawler*, 110 Fed. 135; *In re Proudfoot*, (N. D. W. Va. 1909) 173 Fed. 733; *In re Yoke Vitriified Brick Co.*, (D. C. Kan. 1910) 180 Fed. 235; *In re Rose*, 1 Am. Bankr. Rep. 68. See also *In re*

*Burton Bros. Mfg. Co.*, 134 Fed. 157, and the note to section 64b (5). Compare *In re I. Rheinstrom, etc., Co.*, 207 Fed. 119.

In the case of *In re Proudfoot*, (N. D. W. Va. 1909) 173 Fed. 733, the court said: "The master erred when he held that it was the intention of the Congress to so legislate that the wages due to laborers should be given priority over the secured debts of the bankrupt, as the Bankrupt Law only provides that such claims shall have priority out of the estate of the bankrupt, or, applying the evident purpose of the Act to this case, the wages due to the creditors of Proudfoot, earned within three months before the date of the commencement of the bankrupt proceedings against him, were entitled to priority over other debts not out of the funds derived from the sale of his property, but out of such sum as remained after the satisfaction of the debts duly secured by liens lawfully existing at the time the bankruptcy proceedings were instituted. To hold otherwise would be to disregard the plain intent of the Bankrupt Law, would treat as null and void the existing provisions of the West Virginia statutes, and would place in jeopardy the validity of the liens of deed of trust, of mortgages, and of those reserved to secure unpaid purchase money heretofore universally recognized as efficacious and as essential to the protection of the business transactions and commercial prosperity of the country. The trustee of Proudfoot came into the possession of the bankrupt's property, subject to all the equities existing against it, and he is required by the law to respect the liens with which he found it incumbered." To the same effect see *In re City Trust Co.*, 121 Fed. 706, 58 C. C. A. 126; *In re Mulhauser Co.*, (C. C. A. 6th Cir. 1903) 121 Fed. 629, 10 Am. Bankr. Rep. 231; *In re Meis*, (W. D. Ky. 1907) 18 Am. Bankr. Rep. 104. In the case of *In re Kerby-Dennis Co.*, 95 Fed. 116, 36 C. C. A. 677, 2 Am. Bankr. Rep. 402, affirming 94 Fed. 818, 2 Am. Bankr. Rep. 218, the rule was applied as between claimants for wages due for labor by giving a preference to those claimants who had perfected their lien under the state law. And in the case of *In re Laird*, 109 Fed. 550, 48 C. C. A. 538, 6 Am. Bankr. Rep. 1, a state statute giving a prior lien to laborers and employees on the appointment of a receiver was given effect in a bankruptcy proceeding which superseded a state receivership. So in the case of *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, the rights of an assignee of a paving contract, the assignment being made to secure advances to the bankrupt for the purpose of performing the contract, were held to be prior to the rights of labor creditors who had not perfected their liens under the state statute. In the case



of *In re Byrne*, 97 Fed. 762, the question was not discussed, but a lien for wages of a clerk or employee was held to be prior to a landlord's lien on the ground that under the laws of Iowa preference must be given in insolvency proceedings to wages due employees over a statutory lien for rent.

**Waiver of or estoppel to claim preference.**—A claimant for wages due may be estopped to assert the priority of his claim by the operation of a contract inconsistent with the conventional obligation of an employer. Thus where a clerk allowed his employer to retain from his wages weekly a certain amount, the total to be subsequently repaid or used for the clerk's benefit, it was held that the clerk could not claim priority for this amount as wages, since, by the agreement between himself and his employer, it had become a debt of another kind. *In re Flick*, (1900) 105 Fed. 503.

But in *Ex p. Cooper*, 26 Ch. D. (Eng.) 693, 51 L. T. N. S. 374, it was held that sums which were deducted from the wages of the workmen for a "doctor's fund," and a "reading-room fund" but which were not applied to those purposes, were not payments of wages and were recoverable as preferred claims by the workmen.

**A claim based solely on notes and mortgages**, as it was originally, cannot, upon being rejected on the ground that the notes and mortgages are fraudulent, be accepted as a claim for wages. *In re Hemstreet*, (N. D. Ia. 1903) 139 Fed. 958, where the court said: "The equity of the situation is not such as to require the court to place the claimant in any other position than that he assumed in filing his claim, and that is as the payee of the notes secured by the fraudulent mortgage."

**Effect of judgment on priority.**—A clerk in the store of a bankrupt, having a claim against the bankrupt for wages earned within the three months before bankruptcy, obtained a judgment for such claim and other claims within four months before the bankruptcy, the bankrupt being then insolvent. It was held that he did not thereby lose his priority, as the original wage claim could be proved as an unsecured debt. *In re Anson*, (1899) 101 Fed. 698.

**Assignee's preference lost by novation.**—One who has acquired labor claims by assignment "must not novate the debt nor merge it with other debts, or take from the debtor new obligations and securities therefor wholly due and payable to him." *In re Fuller*, (S. D. W. Va. 1907) 152 Fed. 538, 18 Am. Bankr. Rep. 443, denying priority to a claim consisting of a note and a duebill executed by the bankrupt to the claimant in return for various duebills and "labor scrip checks" issued by the bankrupt to laborers and assigned by the latter to the claimant.

**Application of payments.**—A wage claimant, to whom wages were owing on a running account, is not required to credit payments made to him within the last three months to reduce wages earned within that period, but is entitled to credit all the payments to the earlier items of the account. *In re Van Wert Mach. Co.*, (D. C. Mass. 1910) 186 Fed. 607. See also *In re Flick*, (S. D. Ohio 1900) 105 Fed. 503, 5 Am. Bankr. Rep. 465; *In re Andrews*, (W. D. N. C. 1907) 19 Am. Bankr. Rep. 441; *Matter of McIntyre*, (S. D. Miss. 1908) 21 Am. Bankr. Rep. 588.

**Time of earning wages—Before filing petition.**—A claim for wages, in order to be entitled to the priority accorded by the statute, must have been earned within the three months preceding the commencement of the proceedings in bankruptcy. *In re Rouse*, (C. C. A. 7th Cir. 1899) 91 Fed. 96, 1 Am. Bankr. Rep. 234, reversing (N. D. Ill. 1899) 91 Fed. 514, 1 Am. Bankr. Rep. 231; *In re Flick*, (S. D. Ohio 1900) 105 Fed. 503, 5 Am. Bankr. Rep. 465; *In re B. H. Gladding Co.*, (D. C. R. I. 1903) 120 Fed. 709, 9 Am. Bankr. Rep. 700; *In re Slomka*, (C. C. A. 2d Cir. 1903) 122 Fed. 630, 9 Am. Bankr. Rep. 635; *In re Burton Bros. Mfg. Co.*, (N. D. Ia. 1905) 134 Fed. 157, 14 Am. Bankr. Rep. 218; *In re Hunteburg*, (E. D. N. Y. 1907) 153 Fed. 768, 18 Am. Bankr. Rep. 697; *In re McGowin Lumber Co.*, (S. D. Ala. 1915) 223 Fed. 553. See also *In re Dunn*, (1910) 181 Fed. 701.

**Commissions.**—Where a salesman sells goods on commission, with an agreement that the commissions are not to be paid until the goods sold are paid for, his commissions are not "earned" until payment is made for the goods, and consequently where a sale is made by a salesman for a bankrupt, more than three months before bankruptcy, but the goods are paid for within three months, the commissions of the agent are, under this section, entitled to priority. *In re National Marble & Granite Co.*, (N. D. Ga. 1913) 206 Fed. 185.

**The commencement of a proceeding in bankruptcy** fixes the rights of the parties in determining whether wages were earned within the period entitling them to priority. *Ex p. Fox*, 17 Q. B. D. (Eng.) 4; *In re Waties*, 39 Fed. 264. See also *In re Photo Electrotype Engraving Co.*, 155 Fed. 684, 19 Am. Bankr. Rep. 94. **Compare** *In re Rouse*, (N. D. Ill. 1899) 91 Fed. 514, 1 Am. Bankr. Rep. 231, holding that the three months is to be computed from the time the bankrupt suspended business, and not from the time the petition was filed.

In the case of *In re Waties*, 39 Fed. 264, it was said: "When it is considered that these claims are highly favored by the Act, being in the same category with the expenses attending the proceedings, and with debts due the public, coming next

after these last, a construction making them a dead letter in so many instances cannot be the correct one. Proceedings in involuntary bankruptcy generally come on the respondents suddenly, and without warning. No time is given for preparation. The business is shut down at once, and all operators and laborers, a class who live from day to day, are thrown out without resources. The purpose of this provision is to protect them. The literal construction defeats this intent. Again, everything relates back to the filing of the petition. Only debts existing then are provable, and no claims can be paid out of the assets which did not exist at that time. So these petitioners are without remedy. Pending the proceedings they cannot sue their claims, and if they did, and the adjudication be subsequently declared, their action would be nugatory. See cases collected by Bump on Bankruptcy, 172. The true construction of this section is that in computing the time the period intervening between the institution of the proceedings and the final adjudication must be disregarded." But in the case of *In re Wells*, 4 Fed. 68, a bankrupt filed a petition in bankruptcy and before it was acted on he submitted to his creditors a proposition for composition which was accepted by them and confirmed by the court. The composition was afterwards set aside because of the default of the bankrupt. It was held that wages earned while the composition was in force were entitled to priority.

**Wages accruing during vacation.**—Where the contract of employment provides for the payment of wages during vacation, wages during a vacation taken within three months before bankruptcy are to be preferred and a clause in the contract that the wages for vacation may subsequently be forfeited by the severance of the relation of employer and employee has no application to the contingency of bankruptcy. *In re B. H. Gladding Co.*, (D. C. R. I. 1903) 120 Fed. 709, 9 Am. Bankr. Rep. 700, where the court said: "It was obviously not the purpose of this clause to make a distinction between wages due which have been earned and wages due which have not been earned; but merely to limit the priority to wages owing which had accrued within a limited period. The relation of the parties as employer and employed was not affected by the fact that the employer voluntarily released the clerk from the obligation to perform services during a vacation period. To attempt distinction between wages due which are earned and wages due which are not

earned, by an inquiry into the amount of work done by the wage-earner, would be entirely impractical."

**Where only a part of a claim** against a bankrupt for labor was for services performed within three months prior to the commencement of the bankruptcy proceedings, it was held that the claimant was entitled to priority only for such part as was earned within the three months period. *In re Burton Bros. Mfg. Co.*, (N. D. Ia. 1905) 134 Fed. 157, 14 Am. Bankr. Rep. 218.

**Wages earned after filing petition.**—In *In re Gerson*, (E. D. Pa. 1899) 1 Am. Bankr. Rep. 251, it was said: "While it is probable that all of these sums were not earned before the commencement of proceedings, and may not therefore be within the letter of the clause (4) of section 64, it would be a great hardship to exclude such claimants, who were without notice of the filing of the petition, from this right of priority, and such literal interpretation would not be within the spirit of the usual legislation on the subject, in which the purpose to fully protect such creditors is always apparent."

**Wages for labor in preservation of estate.**—It seems that the claim for wages of one who has been engaged in preserving the property of the bankrupt estate or whose work has contributed to enhance the assets of the estate is superior to all other claims. *In re Erie Lumber Co.*, 150 Fed. 817; *In re Blackstaff Engineering Co.*, 200 Fed. 1019. Compare *Thomas v. Williams*, 3 N. & M. 545, 1 A. & E. 685, 28 E. C. L. 180, 3 L. J. K. B. 212. In the case of *In re Erie Lumber Co.*, *supra*, it was said: "Under the Bankruptcy Law of the United States every laborer who actually labors under the authority of the court for the preservation or enhancement of the fund or property *in custodia legis* is entitled as to that estate to an equitable lien equivalent in effect to that of a *bona fide* purchaser without notice. To express it otherwise, a laborer, who by order of the court is employed on property in the hands of the court, as to the existent values in hand, will be paid by the court for the value of his services rendered to that property to which the liens of the creditors attach, and for the benefit of which his services were rendered."

The amount of a wage claim allowable in bankruptcy is governed by clause (4), and not by clause (5), of section 64b. *In re Shaw*, (E. D. Pa. 1901) 109 Fed. 782, 6 Am. Bankr. Rep. 501; *In re Slomka*, (C. C. A. 2d Cir. 1903) 122 Fed. 630, 9 Am. Bankr. Rep. 635.

(5) [Debts owing to person entitled to priority.] debts owing to any person who by the laws of the States or the United States is entitled to priority. [(1898) 30 Stat. L. 563.]

**As to**

Liens recognized under state laws, see section 67d.

Trustee's title as subject to valid liens, etc., see the several subdivisions of section 70a.

The amendment of section 47a (2) in 1910 does not attempt to repeal or alter section 64 of the Bankruptcy Act, which regulates the order of distribution of assets, nor does it change clause 5 of that section, which provides that "debts owing to any person who by the laws of the states or the United States is entitled to priority" shall be given priority in the distribution of the bankrupt's estate next after those claims which are given priority by previous clauses of the section. *In re Lausman*, (W. D. Ky. 1910) 183 Fed. 647.

**Recognition of local law constitutional.**—The recognition of the local law by the Bankruptcy Act does not render the Act void as an attempt by Congress unlawfully to delegate its legislative power. *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1.

The controlling principle of construction applicable to section 64b (5) is that the creditor shall be allowed the same priority under the Bankruptcy Act which he would have had if such Act had not superseded the state laws governing the distribution of the estates of insolvent debtors. *In re Jones*, (W. D. Mich. 1907) 151 Fed. 108, 18 Am. Bankr. Rep. 206; *In re Yoke Vitri-fied Brick Co.*, (D. C. Kan. 1910) 180 Fed. 235.

But the state statute has no application to enlarge the priority given by the Bankruptcy Act to a certain class of claims or claimants. *In re Crown Point Brush Co.*, (N. D. N. Y. 1912) 200 Fed. 882.

**Priorities accorded by state or federal laws.**—Section 64b (5), in providing for the payment of debts in accordance with the priorities recognized by the laws of the state or the United States, is clearly an adoption of those laws, at least in so far as they do not conflict with the Bankruptcy Law. Therefore, whatever claims are entitled to priority of payment under the state or federal statutes and decisions will also be entitled to such priority of payment in bankruptcy proceedings. *Globe Bank, etc., Co. of Paducah v. Martin*, (1915) 236 U. S. 288, 35 S. Ct. 377, 59 U. S. (L. ed.) 583, *affirming* (C. C. A. 6th Cir. 1912) 201 Fed. 31; *Courtney v. Fidelity Trust Co.*, (C. C. A. 6th Cir. 1914) 219 Fed. 57; *Hanover Nat. Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. Ct. 857, 46 U. S. (L. ed.) 1113, 8 Am. Bankr. Rep. 1; *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1; *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 135, *affirming* (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382; *In re*

*Byrne*, (S. D. Ia. 1899) 97 Fed. 762, 3 Am. Bankr. Rep. 268; *In re Falls City Shirt Mfg. Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437; *In re Lewis*, (D. C. Mass. 1900) 99 Fed. 935, 4 Am. Bankr. Rep. 51; *In re Tebo*, (D. C. W. Va. 1900) 101 Fed. 419, 4 Am. Bankr. Rep. 235; *In re Worcester County*, (C. C. A. 1st Cir. 1900) 102 Fed. 808, 4 Am. Bankr. Rep. 497; *In re Beaver Coal Co.*, (D. C. Ore. 1901) 107 Fed. 98, 6 Am. Bankr. Rep. 404; *In re Laird*, (C. C. A. 6th Cir. 1901) 109 Fed. 550, 6 Am. Bankr. Rep. 1; *In re Matthews*, (W. D. Ark. 1901) 109 Fed. 603, 6 Am. Bankr. Rep. 96; *In re Daniele*, (D. C. R. I. 1901) 110 Fed. 745, 6 Am. Bankr. Rep. 699; *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 767, 7 Am. Bankr. Rep. 648; *In re Crow*, (W. D. Ky. 1902) 116 Fed. 110, 7 Am. Bankr. Rep. 545; *Summers v. Abbott*, (C. C. A. 8th Cir. 1903) 122 Fed. 36, 10 Am. Bankr. Rep. 254; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 548, 12 Am. Bankr. Rep. 680; *Liddon v. Smith*, (C. C. A. 5th Cir. 1905) 135 Fed. 43, 14 Am. Bankr. Rep. 204; *Mott v. Wissler, Min. Co.*, (C. C. A. 4th Cir. 1905) 135 Fed. 697, 14 Am. Bankr. Rep. 321; *In re Smart*, (N. D. Ohio 1905) 136 Fed. 974, 14 Am. Bankr. Rep. 672; *In re Potter*, (W. D. Ky. 1906) 143 Fed. 407, 16 Am. Bankr. Rep. 226; *In re Goldberg*, (D. C. Me. 1906) 144 Fed. 566, 16 Am. Bankr. Rep. 521; *Moore v. Green*, (C. C. A. 4th Cir. 1906) 145 Fed. 480, 16 Am. Bankr. Rep. 648; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *In re Doran*, (W. D. Ky. 1906) 148 Fed. 327, 17 Am. Bankr. Rep. 799; *In re Chavez*, (C. C. A. 8th Cir. 1906) 149 Fed. 73, 17 Am. Bankr. Rep. 641; *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; *In re Jones*, (W. D. Mich. 1907) 151 Fed. 108, 18 Am. Bankr. Rep. 206; *In re Bennett*, (C. C. A. 6th Cir. 1907) 153 Fed. 673, 18 Am. Bankr. Rep. 320; *In re Western Implement Co.*, (D. C. Minn. 1909) 166 Fed. 576, 22 Am. Bankr. Rep. 167; *In re Iroquois Mach. Co.*, (D. C. R. I. 1909) 166 Fed. 629, 22 Am. Bankr. Rep. 183; *In re Faulhaber Stable Co.*, (C. C. A. 2d Cir. 1909) 170 Fed. 68, 22 Am. Bankr. Rep. 381; *In re Standard Oak Veneer Co.*, (E. D. Tenn. 1909) 173 Fed. 103, 22 Am. Bankr. Rep. 883; *In re Clark Coal, etc., Co.*, (W. D. Pa. 1909) 173 Fed. 658, 23 Am. Bankr. Rep. 273; *In re Amoratis*, (C. C. A. 9th Cir. 1910) 178 Fed. 919; *In re Devlin*, (D. C. Kan. 1910) 180 Fed. 170; *In re Yoke Vitri-fied Brick Co.*, (D. C. Kan. 1910) 180 Fed. 235; *In re Lausman*, (W. D. Ky. 1910) 183 Fed. 647; *In re Randolph*, (N. D. W. Va. 1911) 187 Fed. 186; *In re Rose*, (N. D. Ohio 1899) 1 Am. Bankr. Rep. 68; *Spruks v. Lackawanna Dairy Co.*, (M. D. Pa. 1911) 189 Fed. 287; *In re Charles Town Light & Power Co.*, (N. D. W. Va. 1912) 199 Fed. 846; *In re Keith-Gara Co.*, (E.

D. Pa. 1913) 203 Fed. 585; *In re Scruggs*, (S. D. Ala. 1913) 205 Fed. 673; *In re* l. Rheinstrom & Sons Co., (E. D. Ky. 1913) 207 Fed. 119; *In re Frick*, (N. D. Ohio 1899) 1 Am. Bankr. Rep. 719; *In re* Duncan, (N. D. Tex. 1898) 2 Am. Bankr. Rep. 321; *In re Coffin*, (E. D. Tex. 1899) 2 Am. Bankr. Rep. 344; *Matter of Meis*, (W. D. Ky. 1907) 18 Am. Bankr. Rep. 104; *In re* Pittsburg Industrial Iron Works, (W. D. Pa. 1909) 22 Am. Bankr. Rep. 851; *Matter of Langley*, (W. D. Wis. 1910) 24 Am. Bankr. Rep. 69. See also *In re Huxoll*, (C. C. A. 6th Cir. 1912) 193 Fed. 851.

**Priority under federal laws.**—Section 64b (5) does not lessen nor affect the rights of the United States under R. S. sec. 3466, in title CLAIMS herein, nor the right of a surety, in a bond given by the bankrupt to the United States, who pays the money due on such bond, to be subrogated to a "like priority" under the provisions of R. S. sec. 3468, in title CLAIMS. Title Guaranty, etc., Co. v. Guarantee Title, etc., Co., (C. C. A. 3d Cir. 1909) 174 Fed. 385, 23 Am. Bankr. Rep. 340. See also *In re Stoeve*, (E. D. Pa. 1904) 127 Fed. 394, 11 Am. Bankr. Rep. 345.

**Priority dependent on state law.**—Any priority of payment allowed under section 64b (5), so far as it is therein made to depend upon the "law of the state," must be evidenced by some statutory provision or by a judicial rule so certainly established as to put it upon the level of a statutory enactment; and it is clearly incumbent upon the person who claims priority to show the existence of such law. *In re Potter*, (W. D. Ky. 1906) 143 Fed. 407, 16 Am. Bankr. Rep. 226; *In re New Galt House Co.*, (W. D. Ky. 1911) 199 Fed. 533.

**Assignee entitled to priority.**—A claim which is given priority because of a state statute by which the right of priority is given to the debt, and not to the creditor, may be assigned before bankruptcy, and the right of priority will pass to the assignee. *In re Bennett*, (C. C. A. 6th Cir. 1907) 153 Fed. 673, 18 Am. Bankr. Rep. 320; *Matter of Langley*, (W. D. Wis. 1910) 24 Am. Bankr. Rep. 69. See also cases cited under catch line *Assignee of Wage Claim* in note to section 64b (4), *infra*, p. 1096.

**Right of subrogation to priority claim.**—One who, at the request of a debtor, furnishes the money to discharge a lien, under an agreement that he shall have the same lien, is entitled in equity to be subrogated to the lien of the creditor whose debt is paid. *In re McGuire*, (N. D. Ohio 1905) 137 Fed. 967, 13 Am. Bankr. Rep. 704.

**Priority of judgment lien.**—Where a creditor of a bankrupt claims priority of payment out of his estate by virtue of an alleged judgment lien on the property of

the estate, the burden is on such claimant to show that he has done everything required by statute to make his judgment attach as a lien. *In re Wood*, (E. D. N. C. 1899) 95 Fed. 946, 2 Am. Bankr. Rep. 695. But see the following paragraph.

**Claimant not bound to follow procedure prescribed by state statute.**—An adjudication of bankruptcy brings the bankrupt's assets into the custody of the court of bankruptcy for administration; and a creditor of the bankrupt, having a lien on such property at that time, is not bound to follow the course of procedure prescribed by the state statute under which the lien arises, requiring certain action to be taken within a limited time for its preservation, but only to prove his claim as the Bankruptcy Law directs. *In re Falls City Shirt Mfg. Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437. But see the preceding paragraph.

**Right of secured creditors to prove generally.**—When, by a state law, a person furnishing materials or supplies to another for use in a business is allowed a lien upon the property used in the business on the subsequent bankruptcy of the debtor, and such property proves insufficient to pay the debt, he may prove the balance as a general claim against the estate of the bankrupt. *In re Floyd & Bohr Co.*, (W. D. Ky. 1912) 200 Fed. 1016.

**The right to priority may be lost.**—Thus where an infant obtained a bill of sale from a bankrupt to secure advances, and after his claim of preference by virtue of such bill of sale had been disallowed he elected to disaffirm the same because of his infancy, it was held that he was then only entitled to prove his claim for advances as a general creditor. *In re Hunttenberg*, (E. D. N. Y. 1907) 153 Fed. 768, 18 Am. Bankr. Rep. 697.

So, also, it has been held that where payment of an alleged specific lien was made by a bankrupt's trustee, after notice to all creditors and without objection, a general judgment creditor claiming a prior lien cannot thereafter object, under the rule that lien creditors who are not prompt and persistent in asserting rights may lose them. *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576. And see to the same effect *Keyser v. Wessel*, (3d Cir. 1904) 128 Fed. 281, 62 C. C. A. 650, 12 Am. Bankr. Rep. 126.

**Pleading.**—On an issue in bankruptcy as to the priority of a mortgage lien, the bill should allege the names of all the creditors of the bankrupt other than the mortgagee, the amounts of their debts, the character of the same, and when created. *Teague v. Anderson Hardware Co.* (N. D. Ga. 1908) 161 Fed. 765.

**Proof.**—While a verified petition for the allowance of a claim in bankruptcy is *prima facie* evidence of the claim itself,

on which it may be allowed as a general claim, allegations therein of facts to establish the right of such claim to priority are not to be taken as *prima facie* true, but must be proved by evidence. *In re Jones*, (W. D. Mich. 1907) 151 Fed. 108, 18 Am. Bankr. Rep. 206. See also *In re Wood*, (E. D. N. C. 1899) 95 Fed. 946, 2 Am. Bankr. Rep. 695; *In re Potter*, (W. D. Ky. 1906) 143 Fed. 407, 16 Am. Bankr. Rep. 226.

**Order of priority.**—See also cases cited under this caption in note to section 64b (4), *supra*, p. 1097. Debts which come within section 64b (5), as entitled to priority under the laws of the state or the United States, are subordinate, in the order of priority, to the debts enumerated in the preceding clauses of section 64b; that is, they follow (1) the cost of preserving the estate, (2) the filing fees, (3) the cost of administration, and (4) claims due for wages. *In re Consumers' Coffee Co.*, (E. D. Pa. 1907) 151 Fed. 933, 18 Am. Bankr. Rep. 500; *In re West Side Paper Co.*, (E. D. Pa. 1908) 159 Fed. 241, 20 Am. Bankr. Rep. 660; *In re Yoke Vitrified Brick Co.*, (D. C. Kan. 1910) 180 Fed. 235; *In re Lausman*, (W. D. Ky. 1910) 183 Fed. 647; *In re Pittsburg Industrial Iron Works*, (W. D. Pa. 1909) 22 Am. Bankr. Rep. 851.

**Priority as fixed by state statutes.**—Section 64b (5) does not operate to place all preferred debts of the class therein provided for upon a plane of equality; but liens created by the laws of the state will attach to the property of a bankrupt in the hands of his trustee in the same relative rank and order in which they are fixed by the state statutes. *In re Falls City Shirt Mfg. Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437.

**An unliquidated claim for damages for breach of a contract by receivers of a bankrupt is not entitled to priority as against antecedent liens against the estate.** *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689.

**Landlord's right to priority.**—Whether or not a landlord is entitled to priority for rent, as against his tenant's estate in bankruptcy, depends solely on the law of the state; the Bankruptcy Law does not expressly provide for such preference. But under section 64b (5), if the state law allows the landlord a priority over the creditors, such priority will be recognized and enforced in the Bankruptcy Court. *In re Byrne*, (S. D. Ia. 1899) 97 Fed. 762, 3 Am. Bankr. Rep. 268; *In re Ruppel*, (W. D. Pa. 1899) 97 Fed. 778, 3 Am. Bankr. Rep. 233; *In re Wolf*, (N. D. Ia. 1899) 98 Fed. 74, 3 Am. Bankr. Rep. 553; *In re Falls City Shirt Mfg. Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437; *McFarland Carriage Co. v. Solanes*, (E. D. La. 1901) 108 Fed. 532, 6 Am. Bankr. Rep. 221; *In re*

*Hoover*, (W. D. Pa. 1902) 113 Fed. 136, 7 Am. Bankr. Rep. 330; *Wilson v. Pennsylvania Trust Co.*, (C. C. A. 3d Cir. 1902) 114 Fed. 742, 8 Am. Bankr. Rep. 169; *In re Mitchell*, (D. C. Del. 1902) 116 Fed. 87, 8 Am. Bankr. Rep. 335; *In re Duble*, (M. D. Pa. 1902) 117 Fed. 795, 9 Am. Bankr. Rep. 121; *In re Belknap*, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326; *In re Hayward*, (E. D. Pa. 1904) 130 Fed. 720, 12 Am. Bankr. Rep. 284; *In re Lines*, (M. D. Pa. 1903) 133 Fed. 803, 13 Am. Bankr. Rep. 318; *In re McIntire*, (N. D. W. Va. 1906) 142 Fed. 593, 16 Am. Bankr. Rep. 80; *In re Whealton Restaurant Co.*, (E. D. Pa. 1906) 143 Fed. 921, 16 Am. Bankr. Rep. 294; *In re Consumers' Coffee Co.*, (E. D. Pa. 1907) 151 Fed. 933, 18 Am. Bankr. Rep. 500; *In re Bishop*, (D. C. S. C. 1907) 153 Fed. 304, 18 Am. Bankr. Rep. 635; *In re West Side Paper Co.*, (E. D. Pa. 1908) 159 Fed. 241, 20 Am. Bankr. Rep. 289; *In re Morris*, (M. D. Pa. 1908) 159 Fed. 591; *In re Pittsburg Drug Co.*, (W. D. Pa. 1908) 164 Fed. 482, 20 Am. Bankr. Rep. 227; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1001, 22 Am. Bankr. Rep. 860; *Martin v. Orgain*, (C. C. A. 5th Cir. 1909) 174 Fed. 772, 23 Am. Bankr. Rep. 454; *In re Burns*, (S. D. Ga. 1909) 175 Fed. 633, 23 Am. Bankr. Rep. 640, explaining *In re D. H. Dougherty Co.*, (N. D. Ga. 1901) 109 Fed. 480; *In re Southern Co.*, (D. C. Md. 1904) 180 Fed. 838 *Ludlow v. Pugh*, (C. C. A. 3d Cir. 1914) 213 Fed. 450.

But if the landlord is not entitled to priority under the state law, he is not entitled to priority under the Bankruptcy Law. *In re Southern Co.*, (D. C. Md. 1904) 180 Fed. 838; *In re Chaudron*, (D. C. Md. 1910) 180 Fed. 841.

Upon the proof it was held that the landlord had no priority on his claim for "one year's rent due or to become due." *In re Jefferson*, (1899) 93 Fed. 948. See also *In re Mahler*, (1900) 105 Fed. 428.

**Order of priority.**—See also cases cited under catch line *Order of Priority* in note to section 64b (4), p. 1097. The claim of the landlord is not entitled to payment prior to the debts specified in clauses (1), (2), (3), and (4) of section 64b. *In re Consumers' Coffee Co.*, (E. D. Pa. 1907) 151 Fed. 933, 18 Am. Bankr. Rep. 500; *In re West Side Paper Co.*, (E. D. Pa. 1908) 159 Fed. 241, 20 Am. Bankr. Rep. 289.

**Distress unnecessary.**—Where a lease to a bankrupt contained a waiver of exemptions, and the landlord proved his claim for rent before the referee, it was held that he was entitled to receive such rent as a prior claim out of the proceeds of property from which the bankrupt claimed his exemption, and which was subject to distress for rent, though the landlord made no levy either before or

after the filing of the bankruptcy petition. *In re Sloan*, (E. D. Pa. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435.

**Rent to become due.**—Where the landlord of a bankrupt has a lien on the property on the leased premises for "rent due and to become due" by the express terms of the lease, which is entitled to priority under the law of the state, such lien is enforceable against the trustee in bankruptcy. *Martin v. Orgain*, (C. C. A. 5th Cir. 1909) 174 Fed. 772, 23 Am. Bankr. Rep. 454.

Thus it has been held that where the lease expresses an intention to reserve the taxes assessed on the property as part of the rent, the landlord is entitled to the allowance of a claim for the whole amount of the rent due, including taxes as a secured claim. *McCann v. Evans*, (C. C. A. 3d Cir. 1911) 185 Fed. 93.

Where a state statute gives a landlord a lien for a year's rent on any property of the tenant on the leased premises such lien is protected, under this section of the Bankruptcy Act, for rent due or to become due although such rent is not a provable debt under section 63a (4) of this Act. *In re Sapinsky*, (W. D. Ky. 1913) 206 Fed. 523.

Where a lease provided that if the lessor were sold out in bankruptcy, the unaccrued rent for the unexpired term should immediately become due and payable, and should be paid first out of the proceeds of the sale, the lessor was entitled to priority under the law of Pennsylvania. *In re Quality Shoe Shop*, (E. D. Pa. 1914) 212 Fed. 321.

**Property not subject to landlord's claim.**—A landlord is not entitled to priority of payment of rent due from a bankrupt out of the proceeds of a license to the bankrupt to sell liquors upon the demised premises, such license not being property subject to execution or to distress under the laws of the state. *In re Myers*, (E. D. Pa. 1900) 102 Fed. 869, 4 Am. Bankr. Rep. 536; *In re McFadgen*, (E. D. Pa. 1907) 156 Fed. 715, 19 Am. Bankr. Rep. 481, *affirmed* (C. C. A. 3d Cir. 1908) 161 Fed. 914, 20 Am. Bankr. Rep. 540.

**Commingled property.**—Where property of a bankrupt, a part of which was subject to a landlord's lien and a part not, was sold together in gross without objection, the proceeds cannot be apportioned, so as to entitle the landlord to priority of payment from any part thereof. *Vollmer v. McFadgen*, (C. C. A. 3d Cir. 1908) 161 Fed. 914, 20 Am. Bankr. Rep. 540, *affirming* (E. D. Pa. 1907) 156 Fed. 715.

**A lessee who assigns his interest** in his term has no right of distress unless such right is reserved in the assignment, and therefore is not entitled to priority in bankruptcy proceedings. *In re Bayley*, (W. D. Pa. 1908) 22 Am. Bankr. Rep. 249.

**Priorities provided for in state insolvency laws.**—A state insolvency law is "a law of the state" under this section; and where a debt due to a county is, by a state insolvency law, a preferred claim, it will be a preferred claim in bankruptcy. *In re Wright*, (1899) 95 Fed. 807; *In re Worcester County*, (C. C. A. 1900) 102 Fed. 808, where the court said: "We are unable to conceive of any priority to which any one may be entitled by the laws of a state, under section 64 of the Bankruptcy Act, unless it be a priority created by insolvent laws."

The rule that the enactment of the federal Bankruptcy Act supersedes all state insolvency or bankruptcy laws relating to persons or acts declared to be subjects of bankruptcy applies merely to the administration of the state laws in proceedings in the state courts; and it does not prevent the enforcement, in federal bankruptcy proceedings, of general priorities recognized by such state laws as substantive rights, and which do not depend on the particular remedies accessible only in the state courts, and are not in conflict with the express priorities declared by the Bankruptcy Act. *In re Standard Oak Veneer Co.*, (E. D. Tenn. 1909) 173 Fed. 103, 22 Am. Bankr. Rep. 883. See also *In re Western Implement Co.*, (D. C. Minn. 1909) 166 Fed. 576, 22 Am. Bankr. Rep. 167.

Thus it has been held that cost incurred in an action against a bankrupt, prior to the bankruptcy, which would constitute a preferred claim, under the insolvency laws of the state, are entitled to priority against the estate in bankruptcy. *In re Daniels*, (D. C. R. I. 1901) 110 Fed. 745, 6 Am. Bankr. Rep. 699.

**Costs in attachment proceedings**, if entitled to priority under the state law, will be so allowed in bankruptcy, notwithstanding the annulment of the lien. *In re Lewis*, (D. C. Mass. 1900) 99 Fed. 935, 4 Am. Bankr. Rep. 51; *In re Goldberg*, (D. C. Me. 1906) 144 Fed. 566, 16 Am. Bankr. Rep. 521; *In re Iroquois Mach. Co.*, (D. C. R. I. 1909) 166 Fed. 629, 22 Am. Bankr. Rep. 183. See also note to section 63a (3).

But in *In re The Copper King*, (N. D. Cal. 1906) 143 Fed. 649, 16 Am. Bankr. Rep. 148, it was held that attachment costs were not entitled to priority.

**Fees and costs in proceedings in state court.**—Section 64b (1) and (3) relates to costs directly connected with the proceedings in bankruptcy, and does not exclude a right of priority given by state laws to fees and costs arising, before the filing of the petition in bankruptcy, in proceedings against the bankrupt not directly connected with the bankruptcy proceedings. *In re Lewis*, (1900) 99 Fed. 935.

The provision that "a claim for taxable costs incurred in good faith by a creditor before the filing of a petition in

an action to recover a provable debt" may be proved against a bankrupt's estate, does not exclude such claim from a right of priority of payment given by the state law. *In re Lewis*, (1900) 99 Fed. 935; *In re Daniels*, (1901) 110 Fed. 745.

Where a state insolvency law gives priority to a claim for costs in an action against the insolvent, it does not, under section 64b (5), give a claim for costs in an action against a partnership priority as against the estate of an individual partner, neither the firm nor the other partner having been declared bankrupt. *In re Daniels*, (1901) 110 Fed. 745.

**Priority under deed of assignment.**—A general deed of assignment is so far avoided by an adjudication in bankruptcy as to defeat the right of any claim against the bankrupt's estate to the preferences given by such deed. But, so far as the assignee would be allowed for the payment of the preferences set out in the deed, such claims may be preferred in the right of the assignee. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1. See also *In re Mays*, (S. D. W. Va. 1902) 114 Fed. 600, 7 Am. Bankr. Rep. 764.

**Equitable rights.**—The Bankruptcy Law recognizes the equitable rights existing between the parties prior to the institution of the bankruptcy proceedings. *In re McGuire*, (N. D. Ohio 1905) 137 Fed. 967, 13 Am. Bankr. Rep. 704; *In re Chavez*, (C. C. A. 8th Cir. 1906) 149 Fed. 73, 17 Am. Bankr. Rep. 641; *In re Tracy*, (S. D. N. Y. 1911) 185 Fed. 844; *In re Ballantine*, (C. C. A. 3d Cir. 1911) 186 Fed. 91.

Thus where creditors of a bankrupt fail to insist upon a lien to which they were entitled, because they collected their claims by what they mistakenly supposed were valid attachments of the bankrupt's property, they will be entitled to have such lien allowed in the Bankruptcy Court, where no one has changed his position on the faith of their waiver. *Hutchinson v. Otis*, (1903) 190 U. S. 552, 23 S. Ct. 778, 47 U. S. (L. ed.) 1179, 10 Am. Bankr. Rep. 135, *affirming* (C. C. A. 1st Cir. 1902) 115 Fed. 937, 8 Am. Bankr. Rep. 382.

And in *McKay v. Hamill*, (C. C. A. 3d Cir. 1911) 185 Fed. 11, it appears that the bankrupt (a corporation) organized the "S" corporation, in another state, to which it transferred all of its personal

property in that state, taking all of the stock of the company at a nominal price. Thereafter the "S" company, to secure a debt due claimant, executed a deed of trust on such personal property, and, on the organizing corporation's becoming bankrupt, all of such property was treated as its own and sold as a part of its assets; and it was held that it was no objection to claimant's right to have its lien paid out of the proceeds of such property that he was not a creditor of the bankrupt but of the "S" company, the equity powers of the court being sufficient to authorize it to regard the lien as an incumbrance following the property.

**Misappropriation by bankrupt.**—Where a bankrupt improperly mingled funds belonging to its principal with its own funds, and it was not shown that the trust funds, either in their original or a substituted form, came into the hands of the bankrupt's trustee, it was held that the principal was not entitled to a prior right of payment therefor. *John Deere Plow Co. v. McDavid*, (C. C. A. 8th Cir. 1905) 137 Fed. 802, 14 Am. Bankr. Rep. 653.

**The federal decisions control in the determination of equitable rights.** *John Deere Plow Co. v. McDavid*, (C. C. A. 8th Cir. 1905) 137 Fed. 802, 14 Am. Bankr. Rep. 653.

**State may claim priority.**—A state is a person, and, under section 64b (5), is entitled to priority for a debt due it from the estate of a bankrupt which is given priority by its own laws. *In re Western Implement Co.*, (D. C. Minn. 1909) 166 Fed. 576, 22 Am. Bankr. Rep. 167.

A county is a "person" entitled to priority under section 64b (5) where it is entitled to priority under the state law. *In re Worcester County*, (C. C. A. 1900) 102 Fed. 808.

**Priority provided for decedent's estates.**—Where, pending bankruptcy proceedings, the bankrupt dies, his estate is distributable according to the Bankruptcy Law, and not according to the state statutes of distribution; so that the state is not entitled to a preference in the payment of its claims by virtue of a statute providing therefor in such cases. *In re Devlin*, (D. C. Kan. 1910) 180 Fed. 170.

**Taking a note for a debt does not deprive the claim of the right to priority to which it would otherwise be entitled.** *In re Worcester County*, (C. C. A. 1900) 102 Fed. 808.

c [After composition set aside or discharge revoked.] In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force,

and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication. [(1898) 30 Stat. L. 563.]

**As to**

Revocation of discharge, see section 15.  
Setting aside composition, see section 13.

**As to**

Title of trustee as affected by revocation of discharge or setting aside composition, see section 70d.

**SEC. 65. DECLARATION AND PAYMENT OF DIVIDENDS.—a** [On allowed claims.] Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured. [(1898) 30 Stat. L. 563.]

**As to**

Trustee's duty to pay dividends, see section 47a (9).

Unclaimed dividends, see section 66 a and b.

**"Dividend" defined.**—A dividend in bankruptcy is a parcel of the fund arising from the assets of the estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors or in a different proportion. *In re Barber*, (D. C. Minn. 1899) 97 Fed. 547, 3 Am. Bankr. Rep. 306.

While it is true that the word "dividend," as commonly used, seems to be so almost inseparably associated with the idea of a percentage of the claim itself, that the proper significance of the term is readily lost sight of, it must be remembered that a dividend is not an aliquot portion of the claim, but an aliquot portion of the estate against which the claim is made. *In re Gerson*, (E. D. Pa. 1899) 2 Am. Bankr. Rep. 355.

The word "dividend" is also defined in various cases involving the claims of trustees or referees to commissions on dividends. See *supra*, the notes to sections 40a and 48a.

Secured and priority creditors are not entitled to participate in the distribution of dividends under section 65a. *In re Ft. Wayne Electric Corp.*, (D. C. Ind. 1899) 94 Fed. 109, 1 Am. Bankr. Rep. 706; *In re Fielding*, (W. D. Mo. 1899) 96 Fed. 800, 3 Am. Bankr. Rep. 135; *In re Barber*, (D. C. Minn. 1899) 97 Fed. 547, 3 Am. Bankr. Rep. 306; *In re Utt*, (C. C. A. 7th Cir. 1901) 105 Fed. 754, 5 Am. Bankr. Rep. 383; *In re Goldville Mfg. Co.*, (D. C. S. C. 1903) 123 Fed. 579, 10 Am. Bankr. Rep. 552; *In re Sabine*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 322; *In re Coffin*, (E. D. Tex. 1899) 2 Am. Bankr. Rep. 344.

Thus it has been held that a creditor holding a mortgage on exempt property cannot receive a dividend on his entire claim, and resort to the security only to satisfy a balance unpaid. *In re Lantzenheimer*, (N. D. Ia. 1903) 124 Fed. 716, 10 Am. Bankr. Rep. 720.

The term "dividends" can have no application to priority claims, for the

reason that the statute directs them to be paid out of the estate in full, *seriatim*, before the matter of declaring and paying dividends arises. *In re Fielding*, (W. D. Mo. 1899) 96 Fed. 800, 3 Am. Bankr. Rep. 135.

While a secured creditor may ordinarily collect his debt by foreclosure or sale, as if no bankruptcy were pending, yet if, without his request, and solely to realize a surplus for other creditors, the court directs the sale of the property discharged from the incumbrance, his rights must be conserved; and the satisfaction of his secured debt from the proceeds of such sale may not be regarded as a dividend, nor charged with commission. *In re Barber*, (D. C. Minn. 1899) 97 Fed. 547, 3 Am. Bankr. Rep. 306. See also *In re Utt*, (C. C. A. 7th Cir. 1901) 105 Fed. 754, 5 Am. Bankr. Rep. 383.

**Dividends not subject to attachment.**—The law is well settled that the dividends in the hands of a trustee in bankruptcy are not subject to attachment. *In re Hollander*, (D. C. Md. 1910) 181 Fed. 1019.

And see *In re Kranich*, (E. D. Pa. 1910) 182 Fed. 849, wherein it appears that funds in the hands of the trustee were attached, and that an objection was interposed by a creditor, but the trustee did not object, and McPherson, J., said: "The garnishee is an officer of this court, and has more than enough money in his hands to satisfy the judgment; and, while the state tribunal could not compel him to pay over the money, he himself has made no objection either to the judgment or to the order that is now asked for by the creditor. Under such circumstances I see no reason why this court should not pay due respect to a tribunal of the state, and recognize a claim that has thus been conclusively proved—although I repeat that the allowance must be accepted as purely *ex gratia*."

A ruling of the state court permitting the garnishment of dividends, after they have been declared, by an officer of the state court as a receiver, administrator, or trustee, cannot affect the administration by a federal court of an estate in bankruptcy. *In re Argonaut Shoe Co.*, (C. C. A. 9th Cir. 1911) 187 Fed. 784.



**Effect of failure to prove claims.**—In the ordinary case of distribution by a trustee, the debtor's whole property, save that which is exempt, is applicable to the payment of his debts, and belongs to his creditors, and not to him, until their claims have been satisfied. After adjudication there is no voluntary offer to pay by the bankrupt, and no bargained release by the creditor. The creditor takes all his debtor's property, whether the debtor likes it or not, and the debtor is released whether the creditor likes it or not. The bankrupt's right of property arises only in the event of a payment of his creditors

in full. If a creditor will not prove his claim the bankrupt does not take that creditor's share, but it goes to swell the dividends of creditors more diligent. *In re Lane*, (D. C. Mass. 1902) 125 Fed. 772, 11 Am. Bankr. Rep. 137.

**Enforcement of attorney's lien.**—The Bankruptcy Court has jurisdiction to determine the right of a creditor's attorney to a lien on the amount secured for the creditor, and to fix the amount; and it is discretionary with the court whether a jury trial shall be allowed of issues raised in such inquiry. *In re Rude*, (D. C. Ky. 1900) 100 Fed. 805.

**b [First and subsequent dividends.]** The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: [(1898) 30 Stat. L. 563.]

This paragraph was re-enacted without change in 1903 (32 Stat. L. 800).

**Equality essential.**—Bankruptcy proceedings are equitable in their nature, and should be as far as possible conducted on broad lines to accomplish the ultimate purpose of distributing the assets of a bankrupt *pro rata* among his creditors. *Atchison, etc., R. Co. v. Hurley*, (8th Cir. 1907) 153 Fed. 503, 508, 82 C. C. A. 453; *In re Faulkner*, (C. C. A. 8th Cir. 1908) 161 Fed. 900, 20 Am. Bankr. Rep. 542.

Claims enjoying the first dividend are not allowed to share in the second distribution until those that were credited with no part of the first dividend shall have been paid a sum equal in amount to that received by other creditors. *In re Scott*, (N. D. Tex. 1899) 96 Fed. 607, 2 Am. Bankr. Rep. 324.

The referee should withhold from distribution, upon the declaration of dividends, sufficient funds to recover all the expenses of administration and priorities, and claims that will probably be allowed. This includes those claims concerning which he has information such as justifies him in the conclusion that they will be allowed when presented. With these exceptions he should devote the whole sum in the hands of the trustee to the dividend. *In re Scott*, (N. D. Tex. 1899) 96 Fed. 607, 2 Am. Bankr. Rep. 324.

**Partial dividends.**—*In re Stein*, (D. C. Ind. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662, it was said: "Partial dividends are authorized and required within thirty

days after the adjudication, if the money of the estate in excess of the amount of claims which have priority, and such claims as have not been but probably will be allowed, equals five per centum of the claims that are entitled to dividends. The only way in which this can be determined by the referee is by an examination of the schedules of liabilities filed by the bankrupt. Other dividends are required to be declared upon like terms, and as often as the amount of assets equals ten per centum or more of those claims, and also upon the closing of the estate."

**Exceptions to distribution.**—Exceptions to a proposed distribution of a bankrupt estate must be filed before the final decree of confirmation is entered; and exceptions, and a petition for review based thereon, not filed until after such confirmation and after the final dividend has been distributed in accordance therewith, will not be considered. *In re Heebner*, (E. D. Pa. 1904) 132 Fed. 1003, 13 Am. Bankr. Rep. 256.

**Dividend cannot be set aside.**—A dividend in bankruptcy, once declared and paid, cannot be set aside, notwithstanding it was erroneously made so large as not to leave sufficient money in the trustee's hands for an equal dividend to creditors afterwards perfecting their proofs, in addition to the costs of administration. *In re Scott*, (N. D. Tex. 1899) 96 Fed. 607, 2 Am. Bankr. Rep. 324.

**[Amount of first dividend.]** *Provided*, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims

as probably will be allowed: [(*Inserted 1903, which excepted pending cases*) 32 Stat. L. 800.]

This proviso was not in the Act as originally enacted.

**[Declaration of final dividend.]** And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared. [(*Inserted 1903, which excepted pending cases*) 32 Stat. L. 800.]

This proviso was not in the Act as originally enacted.

**Final dividends.**—Where all the known assets of a bankrupt estate have been collected and reduced to money, a final dividend may be declared at any time after the expiration of three months from the declaration of the first dividend; and any creditor who has not then proved his claim is debarred from participating in the fund. *In re Bell Piano Co.*, (S. D. N. Y. 1907) 155 Fed. 272, 18 Am. Bankr. Rep. 183, following *In re Stein*, (D. C. Ind. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662.

It is the duty of the courts to close estates as soon as practicable. *In re Stein*, (D. C. Ind. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662.

Where a bankrupt's estate is ready for final dividend, it may be closed at any time after four months from the adjudication, on notice to all persons scheduled or appearing in any way in the proceedings as creditors. *In re Eldred*, (E. D. N. Y. 1907) 155 Fed. 686, 19 Am. Bankr. Rep. 52.

Prior to the amendment of 1903, regarding the declaration of final dividends, the cases were somewhat conflicting as to distribution before the expiration of a year. In the case of *In re Lockwood*, (1900) 104 Fed. 794, it was held that distribution by consent would not be ordered by the court, so long as unknown creditors have a right to appear and present their claims; that the consent of all known creditors or provision for payment in full of all known creditors who did not consent was not alone sufficient to authorize such distribution. But in the case of *In re Stein*, (D. C. Ind. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662, it was held that a final dividend of all the funds of the estate may be directed, notwithstanding the year allowed for presentation of claims has not expired, and that creditors proving their claims thereafter will be entitled only to subsequently discovered assets and unclaimed dividends.

**c [Claims subsequent to payment of dividends.]** The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends. [(1898) 30 Stat. L. 564.]

**Effect of subsequent proof and allowance of claims.**—It was evidently contemplated by Congress that claims might be proved after dividends had been declared and paid, and that creditors who had been negligent in proving their claims should thereupon take their chances of obtaining an equal distribution with those creditors who had been more diligent. *In re Stein*, (D. C. Ind. 1899) 94 Fed. 124, 1 Am. Bankr. Rep. 662.

**Effect of laches.**—One claiming the right to participate in the distribution of the bankrupt's estate may be barred by laches; thus standing silently by while the trustee pays out all the funds in dividends will preclude a claimant even though, before that time, he could have shown an equitable right to the fund or some part thereof. *Clafin Dry Goods*

*Co. v. Eason*, (E. D. Tex.) 2 Am. Bankr. Rep. 263.

**Review and revocation of order declaring dividend.**—Whether the referee shall direct or refuse to direct the trustees to take a review of an order declaring a dividend, or to allow a review in the name of the trustees is a matter as to which the judgment of the referee, under whose immediate control the estate is being administered, and who is familiar with the property, is entitled to much weight. Likewise the question as to whether a dividend order, which was right when made, should be revoked, and the case reopened on that point, is a matter which rests within the discretion of the referee, to the exercise of which no review lies, except so far as it may proceed upon erroneous principles of law. *In re Henry Siegel Co.*, (D. C. Mass. 1914) 216 Fed. 943.

**d [Where persons adjudged bankrupt without United States.]** Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts. [(1898) 30 Stat. L. 564.]

**e [Limit to amount collectable by claimant.]** A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act. [(1898) 30 Stat. L. 564.]

**SEC. 66. UNCLAIMED DIVIDENDS.—a [Payment into court.]** Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court. [(1898) 30 Stat. L. 564.]

As to dividends generally, see section 65.

**b [Distribution after one year.]** Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends. [(1898) 30 Stat. L. 564.]

**Purpose of section.**—"To those familiar with the incidents following the administration of the Bankrupt Act of 1867, the purpose of the provisions of said section 66 is quite obvious. It occurred under that Act elsewhere, no doubt, as in this district, that dividends declared in favor of general creditors of the bankrupt, which were covered into the court registry or depository, remained uncalled for by the distributees for a great number of years; and this fund in some of the depositories was quite large. As this fund had not for so long a period been called for by the designated distributees, the question arose as to whether or not the courts ought not to hold that this seemingly abandoned fund, in equity, should either be distributed *pro rata* among the creditors who had not been paid in full, or returned to the bankrupt. But the better opinion seemed to be that such a contingency was a *casus omissus* of the Bankrupt Act, which section 66 of the Act of 1898 sought to remedy. Its phraseology strengthens the argument that the

term 'dividends' employed in this statute pertains solely to the fund to be distributed *pro rata* among the general creditors. The uncalled-for dividends are to 'be distributed to the creditors whose claims have been allowed, but not paid in full,' etc. As no dividends could arise until after the claims entitled to priority have been paid in full, 'the creditors whose claims have been allowed, but not paid in full,' are clearly the general creditors." *In re Fielding*, (W. D. Mo. 1899) 96 Fed. 800, 3 Am. Bankr. Rep. 135.

This section relates to unclaimed dividends only, and when there is a surplus of a voluntary bankrupt's estate, after the payment of all proved claims and interest thereon to the date of the filing of the petition, such surplus should be applied first to the payment of the interest accruing on the claims subsequent to the filing of the petition, and the remainder only returned to the bankrupt. *Johnson v. Norris*, (C. C. A. 5th Cir. 1911) 190 Fed. 459.

**SEC. 67. LIENS.—a [Claims not valid liens.]** Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate. [(1898) 30 Stat. L. 564.]

**Purpose of section.**—This section "was designed to preserve rights under attachments and liens that actually existed, and

not to create rights under attachments that had ceased to exist at the time of the filing of the petition in bankruptcy.

The obvious purpose of it was to preserve to the creditors property which they would otherwise lose by an adjudication in bankruptcy, and to prevent the intervention of other liens to their prejudice." *Gary v. Graham*, (1911) 108 Me. 452, 81 Atl. 666.

The section "means that any liens which would not have been valid if other creditors had a right before bankruptcy to avoid the same, either for want of record or otherwise, shall not constitute a lien against the estate in bankruptcy." *In re Pekin Plow Co.*, (C. C. A. 1901) 112 Fed. 308.

**Validity determined by state law.**—The decisions all agree that the validity of an alleged lien, attacked as ineffective under section 67a, is to be determined in accordance with the law of the state, whether statutory or existing by force of well-settled principles. Therefore, if an alleged lien be invalid as to creditors under the law of the state, either for want of recording or for any other reason, it will also be invalid as against the trustee in bankruptcy; but if, on the other hand, the transaction is one recognized as valid as against creditors under the state statutes and decisions, its validity will be equally recognized and enforced in bankruptcy proceedings. *Holt v. Crucible Steel Co.*, (1912) 224 U. S. 262, 32 S. Ct. 414, 56 U. S. (L. ed.) 756; *In re Booth*, (D. C. Ore. 1900) 98 Fed. 975, 3 Am. Bankr. Rep. 574; *In re New York Economical Printing Co.*, (C. C. A. 2d Cir. 1901) 110 Fed. 514, 6 Am. Bankr. Rep. 615; *In re Tatem*, (E. D. N. C. 1901) 110 Fed. 519, 6 Am. Bankr. Rep. 426; *In re Sewell*, (E. D. Ky. 1911 Fed. 791, 7 Am. Bankr. Rep. 133; *In re Shirley*, (C. C. A. 6th Cir. 1901) 112 Fed. 301, 7 Am. Bankr. Rep. 299; *In re Pekin Plow Co.*, (C. C. A. 8th Cir. 1901) 112 Fed. 308, 7 Am. Bankr. Rep. 369; *Duplan Silk Co. v. Spencer*, (C. C. A. 3d Cir. 1902) 115 Fed. 689, 8 Am. Bankr. Rep. 367; *In re Hull*, (D. C. Vt. 1902) 115 Fed. 858, 8 Am. Bankr. Rep. 302; *In re Josephson*, (W. D. Ga. 1902) 116 Fed. 404, 8 Am. Bankr. Rep. 423; *In re H. G. Andrae Co.*, (E. D. Wis. 1902) 117 Fed. 561, 9 Am. Bankr. Rep. 135; *In re Antigo Screen Door Co.*, (C. C. A. 7th Cir. 1903) 123 Fed. 249, 10 Am. Bankr. Rep. 359; *In re Gosch*, (C. C. A. 5th Cir. 1903) 126 Fed. 627, 12 Am. Bankr. Rep. 149; *In re Beede*, (N. D. N. Y. 1903) 126 Fed. 853, 11 Am. Bankr. Rep. 387; *In re Lukens*, (E. D. Pa. 1905) 138 Fed. 188, 14 Am. Bankr. Rep. 683; *Rogers v. Page*, (6th Cir. 1905) 140 Fed. 596, 72 C. C. A. 164, 15 Am. Bankr. Rep. 502; *In re Chadwick*, (N. D. Ohio 1905) 140 Fed. 674, 15 Am. Bankr. Rep. 528; *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639; *In re Doran*, (W. D. Ky. 1906) 148 Fed. 327; *Hanson v. Blake*, (D. C. Me. 1907) 155 Fed. 342, 19 Am. Bankr. Rep. 325; *American Wood*

*Working Machinery Co. v. Norment*, (C. C. A. 4th Cir. 1907) 157 Fed. 301, 19 Am. Bankr. Rep. 679; *Pontiac Buggy Co. v. Skinner*, (N. D. N. Y. 1908) 158 Fed. 853, 20 Am. Bankr. Rep. 206; *In re Hickerson*, (D. C. Idaho 1908) 162 Fed. 345, 20 Am. Bankr. Rep. 682; *In re Claussen*, (D. C. S. C. 1908) 164 Fed. 300, 21 Am. Bankr. Rep. 34; *Walther v. Williams Mercantile Co.*, (C. C. A. 6th Cir. 1909) 169 Fed. 270, 22 Am. Bankr. Rep. 328; *Walter A. Wood Co. v. Eubanks*, (C. C. A. 4th Cir. 1909) 169 Fed. 929, 22 Am. Bankr. Rep. 307; *Corbitt Buggy Co. v. Ricaud*, (C. C. A. 4th Cir. 1909) 169 Fed. 935, 22 Am. Bankr. Rep. 316; *In re Braxelton*, (N. D. Ga. 1909) 169 Fed. 960, 22 Am. Bankr. Rep. 419; *In re Burlage*, (N. D. Ia. 1909) 169 Fed. 1006, 22 Am. Bankr. Rep. 410; *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803; *In re Bement*, (C. C. A. 7th Cir. 1909) 172 Fed. 98; *In re McDonald*, (D. C. Mass. 1908) 173 Fed. 99, 23 Am. Bankr. Rep. 51; *In re Bothe*, (C. C. A. 8th Cir. 1909) 173 Fed. 597, 23 Am. Bankr. Rep. 151; *In re Southern Textile Co.*, (C. C. A. 2d Cir. 1909) 174 Fed. 523, 23 Am. Bankr. Rep. 172; *Mattley v. Wolfe*, (D. C. Neb. 1909) 175 Fed. 619, 23 Am. Bankr. Rep. 673; *In re Bailey*, (D. C. S. C. 1910) 176 Fed. 628, 23 Am. Bankr. Rep. 876; *In re Schmidt*, (C. C. A. 2d Cir. 1910) 181 Fed. 73; *In re Duggan*, (S. D. Ga. 1910) 182 Fed. 252; *In re Lausman*, (W. D. Ky. 1910) 183 Fed. 647; *Foerstner v. Citizens' Sav., etc., Co.*, (C. C. A. 6th Cir. 1911) 186 Fed. 1; *Sturdivant Bank v. Schade*, (C. C. A. 8th Cir. 1912) 195 Fed. 188; *In re Clough*, (D. C. Vt. 1912) 197 Fed. 185; *In re Charles Town Light & Power Co.*, (N. D. W. Va. 1912) 199 Fed. 846; *In re Harneden*, (D. C. N. M. 1912) 200 Fed. 175; *In re United States Lumber Co.*, (W. D. Wash. 1913) 206 Fed. 236; *Schaupp v. Miller*, (D. C. Ore. 1913) 206 Fed. 575; *In re Waters-Colver Co.*, (E. D. N. Y. 1913) 206 Fed. 845; *In re Rose*, (N. D. Ga. 1913) 206 Fed. 991; *Deupree v. Watson*, (C. C. A. 6th Cir. 1914) 216 Fed. 483; *In re Palmer*, (N. D. N. Y. 1914) 218 Fed. 74; *In re Marriner*, (D. C. Me. 1915) 220 Fed. 542; *In re Hellams*, (S. D. Ala. 1915) 223 Fed. 460.

See also the cases cited under the following subdivisions of this section. Valid liens are considered under subdivision d, while void and fraudulent liens generally are discussed under subdivision e, and liens obtained through legal proceedings are treated under subdivisions c and f.

**Unrecorded chattel mortgage.**—In a case controlled by the *Nebraska* law it was held that all the creditors of an involuntary bankrupt are "creditors" within the purview of the state statute providing that chattel mortgages or conveyances intended to operate as such, there being no delivery or change of

possession of the property, "shall be absolutely void as against the creditor of the mortgagor," unless the mortgage or a copy thereof shall be recorded; the word "creditor" in such statute having been held by the state Supreme Court to mean "a judgment, execution, or attachment creditor, that is, a creditor who is using the courts of law and their processes for the collection of his debt." *In re Pekin Plow Co.*, (C. C. A. 1901) 112 Fed. 308.

A chattel mortgage invalid under the state law because not recorded in time will not be recognized by the Bankruptcy Court on the ground that it was executed pursuant to a prior agreement for such mortgage. *In re Ronk*, (1901) 111 Fed. 154.

It has been held that a chattel mortgage, unfiled for a term of five years, is void as against the creditors of a mortgagor whose claims accrued prior to such filing; and although such creditors cannot, under the general rule, attack it until after the recovery of a judgment and issue of an execution, this rule is simply one of procedure and does not affect the right; and, therefore, where the recovery of a judgment is impracticable it is not an indispensable requisite to enforcing the rights of the creditor; hence a trustee in bankruptcy may, for the benefit of creditors, attack such a mortgage, though if a creditor seeks that relief in his own name it would be necessary that his claim be first put in judgment. *Skilton v. Codington*, (1906) 15 Am. Bankr. Rep. 810, 185 N. Y. 80, 77 N. E. 790.

Notwithstanding the fact that an unfiled chattel mortgage is valid as between the parties, and that a trustee in bankruptcy succeeds only to the rights of his bankrupt, he is not thereby precluded from attacking a mortgage made by his bankrupt for default in filing. *Skilton v. Codington*, (1906) 15 Am. Bankr. Rep. 810, 185 N. Y. 80, 77 N. E. 790.

Where the state statute requires a record of the mortgage only as against intervening liens or conveyances, an unrecorded mortgage is good against general creditors of the mortgagor and consequently against his trustee in bankruptcy. *Johnson v. Patterson*, (1875) 2 Woods (U. S.) 443; *In re Wright*, (1899) 96 Fed. 187.

An unrecorded contract, intended to operate as a chattel mortgage, was held to create no lien against the bankrupt estate. *In re Pekin Plow Co.*, (C. C. A. 1901) 112 Fed. 308.

In the following cases, chattel mortgages which had not been recorded as required by state statute were held void as liens. *In re Leigh*, (1899) 96 Fed. 806; *In re Adams*, (1899) 97 Fed. 188; *In re Booth*, (1900) 98 Fed. 975; *Stroud v. McDaniel*, (C. C. A. 1901) 106 Fed. 493; *In re Wright*, (1900) 107 Fed. 428; *Cornelius v. Boling*, (1907) 18 Okla. 469, 90 Pac. 874.

**Fraudulent chattel mortgage.**—A chattel mortgage made by a bankrupt may be set aside at the suit of the trustee on the ground of fraud. See *In re Geiver*, (D. C. S. D. 1912) 193 Fed. 128. In the case of *In re Hugill*, (1900) 100 Fed. 616, a recorded chattel mortgage was held void for actual intent to defraud the mortgagor's creditor, although part of the mortgage debt was a genuine claim. In a case controlled by the *Indiana* law it was held that the verbal permission by the chattel mortgagee, at the time the mortgage was given, to the mortgagor to sell part of the property covered by such mortgage did not vitiate the mortgage as to property to which such permission did not apply. *In re Soudan Mfg. Co.*, (C. C. A. 1902) 113 Fed. 804.

**Conditional sale.**—Since the amendment of 1910 to section 47a (2) of the Bankruptcy Act, an unfiled conditional sale contract is absolutely void as against a trustee in bankruptcy representing creditors who have subsequent to the execution of the contract, and prior to its filing, extended credit to the bankrupt. *In re Johnson*, (E. D. Okla. 1914) 212 Fed. 311.

For cases arising prior to the amendment of 1910 to section 47a (2), as to the validity of unrecorded conditional bills of sale, see *In re Legg*, (1899) 96 Fed. 326; *In re Howland*, (1901) 109 Fed. 869; *In re Tatem*, (1901) 110 Fed. 519; *In re Kellogg*, (1901) 112 Fed. 52; *Haskell v. Merrill*, (1901) 179 Mass. 120, 60 N. E. 485.

**Judgment lien.**—The onus is on the claimant under an alleged judgment lien to show that he has complied with all statutory requirements to constitute his judgment a lien. *In re Wood*, (1899) 95 Fed. 946.

An outlawed judgment was held not to be a lien upon real estate when provable as a debt. *In re Farmer*, (1902) 116 Fed. 763.

**Landlord's lien.**—In *In re Ruppel*, (1899) 97 Fed. 778, it was held that the landlord had no lien for rent overdue at the time of bankruptcy upon the proceeds of the sale of the leasehold, either under state statute or at common law. See also *In re Wolf*, (1899) 98 Fed. 74, where the statutory rent lien was held waived.

**Lien claimed under building contract.**—In *Duplan Silk Co. v. Spencer*, (C. C. A. 1902) 115 Fed. 639, reversing *Spencer v. Duplan Silk Co.*, (1902) 112 Fed. 638, an alleged lien by the owner of a building upon materials deposited upon the ground by a building contractor was held valid under the law of *Pennsylvania* as against the trustee of the bankrupt contractor.

**Confusion of goods.**—In *In re Klapholz*, (1902) 113 Fed. 1002, owing to the intermingling of the goods upon which the creditor claimed a lien with other goods sold by the receiver, and upon other grounds, the creditor was adjudged to have no valid lien.

**b [Trustee subrogated to rights of creditor.]** Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate. [(1898) 30 Stat. L. 564.]

As to right of trustee to avoid fraudulent transactions which, prior to bankruptcy, the creditors might have avoided, see section 70e.

**Trustee subrogated to creditor's rights.**—Section 67b is designed to subrogate the trustee to the rights of creditors, as against liens or transfers which exist at the time of the bankruptcy, but it vests him with no additional rights. *Thompson v. Fairbanks*, (1905) 196 U. S. 522, 25 S. Ct. 306, 49 U. S. (L. ed.) 578, 13 Am. Bankr. Rep. 437; *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967, 15 Am. Bankr. Rep. 642; *In re Howland*, (1901) 109 Fed. 869; *In re New York Economical Printing Co.*, (C. C. A. 2d Cir. 1901) 110 Fed. 514, 6 Am. Bankr. Rep. 615; *In re Sentenne, etc., Co.*, (E. D. N. Y. 1903) 120 Fed. 436, 9 Am. Bankr. Rep. 648; *In re Rodgers*, (C. C. A. 7th Cir. 1903) 125 Fed. 169, 11 Am. Bankr. Rep. 79, reversed on other grounds (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051, 14 Am. Bankr. Rep. 102; *In re Baird*, (W. D. Va. 1904) 126 Fed. 845, 11 Am. Bankr. Rep. 435; *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; *Mitchell v. Mitchell*, (E. D. N. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382, 389; *In re Doran*, (C. C. A. 6th Cir. 1907) 154 Fed. 467, 18 Am. Bankr. Rep. 760, modifying (W. D. Ky. 1906) 17 Am. Bankr. Rep. 799; *Matter of Gerstman*, (S. D. N. Y. 1906) 17 Am. Bankr. Rep. 882.

The statute does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present Act, like all preceding Bankrupt Acts, contemplates that a lien good at that time as against the debtor and as against all

of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the Act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee; and if it is one which was invalid as to some particular creditor, though valid as to other creditors, the trustee in certain cases is subrogated to the rights of that creditor. *In re New York Economical Printing Co.*, (C. C. A. 2d Cir. 1901) 110 Fed. 514, 6 Am. Bankr. Rep. 615.

**Liens may be enforced, but not created.**—The Bankruptcy Law does not continue a dischargeable debt for the purpose of permitting a lien to be created after the adjudication, but only to preserve and enforce a lien in existence at the date of the adjudication. *In re Lineberry*, (N. D. Ala. 1910) 183 Fed. 338.

**Creditor's bill not abated.**—Section 67b does not transfer to the trustee the right of a judgment creditor to enforce an equitable lien acquired by the filing of a creditor's bill before bankruptcy proceedings were begun; nor does it abate the creditor's right to prosecute such suit. *Taylor v. Taylor*, (1900) 59 N. J. Eq. 86, 45 Atl. 440. See also *Sedgwick v. Menck*, (1868) 6 Blatchf. 156, 21 Fed. Cas. No. 12,616; *Stewart v. Isidor*, (1868) 1 Nat. Bankr. Reg. 486; *In re Hinds*, (1869) 3 Nat. Bankr. Reg. 351; *Johnson v. Rogers*, (1876) 15 Nat. Bankr. Reg. 1; *Watkins v. Pinkney*, (1842) 3 Edw. (N. Y.) 533; *Storm v. Waddell*, (1845) 2 Sandf. Ch. (N. Y.) 494; *Fetter v. Cirode*, (1844) 4 B. Mon. (Ky.) 482; *Carr v. Fearington*, (1869) 63 N. C. 560.

The word "prevented," as used in this subsection, means prevented by the bankruptcy proceedings. *In re Schweitzer*, (E. D. Pa. 1914) 217 Fed. 495.

**c [Certain liens dissolved.]** A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if [(1898) 30 Stat. L. 564.]

As to

Liens obtained through legal proceedings generally, see subdivision f of this section.

Liens as preferences, see section 60 a and b.

In so far as section 67c is in conflict with section 67f, the former is doubtless

superseded by the latter section. *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187; *Cook v. Robinson*, (C. C. A. 9th Cir. 1912) 194 Fed. 785; *Folger v. Putnam*, (C. C. A. 9th Cir. 1912) 194 Fed. 793. And see *infra*, subdivision f of this section.

And it has been held that subdivision *c* is destroyed by subdivision *f* of section 67. *In re Tune*, (N. D. Ala. 1902) 115 Fed. 906, 8 Am. Bankr. Rep. 285.

*Notwithstanding the repugnancy of subdivision c to subdivision f* and that the provisions of the latter are controlling, those of the former still remain for the purpose of interpretation, as the intentment of the Act must be gathered from a reading of all its provisions as enacted *in pari materia*. *Folger v. Putnam*, (C. C. A. 9th Cir. 1912) 194 Fed. 693.

**Existing liens only contemplated.**—Subdivisions *c* and *f* of this section refer only to existing liens created by legal proceedings, and are not applicable to a case in which such a lien has become merged into a title by the consummation of an execution sale. *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136.

**Execution on pre-existing judgment.**—Section 67c does not affect the lien of an execution issued and levied within the four months, but founded on a judgment recovered two years before. *In re Easley*, (W. D. Va. 1898) 93 Fed. 419, 1 Am. Bankr. Rep. 715. And see *infra*, this section, subdivision *f*, wherein this subject is fully considered.

**Proceedings begun more than four months before bankruptcy.**—The Act does not apply to suits to enforce a lien begun more than four months before the filing of the petition in bankruptcy, and the court refused to stay proceedings on appeal from a judgment denying the enforcement of the lien. *Smith v. Meisenheimer*, (1898) 104 Ky. 753, 47 S. W. 1087.

**Liens acquired more than four months before the filing of the petition** are undisturbed by bankrupt proceedings. *Williams v. Bosworth*, (1912) 102 Miss. 160, 59 So. 6. And where an attachment is levied more than four months before the filing of the petition, the lien created thereby is not affected by the discharge; it being only the debt, with the right to proceed against the bankrupt *in personam*, which is discharged. *In re Blumberg*, (1899) 94 Fed. 476.

**Under the earlier Bankruptcy Acts** liens by judgment, execution or levy, which were valid under the state law, were preserved in the bankruptcy proceedings. *Matter of Bernstein*, (1867) 2 Ben. 44, 3 Fed. Cas. No. 1,350; *In re Weeks*, (1870) 2 Biss. 259, 29 Fed. Cas. No. 17,350; *Marshall v. Knox*, (1872) 16 Wall. 551, 21 U. S. (L. ed.) 481; *Wilson v. City Bank of St. Paul*, (1873) 17 Wall. 473, 21 U. S. (L. ed.) 723; *Clark v. Iselin*, (1874) 21 Wall. 300, 22 U. S. (L. ed.) 568; *Webster v. Woolbridge*, (1874) 3 Dill. 74, 29 Fed. Cas. No. 17,340; *In re Beadle*, (1879) 5 Sawy. 351, 2 Fed. Cas. No. 1,155; *Voyles v. Parker*, (1880) 9 Biss. (U. S.) 326; *In re Schnepf*, (1867) 1 Nat. Bankr. Reg. 190, 21 Fed. Cas. No. 12,471; *Catlin v. Hoffman*, (1874) 9 Nat. Bankr. Reg. 342,

5 Fed. Cas. No. 2,521; *In re Hufnagel*, (1875) 12 Nat. Bankr. Reg. 554, 12 Fed. Cas. No. 6,837; *Clason v. Morris*, (1812) 10 Johns. (N. Y.) 524; *Wootan v. Clark*, (1851) 23 Miss. 75; *Bruner v. Sherley*, (1854) 27 Miss. 407.

**Attachment under mesne process.**—This section recognizes a preference obtainable through an attachment, acquired upon mesne process pursuant to a suit or proceeding at law or in equity, the condition being that the attachment shall have been made while the debtor was insolvent, and its existence and enforcement will so operate; that is, as a preference. *Folger v. Putnam*, (C. C. A. 9th Cir. 1912) 194 Fed. 793.

Where, under the state law, a plaintiff attaching under mesne process obtains a lien, though he has obtained no judgment, such lien is entitled to recognition in bankruptcy proceedings. *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931.

Where an attachment on mesne process was obtained under the statutes of *Massachusetts* more than four months before the bankruptcy proceedings, and the lien was rendered enforceable by judgment and execution within the four months, it was held that the lien, judgment, and execution were all good, the judgment not being enforceable, however, against the bankrupt personally. *In re Blair*, (1901) 108 Fed. 529. But see *In re Johnson*, (1901) 108 Fed. 373, where the judgment obtained in *Vermont* and execution thereon were held void as to the attached property, and the lien was discharged, the decisions in *Vermont* treating the attachment as only an inchoate lien, to be perfected by judgment and execution.

**Liens determined by state law.**—The Bankrupt Act leaves to each state the right to say when a lien is established by virtue of its law. It is not intended by the Bankrupt Act to disturb vested rights under liens acquired more than four months before the petition in bankruptcy, and each state determines when a lien exists according to its own laws. *Williams v. Bosworth*, (1912) 102 Miss. 160, 59 So. 6.

**Computation of time — Judgment.**—"It is not the date of the warrants of attorney authorizing the entry of judgment, but the date on which the judgments are actually entered, that fixes the time from which the four months period begins to run." *Ferguson v. Greth*, (1900) 195 Pa. St. 272, 45 Atl. 735, 78 A. S. R. 712.

**Attachment or execution.**—The words "which was begun" do not necessarily refer to the beginning of the action or suit, but to the beginning of that particular proceeding which secured the lien; and therefore an attachment was held to be dissolved although the original action had been pending more than a year. *In re Higgins*, (1899) 97 Fed. 775. See also

*In re DeLue*, (1899) 91 Fed. 510; *In re Kletchka*, (1899) 92 Fed. 901. But compare *In re Easley*, (1898) 93 Fed. 419, holding that the lien of an execution

issued and levied within the four months, the judgment having been recovered two years before, is not within section 67c.

(1) [**Defendant insolvent.**] it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or [(1898) 30 Stat. L. 564.]

As to what constitutes insolvency, see section 1a (15).

**Transactions prior to Bankruptcy Act.**—As an involuntary petition could not be filed until four months after the passage of the Act, therefore, under section 67 c, e, and f, no transfer, lien, or incumbrance is avoided by adjudication unless made or arising after the passage of the Act. *In re Brown*, (1898) 91 Fed. 358.

"The creditor 'obtains' his lien when proceedings instituted by him result in its attaching to an insolvent's estate in such a manner as to work a preference; and the debtor 'permits' it when he allows a state of facts to exist rendering such lien possible, and cannot or does not in good faith resist it." *In re Burns*, (1899) 97 Fed. 926.

The word "permitted" must be considered as synonymous with "suffered." "The bankrupt 'permitted' the lien to be obtained when, by not paying the debt and otherwise, he suffered or allowed or permitted the grounds for the attachment to arise, and when he did not in good faith prevent, or at least resist, the effort of the

creditor to obtain the lien by means of the attachment." *In re Arnold*, (D. C. Ky. 1899) 94 Fed. 1001.

**Knowledge of the insolvency**, or reasonable cause for belief of the insolvency, is not necessary under section 67c (1), as it is under section 67c (2), nor is it necessary that the lien should have been sought and permitted in fraud of the Bankruptcy Act, as under section 67c (3). "All that is required for such lien to be dissolved is that the suit or proceeding was begun within four months of the filing of the petition, and while the defendant was insolvent, and that its enforcement will work a preference. The intent on the part of the bankrupt to allow a preference to be obtained, or his collusion and participation to that end, is not, by clause (1), a requisite to the *ipso facto* dissolution of the lien." *In re Burrus*, (1899) 97 Fed. 926.

**Attachments were dissolved** by force of section 67c (1) in *Kosches v. Libowitz*, (Tex. Civ. App. 1900) 56 S. W. 613; *Schmitovitz v. Bernstein*, (1901) 22 R. I. 330, 47 Atl. 884.

(2) [**Knowledge of insolvency.**] the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or [(1898) 30 Stat. L. 564.]

(3) [**Fraud—trustee subrogated.**] that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened. [(1898) 30 Stat. L. 564.]

Section 67c refers to a lien obtained in a proceeding at law or in equity for the benefit, not of the bankrupt's creditors in general, but of one or more creditors less than all of them. The words "such lien," in the second sentence of 67c, refer to any "lien created by or obtained in or pursuant to any suit or proceeding at law or in equity," mentioned at the beginning of the section, and not merely to a lien described by the language of clause 1, clause 2, or clause 3. It is not the intent of the section to dissolve a lien where its retention will benefit the general body of the bankrupt's creditors. *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187.

**Lien permitted in fraud.**—A lien obtained by a foreign creditor of a bankrupt within four months prior to the bankruptcy, and while the bankrupt was solvent, on property of the debtor in a foreign country through judicial proceedings in the nature of an attachment, which were not opposed, is one sought and permitted in fraud of the provisions of the Act within the meaning of section 67c (3); and where the creditor realizes therefrom payment of a portion of his debt he is not entitled to prove the remainder as a claim against the estate in bankruptcy in this country without surrendering the amount so received so as to place him on equitable equality with other creditors.



*In re Pollmann*, (S. D. N. Y. 1907) 156 Fed. 221, 19 Am. Bankr. Rep. 474.

Preservation of liens.—Liens preserved under section 67 b, c, and f, are thereby rendered inoperative as a preference, but are retained in favor of the trustee that the liens may be distributed among the whole body of creditors. *Reardon v. Rock*

*Island Plow Co.*, (C. C. A. 7th Cir. 1909) 168 Fed. 654, 22 Am. Bankr. Rep. 66; *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187. See also *In re O'Connor*, (1899) 95 Fed. 943; *In re Hammond*, (1899) 98 Fed. 845.

**d [Liens given in good faith.]** Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act. [(Amended 1910, which excepted pending cases) 36 Stat. L. 842.]

As originally enacted this subdivision d read as follows:

"d Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act." [30 Stat. L. 564.]

In 1910 it was amended "so as to read as" in the text.

As to priority of liens and other claims under state and federal laws, see section 64b (5).

The amendment of June 25, 1910, inserted the words "to the extent of such present consideration only." That is, the security that a creditor has obtained to the extent of the original consideration shall not be affected. *In re Foster*, (D. C. Vt. 1910) 181 Fed. 703.

Valid liens remain undisturbed.—Section 67d, set out above, is clearly in line with the other provisions of the statute which regulate the vesting of title in the trustee. Thus under section 70a (see note to that section) it has been held that the trustee in bankruptcy takes no better title than the bankrupt had as to *bona fide* lienors; in other words, that the trustee stands in the shoes of the bankrupt in the absence of fraud. And under section 70e (see note to that section) the trustee is vested with power to avoid any transfer, which includes liens fraudulent as to creditors; but in all instances *bona fide* transactions are protected. Therefore it has been held, under section 67d, and in accordance with the language thereof, that liens given and accepted in good faith, and not in contemplation of or in fraud of the provisions of the statute, and for a present consideration, and which are valid under the laws of the state, as to recording and otherwise, shall be deemed valid and enforceable in bankruptcy proceedings. *Hiscock v. Varick Bank*, (1907) 206 U. S. 28, 27 S. Ct. 681, 51 U. S. (L. ed.) 945, 18 Am. Bankr. Rep. 9; *In re Wright*, (N. D. Ga. 1899) 96 Fed. 187, 2 Am. Bankr. Rep. 366; *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *In re Byrne*, (S. D. Ia. 1899) 97 Fed. 762, 3 Am. Bankr. Rep. 268; *In re Wolf*, (N. D. Ia. 1899) 98 Fed. 84,

3 Am. Bankr. Rep. 555; *In re Lowensohn*, (S. D. N. Y. 1900) 100 Fed. 776, 4 Am. Bankr. Rep. 79; *In re Browne*, (1900) 104 Fed. 762; *Greenville City Nat. Bank v. Bruce*, (C. C. A. 4th Cir. 1901) 109 Fed. 69, 6 Am. Bankr. Rep. 312; *In re Sanderlin*, (1901) 109 Fed. 857; *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648; *In re Gerry*, (E. D. Pa. 1902) 112 Fed. 957, 7 Am. Bankr. Rep. 459; *McNair v. McIntyre*, (C. C. A. 4th Cir. 1902) 113 Fed. 113, 7 Am. Bankr. Rep. 638; *In re Seudan Mfg. Co.*, (C. C. A. 7th Cir. 1902) 113 Fed. 804, 18 Am. Bankr. Rep. 45; *In re Klapholz*, (E. D. Pa. 1902) 113 Fed. 1002, 7 Am. Bankr. Rep. 703; *In re Standard Laundry Co.*, (C. C. A. 9th Cir. 1902) 116 Fed. 476, 8 Am. Bankr. Rep. 538; *Stedman v. Monroe Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 237, 9 Am. Bankr. Rep. 4; *Davis v. Turner*, (C. C. A. 4th Cir. 1903) 120 Fed. 605, 9 Am. Bankr. Rep. 716; *Farmers' Bank v. Carr*, (C. C. A. 4th Cir. 1904) 127 Fed. 690, 11 Am. Bankr. Rep. 733; *Crim v. Woodford*, (C. C. A. 4th Cir. 1905) 136 Fed. 34, 14 Am. Bankr. Rep. 302; *In re Clifford*, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 283; *In re Porterfield*, (N. D. W. Va. 1905) 138 Fed. 192, 15 Am. Bankr. Rep. 11; *Savage v. Savage*, (4th Cir. 1905) 141 Fed. 346, 72 C. C. A. 494, 15 Am. Bankr. Rep. 599; *In re Platteville Foundry, etc., Co.*, (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291; *Roberts v. Johnson*, (C. C. A. 4th Cir. 1907) 151 Fed. 567, 18 Am. Bankr. Rep. 135; *In re Franklin*, (E. D. N. C. 1907) 151 Fed. 642, 18 Am. Bankr. Rep. 218; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513; *National Bank of Commerce v. Williams*, (C. C. A. 5th Cir. 1907) 159 Fed. 615, 20 Am. Bankr. Rep. 79;

*In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; *Powell v. Gate City Bank*, (C. C. A. 8th Cir. 1910) 178 Fed. 609; *In re Yoke Vitrified Brick Co.*, (D. C. Kan. 1910) 180 Fed. 235; *In re Vulcan Foundry, etc., Co.*, (C. C. A. 3d Cir. 1910) 180 Fed. 671; *In re Foster*, (D. C. Vt. 1910) 181 Fed. 703; *In re Lee*, (C. C. A. 8th Cir. 1910) 182 Fed. 579; *In re Times Pub. Co.*, (E. D. Pa. 1910) 183 Fed. 603; *In re Forsee*, (N. D. N. Y. 1910) 184 Fed. 85; *In re Milne*, (C. C. A. 2d Cir. 1910) 185 Fed. 244; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931; *In re Zehner*, (E. D. La. 1912) 193 Fed. 787; *Lindley v. Ross*, (C. C. A. 7th Cir. 1912) 200 Fed. 733; *Parker v. Bates*, (S. D. Ga. 1913) 203 Fed. 294; *Norris v. Trenholm*, (C. C. A. 5th Cir. 1913) 209 Fed. 827; *In re Baar*, (C. C. A. 2d Cir. 1914) 213 Fed. 628; *In re Brown*, (E. D. Pa. 1900) 5 Am. Bankr. Rep. 221; *In re Alverson*, (D. C. S. C. 1900) 5 Am. Bankr. Rep. 855; *Harvey v. Smith*, (Mass. 1901) 7 Am. Bankr. Rep. 497; *In re Soudans Mfg. Co.*, (C. C. A. 7th Cir. 1902) 8 Am. Bankr. Rep. 45; *Evans v. Rounsaville*, (Ga. 1902) 8 Am. Bankr. Rep. 236; *Matter of U. S. Food Co.*, (E. D. Mich. 1906) 15 Am. Bankr. Rep. 329.

*Statute protects vigilant creditors.*—It is self-evident that Congress intended by using the words "shall . . . not be affected by this Act" that a vigilant creditor should not be affected; that is, should not be injured by bankruptcy proceedings. *In re Foster*, (D. C. Vt. 1910) 181 Fed. 703.

*The security given for a present loan is not avoided by the fact that it actually hinders or delays creditors by the withdrawal of the security from application to the payment of their claims, unless it was given with an actual intent to defraud such creditors and the recipient had actual or legal notice of that purpose. Actual fraud in which the recipient of the lien or security participates is indispensable to the avoidance of a transaction of this nature.* *Powell v. Gate City Bank*, (C. C. A. 8th Cir. 1910) 178 Fed. 609.

*Lienor not party to bankruptcy proceedings.*—The taking possession of the property of a bankrupt by the Bankruptcy Court does not operate as a caveat or sequestration of property owned by the bankrupt subject to valid liens, so as to make the holder of the lien a party to the proceedings. *In re Platteville Foundry, etc., Co.*, (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291.

Thus it has been held that lienholders, unless they surrender their securities and prove their claims, are strangers to the bankruptcy proceedings, and are entitled to have their property rights adjudicated by the courts of the state in which such property is situated. *Hicks v. Knost*, (1900) 178 U. S. 541, 20 S. Ct. 1006, 44 U. S. (L. ed.) 1183, 4 Am. Bankr. Rep.

178 note; *In re Gerdes*, (S. D. Ohio 1900) 102 Fed. 318, 4 Am. Bankr. Rep. 346.

*Validity of lien determined in bankruptcy proceedings on property in possession of court.*—But where property belonging to a bankrupt, subject to valid liens, has been taken possession of by the Bankruptcy Court, the lien creditor cannot interfere therewith or maintain replevin against the receiver or trustee; but the lienor may petition the Bankruptcy Court for payment of the amount of his debt, in which case the court will have jurisdiction to determine the validity of the lien. *In re Platteville Foundry, etc., Co.*, (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291.

*Proceedings to enforce valid liens.*—Where a valid lien has been secured more than four months prior to bankruptcy, proceedings to enforce the same do not conflict with the Bankruptcy Law, and may be instituted and prosecuted to the end, if that is requisite. *In re Koslowaki*, (M. D. Pa. 1907) 153 Fed. 823, 18 Am. Bankr. Rep. 727. And see to the same effect, *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122. *Pickens v. Roy*, (1902) 187 U. S. 177, 23 S. Ct. 78, 47 U. S. (L. ed.) 128; *In re Snell*, (N. D. Cal. 1903) 125 Fed. 154, 11 Am. Bankr. Rep. 35.

*Valid lien not lost by taking preferential mortgage.*—Where a township was entitled to a preferential lien on a bankrupt's stock, arising out of the bankrupt's misappropriation of township funds, which he had used to replenish the stock, it was held that the township's lien was not lost by the taking of a mortgage on the stock which was unenforceable as a preference. *Smith v. Au Gres Tp.*, (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745.

*Lien relinquished by mistake.*—Where a creditor relinquished a lien through a mistake of fact and it appeared that no one was prejudiced and that no one had relied upon it in such a way that he would be harmed by its being corrected, it was held that the creditor was equitably entitled to be restored to his lien. *Hutchinson v. Otis*, (C. C. A. 1st Cir. 1902) 115 Fed. 937.

The state law governs as to the validity of liens asserted thereunder; providing, of course, that there has been no fraud or preferential transfer in contemplation of bankruptcy within the four months' period. *In re Canton First Nat. Bank*, (C. C. A. 6th Cir. 1905) 135 Fed. 62, 14 Am. Bankr. Rep. 180; *Mott v. Wissler Min. Co.*, (C. C. A. 4th Cir. 1905) 135 Fed. 697, 14 Am. Bankr. Rep. 321; *In re Grissler*, (C. C. A. 2d Cir. 1905) 136 Fed. 754, 13 Am. Bankr. Rep. 508; *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639; *In re Franklin*, (E. D. N. C. 1907) 151 Fed. 642, 18 Am. Bankr. Rep. 218; *In re Miners' Brewing Co.*, (E. D. Pa. 1908) 162

Fed. 327, 20 Am. Bankr. Rep. 717; *Reardon v. Rock Island Plow Co.*, (C. C. A. 7th Cir. 1909) 168 Fed. 654, 22 Am. Bankr. Rep. 26; *In re Faulhaber Stable Co.*, (C. C. A. 2d Cir. 1909) 170 Fed. 68, 22 Am. Bankr. Rep. 381; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; *In re Mahland*, (E. D. N. Y. 1911) 184 Fed. 743; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931; *In re Welland*, (N. D. Ga. 1912) 197 Fed. 116; *In re Jacobson*, (N. D. Ga. 1912) 200 Fed. 812; *In re Lane Lumber Co.*, (C. C. A. 9th Cir. 1914) 217 Fed. 550.

Section 67d is designed to save and protect from the operation of the Bankruptcy Act liens that are valid under the state law. *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863.

Before a creditor can claim a lien given by a state statute on property of a bankrupt, he must perfect the same as required by such statute. *In re Franklin*, (E. D. N. C. 1907) 151 Fed. 642, 18 Am. Bankr. Rep. 218.

In *In re Grissler*, (C. C. A. 2d Cir. 1905) 136 Fed. 754, 13 Am. Bankr. Rep. 508, it was said that "it would be most unfortunate to have a conflict of decision between the state courts and the courts of bankruptcy in respect to the meaning and effect of a statute affecting the titles to real estate, and if this situation can be averted by following the decision of the highest court of the state which settles the previously doubtful question of statutory construction, this court ought not to refuse, even though that decision may seem to us to be illogical and inconsistent with the previous decisions of that court."

*Vendor's right of attachment—section 67d.*—Where, under a state statute, it is provided that property sold shall not be exempt from claims for the purchase money, and that the plaintiff in an action therefor may have an order to the sheriff to take the property and hold it subject to the order of the court, and that the defendant may give a bond to retain the property, the vendor has not a lien arising at the time of sale and protected under section 67d, but only the right to obtain a lien by attachment, such lien falling within section 67f. *In re Wilkes*, (1902) 112 Fed. 975.

*Chattel mortgages.*—In absence of fraud (see section 67e, and note) or preferential transfer (see section 60a and b, *supra*, and notes) the validity of a chattel mortgage is to be determined in accordance with the law of the state; and if under the state statute and decisions a mortgage is good as against creditors, it will be considered effective as against the trustee in bankruptcy of the mortgagor; on the other hand, if under the laws of the state such mortgage is invalid as to creditors, either because of failure to record the same or for any other reason, it may be attacked by the trustee in bankruptcy because of such invalidity. *Thompson v. Fairbanks*,

(1905) 196 U. S. 516, 25 S. Ct. 306, 40 U. S. (L. ed.) 577, 13 Am. Bankr. Rep. 437; *Humphrey v. Tatman*, (1905) 198 U. S. 91, 25 S. Ct. 567, 49 U. S. (L. ed.) 956, 14 Am. Bankr. Rep. 74; *In re Soudan Mfg. Co.*, (7th Cir. 1902) 113 Fed. 804, 51 C. C. A. 476; *In re Durham*, (D. C. Md. 1902) 114 Fed. 750, 8 Am. Bankr. Rep. 115; *In re Josephson*, (1902) 116 Fed. 404; *In re Jones*, (1902) 116 Fed. 431; *Stedman v. Monroe Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 237, 9 Am. Bankr. Rep. 4; *In re Sentenne, etc., Co.*, (E. D. N. Y. 1903) 120 Fed. 436, 9 Am. Bankr. Rep. 648; *In re Williams*, (W. D. Ga. 1903) 120 Fed. 542, 9 Am. Bankr. Rep. 731; *Davis v. Turner*, (C. C. A. 4th Cir. 1903) 120 Fed. 605, 9 Am. Bankr. Rep. 704; *In re Ball*, (D. C. Vt. 1903) 123 Fed. 164, 10 Am. Bankr. Rep. 564; *In re Beede*, (N. D. N. Y. 1903) 126 Fed. 853, 11 Am. Bankr. Rep. 387; *In re Rogers*, (D. C. Vt. 1904) 132 Fed. 560, 13 Am. Bankr. Rep. 75; *In re Clifford*, (N. D. Ia. 1905) 136 Fed. 475, 14 Am. Bankr. Rep. 302; *In re Adamant Plaster Co.*, (N. D. N. Y. 1905) 137 Fed. 251, 14 Am. Bankr. Rep. 815; *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re National Valve Co.*, (N. D. Ohio 1905) 140 Fed. 679, 15 Am. Bankr. Rep. 524; *In re Burnham*, (W. D. N. Y. 1905) 140 Fed. 926, 15 Am. Bankr. Rep. 548; *In re Marine Constr., etc., Co.*, (C. C. A. 2d Cir. 1906) 144 Fed. 649, 16 Am. Bankr. Rep. 325; *In re Cutting*, (W. D. N. Y. 1906) 145 Fed. 388, 16 Am. Bankr. Rep. 751; *In re Erie Lumber Co.*, (S. D. Ga. 1906) 150 Fed. 817, 17 Am. Bankr. Rep. 689; *In re Davis*, (E. D. N. Y. 1907) 155 Fed. 671, 19 Am. Bankr. Rep. 98; *In re McKane*, (E. D. N. Y. 1907) 158 Fed. 647, 18 Am. Bankr. Rep. 594; *In re Farmers' Supply Co.*, (S. D. Ohio 1909) 170 Fed. 502, 22 Am. Bankr. Rep. 460; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; *Mattley v. Wolfe*, (D. C. Neb. 1909) 175 Fed. 619, 23 Am. Bankr. Rep. 673; *In re Kullberg*, (D. C. Minn. 1909) 176 Fed. 585, 23 Am. Bankr. Rep. 758; *In re Beeg*, (E. D. Pa. 1911) 184 Fed. 522; *In re Mahland*, (E. D. N. Y. 1911) 184 Fed. 743; *In re Jacobson*, (N. D. Ga. 1912) 200 Fed. 812; *Millikin v. Baltimore Second Nat. Bank*, (C. C. A. 4th Cir. 1913) 206 Fed. 14; *Matter of U. S. Food Co.*, (E. D. Mich. 1906) 15 Am. Bankr. Rep. 329; *In re Birk*, (C. C. A. 7th Cir. 1905) 15 Am. Bankr. Rep. 694; *Zartman v. Waterloo First Nat. Bank*, (1905) 16 Am. Bankr. Rep. 152, 109 App. Div. 406, 96 N. Y. S. 633; *In re Alden*, (N. D. Ohio 1905) 16 Am. Bankr. Rep. 362.

*Proceeds of mortgage used to pay debts.*

—The fact that a mortgagee to whom a bankrupt gave a mortgage for a present consideration within four months prior to his bankruptcy knew that the proceeds were to be used to pay debts, does not impeach his good faith, nor render the mortgage void, unless he also knew, or had

reasonable cause to believe, that the borrower was insolvent. *In re Kullberg*, (D. C. Minn. 1909) 176 Fed. 585, 23 Am. Bankr. Rep. 758.

A chattel mortgage given by an insolvent firm, in good faith within four months prior to its bankruptcy is not void under the Bankruptcy Act, where it was given for a present loan of money which was used in paying debts of the firm, and was duly recorded so as to become effective prior to the bankruptcy, but is expressly protected by section 67d. *Davis v. Turner*, (4th Cir. 1903) 120 Fed. 605, 56 C. C. A. 669, 9 Am. Bankr. Rep. 704.

A chattel mortgagor's mere inability to pay debts does not invalidate a chattel mortgage given for a present valid consideration advanced by a mortgagee having no reason to know that a fraud will be thereby committed. *In re Mahland*, (E. D. N. Y. 1911) 184 Fed. 743.

*Mortgage valid as to creditors precludes trustee.*—Where a chattel mortgage on a bankrupt's personalty was not fraudulent as to the bankrupt, and there were no creditors in a position to set the same aside, it was held that the bankrupt's trustee could not attack the right of the mortgagee in possession at the time of the adjudication on the ground that the mortgage was fraudulent. *Mattley v. Wolfe*, (D. C. Neb. 1909) 175 Fed. 619, 23 Am. Bankr. Rep. 673.

*Consideration going into estate.*—A chattel mortgage given upon the payment of cash which goes into the hands of the bankrupt and is used for the purposes of his estate, and of which his creditors have the benefit, is a valid mortgage, even if made within four months prior to the filing of the petition, if no actual fraud be shown. *In re Mahland*, (E. D. N. Y. 1911) 184 Fed. 743.

*Renewal mortgage.*—Where a valid mortgage was given as security for a present loan, the fact that a new mortgage on the same property, given within four months prior to the mortgagor's bankruptcy, was made to secure a renewal of the loan, does not render such mortgage voidable. *In re Noel*, (D. C. Md. 1905) 137 Fed. 694, 14 Am. Bankr. Rep. 715; *In re Cutting*, (W. D. N. Y. 1906) 145 Fed. 388, 16 Am. Bankr. Rep. 751.

*Validity confined to present consideration.*—It has been held that a mortgage, given within four months of an adjudication in bankruptcy, to secure a pre-existing debt and a cash consideration, is void as a preference to the extent of the prior indebtedness, and valid only for the present cash consideration. *In re Sanderlin*, (E. D. N. C. 1901) 109 Fed. 857, 6 Am. Bankr. Rep. 384.

Where a defectively executed mortgage, under the local law, amounts to no more than an agreement to give a lien, and the property covered thereby passes into the hands of a trustee in bankruptcy before any proceedings are taken to reform the

instrument, the trustee takes it in the plight in which it then stood; and in such case the title remains in the bankrupt, but there is an outstanding equity in the mortgagee. *Foerstner v. Citizens' Sav., etc., Co.*, (C. C. A. 6th Cir. 1911) 186 Fed. 1.

*Effect of bankruptcy on enforcement of mortgage.*—The provision of the Bankruptcy Act that a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lienholder's contract. It does not have reference to his remedy to enforce his right. The remedy may be altered without impairing the obligation of his contract, so long as an equally efficient and adequate remedy is substituted. Every one who takes a mortgage, or deed of trust intended as a mortgage, takes it subject to the contingency that proceedings in bankruptcy against his mortgagor may deprive him of the specific remedy which is provided for in his contract. *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 692.

*Bona fides presents question of fact.*—The knowledge of the mortgagee as to the fraudulent intent of the bankrupt, as derived from knowledge of his financial condition, is a question of fact. *In re Mahland*, (E. D. N. Y. 1911) 184 Fed. 743.

Where a bankrupt's trustee claimed that a chattel mortgagee was not entitled to property of the bankrupt acquired subsequent to the execution of the mortgage, it was held that the burden was on the trustee to show what property, if any, of that seized and sold by the mortgagee was acquired after the execution of the mortgage. *Mattley v. Wolfe*, (D. C. Neb. 1909) 175 Fed. 619, 23 Am. Bankr. Rep. 673.

In the case of *In re Soudan Mfg. Co.*, (7th Cir. 1902) 113 Fed. 804, 51 C. C. A. 476, it was held that under section 67d of the Bankruptcy Act the validity of a mortgage given to secure a present loan of money within four months prior to the borrower's bankruptcy does not depend upon his solvency at the time, or upon notice of his financial condition by the mortgagee, actual or constructive; but to invalidate such a mortgage it must be shown that the borrower was insolvent, that the purpose of the loan was to accomplish an unlawful preference or otherwise violate the Act, and that the lender knew or was chargeable with knowledge of both of such facts.

So where a bank took mortgages properly recorded for loans advanced at the time to a merchant who was insolvent, but not to the knowledge of the bank, although it knew that he was indebted and that he wanted the money to pay, as he did pay, creditors, and the merchant became bankrupt within four months thereafter, it was held that both parties having acted in good faith, the mortgages were not avoided. *In re Davidson*, (1901) 109 Fed. 882.

*Mechanics' and kindred liens.*—Under the statutes of practically every state it

is provided that mechanics, contractors, sub-contractors, laborers, materialmen, and the like, shall be entitled to a preferential lien for labor or material supplied in and about the erection of buildings or the conducting of mercantile pursuits; and such liens, where valid under the law of the state wherein they are claimed, will be considered of equal validity under the Bankruptcy Law; but if, under the law of the state, a lien of this character would be ineffective as to creditors, such ineffectiveness will continue in bankruptcy proceedings as against the trustee of the person against whom the lien is claimed. *In re Kerby-Dennis Co.*, (C. C. A. 7th Cir. 1899) 95 Fed. 116, 2 Am. Bankr. Rep. 402; *In re Falls City Shirt Mfg. Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437; *In re Emslie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126; *In re Matthews*, (W. D. Ark. 1901) 109 Fed. 603, 6 Am. Bankr. Rep. 96; *In re Georgia Handle Co.*, (C. C. A. 5th Cir. 1901) 109 Fed. 632, 6 Am. Bankr. Rep. 472; *In re Oconee Milling Co.*, (C. C. A. 5th Cir. 1901) 109 Fed. 866, 6 Am. Bankr. Rep. 475; *In re West Norfolk Lumber Co.*, (E. D. Va. 1902) 112 Fed. 759, 7 Am. Bankr. Rep. 648; *Chauncey v. Dyke*, (C. C. A. 8th Cir. 1902) 119 Fed. 1, 9 Am. Bankr. Rep. 444; *George Carroll, etc., Co. v. Young*, (C. C. A. 3d Cir. 1903) 119 Fed. 576, 9 Am. Bankr. Rep. 645; *In re Roerber*, (C. C. A. 2d Cir. 1902) 121 Fed. 449, 9 Am. Bankr. Rep. 303 (decided under New York statute); *In re Gosch*, (C. C. A. 5th Cir. 1903) 126 Fed. 627, 9 Am. Bankr. Rep. 610; *In re Lillingston Lumber Co.*, (E. D. N. C. 1904) 132 Fed. 886, 18 Am. Bankr. Rep. 153; *Mott v. Wissler Min. Co.*, (C. C. A. 4th Cir. 1905) 135 Fed. 697, 14 Am. Bankr. Rep. 321; *In re Grissler*, (C. C. A. 2d Cir. 1905) 136 Fed. 754, 13 Am. Bankr. Rep. 508; *Browder v. Hill*, (C. C. A. 6th Cir. 1905) 136 Fed. 821, 14 Am. Bankr. Rep. 619; *In re Hobbs*, (N. D. W. Va. 1906) 145 Fed. 211, 16 Am. Bankr. Rep. 544; *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *In re Starks-Ullman Saddlery Co.*, (C. C. A. 6th Cir. 1909) 171 Fed. 834, 22 Am. Bankr. Rep. 596; *Graininger v. Riley*, (C. C. A. 6th Cir. 1913) 201 Fed. 901; *In re Little Elk Logging Co.*, (W. D. Wash. 1914) 218 Fed. 142; *In re Huston*, (S. D. N. Y. 1901) 7 Am. Bankr. Rep. 95; *John P. Kane Co. v. Kinney*, (1903) 9 Am. Bankr. Rep. 778 note, 174 N. Y. 69, 66 N. E. 619; *Howard v. Cunliff*, (1902) 10 Am. Bankr. Rep. 71, 96 Mo. App. 67, 69 S. W. 737; *Crane Co. v. Smythe*, (1904) 11 Am. Bankr. Rep. 747, 94 App. Div. 53, 87 N. Y. S. 917; *Fehling v. Goings*, (1904) 13 Am. Bankr. Rep. 154, 67 N. J. Eq. 375, 58 Atl. 642; *Moreau Lumber Co. v. Johnson*,

(1914) 29 N. D. 113, 150 N. W. 563, L. R. A. 1915F 1132; *In re Cramond*, (N. D. N. Y. 1906) 17 Am. Bankr. Rep. 22; *Matter of Langley*, (W. D. Wis. 1910) 24 Am. Bankr. Rep. 69; *Pike Bros. Lumber Co. v. Mitchell*, (1909) 132 Ga. 675, 64 S. E. 998, 26 L. R. A. N. S. 409.

*Mechanics' liens are not liens created or obtained through legal proceedings*, either according to the strict definition or in the ordinary meaning of the term. The filing of notice of a mechanic's lien has no necessary relation to the initiation or the prosecution of a suit. The filing is essential in order to maintain the action to foreclose the lien, because otherwise the lien does not attach; but it is no more a preliminary step in the suit than is the protesting of a note in a suit against the indorser. It is a proceeding of the same kind as filing a chattel mortgage or recording a deed. *In re Emslie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126; *Tube City Mining, etc., Co. v. Otterson*, (1914) 16 Ariz. 305, 146 Pac. 203. See also *In re Grissler*, (C. C. A. 2d Cir. 1905) 136 Fed. 754, 13 Am. Bankr. Rep. 508.

As to the status of mechanics' liens under earlier Bankruptcy Acts, see *In re Coulter*, (1871) 2 Sawy. 42, 6 Fed. Cas. No. 3,276; *In re Dey*, (1872) 9 Blatchf. 285, 7 Fed. Cas. No. 3,871; *In re Brunquest*, (1876) 14 Nat. Bankr. Reg. 529, 4 Fed. Cas. No. 2,055.

**Landlord's liens.**—The lien or preference given to a landlord under the law of the state will be, under section 67d, recognized and enforced in bankruptcy proceedings. *In re Wolf*, (N. D. Ia. 1899) 98 Fed. 84, 3 Am. Bankr. Rep. 558; *In re Falls City Shirt Mfg. Co.*, (D. C. Ky. 1899) 98 Fed. 592, 3 Am. Bankr. Rep. 437; *In re D. H. Dougherty Co.*, (N. D. Ga. 1901) 109 Fed. 480, 6 Am. Bankr. Rep. 457; *Wilson v. Pennsylvania Trust Co.*, (C. C. A. 3d Cir. 1902) 114 Fed. 742, 8 Am. Bankr. Rep. 169; *In re Mitchell*, (D. C. Del. 1902) 116 Fed. 87, 8 Am. Bankr. Rep. 324; *Keyser v. Wesel*, (C. C. A. 3d Cir. 1904) 128 Fed. 281, 12 Am. Bankr. Rep. 126; *In re Belknap*, (E. D. Pa. 1904) 129 Fed. 646, 12 Am. Bankr. Rep. 326; *In re Hayward*, (E. D. Pa. 1904) 130 Fed. 720, 12 Am. Bankr. Rep. 264; *In re Lines*, (M. D. Pa. 1903) 133 Fed. 803, 13 Am. Bankr. Rep. 318; *In re Consumers' Coffee Co.*, (E. D. Pa. 1907) 151 Fed. 933, 18 Am. Bankr. Rep. 500; *In re Bishop*, (D. C. S. C. 1907) 153 Fed. 304, 18 Am. Bankr. Rep. 635; *In re Robinson*, (C. C. A. 7th Cir. 1907) 154 Fed. 343, 18 Am. Bankr. Rep. 563; *In re West Side Paper Co.*, (E. D. Pa. 1908) 159 Fed. 241, 20 Am. Bankr. Rep. 289, *reversing* (C. C. A. 3d Cir. 1908) 20 Am. Bankr. Rep. 660; *In re DeLancey Stables Co.*, (E. D. Pa. 1909) 170 Fed. 860, 22 Am. Bankr. Rep. 406; *Martin v. Orgain*, (C. C. A. 5th Cir. 1909) 174 Fed. 772, 23 Am. Bankr. Rep. 454; *In re Potee*

Brick Co., (D. C. Md. 1910) 179 Fed. 525; *In re Meyer v. Bleuler*, (E. D. La. 1912) 195 Fed. 653; *In re Southern Hardware, etc., Co.*, (S. D. Ala. 1913) 210 Fed. 381; *In re Bell Engraving Co.*, (E. D. Pa. 1914) 213 Fed. 510; *Courtney v. Fidelity Trust Co.*, (C. C. A. 6th Cir. 1914) 219 Fed. 57; *In re Gerson*, (E. D. Pa. 1899) 2 Am. Bankr. Rep. 170; *In re Goldstein*, (W. D. Pa.) 2 Am. Bankr. Rep. 603; *In re Byrne*, (S. D. Ia. 1899) 3 Am. Bankr. Rep. 268; *McFarland Carriage Co. v. Solanas*, (E. D. La. 1901) 6 Am. Bankr. Rep. 221; *In re Hoover*, (D. C. Pa. 1902) 7 Am. Bankr. Rep. 330; *In re McIntyre*, (N. D. W. Va. 1906) 16 Am. Bankr. Rep. 80.

*An adjudication in bankruptcy does not terminate a lease or change the legal relation of landlord and tenant, unless the landlord re-enters, or the trustee assumes the lease, in which event the adjudication operates like any other assignment and all liability of the tenant ceases.* *Witthaus v. Zimmerman*, (1904) 11 Am. Bankr. Rep. 314, 91 App. Div. 202, 86 N. Y. S. 315. And see the annotation, under section 70a (5).

*Property subject to lien cannot be removed.*—Where a bankrupt is indebted to his landlord for rent, neither the bankrupt nor his trustee may remove from the rented premises such fixtures, placed thereon by the bankrupt, as are annexed to the freehold, without paying the rent due. *In re Potee Brick Co.*, (D. C. Md. 1910) 179 Fed. 525.

*Unaccrued rent.*—In some jurisdictions a landlord is given a lien for rent, whether accrued or not, on the tenant's goods carried on the premises. *In re McIntire*, (N. D. W. Va. 1906) 142 Fed. 593, 16 Am. Bankr. Rep. 85.

*Landlord must proceed in Bankruptcy Court.*—On an adjudication of bankruptcy against a tenant the latter's property is in *custodia legis*; the landlord, being thereupon precluded from enforcing his rent claim by distress, is only entitled to proceed against the trustee in the Bankruptcy Court. *In re Bishop*, (D. C. S. C. 1907) 153 Fed. 304, 18 Am. Bankr. Rep. 635.

*Sale in bulk.*—Where a bankrupt's property was sold in bulk without objection by his landlord, so that it was impossible to determine the proportional value of the property covered by the landlord's lien, it was held to be proper to refuse to pay the rent in full out of the proceeds of the sale. *Keyser v. Wessel*, (C. C. A. 3d Cir. 1904) 128 Fed. 281, 12 Am. Bankr. Rep. 126.

*Rents collected by a trustee from property of a bankrupt which is subject to valid liens belongs to the lienholders and not to the general estate.* *In re Torchia*, (C. C. A. 3d Cir. 1911) 188 Fed. 207.

*Attorney's lien.*—The institution of bankruptcy proceedings will not invalidate

an attorney's lien on securities belonging to the bankrupt in possession of the attorney. *In re Rude*, (D. C. Ky. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319; *In re Eurich's Ft. Hamilton Brewery*, (E. D. N. Y. 1908) 158 Fed. 644, 19 Am. Bankr. Rep. 798; *In re Pennell*, (D. C. N. J. 1907) 159 Fed. 500, 18 Am. Bankr. Rep. 909.

Where a creditor claims priority of payment out of the estate of a bankrupt on the ground of his having a lien on property of the bankrupt, and is opposed by the trustee and by other creditors, the attorney for such claimant, who successfully prosecutes the claim in the court of bankruptcy, and secures its allowance, is entitled to a lien for his services on the fund thus secured for his client; and the court of bankruptcy has jurisdiction to determine the right to such lien, fix its amount, and enforce it in the distribution of the property. *In re Rude*, (D. C. Ky. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319.

Where a trustee in bankruptcy has paid to a lien creditor of the bankrupt his distributive share of the estate, but without any warrant or order of the referee or the court so to do, and the court afterwards determines that such creditor's attorney is entitled to a lien on the fund for his services in securing its allowance, the money must be regarded as still in the hands of the trustee, and he will be required to satisfy the claim of the attorney. *In re Rude*, (D. C. Ky. 1900) 101 Fed. 805, 4 Am. Bankr. Rep. 319.

*Trust deeds.*—Whether a deed of trust is valid or not is a local question, in the determination of which the federal courts will follow the decisions of the state court of last resort. *In re Elletson Co.*, (N. D. W. Va. 1909) 174 Fed. 859, 23 Am. Bankr. Rep. 530. See also *Crim v. Woodford*, (C. C. A. 4th Cir. 1905) 136 Fed. 34, 14 Am. Bankr. Rep. 302; *In re Hasie*, (N. D. Tex. 1913) 206 Fed. 739.

*In American Wood Working Machinery Co. v. Norment*, (C. C. A. 4th Cir. 1907) 157 Fed. 801, 19 Am. Bankr. Rep. 679, it was held that a deed of trust, made by a corporation as security, was void as being *ultra vires*.

*Equitable liens.*—It has been held, under section 67d, that the court will recognize and enforce the equitable lien of a party justly entitled thereto as against the estate of the bankrupt. *In re Stout*, (W. D. Mo. 1900) 109 Fed. 794, 6 Am. Bankr. Rep. 505; *In re Oliver*, (N. D. Tex. 1904) 132 Fed. 588, 12 Am. Bankr. Rep. 694; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966; *Smith v. Au Gres Tp.*, (6th Cir. 1906) 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. N. S. 876; *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803; *In re Teter*, (N. D. W. Va. 1909) 173 Fed. 798, 23 Am. Bankr. Rep.

223; *In re Yoke Vitrified Brick Co.*, (D. C. Kan. 1910) 180 Fed. 235.

An equitable lien upon personal property may be created by a verbal agreement where the intention is clear to charge some particular property. *Good-nough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1906) 156 Fed. 504, 19 Am. Bankr. Rep. 244; *In re Stiger*, (C. C. A. 3d Cir. 1913) 209 Fed. 148. See also *Crosby v. Miller*, (D. C. 1906) 16 Am. Bankr. Rep. 805.

**Assignment of future wages.**—It has been held that the right to earn wages is not property that passes to the trustee or receiver, and in fact is not property at all, in the sense that the bankruptcy statute uses the term, but a mere right to create property; and therefore an assignment of such wages does not create a lien upon any existing property. Hence a discharge in bankruptcy, which discharges the consideration for the assignment, discharges the assignment also. *In re West*, (D. C. Ore. 1904) 128 Fed. 205; *In re Home Discount Co.*, (D. C. Ala. 1906) 147 Fed. 538; *Levi v. Loevenhart & Co.*, 138 Ky. 133, 127 S. W. 748, 137 A. S. R. 377, 30 L. R. A. (N. S.) 375; *Leitch v. Northern Pac. R. Co.*, (1905) 95 Minn. 35, 5 Ann. Cas. 63, 103 N. W. 704. See also *Re Ludeke*, 171 Fed. 292.

But it has also been held that a duly recorded assignment of wages, to be earned in the future in an existing employment, executed to secure a valid subsisting debt, may be enforced by the creditor notwithstanding the subsequent discharge of the assignor in bankruptcy. *Citizens' Loan Assoc. v. Boston, etc., R. Co.*, (1907) 196 Mass. 528, 13 Ann. Cas. 365, 82 N. E. 696; *Mallin v. Wenham*, 209 Ill. 252, 70 N. E. 564, 101 A. S. R. 233, 65 L. R. A. 602.

**Pledges.**—The rights of a pledgee in respect to his lien are not affected by the adjudication of bankruptcy of the pledgor or the appointment of his trustee. *In re Mayer*, (C. C. A. 2d Cir. 1907) 157 Fed. 836, 19 Am. Bankr. Rep. 356; *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851; *In re Tracy*, (S. D. N. Y. 1911) 185 Fed. 844; *In re Harvey*, (S. D. Ala. 1914) 212 Fed. 340; *Christ v. Zehner*, (1995) 16 Am. Bankr. Rep. 788, 212 Pa. St. 188, 61 Atl. 822.

It has been held that pledges to secure money loaned at the time are valid; that an exchange of a security validly held for a new security, the old one being released, is not a preference; that a fair exchange of values may be made at any time notwithstanding insolvency; that an insolvent is not bound to abandon all dealing with his property, provided he does not give reference to antecedent debts, and does not so deal with it as to evidence a purpose to defraud or delay his creditors, and that preferences can only arise in case of antecedent debts. *In re Dur-*

*ham*, (D. C. Md. 1902) 114 Fed. 750, 8 Am. Bankr. Rep. 115.

*In Gordon v. Ware Nat. Bank*, (8th Cir. 1904) 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550, it was held that the owner of a policy of life insurance may lawfully and in good faith assign the same to a creditor who has no insurable interest in the assignor to secure the payment of a debt, and that on default of payment the creditor may foreclose the pledge and sell the policy at judicial sale. And see to the same effect *Wilder v. Watts*, (D. C. S. C. 1905) 138 Fed. 426, 15 Am. Bankr. Rep. 57.

**Proposed sale under valid lien.**—The Bankruptcy Court has no power to interfere with the right of sale under the contract possessed by a creditor who has a valid lien upon and possession of property of the bankrupt, as pledgee, where it is not claimed that such power will be exercised fraudulently or oppressively. *In re Browne*, (E. D. Pa. 1900) 104 Fed. 762.

**Lien of banks.**—Under some state statutes the lien given to a banker is limited to property taken by a banker in the usual course of the banking business, such as banks are in the habit of dealing in, or in taking on deposit, or for collection, or otherwise, as notes, bonds, stocks, and other choses in action; and does not include stocks of merchandise, etc., which cannot conveniently pass into the actual possession of the bank. *In re Gesas*, (C. C. A. 9th Cir. 1906) 146 Fed. 734, 16 Am. Bankr. Rep. 872.

**Depositor not entitled to lien.**—Where a check drawn against a sufficient deposit and presented two days before the filing of a petition in bankruptcy by the drawer was not paid or accepted by the bank because of rumors that such proceedings were contemplated, it was held that the payee of such check acquired no claim against the bank or upon the fund; nor did a statement by the bank that it would take advice and pay the check if it could, amount to an acceptance, where it subsequently refused to accept or pay it. *In re Grive*, (D. C. Conn. 1907) 151 Fed. 711, 18 Am. Bankr. Rep. 202, 737.

As to the right of set-off between a bank and its depositors, see the annotation under section 68a.

**Lien on trust funds—tracing funds.**—In the case of *In re Mulligan*, (1902) 116 Fed. 715, it was held that under the circumstances trust funds could no longer be traced and that the owner of the property had no lien, as against the trustee in bankruptcy, on the proceeds.

**Maritime lien.**—In *In re Alaska Fishing, etc., Co.*, (W. D. Wash. 1909) 167 Fed. 875, 21 Am. Bankr. Rep. 685, it was held that a tug owner was entitled to a maritime lien for the value of the service on a barge and its cargo.

A liveryman's lien is not affected by

bankruptcy proceedings. *In re Pratesi*, (D. C. Del. 1903) 128 Fed. 588, 11 Am. Bankr. Rep. 319; *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171.

**Artisans' liens** will be recognized and enforced in bankruptcy proceedings. *In re Lowensohn*, (S. D. N. Y. 1900) 100 Fed. 776, 4 Am. Bankr. Rep. 79; *In re Rich*, (S. D. Ohio 1906) 17 Am. Bankr. Rep. 893.

**Auctioneer's lien.**—An auctioneer employed by a stable company to sell its property, who made an advance to the company, taking a receipt which authorized him to deduct the amount from the proceeds of the property when sold, does not thereby acquire a lien which entitles him to priority over other creditors, on the bankruptcy of the company before the time for sale arrived, the bankrupt having retained possession of the property. *In re Faulhaber Stable Co.*, (C. C. A. 2d Cir. 1909) 170 Fed. 68, 22 Am. Bankr. Rep. 381.

**Warehouse receipt.**—Whether an instrument constitutes a valid and negotiable warehouse receipt so that its transfer operates as delivery is to be determined by the law of the state. *Union Trust Co. v. Wilson*, (1905) 198 U. S. 530, 25 S. Ct. 766, 49 U. S. (L. ed.) 1154, 14 Am. Bankr. Rep. 109; *Love v. Export Storage Co.*, (C. C. A. 6th Cir. 1906) 143 Fed. 1, 16 Am. Bankr. Rep. 171; *Security Warehousing Co. v. Hand*, (C. C. A. 7th Cir. 1906) 143 Fed. 32, 16 Am. Bankr. Rep. 49.

A contract of conditional sale, if the language thereof and the facts warrant it, may give rise to a lien in the interest of the seller which will be recognized in bankruptcy. *National Bank of Commerce v. Williams*, (C. C. A. 5th Cir. 1907) 159 Fed. 615, 20 Am. Bankr. Rep. 79.

**Bill of sale.**—So, also, a bill of sale has been held to create a valid lien which will be enforceable in bankruptcy proceedings. *In re Bartlett*, (M. D. Pa. 1909) 172 Fed. 679, 22 Am. Bankr. Rep. 891.

**Waiver of lien.**—A valid lien may, however, be waived by the proof and allowance of a claim therefor, as unsecured, in the bankruptcy proceedings. *Dunn Salmon Co. v. Pillmore*, (1907) 19 Am. Bankr. Rep. 172, 55 Misc. 546, 106 N. Y.

S. 88. And see the annotation under section 57e.

**Clearance loans.**—For a discussion of clearance loans by banks to stockbrokers as preferential liens, see *Hotchkiss v. National City Bank of New York*, (S. D. N. Y. 1911) 200 Fed. 287.

**Liens invalid as to creditors.**—"The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors." *In re Thomas*, (N. D. N. Y. 1912) 199 Fed. 214.

**Assignment for creditors.**—An assignee in a general deed of assignment, which has been avoided by an adjudication in bankruptcy against his assignor on a petition filed within four months after the making of the assignment, has a lien on the bankrupt's estate for the sum paid by him for such services rendered to him prior to such adjudication as were beneficial to the estate. *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1.

**Collateral security.**—So, also, as with the other liens specified under the present subdivision of the statute, the giving of collateral security to secure the repayment of a *bona fide* indebtedness will be binding in bankruptcy upon the trustee of the pledgor. *Young v. Upson*, (S. D. N. Y. 1902) 115 Fed. 192, 8 Am. Bankr. Rep. 377.

**Property transferred by a borrower at the time of receiving a loan and for the purpose of making the lender safe is security; and the validity of such a transfer, if not accompanied by positive fraud, will be recognized and enforced in bankruptcy.** *McDonald v. Clearwater Shortline R. Co.*, (D. C. Idaho 1903) 164 Fed. 1007, 21 Am. Bankr. Rep. 182.

**Statute protects obligation, not remedy.**—It has been repeatedly held that the provision of the Bankruptcy Act that valid liens shall not be affected by the bankruptcy proceedings has reference only to the validity of the contract, and not to the remedy for enforcing the lienholder's rights, which may be changed without impairing the obligation of the contract, provided an equally efficient and adequate remedy is substituted. *In re Zehner*, (E. D. La. 1912) 193 Fed. 787; *In re Hasie*, (N. D. Tex. 1913) 206 Fed. 789.

e [Conveyances, etc., within four months of petition.] That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the



debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. [(1898) 30 Stat. L. 564.]

**As to**

Fraudulent transfers not within the four months' period, see section 70 a (4) and c.

Fraudulent transfer as an act of bankruptcy, see section 3a (1).

Fraud as affecting right to discharge, see section 14b (3), (4), and (5).

Voidable preferences, see section 60b.

**Purpose of section 67e.**—The primary purpose of section 67e is to prohibit the disposition of property by the debtor to persons other than creditors, in fraud of the Act. *In re Bloch*, (C. C. A. 2d Cir. 1905) 142 Fed. 674, 15 Am. Bankr. Rep. 748.

The effect of this section is to nullify all conveyances of any part of the bankrupt's property made within four months of the filing of the petition in bankruptcy with the intent to hinder, delay, or defraud any of his creditors "except as to purchasers in good faith and for a present fair consideration." It also nullifies all conveyances made by him within the same period while insolvent, which under the state laws are null and void, as against his creditors. *In re Lipman*, (D. C. N. J. 1912) 201 Fed. 169.

**Transfer before passage of Act.**—Where an insolvent debtor, intending to prefer one creditor to others, mortgaged and assigned his property to the creditor before the enactment of the Bankruptcy Act, such transfer was held valid both at common law and under the Act, and the trustee in bankruptcy of the mortgagor was precluded from recovering such property from the creditor, unless, of course, the transfer was contrary to the state law or should be annulled within the required time by proceedings in the state court. *In re Terrill*, (1900) 100 Fed. 778.

The incumbrances which are invalidated by section 67e are those which are "made or given" by the person adjudged a bankrupt; and they include not only those specifically mentioned, "conveyances, transfers, and assignments," but all in-

cumbrances, of whatever form, derived from his contractual act. *In re Emslie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126; *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618.

Thus a conveyance of property by a bankrupt within four months before bankruptcy, which would be fraudulent at the common law, is a void conveyance under section 67e, and the title vests in the bankrupt's trustee. *Belding-Hall Mfg. Co. v. Mercer, etc., Lumber Co.*, (C. C. A. 6th Cir. 1909) 175 Fed. 335, 23 Am. Bankr. Rep. 595.

A conveyance is "made or given" when it is delivered and not when it is recorded; consequently a trustee in bankruptcy cannot avoid a conveyance executed and delivered by the bankrupt more than four months prior to the filing of the petition, though such conveyance is filed for record within the four months' period. *Underleak v. Scott*, (1912) 117 Minn. 136, 134 N. W. 731.

**Transfer must be within four months' period.**—Section 67e is not applicable to a transfer by a bankrupt which was not made within four months prior to the filing of the petition in bankruptcy. *Little v. Holley-Brooks Hardware Co.*, (C. C. A. 5th Cir. 1904) 133 Fed. 874, 13 Am. Bankr. Rep. 422; *Thomas v. Roddy*, (1907) 19 Am. Bankr. Rep. 873, 122 App. Div. 851, 107 N. Y. S. 473; *Hane v. Crown, etc., Co.*, (N. D. N. Y. 1915) 223 Fed. 439. And see the annotation on this question under subdivision f of this section.

**Intent to hinder, delay, or defraud, essential.**—The general rule, under section 67e, is that transfers made, liens created, and securities given, for a present consideration, are valid unless (1) they actually hinder, delay, or defraud creditors; and (2) unless the grantee knew, or had reasonable notice when he took them, that they were intended to hinder, delay, or defraud the creditors of the grantor, or were made in contemplation of bankruptcy, or in fraud of the statute.

*In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *Pollock v. Jones*, (C. C. A. 4th Cir. 1903) 124 Fed. 163, 10 Am. Bankr. Rep. 616; *In re Pease*, (E. D. Mich. 1902) 129 Fed. 446, 12 Am. Bankr. Rep. 66; *Little v. Holley-Brooks Hardware Co.*, (C. C. A. 5th Cir. 1904) 133 Fed. 874, 13 Am. Bankr. Rep. 422; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513; *In re McKane*, (E. D. N. Y. 1907) 155 Fed. 674, 19 Am. Bankr. Rep. 103; *Sargent v. Blake*, (C. C. A. 8th Cir. 1908) 160 Fed. 57, 20 Am. Bankr. Rep. 115; *Henkel v. Seider*, (E. D. N. Y. 1908) 163 Fed. 553, 20 Am. Bankr. Rep. 773; *Fouche v. Shearer*, (N. D. Ga. 1909) 172 Fed. 592, 22 Am. Bankr. Rep. 828; *In re Elletson Co.*, (N. D. W. Va. 1909) 174 Fed. 859, 23 Am. Bankr. Rep. 530; *Shelton v. Price*, (N. D. Ala. 1909) 174 Fed. 891, 23 Am. Bankr. Rep. 431; *In re Kullberg*, (D. C. Minn. 1909) 176 Fed. 585, 23 Am. Bankr. Rep. 758; *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136; *In re Zotti*, (S. D. N. Y. 1910) 178 Fed. 304; *Powell v. Gate City Bank*, (C. C. A. 8th Cir. 1910) 178 Fed. 609; *In re Medina Quarry Co.*, (W. D. N. Y. 1910) 179 Fed. 929; *In re Howard*, (C. C. A. 2d Cir. 1910) 180 Fed. 399; *Cowan v. Burchfield*, (N. D. Ala. 1910) 180 Fed. 614; *In re Salvator Brewing Co.*, (S. D. N. Y. 1910) 183 Fed. 910; *Mutual L. Ins. Co. v. Smith*, (C. C. A. 1st Cir. 1911) 184 Fed. 1; *Vollmer v. Plage*, (E. D. N. Y. 1911) 186 Fed. 598; *Meservey v. Roby*, (C. C. A. 8th Cir. 1912) 198 Fed. 844; *In re Thomas*, (N. D. N. Y. 1912) 199 Fed. 214; *In re Thweatt*, (N. D. Ga. 1912) 199 Fed. 319; *Ogden v. Reddish*, (E. D. Ky. 1912) 200 Fed. 977; *Johnson v. Dismukes*, (C. C. A. 5th Cir. 1913) 204 Fed. 382; *In re Banks*, (N. D. N. Y. 1913) 207 Fed. 662; *Fall v. U. S.*, (C. C. A. 8th Cir. 1913) 209 Fed. 547; *Parker v. Sherman*, (C. C. A. 2d Cir. 1914) 212 Fed. 917; *Halbert v. Pranke*, (Minn. 1904) 11 Am. Bankr. Rep. 620; *Deland v. Miller, etc., Bank*, (1903) 11 Am. Bankr. Rep. 744, 119 Ia. 368, 93 N. W. 304.

*It was not intended to authorize an action to set aside any and all conveyances executed by the bankrupt within four months of the filing of his petition in bankruptcy, but only such as were made within that time for the purpose of hindering, delaying, or defrauding creditors.* The Act does not make conveyances executed within that period *prima facie* fraudulent, and the burden is upon the person bringing an action thereunder to show as an essential element of his cause of action that the transfer was made for the purpose of defrauding creditors. *Halbert v. Pranke*, (Minn. 1904) 11 Am. Bankr. Rep. 620.

*It is every intent to hinder, delay, or defraud creditors unlawfully only, and not every intent to hinder or delay them, that*

*avails to avoid a transfer made for a pre-existing debt under section 67e.* *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513.

*Statute does not affect jus disponendi.*—An insolvent debtor until the commencement of proceedings in bankruptcy still has the *jus disponendi* of his property. He has the right to secure and pay his debts with it, and he has the right to secure and pay one creditor in preference to others, provided always the security or the payment is not violative of any of the Acts of Congress or of any of the statutes of the state. A preference of one creditor over others by such a payment or by such security, which is free from actual and intended fraud, and from any purpose to affect other creditors injuriously, beyond the necessary effect of the security or the payment, is valid and lawful, and it cannot evidence such an intent to hinder, delay, and defraud as will make it void or voidable under section 67e. *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513.

*Effect of transaction insufficient.*—The necessary effect upon other creditors of a mortgage executed by an insolvent within four months of the filing of a petition in bankruptcy, to secure a pre-existing debt, does not dispense with the necessity of showing the actual intent to hinder, delay, or defraud creditors, which is essential under section 67e, in order to avoid such mortgage, where the mortgagee was ignorant of the insolvency of the mortgagor, and had no reason to believe that a preference was intended. *Coder v. Arts*, (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 22 Am. Bankr. Rep. 15, *affirming* (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513; *In re Kullberg*, (D. C. Minn. 1909) 176 Fed. 585, 23 Am. Bankr. Rep. 758.

*Consideration going into estate.*—A transfer for a valid consideration, which consideration goes into the bankrupt estate, is not void, unless it be made with the intent to defraud other creditors. *Vollmer v. Plage*, (E. D. N. Y. 1911) 186 Fed. 598.

*Payment by bank.*—Where a bank, in ignorance of the filing of a petition in bankruptcy, paid the bankrupt's checks drawn on his deposit on the day the petition was filed, it was held that such payment was not a transfer by the bank of the bankrupt's assets, nor an improper meddling with a *res* over which the court of bankruptcy had jurisdiction, which would permit recovery by the trustee in bankruptcy against the bank. *In re Zotti*, (S. D. N. Y. 1910) 178 Fed. 304.

*Payment of wife's debt.*—A payment made by a bankrupt, while insolvent, on his wife's separate debt, cannot be recovered by the bankrupt's trustee as fraudulent in the absence of evidence and a finding that the bankrupt was actuated by a

fraudulent intent. *In re Kayser*, (C. C. A. 3d Cir. 1910) 177 Fed. 383, 24 Am. Bankr. Rep. 174.

**Belief of person receiving preference.**—Under this section "no reasonable cause of belief of insolvency and fraud on the Act by the person receiving the preference is necessary to avoid it. The purpose and intent of the bankrupt only is looked at, and, if contrary to the Act, is sufficient." *In re McLam*, (1899) 97 Fed. 922.

**Consideration for deferred annuity contract.**—An insurance contract, entered into by the company with one who was then insolvent and was subsequently adjudged a bankrupt, by which the insurer obligated itself to pay the insured a certain sum yearly, commencing in the future and continuing during the life of the insured, is not void; and the sum paid for such insurance cannot be recovered by the trustee in bankruptcy of the insured, on the theory that such payment was a transfer in fraud of creditors, and that the insurance company, though acting *bona fide*, was not a purchaser for value, because it had not paid the purchase money or secured it in such a manner that it could not be relieved against payment. In such case, however, a bill, asking that the company be compelled to pay the trustee the sum received from the bankrupt upon the surrender of the contract, will be dismissed without prejudice to any right the trustee may have to claim whatever beneficial interest the bankrupt has, or may thereafter have, under the contract. *Mutual L. Ins. Co. v. Smith*, (C. C. A. 1st Cir. 1911) 184 Fed. 1.

**Evidence of fraudulent intent.**—An intent to hinder, delay, or defraud creditors is to be proven from the facts surrounding the transaction, either from the appearance of the transfer attacked or from evidence *aliunde*. If from the latter, the burden of proof is on the plaintiff. *In re Elletson Co.*, (N. D. W. Va. 1909) 174 Fed. 859, 23 Am. Bankr. Rep. 530.

**Agreement to withhold transfer from record.**—An agreement between the mortgagor and mortgagee to withhold a chattel mortgage from record is evidence of a fraudulent intent. *In re Hickerson*, (D. C. Idaho 1908) 162 Fed. 345, 20 Am. Bankr. Rep. 682.

**Suspicion, fear, and facts that arouse suspicion and fear in the mind of the creditor, but give no reasonable ground for him to believe that the debtor intends a preference by his payment or security, do not make such a transfer voidable.** *Powell v. Gate City Bank*, (C. C. A. 8th Cir. 1910) 178 Fed. 609; *In re Howard*, (C. C. A. 2d Cir. 1910) 180 Fed. 399.

**A sale of the bankrupt's stock and fixtures in bulk is not, in an action by the trustee, *prima facie* fraudulent in the sense that such sale alone establishes the bad faith of the purchaser; the sale being**

**merely a circumstance reflecting on the *bona fides* of the transaction.** *Shelton v. Price*, (N. D. Ala. 1909) 174 Fed. 891, 23 Am. Bankr. Rep. 431.

**Transfer of partnership property.**—An application of partnership property, by consent of all the members of the firm, to the payment of an individual debt of a partner within four months of the filing of a petition in bankruptcy, and while the partners and the partnership are insolvent, does not evidence any intent to hinder, delay, or defraud the creditors of the partnership within the meaning of section 67e. *Sargent v. Blake*, (C. C. A. 8th Cir. 1908) 160 Fed. 57, 20 Am. Bankr. Rep. 115.

**Sufficiency of evidence.**—On the question of evidence held sufficient to establish knowledge in the grantee of a trust deed that it was made in fraud of the statute, see *Dean v. Davis*, (C. C. A. 4th Cir. 1914) 212 Fed. 88.

**A general assignment for the benefit of creditors, made within four months from the filing of a petition in bankruptcy, is void as against a trustee in bankruptcy, in so far as it interferes with his administering the property assigned.** *Randolph v. Scruggs*, (1903) 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1; *In re Gutwillig*, (C. C. A. 2d Cir. 1899) 92 Fed. 337, 1 Am. Bankr. Rep. 388; *In re Plotke*, (7th Cir. 1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171; *In re Jacobson*, (D. C. Mass. 1909) 181 Fed. 870; *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618; *Cohen v. American Surety Co.*, (1908) 20 Am. Bankr. Rep. 65, 192 N. Y. 227, 84 N. E. 947. And see annotation under section 3a (4), as to an assignment for the benefit of creditors as an act of bankruptcy.

**Voluntary general assignments for the benefit of creditors made in conformity with the laws of the state are voidable by the trustee of the debtor in bankruptcy if made within four months of the adjudication, (1) because they are incompatible with the purpose and policy of the Bankruptcy Law and the rights of creditors thereunder to the appointment of the trustee and the supervision of the assets in bankruptcy; (2) because in fraud of creditors within section 70 of the Act, as the assignment deprives creditors of the important advantages secured to them under the statute; and (3) because if not voidable the clause of section 3, making such an assignment *ipso facto* "an act of bankruptcy," would be practically nullified, and rendered of no use to creditors.** *In re Gutwillig*, (S. D. N. Y. 1898) 90 Fed. 475, 1 Am. Bankr. Rep. 78, affirmed (C. C. A. 2d Cir. 1899) 92 Fed. 337, 1 Am. Bankr. Rep. 388.

**Fraud unnecessary.**—A voluntary assignment, though as a matter of fact untainted with any fraudulent purpose, is

yet, when made within four months of the filing of a petition in bankruptcy, as matter of law, a constructive fraud upon the Act, and voidable by trustee under section 67e. *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618.

**Validity determined by federal courts.**

—The question of the effect of the Bankruptcy Law upon the validity of a general assignment made after its passage, in accordance with the provisions of a state statute, is not one which is governed by any rule or decision in a state, but will be determined independently by the federal courts. *In re Plotke*, (7th Cir. 1900) 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171.

**Transfer of corporate property by corporation officers.**—The directors of a corporation who have loaned it money on credit cannot, when they find danger of insolvency pending, transfer its property to themselves as security for their claims. *In re Salvator Brewing Co.*, (S. D. N. Y. 1910) 183 Fed. 910. See also *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136.

**Omission to record deed.**—The fact that a deed, executed and delivered before the four months' period, was not recorded until within that period, does not avoid it. *Miller v. Shriver*, (1900) 197 Pa. St. 191, 46 Atl. 926.

**Renewal notes, etc., within four months.**

—Where an indebtedness arose and a pledge to secure the same was given more than four months prior to bankruptcy proceedings, the fact that renewal notes and a pledge were given within the four months will not render the pledge voidable. *Chattanooga Nat. Bank v. Rome Iron Co.*, (1900) 102 Fed. 755.

**Dissolution of insolvent partnership.**—In *In re Head*, (1902) 114 Fed. 489, it was held that the dissolution of a firm, it being insolvent, and the withdrawal therefrom of assets by the respective partners, to be held as individual property, was in violation of section 67e, and that the court should set aside the terms of the dissolution and treat the assets of the firm in the hands of both partners as partnership property, since to do otherwise would be to defeat the whole spirit and policy of the Act. *Distinguishing In re Rudnick*, (1900) 102 Fed. 751.

**The payment of money by a debtor upon a valid pre-existing debt, the circumstances not making such payment technically a preference, is not such a transfer of property under section 67e as to entitle the trustee, upon proof of the debtor's fraudulent intent, to recover the money back from the creditor to whom it was paid.** *Blakey v. Boonville Nat. Bank*, (1899) 95 Fed. 267.

**Effect of discharge in bankruptcy.**—The discharge of a bankrupt does not affect the right of the trustee in bankruptcy

or his creditors to have property previously disposed of by the bankrupt for the purpose of defrauding his creditors applied to the payment of his debts. This right of the trustee is expressly conferred by this section and section 70e. *Blick v. Nimmo*, (1913) 121 Md. 139, 88 Atl. 116.

**Transfer by husband to wife.**—In a suit by the trustee to set aside, as fraudulent, a conveyance by a bankrupt husband to his wife, the testimony and all of the circumstances of the case may impose the burden upon the defendants to show the good faith and honesty of the conveyance, for the law is well settled that entire fairness is required in dealings between husband and wife, so far as they affect the rights of creditors. *Stroecker v. Patterson*, (C. C. A. 9th Cir. 1915) 220 Fed. 21.

**Payment to bank holding note of bankrupt.**—This section is not relevant on the question whether a payment on a note held by a bank against a depositor, on a threat of the bank to set off the note against the depositor's account, is a voidable preference. *In re Starkweather*, (W. D. Mo. 1913) 206 Fed. 797.

**An engagement ring, given by a person who three months later goes into voluntary bankruptcy, may be recovered from the woman to whom it was given.** *Pollock v. Simon*, (E. D. Pa. 1913) 205 Fed. 1005.

**Property sold under execution on judgment by confession.**—For facts showing a voidable transfer under this section, where property was sold under execution on a judgment by confession and purchased by the judgment creditor at about one-fourth of its value, with knowledge of the debtor's insolvency, see *Grant v. National Bank of Auburn*, (N. D. N. Y. 1912) 197 Fed. 581.

**A conveyance by a wife to her husband, made on the eve of bankruptcy, leaving her nothing to pay creditors, is prima facie fraudulent.** *Fouche v. Shearer*, (N. D. Ga. 1909) 172 Fed. 592, 22 Am. Bankr. Rep. 828. And see to the same effect *Henkel v. Seider*, (E. D. N. Y. 1908) 163 Fed. 553, 20 Am. Bankr. Rep. 773.

**An assignment of a life insurance policy to the insured's wife, without consideration, and while he is insolvent, constitutes a voidable transfer.** *Kirkpatrick v. Johnson*, (S. E. D. Pa. 1912) 197 Fed. 235.

**Transfers void under state law.**—Whether a conditional contract of sale, chattel mortgage, or pledge of personal property, and the like, are valid as against the general creditors of the vendor, mortgagor, or pledgor, or his trustee in bankruptcy, must be determined by the local laws of the state in which the transaction is had. *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187. And see the annotation under subdivisions a and d of this section. See also section 64b (5).

**Transactions void under federal statutes.**—Assignments as collateral security

for a loan of unallowed claims against the United States on account of contracts for furnishing materials to the various departments of the government, being in direct opposition to R. S. sec. 3477, in title CLAIMS herein, making absolutely null and void voluntary transfers of claims against the United States before their allowance, can confer no interest on the assignees, as against the trustee in bankruptcy of the assignors. *National Bank of Commerce v. Downie*, (1910) 218 U. S. 345, 31 S. Ct. 89, 54 U. S. (L. ed.) 1065.

**Secret liens**, when obnoxious under the law of the state, may be attacked by the trustee in bankruptcy in behalf of the general creditors. *Spencer v. Duplan Silk Co.*, (E. D. Pa. 1902) 112 Fed. 638, 7 Am. Bankr. Rep. 563.

**Chattel mortgages.**—Chattel mortgages given for the purpose of hindering, delaying, or defrauding creditors, or which are given by an insolvent debtor and are void under the law of the state, within four months prior to the filing of the petition in bankruptcy, are null and void under section 67e. *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *In re Wolf*, (N. D. Ia. 1899) 98 Fed. 84, 3 Am. Bankr. Rep. 558; *Sabin v. Camp*, (D. C. Ora. 1900) 98 Fed. 974, 3 Am. Bankr. Rep. 578; *In re Hugill*, (N. D. Ohio 1900) 100 Fed. 616, 3 Am. Bankr. Rep. 686; *In re Klingaman*, (S. D. Ia. 1900) 101 Fed. 691, 4 Am. Bankr. Rep. 254; *Chattanooga Nat. Bank v. Rome Iron Co.*, (N. D. Ga. 1900) 102 Fed. 755, 4 Am. Bankr. Rep. 441; *Stroud v. McDaniel*, (C. C. A. 4th Cir. 1901) 106 Fed. 493, 5 Am. Bankr. Rep. 695; *City Nat. Bank v. Bruce*, (C. C. A. 4th Cir. 1901) 109 Fed. 69, 6 Am. Bankr. Rep. 311, *affirming In re Alverson*, (D. C. S. C. 1900) 5 Am. Bankr. Rep. 855; *In re Howland*, (N. D. N. Y. 1901) 109 Fed. 869, 6 Am. Bankr. Rep. 495; *In re Davidson*, (S. D. Ia. 1901) 109 Fed. 882, 5 Am. Bankr. Rep. 528; *In re Platts*, (D. C. S. D. 1901) 110 Fed. 126, 6 Am. Bankr. Rep. 568; *In re Tatem*, (E. D. N. C. 1901) 110 Fed. 519, 6 Am. Bankr. Rep. 426; *In re Ronk*, (D. C. Ind. 1901) 111 Fed. 154, 7 Am. Bankr. Rep. 31; *In re Sewell*, (E. D. Ky.) 111 Fed. 791, 7 Am. Bankr. Rep. 133; *In re Shirley*, (C. C. A. 6th Cir. 1901) 112 Fed. 301, 7 Am. Bankr. Rep. 299; *In re Pekin Plow Co.*, (C. C. A. 8th Cir. 1901) 112 Fed. 308, 7 Am. Bankr. Rep. 369; *In re Soudan Mfg. Co.*, (C. C. A. 7th Cir. 1902) 113 Fed. 804, 8 Am. Bankr. Rep. 45; *In re Durham*, (D. C. Md. 1902) 114 Fed. 750, 8 Am. Bankr. Rep. 115; *In re Garcewich*, (C. C. A. 2d Cir. 1902) 115 Fed. 87, 8 Am. Bankr. Rep. 149; *In re Hull*, (D. C. Vt. 1902) 115 Fed. 858, 8 Am. Bankr. Rep. 302; *In re Josephson*, (W. D. Ga. 1902) 116 Fed. 404, 8 Am. Bankr. Rep. 423; *Stedman v. Monroe Bank*, (C. C. A. 8th Cir. 1902) 117 Fed. 237, 9 Am. Bankr. Rep. 4; *Egan State Bank v. Rice*, (C. C. A. 8th Cir. 1902) 119 Fed.

107, 9 Am. Bankr. Rep. 437; *In re Butler*, (N. D. Ga. 1902) 120 Fed. 100, 9 Am. Bankr. Rep. 539; *In re Cannon*, (D. C. S. C. 1903) 121 Fed. 582, 10 Am. Bankr. Rep. 64; *Clayton v. Exchange Bank*, (5th Cir. 1903) 121 Fed. 630, 57 C. C. A. 656, 10 Am. Bankr. Rep. 173; *In re Antigo Screen Door Co.*, (7th Cir. 1903) 123 Fed. 249, 59 C. C. A. 248, 10 Am. Bankr. Rep. 359; *Pollock v. Jones*, (C. C. A. 4th Cir. 1903) 124 Fed. 163, 10 Am. Bankr. Rep. 616; *Farmers' Bank v. Carr*, (C. C. A. 4th Cir. 1904) 127 Fed. 690, 11 Am. Bankr. Rep. 733; *In re Pease*, (E. D. Mich. 1902) 129 Fed. 446, 12 Am. Bankr. Rep. 66; *In re Sawyer*, (D. C. Mass. 1904) 130 Fed. 384, 12 Am. Bankr. Rep. 269; *Dodge v. Norlin*, (C. C. A. 8th Cir. 1904) 133 Fed. 363, 13 Am. Bankr. Rep. 177; *In re Canton First Nat. Bank*, (C. C. A. 6th Cir. 1905) 135 Fed. 62, 14 Am. Bankr. Rep. 180; *In re Dismal Swamp Contracting Co.*, (E. D. Va. 1905) 135 Fed. 415, 14 Am. Bankr. Rep. 175; *In re Marine Constr., etc., Co.*, (E. D. N. Y. 1905) 135 Fed. 921, 14 Am. Bankr. Rep. 466; *In re Chadwick*, (N. D. Ohio 1905) 140 Fed. 674, 15 Am. Bankr. Rep. 528; *In re Hill*, (N. D. Cal. 1905) 140 Fed. 984, 15 Am. Bankr. Rep. 499; *In re Birk*, (C. C. A. 7th Cir. 1905) 142 Fed. 438, 15 Am. Bankr. Rep. 694; *In re Marine Constr., etc., Co.*, (C. C. A. 2d Cir. 1906) 144 Fed. 649, 16 Am. Bankr. Rep. 325; *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639; *In re Shaw*, (D. C. Me. 1906) 146 Fed. 273, 17 Am. Bankr. Rep. 196; *In re Arkonia Fabric Mfg. Co.*, (E. D. Pa. 1907) 151 Fed. 914, 18 Am. Bankr. Rep. 470; *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513, *modifying* (S. D. Ia. 1906) 16 Am. Bankr. Rep. 583; *In re Davis*, (E. D. N. Y. 1907) 155 Fed. 671, 19 Am. Bankr. Rep. 98; *In re Standard Telephone, etc., Co.*, (E. D. Wis. 1907) 157 Fed. 106, 19 Am. Bankr. Rep. 491; *In re Tucker*, (E. D. N. C. 1908) 161 Fed. 584; *In re Hickerson*, (D. C. Idaho 1908) 162 Fed. 345, 20 Am. Bankr. Rep. 682; *In re Columbia Fireproof Door, etc., Co.*, (E. D. N. Y. 1909) 168 Fed. 159, 21 Am. Bankr. Rep. 714; *In re Hersey*, (N. D. Ia. 1909) 171 Fed. 998, 22 Am. Bankr. Rep. 863; *In re Tysor-Cheatham Mercantile Co.*, (S. D. Ga. 1910) 178 Fed. 733; *In re Walden Bros. Clothing Co.*, (N. D. Ga. 1912) 199 Fed. 315; *Brigman v. Covington*, (C. C. A. 4th Cir. 1913) 219 Fed. 500; *Williams v. German American Trust Co.*, (C. C. A. 8th Cir. 1915) 219 Fed. 507; *Hane v. Crown, etc., Co.*, (N. D. N. Y. 1915) 223 Fed. 439; *In re Adams*, (E. D. Mich. 1899) 2 Am. Bankr. Rep. 415; *In re Leigh*, (D. C. Colo.) 2 Am. Bankr. Rep. 606; *In re Barrett*, (S. D. N. Y. 1901) 6 Am. Bankr. Rep. 48; *Matter of S. B. Hutchinson Co.*, (E. D. Mich. 1905) 14 Am. Bankr. Rep. 518; *Bank of Mendon v. Mell*, (1914) 185 Mo. App. 510, 172 S. W. 484; *Skilton*

*v. Codington*, (1906) 15 Am. Bankr. Rep. 810, 185 N. Y. 80, 77 N. E. 790; *Zartman v. Waterloo First Nat. Bank*, (1905) 16 Am. Bankr. Rep. 152, 109 App. Div. 406, 96 N. Y. S. 633.

**Mortgage partly valid, partly invalid.**—A mortgage made more than four months before a petition in bankruptcy was filed against the mortgagor, but not registered until within a month before, was held not to be wholly invalidated by the bankruptcy proceedings; but the state law under which the mortgage was made invalid as against persons becoming creditors of the mortgagor between the date of execution and that of registration was enforced in favor of those creditors. *In re Adams*, (1899) 97 Fed. 188.

**Where a mortgage is given by a partnership**, and within four months thereafter bankruptcy proceedings are taken against a member of the partnership, the mortgage is not invalidated thereby. *McNair v. McIntyre*, (C. C. A. 1902) 113 Fed. 113.

**Mortgage bills of sale.**—In the case of *In re Durham*, (1902) 114 Fed. 750, certain mortgage bills of sale were upheld under this section although they were attacked on the ground that they constituted a preference with an attempt to hinder and delay creditors.

**Mortgage liens under special circumstances** were held valid in *In re Dunavant*, (1899) 96 Fed. 542; and invalid in *In re Platts*, (1901) 110 Fed. 126, and *In re Steininger Mercantile Co.*, (C. C. A. 1901) 107 Fed. 669.

**A deed of trust executed by a corporation**, within four months prior to its bankruptcy, to secure notes which were issued direct to creditors of its principal stockholder and managing officer to secure his personal indebtedness, is in their hands fraudulent and void as against its creditors. *American Wood Working Machinery Co. v. Norment*, (C. C. A. 4th Cir. 1907) 157 Fed. 801, 19 Am. Bankr. Rep. 679; *In re Elletson Co.*, (N. D. W. Va. 1909) 174 Fed. 859, 23 Am. Bankr. Rep. 530. See also *Morgan v. Mannington First Nat. Bank*, (C. C. A. 4th Cir. 1906) 145 Fed. 466, 16 Am. Bankr. Rep. 639.

**Transfer of exempt property.**—Property, transferred by a bankrupt to a creditor, which is exempted under the laws of the state, cannot be recovered by his trustee. *Vitzthum v. Large*, (N. D. Ia. 1908) 162 Fed. 685, 20 Am. Bankr. Rep. 666.

**Bona fide purchasers protected.**—Section 67e expressly excepts from its operation such transfers, etc., as have been made to purchasers in good faith and for a present fair consideration. *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513, *affirmed* (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 22 Am. Bankr. Rep. 1; *Shelton v. Price*, (N. D. Ala. 1909) 174 Fed. 891, 23 Am. Bankr. Rep. 431; *In re Soforenko*, (D. C. Mass. 1913) 210 Fed. 562; *Halbert v.*

*Pranke*, (Minn. 1904) 11 Am. Bankr. Rep. 620. And see also the annotation under subdivision *d* of this section.

**The burden rests on the purchaser** to show that he took all reasonable and proper steps to ascertain the seller's financial condition and bought in good faith and for a present fair consideration. *In re Knopf*, (D. C. S. C. 1906) 144 Fed. 245, 16 Am. Bankr. Rep. 432; *Dokken v. Page*, (C. C. A. 8th Cir. 1906) 147 Fed. 438, 17 Am. Bankr. Rep. 228; *Bentley v. Young*, (S. D. N. Y. 1914) 210 Fed. 202; *Halbert v. Pranke*, (Minn. 1904) 11 Am. Bankr. Rep. 620.

So a purchaser is not in good faith who makes no effort to determine whether one may make a transfer which will not be in violation of the Bankruptcy Act. Fraud is not to be presumed, but that does not imply that fraud may not be proved by circumstances as well as by direct evidence. Fraud may be actual arising from facts and circumstances of imposition. It may be apparent from the intrinsic nature and subject of the bargain itself. *Lumpkin v. Foley*, (C. C. A. 5th Cir. 1913) 204 Fed. 372.

**Good faith cannot inhere in a transaction** where the transferee knows or has reason to believe that his grantor is insolvent, and that the purpose of the transaction was to defeat the Bankruptcy Act. *In re Pease*, (E. D. Mich. 1902) 129 Fed. 446, 12 Am. Bankr. Rep. 66.

In a fraudulent transaction, the grantee is presumed to be a party to the fraud, and does not occupy the position of an innocent holder for value. If, therefore, an instrument has been made by a bankrupt and recorded within the statutory period, it is a question of fact whether it was done with intent to defraud, hinder, or delay his creditors, or to give a preference to any one of them. *In re McKane*, (E. D. N. Y. 1907) 155 Fed. 674, 19 Am. Bankr. Rep. 103.

**Thus where the agent of an insolvent corporation sold its remaining assets without authority**, and without the consent of all of the creditors, not in the ordinary course of its regular business, it was held that the purchasers were not purchasers in good faith in a legal sense, and that the sale was subject to vacation by the corporation's trustee in bankruptcy. *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136. See also *In re Salvator Brewing Co.*, (S. D. N. Y. 1910) 183 Fed. 910.

**Trustee vested with rights of creditor.**—Since the enactment of the amendment of 1910, trustees as to all property in the custody or coming into the custody of the Bankruptcy Court are vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the Bankruptcy Court, are vested with all the rights, remedies, and powers of a judgment creditor

holding an execution duly returned unsatisfied. See section 47a (2).

**Recovery by trustee.**—The title to property transferred, assigned, or encumbered, in violation of section 67e, is vested in the trustee upon the adjudication of the debtor as a bankrupt, and, where such course is necessary, the property may be recovered by the trustee in an appropriate legal proceeding brought for that purpose. *McNulty v. Feingold*, (E. D. Pa. 1904) 129 Fed. 1001, 12 Am. Bankr. Rep. 338; *Guaranty Title, etc., Co. v. Pearlman*, (W. D. Pa. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461; *In re Jackier*, (M. D. Pa. 1910) 179 Fed. 720; *In re Schwartz*, (S. D. N. Y. 1909) 179 Fed. 767; *Frost v. Latham*, (S. D. Ala. 1910) 181 Fed. 866; *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618; *Deland v. Miller, etc., Bank*, (1903) 11 Am. Bankr. Rep. 744, 119 Ia. 368, 93 N. W. 304; *Drew v. Myers*, (1908) 81 Neb. 750, 116 N. W. 781; *Baker v. Robertson*, (Tex. 1913) 163 S. W. 326. And see also the annotation under section 23b.

The right of the trustee to have transfers annulled under section 67e is conferred upon him by the due operation of the Bankruptcy Law, and is irrespective of whether any other person might, or might not, have had that right in the absence of that law. *Frost v. Latham*, (S. D. Ala. 1910) 181 Fed. 866; *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618.

**Value of property recoverable.**—In a plenary suit by a bankrupt's trustee to recover goods alleged to belong to the bankrupt in the fraudulent custody of a third person, the trustee may recover the value of the goods, even if they cannot be precisely identified. *In re Jackier*, (M. D. Pa. 1910) 179 Fed. 720.

**A receiver cannot sue to set aside a fraudulent transfer.** *Guaranty Title, etc., Co. v. Pearlman*, (W. D. Pa. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461.

**Action for recovery—Plenary action.**—Where the property claimed by the trustee is in the *bona fide* possession of a third person, a plenary action must be brought. See section 23b and annotation thereof.

Thus where a sheriff took possession of certain personal property under a replevin writ, in an action pending in a state court

prior to the filing of a bankruptcy petition against the defendant, the plaintiff in such replevin suit claiming title on the ground that the property was purchased by means of the bankrupt's fraudulent representations, it was held that the Bankruptcy Court had no jurisdiction by a summary order to compel the sheriff to deliver the property to a receiver in bankruptcy, under section 67e, as such section only applies to property of the bankrupt. *In re Rudnick*, (C. C. A. 2d Cir. 1908) 160 Fed. 903, reversing (S. D. N. Y. 1907) 158 Fed. 223, 18 Am. Bankr. Rep. 750.

**The trustee may maintain a suit in equity for an accounting** in the United States District Court against fraudulent transferees of the bankrupt, where the transfer consists of a large number of items, the actual value of which can only be ascertained by an accounting, though the complainants knew the face value of such items. *McNulty v. Feingold*, (E. D. Pa. 1904) 129 Fed. 1001, 12 Am. Bankr. Rep. 338.

**Pleading must set out facts.**—An allegation in a petition by a bankrupt's trustee that a preference sought to be set aside was fraudulent, without any facts showing fraud other than that the transfer constituted a preference, was held to be insufficient. *In re Leech*, (C. C. A. 6th Cir. 1909) 171 Fed. 622, 22 Am. Bankr. Rep. 599.

**An allegation of insufficiency of assets to meet the claims of creditors**, it has been held, is necessary in an action to recover a fraudulent conveyance under section 67e. *Deland v. Miller, etc., Bank*, (1903) 11 Am. Bankr. Rep. 744, 119 Ia. 368, 93 N. W. 304; *Drew v. Myers*, (1908) 81 Neb. 750, 116 N. W. 781.

**Finding of special master.**—On the question whether or not a transfer was fraudulent the findings of a special master should be given great weight, though the district judge from a perusal of the evidence might have come to a different conclusion. *In re Schwartz*, (S. D. N. Y. 1909) 179 Fed. 767.

**No judgment required.**—In order that a creditor may be able to set aside a transaction claimed to be unlawful he need not have a judgment, attachment, or lien. *Union Trust Co. v. Amery*, (1911) 67 Wash. 1, 120 Pac. 539.

**[Jurisdiction.]** For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. [(Inserted 1903, which excepted pending cases) 32 Stat. L. 800.]

This paragraph was not in the Act as originally enacted, but was added by amendment in 1903.

**Concurrent jurisdiction.**—Since the enactment of the amendment of 1903 the federal District Courts have concurrent jurisdiction with the state courts of actions

to set aside alleged fraudulent conveyances by a bankrupt made within four months prior to the filing of the bankruptcy petition. *Johnston v. Forsyth*

Mercantile Co., (S. D. Ga. 1904) 127 Fed. 845, 11 Am. Bankr. Rep. 669; *Horner-Gaylord Co. v. Miller*, (N. D. W. Va. 1906) 147 Fed. 295, 17 Am. Bankr. Rep. 257; *In re McMahon*, (C. C. A. 6th Cir. 1906) 147 Fed. 684, 17 Am. Bankr. Rep. 530; *Lynch v. Bronson*, (D. C. Conn. 1908) 160 Fed. 139, 20 Am. Bankr. Rep. 409; *In re Kerski*, (E. D. Wis.) 2 Am. Bankr. Rep. 79; *Sheldon v. Parker*, (1902) 11 Am. Bankr. Rep. 152, 66 Neb. 610, 92 N. W. 923; *Grandison v. National Bank of Commerce*, (W. D. N. Y. 1915) 220 Fed. 981; *Grandison v. Robertson*, (W. D. N. Y. 1915) 220 Fed. 985. And see also the annotation under section 23b.

**Proper district.**—An action to recover money paid by a bankrupt, in contemplation of insolvency, must be brought in the district where the person receiving the money resides, and not in the district of adjudication, if that is different from the district of such person's residence. *Kirkpatrick v. Gallup*, (W. D. Mich. 1912) 200 Fed. 108.

**f [Liens, etc., created through legal proceedings.]** That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. [(1898) 30 Stat. L. 565.]

As to legal proceedings resulting in preference, as an act of bankruptcy, see section 3a (3).

- I. Annulment of liens generally, 1130.
- II. Time of acquiring lien, 1133.
- III. Judgment liens, 1134.
- IV. Attachment and garnishment liens, 1136.
- V. Liens on exempt property, 1138.
- VI. Enforcement of pre-existing liens, 1139.

#### I. ANNULMENT OF LIENS GENERALLY.

**Purpose of statute.**—The purpose of the statute is to preserve all liens whether arising by contract or by statute, except those which are expressly declared void. *In re Kerby-Dennis Co.*, (C. C. A. 1899) 95 Fed. 116.

**Relation to section 67c.**—This section prevails over section 67c in so far as the provisions of the two sections are repugnant. *Cook v. Robinson*, (C. C. A. 9th Cir. 1912) 194 Fed. 785; *Folger v. Putnam*, (C. C. A. 9th Cir. 1912) 194 Fed. 793. And see *supra*, note to subdivision c of this section.

**Property in possession of court.**—A court of bankruptcy which, by its trustee, has possession of the property of a bankrupt, has jurisdiction to determine all questions in respect to title or to liens thereon, and may entertain and determine a suit or petition by the trustee against a mortgagee of the property to set aside the mortgage as one given within four months prior to the bankruptcy and void under section 67c. *In re McMahon*, (C. C. A. 6th Cir. 1906) 147 Fed. 684, 17 Am. Bankr. Rep. 530.

**Where a trustee proceeds in the state courts to recover property of the bankrupt fraudulently conveyed, he is entitled to all remedies and all relief that would be afforded any other party litigant under the same facts.** *Sheldon v. Parker*, (1902) 11 Am. Bankr. Rep. 152, 66 Neb. 610, 92 N. W. 923.

**Ancillary jurisdiction** also has been provided for by the amendment of 1910. See section 2 (20) and the annotation thereunder.

**Construction in connection with section 60b.**—See under this title, *supra*, note to section 60b.

**Legal proceeding defined.**—A legal proceeding is any proceeding in a court of justice by which a party pursues a remedy which the law affords him. The term embraces any of the formal steps or measures employed in the prosecution or defense of a suit. In section 67f it obviously refers to the use of judicial process, the phraseology being "levies, judgments, attachments, or other liens obtained through legal proceedings." *In re Emslie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126.

The term "all levies" has been used in its most comprehensive sense, and it covers any and all seizures of the property of the bankrupt within the four months period, under legal process, looking to the enforcement of claims against the bankrupt which would be released by his final discharge. *In re Hynes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477.



A proceeding, under a state law, whereby a trust fund is subjected to the payment of the claims of creditors, is a lien obtained through legal proceedings, which if acquired within four months prior to the filing of the petition in bankruptcy would have been rendered void by section 67f. *In re Tiffany*, (S. D. N. Y. 1904) 133 Fed. 799, 13 Am. Bankr. Rep. 310. See also *In re Porterfield*, (N. D. W. Va. 1905) 138 Fed. 192, 15 Am. Bankr. Rep. 11.

With attachments and liens acquired under state laws, the Bankruptcy Act deals in provisions which are superior to all state laws upon the subject in virtue of the constitutional authority of Congress to enact a uniform system of bankruptcy. *Globe Bank, etc., Co. of Paducah v. Martin*, (1915) 236 U. S. 288, 35 S. Ct. 377, 59 U. S. (L. ed.) 583, *affirming* (C. C. A. 6th Cir. 1912) 201 Fed. 31.

**Replevin.**—It has been held that the goods of a bankrupt taken on a replevin suit, brought by a creditor within four months of the bankruptcy proceedings, must be returned to the trustee; such proceedings being within the meaning of section 67f. *In re Haynes*, (D. C. Vt. 1903) 123 Fed. 1001, 10 Am. Bankr. Rep. 716; *In re Weinger*, (S. D. N. Y. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 424; *In re Hymes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477; *In re Rudnick*, (S. D. N. Y. 1907) 158 Fed. 223, 18 Am. Bankr. Rep. 750.

**Landlord's lien.**—Whether a levy made for the enforcement of a lien asserted in favor of a landlord against personal property of the bankrupt, as tenant, for unpaid rent, is a lien obtained through legal proceedings depends upon the application of the statutory provisions under which the case arises. In *Henderson v. Mayer*, 225 U. S. 631, 32 S. Ct. 699, 56 U. S. (L. ed.) 1233, a case arising under and governed by the statutory provisions of Georgia, it was held that the lien of a distress warrant is not one obtained through legal proceedings and that the landlord's right therein was preserved even though it was not enforced until within four months of the bankruptcy. Similarly in the case of *In re West Side Paper Co.*, (C. C. A. 3d Circuit) 162 Fed. 110, 89 C. C. A. 110, 15 Ann. Cas. 384, a case in which the issue arose under the Pennsylvania statute, the court held, in an opinion pointing out the effect of the provisions on which the ruling in favor of the lien was predicated, that the landlord's lien was one not obtained through legal proceedings. On the other hand in the case of *In re United Motor Chicago Co.*, (C. C. A. 7th Cir. 1915) 220 Fed. 772, a case controlled by the Illinois statute, the court held that a lien acquired by levy, under a distress warrant for the enforcement of rent, is one obtained through legal proceedings.

**Laborers', mechanics' and contractors' liens.**—Liens in favor of laborers, me-

chanics and contractors are inchoate liens given by statute and although they may be perfected by record or foreclosure within four months of the bankruptcy, they are not created by judgments, nor are they treated as having been "obtained through legal proceedings," even when it is necessary to enforce them by some form of legal proceeding. The courts dealing specially with bankruptcy matters have almost uniformly held that these statutory preferences are not obtained through legal proceedings and therefore are not defeated by this section, even where the registration, foreclosure or levy necessary to their completion or enforcement was within four months of the filing of the petition in bankruptcy. *Henderson v. Mayer*, (1912) 225 U. S. 631, 32 S. Ct. 699, 56 U. S. (L. ed.) 1233.

A mechanic's lien is not one "obtained through legal proceedings," within the meaning of section 67f. *In re Emslie*, (C. C. A. 2d Cir. 1900) 102 Fed. 291, 4 Am. Bankr. Rep. 126. And see cases cited to this effect under section 67d.

**Admiralty lien.**—The lien acquired by filing a libel against a ship in admiralty is not affected by bankruptcy proceedings instituted within four months thereafter. *The Philomena*, (D. C. Mass. 1911) 200 Fed. 859. See also *The Bethulia*, (D. C. Mass. 1911) 200 Fed. 862; *The Geisha*, (D. C. Mass. 1911) 200 Fed. 864.

A livery stable keeper's lien, given by statute, is not a lien "obtained through legal proceedings," and is not dissolved by an adjudication in bankruptcy. *In re Mero*, (D. C. Conn. 1904) 128 Fed. 630, 12 Am. Bankr. Rep. 171. See also cases cited to this effect under section 67d.

**Lien by creditors' bill.**—A creditor of the bankrupt, by filing a creditors' bill more than four months before the commencement of the bankruptcy proceedings, having acquired an equitable lien upon the assets of the bankrupt, the trustee takes the property subject to such lien. *Taylor v. Taylor*, (1900) 59 N. J. Eq. 86, 45 Atl. 440.

**Equitable liens.**—The provision of the section expressly exempting from its operation and preserving all liens created by the bankrupt in good faith and for a valuable consideration more than four months before the filing of the petition in bankruptcy, includes an equitable lien such as one arising from an assignment by the bankrupt of an expectant interest in the estate of his mother. *Bridge v. Kedon*, (1912) 163 Cal. 493, 126 Pac. 149.

**Notes indorsed by bankrupt.**—Where a trustee purchases notes on which the bankrupt is liable as an indorser he becomes subrogated to the rights of the sellers, and has an interest in a special fund securing the notes. *Merchants' Nat. Bank of New York v. Sexton*, (1913) 228 U. S. 634, 33 S. Ct. 725, 57 U. S. (L. ed.) 998.

Where proceedings supplementary to execution in a state court were begun within the four months and are pending at the date of the adjudication, the Bankruptcy Court will enjoin all further proceedings in the state court. *In re Kletchka*, (1899) 92 Fed. 901.

The trustee is subrogated to liens acquired by creditors on assets of the bankrupt within four months of the petition. *Fallows v. Continental, etc., Sav. Bank*, (1914) 235 U. S. 300, 35 S. Ct. 29, 59 U. S. (L. ed.) 238, following *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967, and *Rock Island Plow Co. v. Reardon*, (1912) 222 U. S. 354, 32 S. Ct. 164, 58 U. S. (L. ed.) 231.

**Annulment of liens obtained through legal proceedings.**—Under the express terms of section 67f all liens obtained through legal proceedings, within four months prior to the filing of the petition in bankruptcy, against a person who is insolvent, shall be deemed null and void in the event of such insolvent being adjudged a bankrupt, unless such lien has been preserved by the court for the benefit of the estate. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 43; *In re Brown*, (D. C. Ore. 1898) 91 Fed. 359; *In re Reichman*, (E. D. Mo. 1899) 91 Fed. 624, 1 Am. Bankr. Rep. 17; *In re Francis-Valentine Co.*, (C. C. A. 9th Cir. 1899) 94 Fed. 793, 2 Am. Bankr. Rep. 522; *In re Fellerath*, (N. D. Ohio 1899) 95 Fed. 121, 2 Am. Bankr. Rep. 40; *In re Richards*, (W. D. Wis. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 506; *In re Kenney*, (S. D. N. Y. 1899) 95 Fed. 427, 2 Am. Bankr. Rep. 494; *In re Rome Planing Mill*, (N. D. N. Y. 1899) 96 Fed. 812, 3 Am. Bankr. Rep. 123; *In re Kenney*, (S. D. N. Y. 1899) 97 Fed. 557, 3 Am. Bankr. Rep. 353; *In re Vaughan*, (S. D. N. Y. 1899) 97 Fed. 560, 3 Am. Bankr. Rep. 362; *In re Higgins*, (D. C. Ky. 1899) 97 Fed. 775, 3 Am. Bankr. Rep. 364; *In re Burrus*, (W. D. Va. 1899) 97 Fed. 926, 3 Am. Bankr. Rep. 296; *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746; *In re Kemp*, (D. C. Colo. 1900) 101 Fed. 689, 4 Am. Bankr. Rep. 242; *In re Darwin*, (C. C. A. 6th Cir. 1902) 117 Fed. 407, 8 Am. Bankr. Rep. 703; *In re Breslauer*, (N. D. N. Y. 1903) 121 Fed. 910, 10 Am. Bankr. Rep. 33; *In re Weinger*, (S. D. N. Y. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 427; *In re Hymes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477; *In re Bailey*, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187; *In re Oxley*, (W. D. Wash. 1910) 182 Fed. 1019; *In re Forbes*, (C. C. A. 9th Cir. 1911) 186 Fed. 79; *In re*

*Monroe Lumber Co.*, (S. D. Miss. 1910) 186 Fed. 252; *In re Huxoll*, (C. C. A. 6th Cir. 1912) 193 Fed. 851; *In re Martin*, (C. C. A. 6th Cir. 1912) 193 Fed. 841; *In re Federal Biscuit Co.*, (C. C. A. 2d Cir. 1914) 214 Fed. 221; *In re Richards*, (W. D. Wis. 1899) 2 Am. Bankr. Rep. 518; *In re Hammond*, (D. C. Mass. 1899) 3 Am. Bankr. Rep. 490; *Schmilovitz v. Bernstein*, (R. I. 1901) 5 Am. Bankr. Rep. 265; *Levor v. Seiter*, (N. Y. 1901) 5 Am. Bankr. Rep. 576; *Mauran v. Crown Carpet Lining Co.*, (R. I. 1901) 6 Am. Bankr. Rep. 734; *Watschke v. Thompson*, (1901) 85 Minn. 105, 88 N. W. 263, 7 Am. Bankr. Rep. 504; *Matter of Benedict*, (N. Y. 1902) 8 Am. Bankr. Rep. 463; *Hardt v. Schuykill Plush, etc., Co.*, (N. Y. 1902) 8 Am. Bankr. Rep. 479; *Wood v. Carr*, (Ky. 1903) 10 Am. Bankr. Rep. 577; *McKenney v. Cheney*, (1903) 11 Am. Bankr. Rep. 54, 118 Ga. 387, 45 S. E. 433; *Blick v. Nimmo*, (1913) 121 Md. 139, 88 Atl. 116; *Pope v. Title Guaranty, etc., Co.*, (1913) 152 Wis. 611, 140 N. W. 348.

*The statute makes no exceptions in favor of any lien creditor whose lien has been obtained through legal proceedings against the bankrupt within four months prior to the filing of the petition, other than such person who may have obtained title by virtue of such proceedings, and has been a bona fide purchaser for value without notice or reasonable cause for inquiry. In re Green*, (W. D. Pa. 1910) 179 Fed. 870.

The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors. *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967, 15 Am. Bankr. Rep. 639.

*The costs*, when dependent on the lien, fall with it in so far as any right of lien therefor is concerned. *In re Young*, (E. D. N. Y. 1899) 96 Fed. 606, 2 Am. Bankr. Rep. 673; *In re Beaver Coal Co.*, (D. C. Ore. 1901) 107 Fed. 98; *In re The Copper King*, (N. D. Cal. 1906) 143 Fed. 649, 16 Am. Bankr. Rep. 149; *In re Francis-Valentine Co.*, (C. C. A. 9th Cir. 1899) 2 Am. Bankr. Rep. 522; *Matter of Jennings*, (W. D. N. Y. 1902) 8 Am. Bankr. Rep. 358; *Matter of Thompson Mercantile Co.*, (D. C. Minn. 1904) 11 Am. Bankr. Rep. 579. See also *In re Allen*, (1899) 96 Fed. 512, wherein it was held that costs of the attachment proceedings incurred prior to the filing of the petition in bankruptcy are not a lien on the proceeds of the sale by the trustee of the attached property, although this claim is provable against the estate.

Thus it has been held that a sheriff, holding property of an involuntary bankrupt under writs levied within four months before the commencement of the

proceedings in bankruptcy, has no right, as against the trustee, to retain possession of such property until payment of his costs. *In re Francis-Valentine Co.*, (N. D. Cal. 1899) 93 Fed. 953, 2 Am. Bankr. Rep. 188.

*Fees.*—But section 67f was not intended to deprive a state officer of his statutory fees, accruing prior to bankruptcy, under proceedings in the state courts, which were in all respects regular and in accordance with the state law and practice. *In re Schmidt*, (C. C. A. 2d Cir. 1908) 165 Fed. 1006, 21 Am. Bankr. Rep. 593.

*Suit by trustee to set aside lien.*—It is sufficient under section 67f if the complaint of the trustee seeking to set aside liens alleges that the bankrupt was insolvent, and that within four months of his adjudication judgments were taken against him by the creditors with the fraudulent intent of enabling them to obtain a preference. *Severin v. Robinson*, (1901) 27 Ind. App. 55, 60 N. E. 966.

*In Simpson v. Van Etten*, (1901) 108 Fed. 199, it was held that the omission of the allegation of the insolvency of the bankrupt at the time the liens were obtained was fatal to the success of the trustee in his action against judgment creditors to recover money obtained by them from the bankrupt's property by levy and sales within four months of the adjudication in bankruptcy.

*Voluntary and involuntary proceedings included.*—It is now well settled that section 67f applies to voluntary as well as involuntary proceedings; the nullification of liens obtained within the four months' period being the same in both cases. *In re Brown*, (D. C. Ore. 1898) 91 Fed. 359, 1 Am. Bankr. Rep. 107; *In re Fellerath*, (N. D. Ohio 1899) 95 Fed. 121, 2 Am. Bankr. Rep. 40; *In re Richards*, (W. D. Wis. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 518, *affirmed* (C. C. A. 7th Cir. 1899) 96 Fed. 935, 3 Am. Bankr. Rep. 145; *In re O'Connor*, (E. D. N. Y. 1899) 95 Fed. 943; *In re Vaughan*, (S. D. N. Y. 1899) 97 Fed. 560, 3 Am. Bankr. Rep. 363; *In re Dobson*, (N. D. Ill. 1899) 98 Fed. 86, 3 Am. Bankr. Rep. 420; *In re Rhoads*, (W. D. Pa. 1899) 98 Fed. 399, 3 Am. Bankr. Rep. 380; *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746; *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815; *In re Kemp*, (D. C. Colo. 1900) 101 Fed. 689, 4 Am. Bankr. Rep. 242; *In re Steininger Mercantile Co.*, (C. C. A. 1901) 107 Fed. 669; *In re McCartney*, (E. D. Wis. 1901) 109 Fed. 621, 6 Am. Bankr. Rep. 367; *In re Friedman*, (S. D. N. Y. 1899) 1 Am. Bankr. Rep. 510; *Peck Lumber Mfg. Co. v. Mitchell*, (Pa. 1899) 1 Am. Bankr. Rep. 701, 1 Nat. Bankr. N. 262; *In re Higgins*, (D. C. Ky. 1899) 3 Am. Bankr. Rep. 367; *In re Dobson*, (N.

D. Ill. 1899) 3 Am. Bankr. Rep. 420; *Doyle v. Heath*, (1900) 4 Am. Bankr. Rep. 705, 22 R. I. 213, 47 Atl. 213; *Jones v. Stevens*, (1901)\* 5 Am. Bankr. Rep. 571, 94 Me. 582, 48 Atl. 170; *In re Blair*, (D. C. Mass. 1901) 6 Am. Bankr. Rep. 206; *Brown v. Case*, (Mass. 1901) 6 Am. Bankr. Rep. 744; *Matter of Benedict*, (N. Y. 1902) 8 Am. Bankr. Rep. 463; *National Bank, etc., Co. v. Spencer*, (1900) 53 App. Div. 547, 65 N. Y. S. 1001; *Mencke v. Rosenberg*, (1902) 9 Am. Bankr. Rep. 323, 202 Pa. St. 131, 51 Atl. 767; *McKenney v. Cheney*, (1903) 11 Am. Bankr. Rep. 54, 118 Ga. 387, 45 S. E. 433; *Mohr v. Mattox*, (Ga. 1904) 12 Am. Bankr. Rep. 332.

It was, however, formerly held that voluntary proceedings were not within the contemplation of the statute in so far as the annulment of liens obtained through legal proceedings was concerned. See *In re De Lue*, (D. C. Mass. 1899) 91 Fed. 510, 1 Am. Bankr. Rep. 387; *In re Easley*, (W. D. Va. 1898) 93 Fed. 419, 1 Am. Bankr. Rep. 715; *In re O'Connor*, (E. D. N. Y. 1899) 95 Fed. 943.

## II. TIME OF ACQUIRING LIEN.

*Time of acquiring lien.*—In order to be affected by the provisions of section 67f, a lien obtained through legal proceedings must have been acquired within the four months immediately preceding the filing of the petition in bankruptcy. *Metcalf v. Barker*, (1902) 187 U. S. 165, 174, 23 S. Ct. 67, 47 U. S. (L. ed.) 122; *In re Richards*, (C. C. A. 7th Cir. 1899) 96 Fed. 935, 3 Am. Bankr. Rep. 145; *In re Engle*, (E. D. Pa. 1901) 105 Fed. 893, 5 Am. Bankr. Rep. 372; *In re Blair*, (D. C. Mass. 1901) 108 Fed. 529, 6 Am. Bankr. Rep. 206; *In re Beaver Coal Co.*, (D. C. Ore. 1901) 110 Fed. 630; *In re Snell*, (N. D. Cal. 1903) 125 Fed. 154, 11 Am. Bankr. Rep. 35; *In re Bailey*, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; *In re Shinn*, (D. C. N. J. 1911) 185 Fed. 990; *In re Schow*, (D. C. Conn. 1914) 213 Fed. 614; *Pepperdine v. Seymour*, (Mo. 1903) 10 Am. Bankr. Rep. 570; *Wrede v. Clark*, (1909) 21 Am. Bankr. Rep. 821, 132 App. Div. 293, 117 N. Y. S. 5; *Woods v. Klein*, (1909) 22 Am. Bankr. Rep. 722, 223 Pa. St. 257, 72 Atl. 523; *Fairlamb v. Smedley Constr. Co.*, (1908) 22 Am. Bankr. Rep. 824, 36 Pa. Super. Ct. 17.

Where the lien has been obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36. And see to the same effect, *In re Dunavant*, (W. D. N. C. 1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41; *In re Chapman*, (N. D. Ga. 1900) 99 Fed. 395, 3 Am. Bankr. Rep. 607; *Frazier v. Southern L. & T. Co.*, (C. C. A. 4th

Cir. 1900). 99 Fed. 707, 3 Am. Bankr. Rep. 710; *In re* Kavanaugh, (D. C. Ky. 1900) 99 Fed. 928, 3 Am. Bankr. Rep. 832; *Pickens v. Dent*, (C. C. A. 4th Cir. 1901) 106 Fed. 653, 5 Am. Bankr. Rep. 644; *In re* Blair, (D. C. Mass. 1901) 108 Fed. 529, 6 Am. Bankr. Rep. 206; *In re* Beaver Coal Co., (C. C. A. 9th Cir. 1902) 113 Fed. 889, 7 Am. Bankr. Rep. 542; *Owen v. Brown*, (C. C. A. 8th Cir. 1903) 120 Fed. 812, 9 Am. Bankr. Rep. 717; *In re* Bailey, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; *In re* Koslowski, (M. D. Pa. 1907) 153 Fed. 823, 18 Am. Bankr. Rep. 723; *In re* U. S. Graphite Co., (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 573; *In re* Crafts-Riordon Shoe Co., (D. C. Mass. 1910) 185 Fed. 931; *Blair v. Brailey*, (C. C. A. 5th Cir. 1915) 221 Fed. 1; *Continental Nat. Bank v. Katz*, (Ill.) 1 Am. Bankr. Rep. 19; *Reid v. Cross*, (Ill.) 1 Am. Bankr. Rep. 34; *Stickney, etc., Coal Co. v. Goodwin*, (1901) 95 Me. 246, 49 Atl. 1039; 85 A. S. R. 408; *Taylor v. Taylor*, (1900) 4 Am. Bankr. Rep. 211, 59 N. J. Eq. 86; *Doyle v. Heath*, (1900) 4 Am. Bankr. Rep. 705, 22 R. I. 213, 47 Atl. 213; *New York City Ninth Nat. Bank v. Moses*, (N. Y. 1903) 11 Am. Bankr. Rep. 772; *Batchelder v. Wedge*, (Vt. 1907) 19 Am. Bankr. Rep. 268.

A lien acquired subsequent to the filing of the petition in bankruptcy, it has been held, is not annulled by section 67f. *In re* Engle, (E. D. Pa. 1901) 105 Fed. 893, 5 Am. Bankr. Rep. 372; *In re* Schow, (D. C. Conn. 1914) 213 Fed. 514; *Kinmouth v. Braeutigam*, (1900) 4 Am. Bankr. Rep. 345, 65 N. J. L. 165, 46 Atl. 769; *Kinmouth v. Braeutigam*, (1902) 10 Am. Bankr. Rep. 85, 63 N. J. Eq. 103, 52 Atl. 226.

**Pleading.**—This section affects only the lien thereby acquired, and not the judgment itself; and hence in a petition drawn under said section seeking to recover a voidable preference it is necessary to allege that at the time of filing the bankruptcy petition the lien acquired through the legal proceedings was in effect. *Rodolf v. First Nat. Bank of Tulsa*, (1912) 30 Okla. 631, 121 Pac. 629, 41 L. R. A. (N. S.) 204.

The time is to be computed, in accordance with section 31, from the time the lien actually accrues to the time of the filing of the petition. *Dutcher v. Wright*, (1876) 94 U. S. 553, 24 U. S. (L. ed.) 130; *In re* Stevenson, (D. C. Del. 1899) 94 Fed. 110, 2 Am. Bankr. Rep. 66; *Parmenter Mfg. Co. v. Stoeber*, (C. C. A. 1st Cir. 1899) 97 Fed. 330, 3 Am. Bankr. Rep. 220; *In re* Bailey, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; *Peck Lumber Mfg. Co. v. Mitchell*, (Pa. 1899) 1 Am. Bankr. Rep. 701; *Jones v. Stevens*, (1901) 5 Am. Bankr. Rep. 571, 94 Me. 582, 48 Atl. 170; *In re* Tonawanda St. Planing Mill Co., (W. D. N. Y.

1901) 6 Am. Bankr. Rep. 38; *In re* Warner, (D. C. Conn. 1906) 16 Am. Bankr. Rep. 519. And see also the cases cited under section 31.

Thus it has been held that an attachment made on Feb. 8th was dissolved by an adjudication on a petition filed on June 8th following, and that the time of day when the attachment was made or the petition filed is immaterial. *In re* Warner, (D. C. Conn. 1906) 144 Fed. 987, 16 Am. Bankr. Rep. 519.

And in *Jones v. Stevens*, (1901) 5 Am. Bankr. Rep. 571, 94 Me. 582, 48 Atl. 170, it appears that an attachment was made on Sept. 9th, at 10 A. M., and the petition was filed on Jan. 9th following, at 2 P. M.; and it was held that, in accordance with section 31, in order to determine whether or not the attachment was within four months prior to the filing of the petition the time must be reckoned back from the 9th day of January, 1899, and so reckoned the 9th day of the preceding September was held to be clearly within the four months' period.

### III. JUDGMENT LIENS.

**Judgment liens.**—The statute does not affect a mere judgment which has not resulted in the creation of a lien; but where a judgment, either of itself or by virtue of any process issued thereon, or statutory authority therefor, has culminated in a lien within the four months immediately preceding the filing of the petition in bankruptcy, the lien so created is rendered null and void by virtue of the provisions of section 67f. *Wilson v. Nelson*, (1904) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142; *Metcalfe v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36; *Clarke v. Larremore*, (1903) 188 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 555, 9 Am. Bankr. Rep. 477; *In re* Francis-Valentine Co., (N. D. Cal. 1899) 93 Fed. 953, 2 Am. Bankr. Rep. 188; *In re* Richards, (W. D. Wis. 1899) 95 Fed. 258, 2 Am. Bankr. Rep. 518, *affirmed* (C. C. A. 7th Cir. 1899) 96 Fed. 935; *In re* Kenney, (S. D. N. Y. 1899) 95 Fed. 427, 2 Am. Bankr. Rep. 494, 97 Fed. 554, 3 Am. Bankr. Rep. 353, (C. C. A. 2d Cir. 1900) 105 Fed. 897, 5 Am. Bankr. Rep. 355; *In re* Franks, (S. D. Ala. 1899) 95 Fed. 635; *In re* Kavanaugh, (D. C. Ky. 1900) 99 Fed. 928, 3 Am. Bankr. Rep. 832; *In re* Blair, (S. D. N. Y. 1900) 102 Fed. 987, 4 Am. Bankr. Rep. 220; *In re* Storm, (E. D. N. Y. 1900) 103 Fed. 618, 4 Am. Bankr. Rep. 601; *St. Cyr v. Daignault*, (1900) 103 Fed. 854; *In re* Blair, (D. C. Mass. 1901) 108 Fed. 529, 6 Am. Bankr. Rep. 206; *In re* Stout, (W. D. Mo. 1900) 109 Fed. 794, 6 Am. Bankr. Rep. 505; *In re* Beaver Coal Co., (C. C. A. 9th Cir. 1902) 113 Fed. 889, 7 Am. Bankr. Rep. 542; *In re* Darwin, (C. C. A. 6th Cir. 1902) 117 Fed. 407, 8 Am. Bankr. Rep.

703; *Owen v. Brown*, (C. C. A. 8th Cir. 1903) 120 Fed. 812, 9 Am. Bankr. Rep. 717; *In re Breslauer*, (N. D. N. Y. 1903) 121 Fed. 910, 10 Am. Bankr. Rep. 33; *In re Hymes Buggy, etc., Co.*, (W. D. Mo. 1904) 130 Fed. 977, 12 Am. Bankr. Rep. 477; *In re Thackara Mfg. Co.*, (E. D. Pa. 1905) 140 Fed. 126, 15 Am. Bankr. Rep. 258; *In re Bailey*, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; *In re Smith*, (N. D. N. Y. 1910) 176 Fed. 426, 23 Am. Bankr. Rep. 864; *In re Green*, (W. D. Pa. 1910) 179 Fed. 870; *In re Harrington*, (N. D. N. Y. 1912) 200 Fed. 1010; *In re Sharp*, (D. C. Ky. 1898) 1 Am. Bankr. Rep. 379; *In re Chapman*, (N. D. Ga. 1900) 3 Am. Bankr. Rep. 607; *In re Pease*, (N. D. N. Y.) 4 Am. Bankr. Rep. 550; *Citizens' Nat. Bank v. Dasher*, (Ga. 1915) 84 N. Y. 482; *People's Nat. Bank of Independence v. Maxson*, (Ia. 1915) 150 N. W. 601; *Wilson v. Van Buren County Farmers' Mut. F. Ins. Co.*, (Mich. 1915) 151 N. W. 752; *Doyle v. Heath*, (1900) 4 Am. Bankr. Rep. 705, 22 R. I. 213, 47 Atl. 213; *In re Beaver Coal Co.*, (D. C. Ore. 1901) 5 Am. Bankr. Rep. 787; *Mauran v. Crown Carpet Lining Co.*, (R. I. 1901) 6 Am. Bankr. Rep. 734; *Matter of Benedict*, (1902) 8 Am. Bankr. Rep. 463, 37 Misc. 230, 75 N. Y. S. 165; *Menneke v. Rosenberg*, (1902) 9 Am. Bankr. Rep. 323, 202 Pa. St. 131, 51 Atl. 767; *Fairlamb v. Smedley Constr. Co.*, (1908) 22 Am. Bankr. Rep. 824, 36 Pa. Super. Ct. 17; *Keystone Brewing Co. v. Schermer*, (1913) 241 Pa. St. 361, 88 Atl. 657; *Kinmouth v. Braeutigam*, (1902) 10 Am. Bankr. Rep. 85, 63 N. J. Eq. 103, 52 Atl. 226; *Mohr v. Mattox*, (Ga. 1904) 12 Am. Bankr. Rep. 330; *Matter of S. Ah Mi*, (D. C. Hawaii 1907) 18 Am. Bankr. Rep. 138.

A judgment itself does not necessarily constitute a lien upon property, unless made so by statute. *In re Bailey*, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289.

And a judgment which does not create a lien upon the bankrupt's estate is not annulled by section 67f. *Plaut v. Gorham Mfg. Co.*, (S. D. N. Y. 1909) 174 Fed. 852, 23 Am. Bankr. Rep. 42.

**Judgment authorized by power of attorney.**—It has been held that a lien acquired within the four months' period, on a judgment recovered by virtue of a warrant of attorney which was given more than four months before the institution of proceedings in bankruptcy, was annulled under section 67f. *Wilson v. Nelson*, (1901) 183 U. S. 191, 22 S. Ct. 74, 46 U. S. (L. ed.) 147, 7 Am. Bankr. Rep. 142.

**A judgment for a fine, imposed under a state liquor law for a violation thereof, comes within the language of section 67f; and an execution issued on such a judgment, at the instance of the state, will be restrained; it is immaterial, in such case,**

whether the claim for which the judgment was recovered was provable in bankruptcy, or whether it would be affected by a discharge of the bankrupt. *In re Green*, (W. D. Pa. 1910) 179 Fed. 870.

**Judgment appointing receiver in state court.**—The word "judgment," in section 67f, is sufficiently broad to apply to the judgment of a state court in appointing a receiver of an insolvent corporation, obtained within three months of an adjudication as an involuntary bankrupt. *Mauran v. Crown Carpet Lining Co.*, (R. I. 1901) 6 Am. Bankr. Rep. 734.

**Lien by creditor's bill dependent on acquiring judgment.**—Where, under the state law, a judgment creditor who files a creditor's bill to reach equitable assets or to set aside fraudulent conveyances thereby acquires an equitable lien, depending for its perfection and enforcement upon the recovery of a valid judgment in his suit, such judgment is annulled by the adjudication of the debtor as a bankrupt within four months thereafter, and the creditor's lien falls with it, and he has no rights in the fund superior to those of other creditors. *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815.

**Judgment acquired after adjudication.**—Property of a bankrupt, the title to which has vested in his trustee under section 70, is not subject to seizure on execution against the bankrupt issued on a judgment recovered after the adjudication. *In re Franklin Lumber Co.*, (D. C. N. J. 1906) 147 Fed. 852, 17 Am. Bankr. Rep. 443. And see *supra*, this note, p. 1133, *Time of Acquiring Lien*.

**Judgment acquired prior to four months' period.**—Where a mortgage lien was obtained long prior to a period of four months next preceding the date of filing of the petition in bankruptcy, although suit was commenced and a decree of foreclosure rendered within that period, it was held that neither the mortgage lien nor the judgment lien was denounced by any provision of the bankruptcy statute. *In re Rohrer*, (C. C. A. 6th Cir. 1910) 24 Am. Bankr. Rep. 52. And see *supra*, this note, p. 1133, *Time of Acquiring Lien*.

So, also, it has been held that where a judgment, recovered against a bankrupt and claimed to be a lien on his remainder interest in certain real estate, was entered more than four months before the filing of the bankruptcy petition, it was not affected by section 67f, though the Bankruptcy Court had jurisdiction to control the disposition of the property subject to the lien in the interest of the entire estate. *In re Arden*, (E. D. N. Y. 1911) 188 Fed. 475.

**Execution liens are annulled where the execution is issued within the four months, although the judgment was entered up before the four months.** *Peck Lumber Mfg. Co. v. Mitchell*, (1898) 8 Pa. Dist. 203.

In *In re Rhoads*, (1899) 98 Fed. 399, it was held that the lien obtained by the execution while the debtor was insolvent and within four months of the filing of his petition in bankruptcy was void, although the judgment note with warrant of attorney was given more than four months before and while the debtor was solvent. See also *In re Vaughan*, (1899) 97 Fed. 560.

In *In re Fellerath*, (1899) 95 Fed. 121, it was held that a certain judgment lien and execution thereon were annulled by the adjudication, and that the trustee should proceed to recover from the sheriff all unconverted property of the bankrupt in his possession and all proceeds of rents and sales of the property seized and sold by him. See also *In re Francis-Valentine Co.*, (1899) 93 Fed. 953, *affirmed* (C. C. A. 1899) 94 Fed. 793.

**Payment made to execution creditor.**—Bankruptcy proceedings cannot affect a judgment and execution if payment has been made to the execution creditor. *In re Weitzel*, (E. D. N. Y. 1911) 191 Fed. 463.

**Discharge of surety.**—It is the lien created by a judgment that is destroyed by an adjudication in bankruptcy within four months after the recovery of the judgment against the bankrupt, and as a result a surety is not discharged by such adjudication. *Pope v. Title Guaranty, etc., Co.*, (1913) 152 Wis. 611, 140 N. W. 348.

**Proof of insolvency.**—The burden of proving the insolvency of the judgment debtor at the date of the entry of the judgment rests upon the party alleging it. *Keystone Brewing Co. v. Schermer*, (1913) 241 Pa. St. 361, 88 Atl. 657.

#### IV. ATTACHMENT AND GARNISHMENT LIENS.

**Effect of section.**—It is apparent that the effect of section 67f is not to avoid attachment, levies, or liens therein referred to against all the world, but merely as against the trustee in bankruptcy and those claiming under him, so that the property may pass to and be distributed by him among the creditors of the bankrupt, and such is the view entertained by several well-considered cases. *Casady v. Hartzell*, (Ia. 1915) 151 N. W. 97.

**"Legal proceedings."**—The phrase "legal proceedings" occurring in this subdivision applies to proceedings in garnishment and includes any proceeding in a court of justice by which a party pursues a remedy which the law affords him, and the charge or incumbrance created by garnishment proceedings is one of the "other liens" mentioned in such subdivision. *In re Ransford*, (C. C. A. 6th Cir. 1912) 194 Fed. 658.

**Attachment and garnishment liens.**—Whether or not an attachment or garnishment proceeding has resulted in a lien is a question to be determined from the state statutes and decisions. The Bankruptcy

Law reaches only the lien, not the preliminary steps; and whenever it appears that the proceeding has become a lien, and such lien has been obtained within the four months immediately preceding the filing of the petition in bankruptcy, the provisions of section 67f are applicable, and the lien becomes void, unless preserved by the court for the benefit of the estate. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122; *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967, 15 Am. Bankr. Rep. 639; *Lehman v. Gumbel*, (1915) 236 U. S. 448, 35 S. Ct. 307, 59 U. S. (L. ed.) 666, *affirming* 132 La. 231, 61 So. 212; *Globe Bank v. Martini*, (1915) 236 U. S. 288, 35 S. Ct. 377, 59 U. S. (L. ed.) 583, *affirming* (C. C. A. 6th Cir. 1912) 201 Fed. 31; *In re Higgins*, (D. C. Ky. 1899) 97 Fed. 775, 3 Am. Bankr. Rep. 364; *In re Kemp*, (D. C. Colo. 1900) 101 Fed. 689, 4 Am. Bankr. Rep. 242; *In re Kaupisch Creamery Co.*, (D. C. Ore. 1901) 107 Fed. 93, 5 Am. Bankr. Rep. 790; *In re McCartney*, (E. D. Wis. 1901) 109 Fed. 621, 6 Am. Bankr. Rep. 366; *Tilghman v. Paxson Co.*, (1902) 115 Fed. 906; *In re Snell*, (N. D. Cal. 1903) 125 Fed. 154, 11 Am. Bankr. Rep. 35; *Klipstein v. Allen-Miles Co.*, (5th Cir. 1905) 136 Fed. 385, 69 C. C. A. 229; *Chicago State Bank v. Cox*, (C. C. A. 7th Cir. 1906) 143 Fed. 91, 16 Am. Bankr. Rep. 32; *In re Pollmann*, (S. D. N. Y. 1907) 156 Fed. 221, 19 Am. Bankr. Rep. 474; *In re Walsh*, (N. D. Ia. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472; *In re U. S. Graphite Co.*, (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 573; *In re Maher*, (N. D. Ga. 1909) 169 Fed. 997; *In re Driggs*, (S. D. N. Y. 1909) 171 Fed. 897, 22 Am. Bankr. Rep. 621; *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803; *Staunton v. Wooden*, (C. C. A. 9th Cir. 1910) 179 Fed. 61; *In re Crafts-Riordon Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931; *In re Ransford*, (C. C. A. 6th Cir. 1912) 194 Fed. 658; *Cook v. Robinson*, (C. C. A. 9th Cir. 1912) 194 Fed. 786; *In re Walsh*, (N. D. Ia. 1912) 195 Fed. 576; *Peck Lumber Co. v. Mitchell*, (Pa. 1899) 1 Am. Bankr. Rep. 701; *Jones v. Stevens*, (1901) 5 Am. Bankr. Rep. 571, 94 Me. 582, 48 Atl. 170; *Hardt v. Schuykill Plush, etc., Co.*, (N. Y. 1902) 8 Am. Bankr. Rep. 481; *Wood v. Carr*, (Ky. 1903) 10 Am. Bankr. Rep. 577; *Sharp v. Woolslare*, (1904) 12 Am. Bankr. Rep. 396, 25 Pa. Super. Ct. 251; *Jewett v. Huffman*, (1905) 13 Am. Bankr. Rep. 738, 14 N. D. 110, 103 N. W. 408; *King v. Will J. Block Amusement Co.*, (1908) 20 Am. Bankr. Rep. 784, 126 App. Div. 48, 111 N. Y. S. 102; *Crook-Horner Co. v. Gilpin*, (Md. 1910) 23 Am. Bankr. Rep. 350; *Hobbs v. Thompson*, (1909) 160 Ala. 360, 49 So. 787, 18 Ann. Cas. 381; *National Surety Co. v.*

Medlock, (1907) 2 Ga. App. 672, 58 S. E. 1136; Albany, etc., R. Co. v. Dunlap Hardware Co., (1910) 8 Ga. App. 171, 68 S. E. 871; Citizens' Nat. Bank v. Dasher, (Ga. 1915) 84 S. E. 482; Lamorelle v. Nass, (1908) 30 Pa. Super. Ct. 190; Fairlamb v. Smedley Constr. Co., (1908) 36 Pa. Super. Ct. 17.

Thus it has been held that an adjudication in bankruptcy, whether in voluntary or involuntary proceedings, renders void a judgment against a garnishee rendered in an action brought against the bankrupt within four months prior to the filing of the petition, and when he was insolvent, and discharges the garnishee from liability thereon; and such judgment must thereafter be treated as a nullity whenever drawn in question, whether directly or collaterally. *In re Beals*, (D. C. Ind. 1902) 116 Fed. 530, 8 Am. Bankr. Rep. 639; *Cavanaugh v. Fenley*, (1905) 94 Minn. 507, 103 N. W. 711, 110 A. S. R. 382.

*Attachments sued out in either state or federal courts are covered by section 67f.* *Wood v. Carr*, (Ky. 1903) 10 Am. Bankr. Rep. 577.

*The bond upon which the attachment issued falls with it.* *Crook-Horner Co. v. Gilpin*, (Md. 1910) 23 Am. Bankr. Rep. 350.

But where a warrant of attachment, issued within four months of the filing of a petition in bankruptcy of the defendant, was discharged by an undertaking for which the surety took no security, it will not be vacated after the adjudication in bankruptcy so as to discharge the surety. *King v. Will J. Block Amusement Co.*, (1908) 20 Am. Bankr. Rep. 784, 126 App. Div. 48, 111 N. Y. S. 102.

*Attachment writ not vacated.*—But, while section 67f discharges the lien of an attachment, it does not vacate the writ. *King v. Will J. Block Amusement Co.*, (1908) 20 Am. Bankr. Rep. 784, 126 App. Div. 48, 111 N. Y. S. 102.

*Attachment without debtor's knowledge.*—In *Ex p. Chase*, (1900) 62 S. C. 353, 38 S. E. 718, it was held that the particular or special provisions of section 67c form exceptions to the general provisions of section 67f; and therefore that attachments issued within four months prior to the adjudication in bankruptcy, in favor of creditors who were not aware of the debtor's insolvency, and obtained without his knowledge or permission, ought not to have been vacated.

Section 67f makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released, and shall pass to the trustee of the estate of the bankrupt; or, second, the court may order that the right acquired

by the attachment shall be preserved for the benefit of the estate. In the first case the whole property passes free from the attachment. In the second, so much of the value of the property attached as is represented by the attachments passes to the trustee for the benefit of the entire body of creditors, that is, "for the benefit of the estate"—in other words, the statute recognizes the lien of the attachment, but distributes the lien among the whole body of creditors. The first provision contemplates the attachment of property to which the bankrupt has the complete legal and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since under the first clause the entire value of the property attached passes to the trustee free from the attachment. The second clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was dissolved as a preferential lien in favor of the attaching creditors, by the institution of proceedings in bankruptcy. *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 28 S. Ct. 580, 50 U. S. (L. ed.) 967, 15 Am. Bankr. Rep. 639; *Nisbet v. Siegel-Campion Live Stock Co.*, (1912) 21 Colo. App. 494, 123 Pac. 110; *Corey v. Blackwell Lumber Co.*, (1913) 24 Idaho 642, 135 Pac. 742. See also *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. (1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803.

*Insolvent at time lien is acquired.*—To render a lien acquired by the levy of an attachment writ within four months void, the bankrupt must be insolvent at the time the lien is acquired. *D. C. Wise Coal Co. v. Columbia Zinc, etc., Co.*, (1911) 157 Mo. App. 315, 138 S. W. 67.

*Dissolution of attachment not impairment of contractual obligation.*—The dissolution of an attachment lien under section 67f is not in any sense an impairment or divestiture of contractual rights. *Wood v. Carr*, (Ky. 1903) 10 Am. Bankr. Rep. 577.

*Interference with attached property in possession of Bankruptcy Court.*—Where a sheriff, after having attached property of a bankrupt, was informed of the adjudication and requested by the referee to hold the property for the referee until a trustee could be appointed, the attachment having

been dissolved by the adjudication, it was held that the sheriff was in possession as custodian of the Bankruptcy Court, so that a seizure from the sheriff on writs of replevin constituted a direct interference with the court's custody of the property. *In re Walsh*, (N. D. Ia. 1908) 159 Fed. 560, 20 Am. Bankr. Rep. 472.

**Enjoining proceedings on attachment.**—Where the act of bankruptcy alleged in an involuntary petition, on which an adjudication is made, is that the debtor suffered certain creditors to obtain a preference through the levy of attachments on his goods, and failed to discharge such levy before sale, the court of bankruptcy has jurisdiction upon a rule to show cause, entered in the bankruptcy proceedings, to enjoin the attaching creditors from the further prosecution of their attachment suits. *Bear v. Chase*, (C. C. A. 4th Cir. 1900) 99 Fed. 920, 3 Am. Bankr. Rep. 746.

**Prosecution of attachment proceeding as against surety.**—A court of bankruptcy may properly permit an attachment creditor, where the bankrupt had given a bond, to prosecute his action to judgment against the bankrupt for the purpose of perfecting his right of action against the surety, where the estate is protected from loss. *In re Maaget*, (S. D. N. Y. 1909) 173 Fed. 232, 23 Am. Bankr. Rep. 14.

**Lien obtained prior to four months' period.**—Where a lien is obtained at the time the attachment is made, it is not avoided by the provisions of section 67f if the attachment is made more than four months before bankruptcy, though the judgment or decree in enforcement of the lien is not obtained until within the four months' period referred to. *In re Crafts-Riordan Shoe Co.*, (D. C. Mass. 1910) 185 Fed. 931, following *In re Blair*, (D. C. Mass. 1901) 108 Fed. 529.

So, also, where a foreign attachment was levied on the property of a bankrupt more than four months prior to the commencement of the bankruptcy proceedings, it was held that the lien of a *fi. fa.*, on a judgment subsequently obtained, related back to the date of the attachment and was not divested by the Bankruptcy Act. *In re U. S. Graphite Co.*, (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 573. And see *supra*, this note, p. 1133, *Time of Acquiring Lien*.

**Exempt property.**—Where money is garnished in an action in a justice court, and a claim for exemption is disallowed in such court, a subsequent adjudication in bankruptcy in the federal courts in which such property is claimed and set aside to the debtor as and for his exemptions will not release or avoid the lien of such prior garnishment, even though such garnishment proceedings may have been instituted within four months of such adjudication in bankruptcy, and in spite of the provisions of this section which only avoids liens upon property which passes

to the trustee in bankruptcy, and over which the Bankruptcy Court could and has assumed jurisdiction. By setting aside the property as exempt, such court will be held to have disclaimed any intention of assuming or of having ever assumed jurisdiction over it, and it cannot be said to have passed at any time to the trustee in bankruptcy. Nor will the fact that on account of such adjudication in bankruptcy a personal judgment cannot be rendered against the defendant in the District Court alter the case or preclude the foreclosure of the lien, as the jurisdiction of the District Court is *in rem* and not *in personam*. *Burcell v. Goldstein*, (1912) 23 N. D. 257, 136 N. W. 243.

**Powers of state court.**—Under this section, after an adjudication in bankruptcy, a state court has no jurisdiction to hold property under an attachment for any purpose. A proceeding which becomes null and void can no longer produce any legal effect. A state court cannot retain the possession of property which the federal statute declares shall be wholly discharged and released from a levy, attachment, or judgment. *Lehman v. Martin*, (1913) 132 La. 231, 61 So. 212.

**Fund in custody of state court.**—Irrespective of whether the lien upon the funds impounded by the service of the summons of garnishment attaches before final judgment or not, the service of the summons of garnishment so far places the funds found in the hands of the garnishee (especially when the money is paid into court, or in lieu thereof a dissolving bond given) into the custody and control of the court administering the case that it will be entitled to hold and subject the fund, despite the subsequent bankruptcy of the defendant, if the petition in bankruptcy be filed more than four months after such custody is obtained. *National Surety Co. v. Medlock*, (Ga. 1907) 19 Am. Bankr. Rep. 654.

**Attachment of exempt property.**—As to the attachment of exempt property, see the following division of this note.

#### V. LIENS ON EXEMPT PROPERTY.

A lien acquired on exempt property, it has been quite generally held, is not annulled by section 67f. *Peoples' Nat. Bank of Independence v. Maxson*, (1915) 168 Ia. 318, 150 N. W. 601; *Powers Dry Goods Co. v. Nelson*, (N. D. 1901) 7 Am. Bankr. Rep. 506; *Jewett v. Huffman*, (1905) 13 Am. Bankr. Rep. 738, 14 N. D. 110, 103 N. W. 408. See also *In re Driggs*, (S. D. N. Y. 1909) 171 Fed. 897; *In re Snyder*, (M. D. Pa. 1914) 216 Fed. 989; *McKenney v. Cheney*, (1903) 11 Am. Bankr. Rep. 54, 118 Ga. 387, 45 S. E. 433; *Sharp v. Woolslare*, (1904) 12 Am. Bankr. Rep. 396, 25 Pa. Super. Ct. 251.

Thus it has been said that the lien of an attachment on the personal property of a bankrupt is not destroyed by a mere



discharge of the debt secured by the lien, through a discharge in bankruptcy; and unless such lien is one which is itself declared void by said Act it may be enforced, through a modified form of judgment, as against the property on which the lien exists. *Powers Dry Goods Co. v. Nelson*, (1901) 7 Am. Bankr. Rep. 506, 10 N. D. 580, 88 N. W. 703.

But it has also been held that section 67f is applicable to liens acquired through legal proceedings against the bankrupt within four months prior to the filing of the bankruptcy petition without reference to whether the lien was acquired on exempt or nonexempt property; so that an attachment on property of the bankrupt, subsequently exempted to him as a homestead, is dissolved by bankruptcy proceedings, although the property did not pass to the trustee. *Chicago, etc., R. Co. v. Hall*, (1913) 229 U. S. 511, 33 S. Ct. 885, 57 U. S. (L. ed.) 1306; *In re Forbes*, (C. C. A. 9th Cir. 1911) 186 Fed. 79, *following In re Tume*, (N. D. Ala. 1902) 115 Fed. 906, and *distinguishing Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061; *Southern Pac. Co. v. I. X L. Furniture, etc., Installment House*, (1914) 44 Utah 472, 140 Pac. 665. See also *In re Bolinger*, (W. D. Pa. 1901) 108 Fed. 374, 6 Am. Bankr. Rep. 171.

*Compare Portal First International Bank v. Lee*, (1913) 25 N. D. 197, 141 N. W. 716, wherein the court held that where property is seized upon a writ of attachment, and thereafter bankruptcy proceedings are instituted and said property is scheduled, but in said proceedings is set apart as and for the exemptions of the debtor, the lien of the attachment writ will not be considered to have been avoided.

*Nature of liens affected.*—While section 67f, in general terms, nullifies liens against the debtors' property, it means liens "obtained through legal proceedings," and not the lien on exempt property which has been created by contract; for "these may be enforced or foreclosed by judgments obtained even after the petition in bankruptcy was filed." *Bank of Mendon v. Mell*, (1914) 185 Mo. App. 510, 172 S. W. 484.

*Rights in exempt property acquired by contract or waiver of exemption.*—The liens rendered void by this section are those obtained by legal proceedings within four months. The section does not, however, defeat rights in the exempt property acquired by contract or by waiver of the exemption. These may be enforced or foreclosed by judgments obtained even after the petition in bankruptcy was filed, under the principle declared in *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061; *Chicago, B. & Q. R. Co. v. Hall*, (1913) 229 U. S. 511, 33 S. Ct. 885, 57 U. S. (L. ed.) 1306.

## VI. ENFORCEMENT OF PRE-EXISTING LIENS.

*Enforcement of pre-existing lien.*—There is a clear distinction between the bald creation of a lien within the four months and the enforcement of one previously acquired. *Thompson v. Fairbanks*, (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577, 13 Am. Bankr. Rep. 437; *Woods v. Klein*, (1909) 22 Am. Bankr. Rep. 722, 223 Pa. St. 257, 72 Atl. 523.

And where a valid lien was in existence more than four months prior to the filing of the petition in bankruptcy the lawful enforcement of such lien is not prohibited by the statute. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36; *In re McKane*, (E. D. N. Y. 1907) 158 Fed. 647, 18 Am. Bankr. Rep. 594; *Colston v. Austin Run Mining Co.*, (C. C. A. 3d Cir. 1912) 194 Fed. 929; *Hillyer v. Le Roy*, (1904) 12 Am. Bankr. Rep. 733, 179 N. Y. 369, 72 N. E. 237. See also *Mencke v. Rosenberg*, (1902) 9 Am. Bankr. Rep. 323, 202 Pa. St. 131, 51 Atl. 767; *Fairlamb v. Smedley Constr. Co.*, (1908) 22 Am. Bankr. Rep. 824, 36 Pa. Super. Ct. 17.

Thus it has been held that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated; and where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36.

*Lien created by enforcement.*—But where the enforcement of a pre-existing lien is, in itself, the creation of a new lien, such new lien is rendered void under the provisions of section 67f of the Bankruptcy Act. Thus, under a Pennsylvania statute it has been held that a judgment lien entered of record in the County Court does not create a lien on the goods or chattels, or on the rights and credits, of the debtor in such county, or on his real estate in a neighboring county. To secure a lien upon these, the plaintiff must resort to the legal process the law has placed at his command; that is, to his writs of *fi. fa.*, attachment execution, or *testatum fi. fa.* But all of these liens are "obtained through legal proceedings," and if so obtained within four months of the filing of a petition in bankruptcy they will be stricken down by the paramount law. *Mencke v. Rosenberg*, (1902) 9 Am. Bankr. Rep. 323, 202 Pa. St. 131, 51 Atl. 767; *Fairlamb v. Smedley Constr. Co.*, (1908) 22 Am. Bankr. Rep. 824, 36

Pa. Super. Ct. 17. See also *Clarke v. Larremore*, (1903) 188 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 555, 9 Am. Bankr. Rep. 476.

**Enforcement enjoined.**—A court of bankruptcy has jurisdiction over a judgment creditor of the bankrupt, for the purpose of enjoining him from proceeding in a state court for the enforcement of his judgment against property of the debtor, where the judgment was rendered null or inoperative by the adjudication of the debtor as a bankrupt within four months after its rendition, because all creditors are parties to the proceedings in bankruptcy, and because the court has power to restrain any person from illegally possessing himself of assets of the estate. *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815.

*In In re Oxley*, (W. D. Wash. 1910) 182 Fed. 1019, it was held that, in order to give effect to section 67f, a court of bankruptcy has full jurisdiction over property held under liens obtained through legal proceedings, and may enjoin a sale thereon. And see the annotation under section 11a.

**Proceeds of execution sale in sheriff's hands.**—The proceeds of an execution sale remaining in the sheriff's hands at the time of the adjudication do not belong to the judgment creditor, but to the estate of the bankrupt, and the court of bankruptcy has power and jurisdiction to order the sheriff to pay over such proceeds to the trustee when appointed. *Clarke v. Larremore*, (1903) 188 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 555, 9 Am. Bankr. Rep. 476; *In re Kenney*, (C. C. A. 2d Cir. 1900) 105 Fed. 897, 5 Am. Bankr. Rep. 355, *affirming* (S. D. N. Y. 1899) 97 Fed. 554, 3 Am. Bankr. Rep. 353, 95 Fed. 427, 2 Am. Bankr. Rep. 494. And see to the same effect, *In re Franks*, (S. D. Ala. 1899) 95 Fed. 635, 2 Am. Bankr. Rep. 635; *Schmilovitz v. Bernstein*, (R. I. 1901) 5 Am. Bankr. Rep. 265; *In re Kenney*, (C. C. A. 2d Cir. 1900) 5 Am. Bankr. Rep. 355; *Jones v. Stevens*, (Me. 1901) 5 Am. Bankr. Rep. 571.

**[Court may order conveyance.]** And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: [(1898) 30 Stat. L. 565.]

**Preservation of liens.**—Under the express terms of section 67f, a lien affected thereby may be preserved by the court for the benefit of the estate. *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187. And see to the same effect the following earlier cases: *Thompson v. Fairbanks*, (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577, 13 Am. Bankr. Rep. 446; *Baltimore First Nat. Bank v.*

*The trustee in bankruptcy* is entitled to the entire proceeds of an execution sale remaining in the sheriff's hands, less costs of sale, after the allowance of the exemption when it is claimed from such proceeds. *In re Duguid*, (E. D. N. C. 1900) 100 Fed. 274, 3 Am. Bankr. Rep. 794.

**Proceeds released from claim of execution creditor.**—The proceeds in the hands of a sheriff, realized from a sale under an execution, are released from the claim of the execution creditor by the filing of a petition in bankruptcy against the debtor within four months after the judgment is rendered, by virtue of the provisions of section 67f. *Clarke v. Larremore*, (1903) 188 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 555, 9 Am. Bankr. Rep. 476.

**Distribution of proceeds enjoined.**—The right of the Bankruptcy Court to restrain a sheriff from paying money collected on an execution, issued against the property of the bankrupt, and invalidated by the bankruptcy proceedings, to a judgment creditor, and to require the sheriff to pay such proceeds to a trustee of the bankrupt estate, while those proceeds still remain in his custody, is now firmly established. *In re Knickerbocker*, (W. D. N. Y. 1903) 121 Fed. 1004, 10 Am. Bankr. Rep. 381.

**Proceeds paid over to execution creditor.**—Where an execution was issued against an insolvent debtor within four months prior to his bankruptcy, and a levy and sale made, and the proceeds paid over to the judgment creditor before the filing of the petition, the case does not fall within section 67f, and a referee in such case is without power summarily to direct a repayment of the money; the remedy of the trustee, if any, being by a plenary action to recover the amount as a preference under section 60b. *In re Resnek*, (E. D. Pa. 1909) 167 Fed. 574, 21 Am. Bankr. Rep. 740. And see to the same effect, *In re Bailey*, (D. C. Ore. 1906) 144 Fed. 214, 16 Am. Bankr. Rep. 289; *Levor v. Seiter*, (1902) 69 App. Div. 33, 74 N. Y. S. 499, 8 Am. Bankr. Rep. 459, *reversing* (1901) 5 Am. Bankr. Rep. 576.

*Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967, 15 Am. Bankr. Rep. 639; *In re Kenney*, (C. C. A. 2d Cir. 1900) 105 Fed. 897, 5 Am. Bankr. Rep. 355; *In re Moore*, (D. C. Vt. 1901) 107 Fed. 234, 6 Am. Bankr. Rep. 175; *In re New York Economical Printing Co.*, (2d Cir. 1901) 110 Fed. 518, 49 C. C. A. 133, 6 Am. Bankr. Rep. 615; *In re Hinsdale*, (D. C. Vt. 1901) 111 Fed. 502, 7 Am. Bankr. Rep. 85; *In re Sentenne*,

etc., Co., (E. D. N. Y. 1903) 120 Fed. 436, 9 Am. Bankr. Rep. 648; *In re Union Trust Co.*, (C. C. A. 1st Cir. 1903) 122 Fed. 937; *In re Baird*, (W. D. Va. 1904) 126 Fed. 845, 11 Am. Bankr. Rep. 438; *In re Merrow*, (D. C. Mass. 1904) 131 Fed. 993, 12 Am. Bankr. Rep. 615; *Virginia Iron, etc., Co. v. Staake*, (C. C. A. 4th Cir. 1904) 133 Fed. 717, 13 Am. Bankr. Rep. 281; *In re Lesser*, (S. D. N. Y. 1901) 5 Am. Bankr. Rep. 326; *In re Howland*, (N. D. N. Y. 1901) 6 Am. Bankr. Rep. 495; *Patten v. Carley*, (N. Y. 1902) 8 Am. Bankr. Rep. 482; *In re Jackson*, (E. D. Pa. 1902) 8 Am. Bankr. Rep. 594; *New York City Ninth Nat. Bank v. Moses*, (N. Y. 1903) 11 Am. Bankr. Rep. 772; *Matter of Ah Mi*, (D. C. Hawaii 1907) 18 Am. Bankr. Rep. 138.

**Order of court necessary.**—The trustee in bankruptcy is not, by section 67f, subrogated by mere operation of law to the rights of a levying creditor. But he

must obtain an order of court preserving the rights of the levying creditor for the benefit of the bankrupt's estate. *Pittsburgh First Nat. Bank v. Guarantee Title, etc., Co.*, (C. C. A. 3d Cir. 1910) 178 Fed. 187. See also *Miller v. New Orleans Acid, etc., Co.*, (1909) 211 U. S. 496, 29 S. Ct. 176, 53 U. S. (L. ed.) 300, 21 Am. Bankr. Rep. 416, *affirming* (1906) 117 La. 821, 42 So. 329.

**Court may order surrender of property affected.**—Where the bankrupt's property has been seized by an abuse of process, as where the taking was after the filing of the petition in bankruptcy, on a writ of replevin which did not describe the property, but other and different property, it was held that the court has power to order its surrender by the person in possession to the trustee or receiver in bankruptcy. *In re Weinger*, (S. D. N. Y. 1903) 126 Fed. 875, 11 Am. Bankr. Rep. 424.

**[Bona fide purchasers.]** *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry. [(1898) 30 Stat. L. 565.]

**Bona fide purchasers protected.**—Section 67f expressly provides for the protection of bona fide purchasers for value. *Clarke v. Larremore*, (1903) 188 U. S. 486, 23 S. Ct. 363, 47 U. S. (L. ed.) 555, 9 Am. Bankr. Rep. 478; *Jones v. Springer*, (1912) 226 U. S. 148, 33 S. Ct. 64, 57 U. S. (L. ed.) 161; *In re Kenney*, (S. D. N. Y. 1899) 95 Fed. 427, 2 Am. Bankr. Rep. 494; *In re Franks*, (S. D. Ala. 1899) 95 Fed. 635, 2 Am. Bankr. Rep. 634; *In re Breslau*, (N. D. N. Y. 1903) 121 Fed. 910, 10 Am. Bankr. Rep. 33; *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136; *In re Alabama Coal, etc., Co.*, (N. D. Ky. 1913) 210 Fed. 940; *In re Kenney*, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 494, *affirmed* (C. C. A. 2d Cir. 1900) 105 Fed. 897, 5 Am. Bankr. Rep. 355; *Jones v. Stevens*, (1901) 5 Am. Bankr. Rep. 571, 94 Me. 582, 48 Atl. 170. And see also the cases cited to the same effect under section 67e, section 70 a and a (5).

Subdivisions c and f of section 67 refer only to existing liens created by legal proceedings, and are not applicable to a case in which such a lien has become merged into a title by the consummation of an execution sale. In such case the property does not belong to the bankrupt, and could not have been levied upon

under an execution against him at the time of the initiation of the bankruptcy proceedings. *Nelson v. Svea Pub. Co.*, (W. D. Wash. 1910) 178 Fed. 136.

**The burden of proving the bona fides** of a sale of the bankrupt's property within the four months' period rests on the purchaser. *Mencke v. Rosenberg*, (1902) 9 Am. Bankr. Rep. 323, 202 Pa. St. 131, 51 Atl. 767.

**But in a suit against a sheriff**, for the seizure and sale of property on an attachment proceeding within the four months' period, the provision for the protection of bona fide purchasers is not applicable. *Jones v. Stevens*, (1901) 94 Me. 582, 48 Atl. 170, 5 Am. Bankr. Rep. 571.

A levy of attachment having been made upon the property of the bankrupt within four months of the adjudication, and the sheriff having sold thereunder to a bona fide purchaser for value, the trustee must recover from the sheriff as part of the estate the proceeds of such sale in the sheriff's hands. *In re Franks*, (1899) 95 Fed. 635; *In re Kenney*, (1899) 97 Fed. 427, (C. C. A. 1900) 105 Fed. 397, holding that the Bankruptcy Court may order the sheriff to pay over the proceeds to the trustee. See also *Bristol v. Mills*, (1900) 14 Pa. Super. Ct. 107.

**SEC. 68. SET-OFFS AND COUNTERCLAIMS.—a [Mutual debts and credits.]** In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off

against the other, and the balance only shall be allowed or paid. [(1898) 30 Stat. L. 565.]

**Object and scope of section.**—The object of this provision is to permit, as its terms declare, the statement of the account between the bankrupt and the creditor, with a view to the application of the doctrine of set-off between mutual debts and credits. The provision is permissive rather than mandatory, and does not enlarge the doctrine of set-off, and cannot be invoked in cases where the general principles of set-off would not justify it. *Cumberland Glass Mfg. Co. v. De Witt*, (1915) 237 U. S. 447, 35 S. Ct. 636, 59 U. S. (L. ed.) 1042.

That this section does not enlarge the doctrine of set-off in cases where the principles of legal or equitable set-off did not previously authorize it is also the holding in *Morris v. Windsor Trust Co.*, (1914) 213 N. Y. 27, 106 N. E. 753.

The main purpose of this statute is to prevent debtors of the bankrupt from acquiring claims against the bankrupt for use by way of set-off and reduction of their indebtedness to the estate. *Continental, etc., Trust, etc., Bank v. Chicago Title, etc., Co.*, (1913) 229 U. S. 435, 33 S. Ct. 829, 57 U. S. (L. ed.) 1268.

The word "debt," as used in section 68a, includes any debt provable in bankruptcy. *Germania Sav. Bank, etc., Co. v. Loeb*, (C. C. A. 6th Cir. 1911) 188 Fed. 285.

Any debt, liquidated or unliquidated, owing to the bankrupt from a creditor of his, whether for damages or on contract, express or implied, which passes to the trustee, may be used by him to reduce the claim of such creditor when presented, or to extinguish it altogether. *In re Harper*, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918.

Thus it has been held that the word "debts," in section 68a, should be construed to include a right of action against the creditor for injury to the bankrupt's property, which passed to the trustee under section 70a (6), although unliquidated. *In re Harper*, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918.

So, also, a creditor may set off a claim which was unliquidated at the commencement of the bankruptcy proceedings, where it has been liquidated subsequently thereto. *Morgan v. Wordell*, (1901) 6 Am. Bankr. Rep. 167, 178 Mass. 360, 59 N. E. 1037, 55 L. R. A. 33.

**Surety debts.**—A surety who pays the debt of his bankrupt principal, after the adjudication in bankruptcy, may set off the amount so paid against his own debt to the bankrupt. *In re Dillon*, (D. C. Mass. 1900) 100 Fed. 627, 4 Am. Bankr. Rep. 63.

**Mutual debts and credits**, under the language of the statute, may be set off

against each other, the balance only being allowable and payable, in bankruptcy proceedings. *New York County Nat. Bank v. Massey*, (1904) 192 U. S. 138, 24 S. Ct. 199, 48 U. S. (L. ed.) 380, 11 Am. Bankr. Rep. 42, reversing (1902) 8 Am. Bankr. Rep. 515; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *Walther v. Williams Mercantile Co.*, (C. C. A. 6th Cir. 1909) 169 Fed. 270, 22 Am. Bankr. Rep. 328; *Booth v. Prete*, (1909) 22 Am. Bankr. Rep. 579, 15 Ann. Cas. 306, 81 Conn. 636, 71 Atl. 938; *Shields v. John Shields Const. Co.*, (1914) 83 N. J. Eq. 21, 89 Atl. 1022.

If, however, the claim asserted as a set-off does not fall within the language of the Act as a mutual transaction, it will not be allowed as a set-off. *In re Crystal Spring Bottling Co.*, (D. C. Vt. 1900) 100 Fed. 265, 4 Am. Bankr. Rep. 55; *In re Shults*, (W. D. N. Y. 1904) 132 Fed. 573, 13 Am. Bankr. Rep. 84; *In re Becker*, (M. D. Pa. 1905) 139 Fed. 366, 15 Am. Bankr. Rep. 228; *In re Bevins*, (C. C. A. 2d Cir. 1908) 165 Fed. 434, 21 Am. Bankr. Rep. 344; *Alvord v. Ryan*, (C. C. A. 8th Cir. 1914) 212 Fed. 83.

Thus, the mere fact that the stockholders of a bankrupt corporation are also bondholders, and as such entitled to share in the distribution of the estate, does not entitle them to set off their claims as such in a suit against them by the trustee in bankruptcy to recover unpaid subscriptions. *Babbitt v. Read*, (S. D. N. Y. 1909) 173 Fed. 712, 23 Am. Bankr. Rep. 254.

So, also, where five persons, only one of whom was solvent, had a joint claim against the estate of a bankrupt, and each of them had severally become liable to the trustee in bankruptcy, the amounts of such liabilities aggregating more than the claim, but it did not appear that the joint liability and the separate debts grew out of the same transaction, or that either formed the inducement or consideration for the other, it was held that there could be no set-off of such claims. *In re Crystal Spring Bottling Co.*, (D. C. Vt. 1900) 100 Fed. 265, 4 Am. Bankr. Rep. 55.

Similarly where property was transferred for the specified purpose of being held by way of indemnity against a possible liability on a bond dissolving attachments upon which the transferees were sureties, it was held that the property transferred was trust property, that the holders were trustees and not claimants, and that there were thus no "mutual credits" within this section, and the right of set-off did not exist. *Alvord v. Ryan*, (C. C. A. 8th Cir. 1914) 212 Fed. 83.

**Liability to trustee included.**—Section 68a includes a liability on the part of a creditor which has accrued to a trustee in bankruptcy as such, though not to the bankrupt himself, when the creditor's claim and such liability are mutual. *In re Crystal Spring Bottling Co.*, (D. C. Vt. 1900) 100 Fed. 265, 4 Am. Bankr. Rep. 55.

**Money retained by creditor under agreement.**—Where, in a proceeding by a bankrupt's trustee to recover a sum of money from the manager of one of the bankrupt's stores, the answer, admitted to be true, alleged that prior to the bankruptcy there were mutual accounts between the defendant and the bankrupt, and that the defendant applied to the payment of the balance due him by the bankrupt for salary the sum claimed which he was authorized to do in accordance with his custom and under an agreement with the bankrupt when he undertook the management of the business, it was held that the money so applied did not belong to the bankrupt's estate at the time the petition was filed, and could not, therefore, be recovered in such proceeding. *In re Lebrecht*, (W. D. Tex. 1905) 135 Fed. 878, 14 Am. Bankr. Rep. 445.

**Payments on running accounts.**—Payments made from time to time to apply on a running account do not constitute mutual debts or credits within the meaning of section 68. *In re Christensen*, (N. D. Ia. 1900) 101 Fed. 802, 4 Am. Bankr. Rep. 202.

Cash payments on account, made within four months of the filing of the petition, are not such debts or credits as entitled the creditor to state the account, and hold the bankrupt only for the balance found under section 68a. *In re Ryan*, (N. D. Ill. 1900) 105 Fed. 760, 5 Am. Bankr. Rep. 396.

**Set-off between bank and depositor.**—A bank which is a creditor of a bankrupt who has a sum on deposit to his credit at the date of bankruptcy is entitled to apply the same on its claim as a set-off. *New York County Nat. Bank v. Massey*, (1904) 192 U. S. 138, 24 S. Ct. 199, 48 U. S. (L. ed.) 380; *Studley v. Boylston Bank*, (1913) 229 U. S. 527, 33 S. Ct. 806, 57 U. S. (L. ed.) 1313; *In re Myers*, (D. C. Ind. 1900) 99 Fed. 691; *In re Little*, (N. D. Ia. 1901) 110 Fed. 621, 6 Am. Bankr. Rep. 681; *In re George M. Hill Co.*, (7th Cir. 1904) 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68; *In re Scherzer*, (N. D. Ia. 1904) 130 Fed. 631; *In re Shults*, (W. D. N. Y. 1904) 132 Fed. 573; *In re Philip Semmer Glass Co.*, (2d Cir. 1905) 135 Fed. 77, 67 C. C. A. 551, appeal dismissed (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128; *Ridge Ave. Bank v. Studheim*, (3d Cir. 1906) 145 Fed. 798, 76 C. C. A. 362; *Tomlinson v. Lexington*

*Bank*, (4th Cir. 1906) 145 Fed. 824, 76 C. C. A. 400, 16 Am. Bankr. Rep. 632; *Irish v. Citizens' Trust Co.*, (N. D. N. Y. 1908) 163 Fed. 880; *Chicago Title, etc., Co. v. Federal Trust, etc., Bank*, (N. D. Ill. 1911) 192 Fed. 967; *In re Percy Ford Co.*, (D. C. Mass. 1911) 199 Fed. 334; *Walsh v. First Nat. Bank*, (C. C. A. 6th Cir. 1913) 201 Fed. 522; *West v. Lahoma Bank*, (1905) 16 Am. Bankr. Rep. 733, 16 Okla. 328, 85 Pac. 469; *Booth v. Prete*, (1909) 81 Conn. 636, 15 Ann. Cas. 306, 71 Atl. 938; *Hooks v. Gila Valley Bank, etc., Co.*, (1909) 12 Ariz. 315, 100 Pac. 806; *Frank v. Mercantile Nat. Bank*, (1905) 182 N. Y. 264, 74 N. E. 841; *Knoll v. Commercial Trust Co.*, (1915) 249 Pa. St. 197, 94 Atl. 750, Ann. Cas. 1916C 988, L. R. A. 1916A 683.

The rule stated in the foregoing paragraph is, however, applicable only in the absence of fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank. *In re Shults*, (W. D. N. Y. 1904) 132 Fed. 573, 13 Am. Bankr. Rep. 84.

**Set-off prior to filing of petition.**—The fact that a set-off was made by the bank prior to the filing of the bankruptcy petition does not affect the question, because, in such case, it did only what the law would have done had the bank waited until the petition was filed. *Booth v. Prete*, (1909) 22 Am. Bankr. Rep. 579, 15 Ann. Cas. 306, 81 Conn. 636, 71 Atl. 938.

But it has been held that the liability arising from the indorsement of unmatured commercial paper is not a debt which will support a set-off of a fixed indebtedness before the commencement of bankruptcy proceedings. *Heyman v. Jersey City Third Nat. Bank*, (D. C. N. J. 1914) 216 Fed. 685.

**Claim maturing subsequent to filing of petition.**—A bank has the right to set off a deposit against the debt of the bankrupt whether matured or not at the date of the adjudication in bankruptcy. *Irish v. Citizens' Trust Co.*, (N. D. N. Y. 1908) 163 Fed. 880; *Germania Sav. Bank, etc., Co. v. Loeb*, (C. C. A. 6th Cir. 1911) 188 Fed. 285; *In re Philip Semmer Glass Co.*, (S. D. N. Y. 1904) 11 Am. Bankr. Rep. 665, affirmed (2d Cir. 1905) 135 Fed. 77, 67 C. C. A. 551, 14 Am. Bankr. Rep. 25, appeal dismissed (1906) 203 U. S. 141, 27 S. Ct. 50, 51 U. S. (L. ed.) 128; *Steinhardt v. National Park Bank*, (1907) 120 App. Div. 255, 105 N. Y. S. 23, reversing 52 Misc. 464, 102 N. Y. S. 546; *Frank v. Mercantile Nat. Bank*, (1905) 182 N. Y. 264, 74 N. E. 841, 108 A. S. R. 805, affirming 100 App. Div. 449, 91 N. Y. S. 488.

**Mistake in failing to claim set-off.**—And where a bank pays, by mistake, to the trustee in bankruptcy the amount on

deposit to the credit of the bankrupt, instead of setting off the same against a debt due the bank by the bankrupt, the amount so paid the trustee in bankruptcy may be recovered by the bank. *Union Nat. Bank v. McKey*, (7th Cir. 1900) 102 Fed. 662, 42 C. C. A. 583.

**One bank assuming rights and liabilities of another.**—Although a bank cannot, after the insolvency of the debtor, acquire his obligation for the purpose of using it as a set-off or counterclaim, it has been held that this rule does not apply where the bank acquires the depositor's obligation in the transaction by which it assumes the liability to pay the deposit; i. e., where one bank takes the assets and assumes the liabilities of another bank the former is entitled to the right of set-off belonging to the latter. *Frank v. Mercantile Nat. Bank*, (1905) 182 N. Y. 264, 74 N. E. 841, 108 A. S. R. 805, affirming 100 App. Div. 449, 91 N. Y. S. 488.

**Set-off of deposit not preference.**—A deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security. It is true that it creates a debt, which, when set off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off; but this fact does not operate to enlarge the scope of the section relating to preferences so as to prevent set-off in cases coming within the terms of section 68a. *New York County Nat. Bank v. Massey*, (1904) 192 U. S. 138, 24 S. Ct. 199, 48 U. S. (L. ed.) 380, 11 Am. Bankr. Rep. 42, reversing (1902) 8 Am. Bankr. Rep. 515, and *distinguishing* *Pirie v. Chicago Title, etc., Co.*, (1901) 182 U. S. 438, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171, 5 Am. Bankr. Rep. 814.

**Set-off as against special deposit.**—But where the deposit is made not as a general deposit subject to check, but in trust for some special purpose of which the bank has notice, the bank is not at liberty to set off the deposit against a debt due it from the depositor. *In re Davis*, (W. D. Tex. 1903) 119 Fed. 950, 9 Am. Bankr. Rep. 670; *Farmers', etc., State Bank v. Park*, (C. C. A. 5th Cir. 1913) 209 Fed. 613; *Lynam v. Belfast Nat. Bank*, (1904) 98 Me. 448, 57 Atl. 799.

**Depositor may set off account.**—On the bankruptcy of a banking partnership, a depositor having a credit balance in his account is entitled to set off the same against a note on which he is indebted

to the bank. *In re Shultz*, (W. D. N. Y. 1904) 132 Fed. 573, 13 Am. Bankr. Rep. 84.

**Deposits may be made and accepted for specified purposes**, not within the general rule, whereby "the bank becomes bailee of the depositor" or trustee of the fund, with title thereto remaining in the depositor until the purpose of deposit is discharged; and the relation thereby established is not that of debtor and creditor, although it was not intended that the identical money so deposited was to be held for the payment. *Continental & C. T. & S. Bank v. Chicago T. & Trust Co.*, (C. C. A. 7th Cir. 1912) 199 Fed. 704. See also *Bank of Brodhead v. Smith*, (C. C. A. 7th Cir. 1912) 199 Fed. 703.

**Deposit to meet post-dated check.**—Where a deposit is not made for general purposes, but for the purpose of meeting an outstanding post-dated check of the bank, it is tantamount to a payment direct to the bank, and possesses none of the elements of an allowable set-off. *In re Starkweather*, (W. D. Mo. 1913) 206 Fed. 797.

**Payment to bank on overdue note.**—A payment to a bank of part of the amount of an overdue note, upon the threat of the bank to set off the note against the account of the maker of the note at the bank, does not constitute an allowable set-off within this section. *In re Starkweather*, (W. D. Mo. 1913) 206 Fed. 797.

So also it has been held that where a bank holding a depositor's notes accepts payment thereof by check against the deposit, within four months of the bankruptcy of the depositor and with full knowledge of his insolvent condition, it receives an unlawful preference and its right to set off the notes is thereby forfeited and it becomes liable to the trustee for the amount of the check. *Knoll v. Commercial Trust Co.*, (1915) 249 Pa. St. 197, Ann. Cas. 1916C 988, 94 Atl. 750.

**Preferences.**—This section does not apply so as to entitle a bank to claim a set-off unless the money is allowed to remain in the account until after bankruptcy supervenes. So in a case where the money was actually drawn against by check, and the check handed over to the bank in payment of a note, it was held that the money was used to pay a debt under circumstances that made the payment preferential and there was not a case of mutual accounts where one may be set off against the other. *In re National Lumber Co.*, (C. C. A. 3d Cir. 1914) 212 Fed. 928.

If a bank has reasonable cause to believe that payments made to it will effect a preference in its favor, such payments are voidable by the trustee and not available as set-offs. *In re Wright-Dana Hardware Co.*, (C. C. A. 2d Cir. 1914) 212 Fed. 397.

*A deposit with a bank prior to the beginning of bankruptcy proceedings is not such a transfer as is unavailable as a set-off unless it were fraudulent as against creditors and hence not valid as the basis of any legal claim. In re Radley Steel Const. Co., (E. D. N. Y. 1914) 212 Fed. 462.*

*Bank's knowledge of insolvency.*—A bank may do business in the usual manner with one it knows to be insolvent and the mere fact of insolvency or mere knowledge of the insolvency of the depositor is not alone sufficient to deprive the bank of its right to a set-off. *In re Wright-Dana Hardware Co., (C. C. A. 2d Cir. 1914) 212 Fed. 397.*

*Time as of which account is stated and liquidated.*—The statutory direction that the account shall be stated implies that there must be a time when the statement is to be made, and when a final statement of an account is made, the account is closed and all mutuality ceases. This time has been fixed as the date of filing the petition. It follows, therefore, that a mutual account between a bankrupt and his bank of deposit is closed by operation of law the moment the petition in bankruptcy is filed and that any money thereafter intrusted by the bankrupt to the bank is like a deposit with another person and not subject to any set-off existing before the petition is filed. *In re Michaelis, (S. D. N. Y. 1912) 196 Fed. 718.*

*Unpaid stock subscriptions due an insolvent corporation are not subjects of set-off against ordinary claims held by the subscribers against the corporation, since after a corporation becomes insolvent, any sum due upon a stock subscription is impressed with the character of a trust in favor of all the creditors, except only such as may have given credit to the company with knowledge of the scheme of stock issue. In re Howe Mfg. Co., (W. D. Ky. 1912) 193 Fed. 524; Kiskadden v. Steinle, (C. C. A. 6th Cir. 1913) 203 Fed. 375.*

*Secured and unsecured debts.*—Where it appeared that a creditor holding a secured note against a bankrupt and also an unsecured note sold the collateral for the secured note, realizing on the sale more than enough to satisfy such note, it was held that he could set off the balance against the unsecured note, although in the proof of claim no mention was made of any security available for any part of the debt represented by the secured note. *In re Searles, (E. D. N. Y. 1912) 200 Fed. 893.*

*Claims not due at institution of proceedings.*—As claims maturing subsequently to the filing of the petition are provable against the estate, they necessarily are the subject of set-off under the provisions of section 68. *Germania Sav. Bank, etc., Co. v. Loeb, (C. C. A.*

*6th Cir. 1911) 188 Fed. 285; Frank v. Mercantile Nat. Bank, (1905) 14 Am. Bankr. Rep. 125, 182 N. Y. 264, 74 N. E. 841; Morgan v. Wordell, (1901) 6 Am. Bankr. Rep. 167, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33. And see also the cases cited, p. 1143, to this effect, under the catch line Set-off between bank and depositor.*

*A wrongdoer who has misapplied the subject of a trust is not entitled, either under the Bankruptcy Act or under the rules of equitable set-off, to apply a credit that belongs to him in his own right in cancellation of his liability as a fiduciary. Morris v. Windsor Trust Co., (1914) 213 N. Y. 27, Ann. Cas. 1916C 972, 106 N. E. 753. See also Libby v. Hopkins, (1881) 104 U. S. 303, 26 U. S. (L. ed.) 769, a leading case decided under a similar section of the Act of 1867, wherein the court ruled that there can be no set-off of claims and liabilities held in inconsistent relations and that one holding a pledge in trust for a bankrupt cannot convert it and offset a debt that belongs to him in his own right.*

*Right and duty of trustee to claim set-off.*—If a claimant is indebted to the estate, such debt is an asset of the estate, and it is the duty of the trustee to interpose the same as a set-off or counterclaim. *In re Royce Dry Goods Co., (W. D. Mo. 1904) 133 Fed. 100, 13 Am. Bankr. Rep. 258.*

*A trustee in bankruptcy may set up, as a set-off against a claim filed by a creditor, a claim for unliquidated damages existing in favor of the bankrupt against such creditor which passed to the trustee, and which under the law of the state the bankrupt, but for his bankruptcy, might have pleaded as a counterclaim in an action by the creditor; and the trustee may have such claim liquidated by the referee, unless some other mode of liquidation is directed. In re Harper, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918.*

*And where a creditor of a corporation is also a subscriber for its corporate stock, and his subscription has not been fully paid, he will not be allowed to prove his claim against the estate of the corporation in bankruptcy until he has paid the balance remaining due on his subscription. In re Wiener, etc., Shoe Co., (E. D. Pa. 1899) 96 Fed. 949, 3 Am. Bankr. Rep. 200.*

*Burden of proof.*—Where the debt of a creditor against the estate of a bankrupt has been duly proved, the burden of proof rests upon the trustee to establish a set-off pleaded by him. *In re Harper, (N. D. N. Y. 1910) 175 Fed. 412, 23 Am. Bankr. Rep. 918.*

*Claim of set-off as consent to jurisdiction.*—Where a creditor of a bankrupt, who was also a director, on filing his

claim, sought to set off his own indebtedness as a credit thereon, and went to trial on such issue, he thereby gave his "consent," within the meaning of section 23b, that the court of bankruptcy should determine the amount due from him and enter judgment thereon on the disallowance of the set-off claimed. *In re White*, (C. C. A. 7th Cir. 1910) 177 Fed. 194, 24 Am. Bankr. Rep. 197.

**Waiver of claim of set-off.**—A creditor who takes his composition dividend after the composition is finally passed over his objections, making no attempt to have mutual claims adjusted and set off, thereby waives his claim of set-off; there being no evidence that he receives the amount under protest or by mistake or under any other circumstances which will entitle him to a hearing or readjustment. *Cumberland Glass Mfg. Co. v. De Witt*, (1915) 237 U. S. 447, 35 S. Ct. 636, 59 U. S. (L. ed.) 1042, *affirming* (1913) 120 Md. 381, 87 Atl. 927, Ann. Cas. 1915A 702.

Under earlier Bankruptcy Acts, the right to set-offs given by provisions analogous to those in the present Act was discussed in *Libby v. Hopkins*, (1881)

104 U. S. 303, 26 U. S. (L. ed.) 769; *Sawyer v. Hoag*, (1873) 17 Wall. 610, 21 U. S. (L. ed.) 731; *Gray v. Rollo*, (1873) 18 Wall. 629, 21 U. S. (L. ed.) 927; *Tucker v. Oxley*, (1809) 5 Cranch 34, 3 U. S. (L. ed.) 29; *Ex p. Caylus*, (1871) 1 Lowell (U. S.) 550; *Re Lane*, (1874) 2 Lowell (U. S.) 305; *Catlin v. Foster*, (1870) 1 Sawy. (U. S.) 37; *Lloyd v. Turner*, (1879) 5 Sawy. (U. S.) 463; *Wilson v. National Bank*, (1880) 1 McCrary (U. S.) 538; *Drake v. Rollo*, (1872) 3 Biss. (U. S.) 273; *Scammon v. Kimball*, (1873) 5 Biss. (U. S.) 431; *Marks v. Barker*, (1804) 1 Wash. (U. S.) 178; *Hitchcock v. Rollo*, (1872) 3 Biss. (U. S.) 276; *In re Voetter*, (1880) 4 Fed. 632; *Ex p. Whiting*, (1876) 14 Nat. Bankr. Reg. 307; *Fleming v. Andrews*, (1880) 3 Fed. 632; *In re City Bank*, (1873) 6 Nat. Bankr. Reg. 71; *In re Farnsworth*, (1873) 14 Nat. Bankr. Reg. 148; *Rollins v. Twitchell*, (1876) 14 Nat. Bankr. Reg. 201; *In re Catlin*, 3 Nat. Bankr. Reg. 545; *Cosgrove v. Cosby*, (1882) 86 Ind. 511; *Murray v. Riggs*, (1818) 15 Johns. (N. Y.) 571; *Smith v. Brinckerhoff*, (1850) 8 Barb. (N. Y.) 519; *Goodrich v. Dobson*, (1876) 43 Conn. 576.

**b [When not allowed.]** A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which [(1898) 30 Stat. L. 565.]

(1) **[Debts not provable.]** is not provable against the estate; or [(1898) 30 Stat. L. 565.]

**Unprovable claims may not be set off.**—An indebtedness which is not provable against the bankrupt's estate may not, under the statutory inhibition, be allowed as a set-off in the bankruptcy proceedings. *In re Bingham*, (D. C. Vt. 1899) 94 Fed. 796, 2 Am. Bankr. Rep. 223; *In re Philip Semmer Glass Co.*, (C. C. A. 2d Cir. 1905) 135 Fed. 77, 14 Am. Bankr. Rep. 25; *In re Becker*, (M. D. Pa. 1905) 139 Fed. 366, 15 Am. Bankr. Rep. 228. And as to what constitutes provable debts see the annotation under section 63 a and b.

**Unliquidated claim.**—Section 68b (1) does not prevent a set-off of a claim which was liquidated at the later moment merely because, for some reason, it did not admit of proof when the proceedings were commenced. *Morgan v. Wordell*, (1901) 6 Am. Bankr. Rep. 167, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33.

But an unliquidated claim, of such a nature as not to be provable in bankruptcy, cannot be used as a set-off under

section 68. *In re Becker*, (M. D. Pa. 1905) 139 Fed. 366, 15 Am. Bankr. Rep. 228. And see the annotation under section 63b, as to the provability of unliquidated claims.

**Failure to prove claim does not prevent its use as set-off.**—Section 57a, limiting the time for proving claims to one year, has reference to the bankruptcy proceedings alone; and if the claim of a creditor, who is also a debtor of the estate, is one provable in its nature, the fact that he has not proved it within the year does not affect his right to plead it as a set-off or counterclaim, in an action by the trustee to recover his indebtedness to the estate, as a claim "provable against the estate" within the meaning of section 68b. *Norfolk, etc., R. Co. v. Graham*, (C. C. A. 4th Cir. 1906) 145 Fed. 809, 16 Am. Bankr. Rep. 615. See also *Morgan v. Wordell*, (1901) 6 Am. Bankr. Rep. 167, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33.

(2) **[Purchase or transfer for purpose of set-off.]** was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy. [(1898) 30 Stat. L. 565.]



**Claims procured for purpose of set-off.**

—A set-off will not be allowed to one who, with knowledge of the bankrupt's insolvency, purchases claims against such bankrupt with a view to using the same, by way of payment or set-off, so as to obtain an advantage over other creditors. *Western Tie, etc., Co. v. Brown*, (1905) 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571, 13 Am. Bankr. Rep. 447. See also *In re Shults*, (W. D. N. Y. 1905) 135 Fed. 623, 14 Am. Bankr. Rep. 378.

Thus where an indorser of a bankrupt's paper took it up within four months prior to bankruptcy, knowing that the bank-

rupt was insolvent, and for the purpose of setting it off against its debt to the bankrupt, it was held that such paper was not available as a set-off against the bankrupt's trustee. *Mason v. National Herkimer County Bank*, (C. C. A. 2d Cir. 1909) 172 Fed. 529, 22 Am. Bankr. Rep. 733.

**Claims based on preferences.**—Where a claim for which the right of set-off is sought is based upon a preference, which is voidable under section 60b, it will not be allowed. *In re Shults*, (W. D. N. Y. 1904) 132 Fed. 573, 13 Am. Bankr. Rep. 84.

**SEC. 69. POSSESSION OF PROPERTY.**—*a* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition. [(1898) 30 Stat. L. 565.]

As to

Appointment of receiver or marshal to take possession of assets, see section 2 (3).

Bond required, etc., see section 3e.

**Duty to seize property.**—It is the duty of the court on its own motion, in a proper case, to take actual possession and custody of the bankrupt's estate, either through a receiver or by a direction to the marshal. *In re Abrahamson*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 44. See also *Davis v. Bohle*, (8th Cir. 1899) 92 Fed. 325, 34 C. C. A. 372.

Wherever it appears that it is necessary for the preservation of the property claimed to be a part of the bankrupt's estate, after a petition in bankruptcy has been filed, that the court should take possession of the same, pending the adjudication of title, it is within the jurisdiction of the court to order the marshal or a custodian to take possession of such property; and wherever the petition, duly verified, avers that the alleged bankrupt has transferred his property for the purpose of hindering, delaying, and defrauding creditors, and sets forth facts tending to show that the transfer is null and void under the Bankruptcy Act, and that the party in possession is financially irresponsible, and that there is danger that

goods alleged to belong to the bankrupt will be lost to his estate without the interposition of the court, such court has the power, and it was its duty, to lay its hand upon the property and hold the same until the claims thereto or rights therein can be determined. The object of the Bankruptcy Law, which is to have the property of the bankrupt equally distributed among his creditors, would be entirely defeated if in such a case the court was compelled to wait for the appointment of a trustee to bring a suit to recover such property, for by the time such suit could be determined the property in the hands of an irresponsible person might have been entirely dissipated. But the power to make such seizure should not be lightly exercised, or abused, so as needlessly to oppress or injure those who claim title; and in all cases creditors who pray for such an order of seizure should be required to give bond to indemnify the party injured, in the event that it should be determined thereafter that the party in whose possession the goods are is lawfully the owner thereof. *In re Knopf*, (D. C. S. C. 1906) 144 Fed. 245, 16 Am. Bankr. Rep. 432.

It is not necessary to allege that property to be seized is not exempt from seizure. *Hoffschlaeger Co. v. Young Nap.*

(D. C. Hawaii 1904) 12 Am. Bankr. Rep. 510.

After adjudication of voluntary bankruptcy, an application by creditors, in which the bankrupt unites, to appoint a receiver or custodian to preserve the assets of the estate, otherwise wholly unprotected, will usually be granted, especially in the absence of any charge of fraud or collusion, and where the creditors and other persons interested make no objection whatever. *In re Huddleston*, (S. D. Ga. 1908) 167 Fed. 428, 21 Am. Bankr. Rep. 669.

**Application for warrant.**—The petition in involuntary bankruptcy and the application for a warrant to the marshal under this section "ought to be separated in practice, whether it is required by the statute or not," and the affidavits in support of the application must be as specific as possible in their statements of all the essential facts, such as the neglect of his property by the bankrupt, his insolvency, and the alleged acts of bankruptcy. *In re Kelly*, (W. D. Tenn. 1899) 91 Fed. 504, 1 Am. Bankr. Rep. 306, where in a footnote at p. 507 will be found a form of affidavit prescribed by the court to govern proceedings in the future.

**Statutory requirements must be complied with.**—A warrant will not be issued, under section 69, excepting where the statutory requirements are strictly complied with. Thus it has been held that the statute does not authorize the court to issue a warrant for the seizure of an alleged bankrupt's property, against whom an involuntary petition is pending, on the application of the petitioning creditors, merely supported by the affidavit of the bankrupt, averring that he waives proof showing that he has committed an act of bankruptcy, that he has neglected his property and that it has thereby deteriorated in value, and that he waives the giving of the required bond, and that he agrees that the warrant may issue. *In re Sarsar*, (W. D. Tenn. 1903) 120 Fed. 40, 9 Am. Bankr. Rep. 576.

**The purpose of requiring a bond**, either under section 3e or under section 69, is to indemnify the alleged bankrupt before his property may be taken from his possession by petitioning creditors prior to an adjudication of bankruptcy. *In re Haff*, (C. C. A. 2d Cir. 1905) 135 Fed. 742.

**Property in possession of adverse claimant.**—Section 69 does not authorize the court to issue a warrant to the marshal to take property away from the possession of a third party who holds it under a *bona fide* claim of right or title. *In re Rockwood*, (N. D. Ia. 1899) 91 Fed. 363, 1 Am. Bankr. Rep. 272; *In re Kelly*, (W. D. Tenn. 1899) 91 Fed. 504, 1 Am. Bankr. Rep. 306; *In re Ward*, (D. C. Mass. 1900) 104 Fed. 985, 5 Am. Bankr. Rep. 215; *In re Bender*, (W. D. Ark. 1901) 106 Fed. 873, 5 Am. Bankr. Rep.

632; *In re Andre*, (2d Cir. 1905) 135 Fed. 736, 68 C. C. A. 374, 13 Am. Bankr. Rep. 132.

Thus in *In re Kelly*, (W. D. Tenn. 1899) 91 Fed. 504, 1 Am. Bankr. Rep. 306, it was said that section 69 was not designed as a general grab-all attachment proceeding, nor a statutory remedy for the seizure of property fraudulently conveyed by an alleged insolvent debtor, nor is it in any sense to be made a summary proceeding against anybody but the alleged bankrupt, nor against any property except that which is in his own hands or those of his acknowledged agents.

It has also been held that it is error for a court of bankruptcy to appoint a receiver to take possession of property, and to make a summary order for the sale thereof, without the consent of an adverse claimant who is in actual possession of such property claiming it as owner. *Beach v. Macon Grocery Co.*, (C. C. A. 5th Cir. 1902) 116 Fed. 143, 8 Am. Bankr. Rep. 751.

The amendment of section 23 by the Act of Feb. 5, 1903, does not affect the original meaning of section 69, nor enlarge its scope so as to authorize a court of bankruptcy to make a summary order directing the transfer of property in the possession of a *bona fide* adverse claimant. *In re Andre*, (2d Cir. 1905) 135 Fed. 736, 68 C. C. A. 374, 13 Am. Bankr. Rep. 132.

The mere filing of a petition does not give the Bankruptcy Court constructive possession of property held under an adverse claim; and such a claimant cannot be summarily deprived of his possession by the trustee in bankruptcy of an alleged owner. *Morning Tel. Pub. Co. v. S. B. Hutchinson Co.*, (Mich. 1906) 17 Am. Bankr. Rep. 425.

But see *In re Knopf*, (D. C. S. C. 1906) 144 Fed. 245, 16 Am. Bankr. Rep. 432, wherein it was held that whenever, after the filing of a petition in bankruptcy, it appears to be necessary for the preservation of property claimed to be a part of the bankrupt's estate, it is within the jurisdiction of the court to order the marshal, or a custodian, to take possession of such property, although in possession of an adverse claimant, pending the adjudication of title; such proceeding being one in bankruptcy, and not a controversy at law or in equity.

*But where the possession of an adverse claimant was acquired subsequent to the filing of the petition in bankruptcy the property may be seized under an order of court.* Thus in *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, 5 Am. Bankr. Rep. 623, it was held that a court of bankruptcy has authority, after the adjudication, to order the marshal or receiver to take possession of the property of the

bankrupt from a third party who acquired his possession and alleged right thereto after the filing of the petition, and before the adjudication of bankruptcy. *In re Moody*, (N. D. Ia. 1904) 131 Fed. 525, 12 Am. Bankr. Rep. 718.

**Determination of adverse claim.**—In the case of *In re Young*, (C. C. A. 8th Cir. 1901) 111 Fed. 158, 7 Am. Bankr. Rep. 14, it was said that when third parties claim title to property which has been seized by the marshal under a warrant, as forming part of a bankrupt's estate, it will sometimes be found most convenient to settle the controversy summarily on a mere motion filed in the bankruptcy proceedings; but in other cases, where the claimant's right depends upon a decision of contested issues of fact or disputable questions of law, it will be found most expedient to require the controversy to be determined by a plenary action either in the Bankruptcy Court or in some other court of competent jurisdiction. As such controversies arise the Bankruptcy Courts can best determine how the issues involved can be tried with least delay, inconvenience, and expense, and with the greatest assurance of reaching a correct result. Therefore they should be allowed to direct the course of procedure in such cases, and orders made in that behalf should not be disturbed unless the case discloses a clear abuse of this discretionary power.

Thus where a marshal took possession of property which he found in the bankrupt's possession, and which was surrendered to him by the bankrupt as his own, it was held that there was no error in refusing, on a mere motion, to order such property returned to a mortgagee, upon his claim that he was legally in possession under his mortgage when it was seized, the validity of his mortgage being denied by creditors; and that the court acted within its discretion in requiring such claimant to assert his rights by a plenary action in which they could be more properly tried and determined. And see to the same effect *In re Bender*, (W. D. Ark. 1901) 106 Fed. 873, 5 Am. Bankr. Rep. 632. See also *In re Radley Steel Const. Co.*, (E. D. N. Y. 1914) 212 Fed. 462; *In re Lummus*, (N. D. Ga. 1913) 214 Fed. 891.

**Summary determination.**—Although section 69 extends only to the taking custody of property belonging to the bankrupt, or which is in his possession, or that of a third person as his bailee or agent, and not to property in the possession of an adverse claimant, this power, nevertheless, confers jurisdiction upon the Bankruptcy Court to ascertain whether the property is in the possession of the bankrupt, or his bailee or agent, or whether it is in the possession of an adverse claimant, and to institute and entertain an appropriate proceeding for that purpose; and such

proceeding must necessarily be a summary one because, as no trustee has been appointed, there is no person to represent the estate as a party to a formal suit. *In re Andre*, (2d Cir. 1905) 135 Fed. 736, 68 C. C. A. 374, 13 Am. Bankr. Rep. 132. And see to the same effect *In re Rochford*, (C. C. A. 8th Cir. 1903) 124 Fed. 182.

But it is the duty of all courts to see that such process as they may issue directing the seizure of property is not abused or so executed as to needlessly oppress or injure third persons who are strangers to the litigation. Ordinarily they should act with as much expedition as possible when complaint is made that under color of process the rights of third parties have been invaded. *In re Young*, (C. C. A. 8th Cir. 1901) 111 Fed. 158, 7 Am. Bankr. Rep. 14.

**Interference with property restrained.**—Where property, claimed to belong to one against whom an involuntary petition in bankruptcy is filed, is also claimed by a third person who is about to remove it, the court, on petition of the creditors, will restrain such third person from removing such property or making any change therein. *In re Smith*, (N. D. Ga. 1902) 113 Fed. 993, 8 Am. Bankr. Rep. 55, relying on *Bryan v. Bernheimer*, (1901) 181 U. S. 188, 21 S. Ct. 557, 45 U. S. (L. ed.) 814, 5 Am. Bankr. Rep. 623. And see also the annotation under section 11a.

And where an ancillary receiver was properly appointed in bankruptcy proceedings, it was held that the property in his hands, as such receiver, was *in custodia legis*, and was not subject to attachment. *In re John L. Nelson, etc., Co.*, (S. D. N. Y. 1907) 149 Fed. 590, 18 Am. Bankr. Rep. 66.

So, also, it has been held that after an adjudication in bankruptcy an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin was begun. *White v. Schloerb*, (1900) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183, 4 Am. Bankr. Rep. 178.

But see *In re Ward*, (D. C. Mass. 1900) 104 Fed. 985, 5 Am. Bankr. Rep. 215 wherein it was held that the court had no power to enjoin a third party from disposing of property in his possession and claimed by him adversely to the bankrupt.

The words "wrongfully obtained" in this section include the securing of an order of seizure of property when thereafter the petition shall be dismissed. *T. E. Hill Co. v. United States Fidelity, etc., Co.*, (1911) 250 Ill. 242, 95 N. E. 150.

**SEC. 70. TITLE TO PROPERTY.—a [Vested in trustee.]** The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all [(1898) 30 Stat. L. 565.]

As to

Dower rights, see section 8a.

Duty of trustee to collect assets, see section 47a (2).

Recovery of voidable preferences, see section 60b.

Recovery of property fraudulently transferred, see section 67e, and subdivision e of this section 70.

I. What constitutes "property," 1150.

II. Nature of trustee's title, 1151.

III. Time when title passes, 1154.

IV. Condition of title after petition filed, but before appointment of trustee, 1158.

V. Burdensome property, 1160.

VI. Exempt property, 1162.

VII. Reclamation proceedings, 1165.

I. WHAT CONSTITUTES "PROPERTY."

"Title to property" is the enacted caption of section 70. The word "property" appears several times in the section, and is the leading word in section 70a (5).

"It is impossible to give any categorical definition to the word 'property,' nor can we attach to it in certain relations the limitations which would attach to it in others. This will be obvious on examining the article about property in the several editions of Bouvier's Law Dictionary. The same is equally obvious on an examination of the definitions given to the word in the standard dictionaries of the English language. All that can be said positively in reference to it is that, when found in a statute like the Bankrupt Act, it is not to be construed in any loose, popular sense, but with regard to the limitations which the law attaches to it. *Fisher v. Cushman*, (1st Cir. 1900) 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, holding that, since a mere license to sell liquor represents a police regulation, and may be revoked without compensation by legislation touching the public interests, because it represents no vested right, the license cannot be regarded as property of itself; but the pecuniary interest or capital which the license represents, and which may customarily be made available, is property which the bankrupt is bound to assist in realizing for his creditors, so long as he can render practical aid thereto by merely giving his signature to a transfer of the license. See further as to licenses division X in the note to section 70a (5), *infra*, p. 1193.

"The term 'property' used in the Bankruptcy Act, is of the broadest pos-

sible signification, embracing everything that has exchangeable value, or goes to make up a man's wealth — every interest or estate which the law regards of sufficient value for judicial recognition." *Earle v. Maxwell*, (1910) 86 S. C. 1, 67 S. E. 962, 138 A. S. R. 1012.

"Courts should not be swift to find reasons why creditors should not receive the benefit of all a bankrupt's assets." *In re Wright*, (2d Cir. 1907) 157 Fed. 544, 85 C. C. A. 206, 18 L. R. A. (N. S.) 193.

"Money is one form of property, and as such should be transferred to the trustee by the bankrupt." *Bristol v. Mills*, (1900) 14 Pa. Super. Ct. 107; *Landry v. Andrews*, (1901) 22 R. I. 597, where the court said: "The word 'property' is evidently used as a generic term, intended to include money as the readiest and most valuable form of property, since it is the product of all kinds of property reduced to its standard of value." See also *In re Tudor*, (1900) 100 Fed. 796.

Interest in joint adventure.—*The interest of a bankrupt in a stock pool* to advance the market in a certain stock and then sell to the public, constitutes "property" within the meaning of the Bankruptcy Act. *In re Lathrop*, (S. D. N. Y. 1910) 184 Fed. 534.

"That the words 'property of the bankrupt' mean only the property to which the bankrupt is beneficially entitled, and do not include property to which he has only a bare legal title, is perhaps justified by our decision in *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986." *Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967.

Nonenumerated vested interests.—"The Bankruptcy Act cannot be construed so narrowly as to exclude any vested interest constituting an asset available to creditors, merely on the ground that this asset is not expressly enumerated in section 70. Other provisions of the Bankrupt Act show that the Act is designed to cover all the property and estate of the bankrupt and all assets that can in any manner be legally made available for the payment of his debts, and to distribute all those assets equally among his creditors." *In re Bandouine*, (1899) 96 Fed. 536.

"The debtor's right to earn wages in the future and to dispose of the fruits of his labor is not 'property' in any sense

in which the bankruptcy statute uses the term, but constitute rather rights and privileges which go to make up a man's liberty and freedom." *In re Home Discount Co.*, (N. D. Ala. 1906) 147 Fed. 538, holding that the bankrupt's discharge operated to avoid an assignment of wages earned after the filing of the petition.

The interest of a beneficiary in a will, if it depends upon the death of another dying without issue after the death of the father of the beneficiary, and while the beneficiary is yet alive, amounts to a mere possibility, and does not pass to the trustee in bankruptcy of the beneficiary. *Clarke v. Fay*, (1910) 205 Mass. 228, 91 N. E. 328, 27 L. R. A. (N. S.) 454.

**Estate by entirety.**—The trustee takes no title to an estate by the entirety standing in the name of the bankrupt and his wife; "each has only an expectancy, for, upon the death of one, the other takes the whole in severalty, not by survivorship, but by the original title." *In re Beihl*, (E. D. Pa. 1912) 197 Fed. 870. To the same point see *In re Meyer*, (1911) 232 Pa. St. 89, 81 Atl. 145, Ann. Cas. 1912C 1240, 36 L. R. A. (N. S.) 205.

**A right of action for damages for personal injuries** is not property nor a right of property until it is reduced to a judgment. *Sibley v. Nason*, (1907) 196 Mass. 125, 81 N. E. 887, 124 A. S. R. 520, 12 Ann. Cas. 938, 12 L. R. A. (N. S.) 1173; *Beechwood v. Joplin-Pittsburg R. Co.*, (1913) 173 Mo. App. 371, 158 S. W. 868.

Under the Bankruptcy Act of 1800 a right of action founded on a tort was "estate real and personal" and therefore did not pass to the assignee in bankruptcy. *Bird v. Hempstead*, (1808) 3 Day (Conn.) 272, 3 Am. Dec. 269. See in general as to the bankrupt's right of action for torts, the note to section 70a (6).

"A bare possibility or mere expectation of acquiring property does not constitute property or a title to property; nor can it be transferred or levied upon. While the right of enjoyment may be uncertain and contingent, it is necessary that an interest or title of some kind be vested in the bankrupt, in order that it may pass by operation of law to the trustee." *In re Wetmore*, (C. C. A. 1901) 108 Fed. 520.

## II. NATURE OF TRUSTEE'S TITLE.

Section 70 is to be construed with section 47a (2) as amended by the Act of June 25, 1910, which vests the trustee with the rights of a creditor holding a lien. *In re Hammond*, (N. D. Ohio 1911) 188 Fed. 1020.

**Trustee takes bankrupt's title.**—Section 70a vests the trustee, by operation of law, with such title as the bankrupt had prior to his adjudication; and, in the absence of fraud, the trustee takes

no better title. So, also, it has been uniformly held that, with respect to the character of his title, the trustee occupies the same relation to creditors that the bankrupt sustained prior to the inception of the proceedings. *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986, 11 Am. Bankr. Rep. 709; *York Mfg. Co. v. Cassell*, (1906) 201 U. S. 344, 26 S. Ct. 481, 50 U. S. (L. ed.) 782; *Zartman v. Waterloo First Nat. Bank*, (1910) 216 U. S. 134, 30 S. Ct. 368, 54 U. S. (L. ed.) 418; *In re Adams*, (D. C. Conn. 1905) 134 Fed. 142, 14 Am. Bankr. Rep. 23; *In re Grissler*, (C. C. A. 2d Cir. 1905) 136 Fed. 754, 13 Am. Bankr. Rep. 508; *In re Chavez*, (C. C. A. 8th Cir. 1906) 149 Fed. 73, 17 Am. Bankr. Rep. 641; *In re Blake*, (C. C. A. 8th Cir. 1906) 150 Fed. 279, 17 Am. Bankr. Rep. 668; *In re Franklin*, (E. D. N. C. 1907) 151 Fed. 642, 18 Am. Bankr. Rep. 218; *In re Chantler Cloak, etc., Co.*, (D. C. R. I. 1907) 151 Fed. 952, 18 Am. Bankr. Rep. 498; *In re Great Western Mfg. Co.*, (C. C. A. 8th Cir. 1907) 152 Fed. 123, 18 Am. Bankr. Rep. 259; *Dunlop v. Mercer*, (C. C. A. 8th Cir. 1907) 156 Fed. 545, 19 Am. Bankr. Rep. 361; *In re Shiehler*, (E. D. N. Y. 1908) 163 Fed. 545; *In re Cincinnati Iron Store Co.*, (6th Cir. 1909) 167 Fed. 486, 488, 93 C. C. A. 122; *Walter A. Wood Co. v. Eubanks*, (C. C. A. 4th Cir. 1909) 169 Fed. 929, 22 Am. Bankr. Rep. 307; *Walter A. Wood Mowing, etc., Mach. Co. v. Vanstony*, (C. C. A. 4th Cir. 1909) 171 Fed. 375, 22 Am. Bankr. Rep. 740; *In re Meadows*, (W. D. N. Y. 1909) 173 Fed. 694, 23 Am. Bankr. Rep. 124; *In re National Grocer Co.*, (C. C. A. 6th Cir. 1910) 181 Fed. 33; *In re L. M. Alleman Hardware Co.*, (C. C. A. 3d Cir. 1910) 181 Fed. 810; *Hobbs v. Frazier*, (Fla. 1908) 22 Am. Bankr. Rep. 684; *Crowe v. Baumann*, (N. D. N. Y. 1911) 190 Fed. 399; *Lovell v. Newman*, (C. C. A. 5th Cir. 1912) 192 Fed. 753; *In re Interstate Paving Co.*, (N. D. N. Y. 1912) 197 Fed. 371; *In re McConnell*, (N. D. N. Y. 1912) 197 Fed. 438; *In re National Boat & Engine Co.*, (D. C. Me. 1912) 198 Fed. 407; *In re T. C. Burnett & Co.*, (E. D. Tenn. 1912) 201 Fed. 162; *In re Snelling*, (D. C. Mass. 1912) 202 Fed. 259; *In re Thompson*, (D. C. N. J. 1913) 205 Fed. 556; *Massachusetts Bonding, etc., Co. v. Kemper*, (C. C. A. 6th Cir. 1915) 220 Fed. 847; *Chicago Title & Trust Co. v. National Storage Co.*, (1913) 260 Ill. 485, 103 N. E. 227.

Thus it has been held that the trustee in bankruptcy stands in the shoes of the bankrupt. *In re English*, (C. C. A. 2d Cir. 1904) 127 Fed. 940, 11 Am. Bankr. Rep. 674; *In re Blake*, (C. C. A. 8th Cir. 1906) 150 Fed. 279, 17 Am. Bankr. Rep. 668.

The statute does not undertake to vest the bankrupt with title to property to

which he had no title prior to his adjudication, but only relates to property the title to which he had acquired to such an extent as to render the same liable to seizure and sale under execution for his debts; thus the statute does not cover property which the bankrupt held as bailee only, although he may have had an option to purchase any part of the same at any time. *Walter A. Wood Mowing, etc., Mach. Co. v. Vanstory*, (C. C. A. 4th Cir. 1909) 171 Fed. 375, 22 Am. Bankr. Rep. 740.

*Third persons holding adversely to bankrupt.*—The statute does not cover property the title to which has vested, *bona fide*, in third parties prior to the institution of the bankruptcy proceedings. *In re Ozark Cooperage, etc., Co.*, (C. C. A. 3th Cir. 1910) 180 Fed. 105.

Section 70, by operation of law, vests title of the bankrupt in the trustee in bankruptcy, but does not purport to divest the title or right of possession of third persons holding adversely to the bankrupt. In other words, adjudication in bankruptcy will not operate automatically as a judgment in ejectment, ousting adverse claimants from the possession of land. The federal Bankruptcy Laws supersede the state Insolvency Law in regard to the administration of insolvent estates. But this refers particularly to the estate of the insolvent and has no application to rights of others holding adversely to the insolvent. *Harris v. Luxury Fruit Co.*, (1914) 142 Ga. 87, 82 S. E. 447.

A title or lien acquired by an assignee under a general assignment, valid according to the law of the state where it is made, that is to the advantage of the estate when it has subsequently passed into bankruptcy, is not necessarily destroyed by the suppression of the assignment proceeding; but upon the order of the court of bankruptcy it may be retained by the trustee for the benefit of the creditors. *In re Fish Bros. Wagon Co.*, (C. C. A. 8th Cir. 1908) 164 Fed. 553, 21 Am. Bankr. Rep. 149. And see to the same effect *In re H. G. Andrae Co.*, (E. D. Wis. 1902) 117 Fed. 561.

The provisions of section 70 are in themselves sufficient to vest the trustee in bankruptcy, when appointed, with the title to property of the bankrupt held by an assignee under a general assignment for the benefit of creditors, executed prior to proceedings in bankruptcy, if an adjudication subsequently follows within the statutory period of four months. *In re Gutwillig*, (S. D. N. Y. 1898) 90 Fed. 475; *Davis v. Bohle*, (C. C. A. 8th Cir. 1899) 92 Fed. 325; *Davis v. Coe*, (1899) 10 Ohio Cir. Dec. 264.

And a sale of property by an assignee for the benefit of creditors vests the purchaser with no title as against the trustee in bankruptcy of the assignor, subse-

quently appointed on an adjudication based on the assignment, where such purchaser has made no payment for the property. *In re Knight*, (W. D. Ky. 1903) 125 Fed. 35, 11 Am. Bankr. Rep. 6.

*Title as against state receiver.*—The trustee takes title as against a receiver, appointed by a state court, who fails to comply with the requirements of the state law as to the filing of his order of appointment. *In re Tyler*, (W. D. N. Y. 1900) 104 Fed. 778, 5 Am. Bankr. Rep. 152.

So, also, it has been held that the title to the property of a bankrupt in possession of a state court receiver, appointed within the four months' period, passes to and becomes vested in the trustee in bankruptcy, by operation of law, as of the date of the adjudication; and the rights of the trustee will be enforced by the Bankruptcy Court, if not recognized by the receiver. *In re Hecox*, (C. C. A. 8th Cir. 1908) 21 Am. Bankr. Rep. 314.

*Title subject to existing equities.*—Speaking before the amendment in 1910 of section 47a (2), the federal Supreme Court said: "It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided in the Bankrupt Act, is subject to all of the equities impressed upon it in the hands of the bankrupt. This has been the rule under former acts and is now the rule." *Security Warehousing Co. v. Hand*, (1907) 206 U. S. 415, 27 S. Ct. 720, 51 U. S. (L. ed.) 1117, 11 Ann. Cas. 789, *per Mr. Justice Peckham* citing to that point and discussing each of the following cases: *Thompson v. Fairbanks*, (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577; *Humphrey v. Tatman*, (1905) 198 U. S. 91, 25 S. Ct. 567, 49 U. S. (L. ed.) 956; *York Mfg. Co. v. Cassell*, (1906) 201 U. S. 344, 26 S. Ct. 481, 50 U. S. (L. ed.) 782. To the same point see *Bryant v. Swofford Bros. Dry Goods Co.*, (1909) 214 U. S. 279, 29 S. Ct. 614, 53 U. S. (L. ed.) 997; *Zartman v. Waterloo First Nat. Bank*, (1910) 216 U. S. 134, 30 S. Ct. 368, 54 U. S. (L. ed.) 418; *Sexton v. Kessler*, (1912) 225 U. S. 90, 32 S. Ct. 657, 56 U. S. (L. ed.) 995; *In re McConnell*, (N. D. N. Y. 1912) 197 Fed. 438; *In re Fish Bros. Wagon Co.*, (1908) 164 Fed. 553, 90 C. C. A. 427, 26 L. R. A. (N. S.) 433; *Consolidated Arizona Smelting Co. v. Hinchman*, (C. C. A. 1st Cir. 1914) 212 Fed. 813; *In re National Grocer Co.*, (1910) 181 Fed. 33, 104 C. C. A. 47, 30 L. R. A. (N. S.) 982; *Goodnough Mercantile, etc., Co. v. Galloway*, (D. C. Ore. 1909) 171 Fed. 940, 22 Am. Bankr. Rep. 803; *In re Macdougall*, (N. D. N. Y. 1909) 175 Fed. 400, 23 Am. Bankr. Rep. 762; *In re Peacock*, (E. D. N. C. 1910) 178 Fed. 851; *Crosby v. Miller*, (D. C. 1906) 16 Am. Bankr. Rep. 865; *Lytle v. National Surety Co.*, (1915)

43 App. Cas. (D. C.) 136; *In re Garcewich*, (C. C. A. 1902) 115 Fed. 89; *Chattanooga Nat. Bank v. Rome Iron Co.*, (1900) 102 Fed. 755. To the same effect see *In re New York Economical Printing Co.*, (C. C. A. 1901) 110 Fed. 514; *In re Kellogg*, (1901) 112 Fed. 52; *Hawk v. Hawk*, (1900) 102 Fed. 679; *In re Standard Laundry Co.*, (1901) 112 Fed. 126; *In re Hanna*, (1900) 105 Fed. 587; *Hauselt v. Harrison*, (1881) 105 U. S. 401, 26 U. S. (L. ed.) 1075; *Cook v. Tullis*, (1873) 18 Wall. 332, 21 U. S. (L. ed.) 933; *Stewart v. Platt*, (1879) 101 U. S. 731, 25 U. S. (L. ed.) 816; *South Branch Lumber Co. v. Ott*, (1891) 142 U. S. 622, 12 S. Ct. 318, 35 U. S. (L. ed.) 1136; *Bailey v. Wood*, (1912) 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A 950; *Valley v. Grafton First Nat. Bank*, (1906) 14 N. D. 580, 106 N. W. 127, 116 A. S. R. 700, 5 L. R. A. (N. S.) 387; *Claridge v. Evans*, (1908) 137 Wis. 218, 118 N. W. 198, 803, 25 L. R. A. (N. S.) 144; *Eastman v. Parkinson*, (1907) 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921.

"It is no doubt true, speaking generally, that, under section 70a [5], Bankruptcy Act, the trustee takes no better title to the property than the bankrupt himself possessed; but there are exceptions to this statement, as plainly appears from other provisions of the Act. Under certain circumstances the trustee is the representative of the creditors, rather than of the bankrupt, in relation to the property of the estate, and he may unquestionably exercise rights and enforce a title that the bankrupt himself could neither enforce nor exercise. For example, with regard to property that the bankrupt has fraudulently transferred, the trustee may undoubtedly recover it for the estate, although it is also undoubted that the bankrupt himself could not undo his own fraudulent transaction." *Spencer v. Duplan Silk Co.*, (1902) 112 Fed. 638, *reversed*, but not on this point in *Duplan Silk Co. v. Spencer*, (C. C. A. (1902) 115 Fed. 689. And see now section 47a (2) as amended in 1910.

"The trustee takes with the equities in the bankrupt's favor as well as with the equities against him." *Consolidated Arizona Smelting Co. v. Hinchman*, (C. C. A. 1st Cir. 1914) 212 Fed. 813, 826, holding that a purchaser from the bankrupt assumes no obligation which could not be enforced against the bankrupt.

**Equitable assignment.**—Thus if there has been an equitable assignment of part of a fund by a bankrupt, valid as between him and the assignee, the trustee in bankruptcy takes the fund subject to the assignment, even if for reasons of public policy it could not have been enforced against the holder of the fund. *In re Hanna*, (E. D. Pa. 1900) 105 Fed. 587, 5 Am. Bankr. Rep. 127.

**Where bankrupt had not paid purchase price.**—The trustee of a bankrupt has no equitable standing to enjoin the removal, from a building, of a steam engine which the bankrupt had not paid for, nor acquired the legal title to, without an offer to pay to the owner the unpaid purchase price. *In re Smith*, (D. C. R. I. 1903) 119 Fed. 1004, 9 Am. Bankr. Rep. 590. See also *In re Manuel J. Portuondo Co.*, (E. D. Pa. 1905) 135 Fed. 592.

**The validity of such rights, claims, and equities of third persons**, as are impressed upon the estate of the bankrupt while in his hands, and which his trustee must take with the property, must, in the absence of federal regulation therefor, be determined by the local law. *In re Wade*, (W. D. Mo. 1911) 185 Fed. 664. See also *Godwin v. Murchison Nat. Bank*, (1907) 22 Am. Bankr. Rep. 703, 145 N. C. 320, 59 S. E. 154.

**Valid liens and incumbrances.**—It is well settled that the trustee in bankruptcy takes title to the assets of the estate subject to all such liens, claims, and incumbrances thereon as are valid as against the creditors whom he represents. *Hewitt v. Berlin Mach. Works*, (1904) 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986, 11 Am. Bankr. Rep. 709; *Zartman v. Waterloo First Nat. Bank*, (1910) 216 U. S. 134, 30 S. Ct. 368; *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *Chattanooga Nat. Bank v. Rome Iron Co.*, (N. D. Ga. 1900) 102 Fed. 755, 4 Am. Bankr. Rep. 441; *In re Moore*, (D. C. Vt. 1901) 107 Fed. 234, 6 Am. Bankr. Rep. 175; *In re Standard Laundry Co.*, (N. D. Cal. 1901) 112 Fed. 126, 7 Am. Bankr. Rep. 254; *Virginia Iron, etc., Co. v. Staake*, (C. C. A. 4th Cir. 1904) 133 Fed. 717, 13 Am. Bankr. Rep. 281; *In re Kolin*, (C. C. A. 7th Cir. 1905) 134 Fed. 557, 13 Am. Bankr. Rep. 531; *In re Mertens*, (C. C. A. 2d Cir. 1906) 144 Fed. 818, 16 Am. Bankr. Rep. 825; *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *In re Platteville Foundry, etc., Co.*, (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291; *In re Columbia Fireproof Door, etc., Co.*, (E. D. N. Y. 1909) 168 Fed. 159, 21 Am. Bankr. Rep. 714; *In re Beachy*, (E. D. Wis. 1909) 170 Fed. 825, 22 Am. Bankr. Rep. 538; *Continental Nat. Bank v. Katz*, (Ill.) 1 Am. Bankr. Rep. 19; *Crosby v. Miller*, (D. C. 1906) 16 Am. Bankr. Rep. 805; *Godwin v. Murchison Nat. Bank*, (1907) 22 Am. Bankr. Rep. 703, 145 N. C. 320, 59 S. E. 154; *Title Guaranty & Surety Co. v. Witmire*, (C. C. A. 6th Cir. 1912) 195 Fed. 41; *Rode & Horn v. Phipps*, (C. C. A. 6th Cir. 1912) 195 Fed. 414.

Thus it has been held that where the claimant sold tobacco to a bankrupt, receiving the bankrupt's notes as a conditional payment, and the claimant retained possession of the tobacco in question until

after the bankrupt's adjudication, and until the notes matured and were unpaid, the title to the property so retained did not pass to the bankrupt's trustee except subject to the claimant's existing lien for the unpaid portion of the price. *In re* Manuel J. Portuondo Co., (E. D. Pa. 1905) 135 Fed. 592. See also *In re* Smith, (D. C. R. I. 1903) 119 Fed. 1004, 9 Am. Bankr. Rep. 590.

And though the claimant waived his right to a vendor's lien by extending credit to the bankrupt, it was held that such lien was immediately revived, on the bankrupt's becoming insolvent, as to so much of the tobacco as remained in the claimant's possession. *In re* Manuel J. Portuondo Co., (E. D. Pa. 1905) 135 Fed. 592.

The trustee is in no sense a bona fide purchaser for value, nor entitled to protection as such. *Zartman v. Waterloo First Nat. Bank*, (1910) 216 U. S. 134, 30 S. Ct. 368, 23 Am. Bankr. Rep. 635, affirming (1907) 189 N. Y. 267, 82 N. E. 127; *Allen v. Hollander*, (C. C. Mass. 1904) 128 Fed. 159, 11 Am. Bankr. Rep. 753; *Palmer v. Welch*, (1913) 171 Mo. App. 580, 154 S. W. 433.

Thus it has been held that the trustee of a bankrupt corporation, which took title to property expressly subject to certain chattel mortgages, cannot attack the validity of such mortgages on the ground that they were not recorded in a county where one of the original mortgagors resided, as required by the state statute; his rights being measured by those of the bankrupt. *In re* Columbia Fireproof Door, etc., Co., (E. D. N. Y. 1909) 168 Fed. 159, 21 Am. Bankr. Rep. 714.

But a trustee in bankruptcy is entitled to possession of all of the bankrupt's property, and to administer the same, although it may be subject to liens or in possession of a state court in proceedings to enforce a lien instituted within four months prior to the bankruptcy. *In re* Kaplan, (N. D. Ga. 1905) 144 Fed. 159, 16 Am. Bankr. Rep. 267, explaining *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122.

**Trustee vested with rights of creditor.**—Since the enactment of the amendment of 1910, trustees as to all property in the custody or coming into the custody of the Bankruptcy Court are vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the Bankruptcy Court, are vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. See section 47a (2).

**Liens invalid as to creditors.**—But the rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors.

*Baltimore First Nat. Bank v. Staake*, (1906) 202 U. S. 141, 26 S. Ct. 580, 50 U. S. (L. ed.) 967, 15 Am. Bankr. Rep. 639; *In re* Rudnick, (D. C. Wash. 1900) 102 Fed. 750, 4 Am. Bankr. Rep. 531; *In re* Cramond, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *Fourth St. Nat. Bank v. Millbourne Mills Co.*, (C. C. A. 3d Cir. 1909) 172 Fed. 177, 22 Am. Bankr. Rep. 442. See also the annotation under sections 60b, 67e, and 70e.

Unlike an assignee for the benefit of creditors, who has no rights beyond those of his assignor, by whose voluntary act the assignment was made, a trustee in bankruptcy takes title by operation of law entirely independent of the bankrupt, and is expressly invested with the rights of creditors, and with authority to avoid any transfer by the bankrupt of his property which any creditor might have avoided. *Fourth St. Nat. Bank v. Millbourne Mills Co.*, (C. C. A. 3d Cir. 1909) 172 Fed. 177, 22 Am. Bankr. Rep. 442; *Swager v. Smith*, (C. C. A. 4th Cir. 1912) 194 Fed. 762.

If for any reason the bankruptcy proceeding is absolutely void, the trustee will be a mere custodian or bailee of property in his hands belonging to the bankrupt, and will hold it subject to the direction of the court. *Adams v. Haskell*, (1856) 6 Cal. 113, 65 Am. Dec. 491.

### III. TIME WHEN TITLE PASSES.

#### Effect of commencement of proceedings

—*Generally.*—In *Everett v. Judson*, (1913) 228 U. S. 474, 33 S. Ct. 568, 57 U. S. (L. ed.) 927, 46 L. R. A. (N. S.) 154, the court said: "While it is true that section 70a provides that the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, there are other provisions of the statute which, we think, evidence the intention to vest in the trustee the title to such property as it was at the time of the filing of the petition. This subject was considered in *Acme Harvester Co. v. Beekman Lumber Co.*, (1911) 222 U. S. 300, wherein it was held that, pending the bankrupt proceedings and after the filing of the petition, no creditor could obtain by attachment a lien upon the property which would defeat the general purpose of the law to dedicate the property to all creditors alike. Section 70a vests all the property in the trustee, which, prior to the filing of the petition, the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process against him. The bankrupt's discharge is from all provable debts and claims which existed on the day on which the petition for adjudication was filed. *Zavelo v. Reeves*, (1913) 227 U. S. 625,



630, 631. The schedule that the bankrupt is required to file, showing the location and value of his property, must be filed with his petition. We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition." See also cases cited *infra*, p. 1158, division IV of this note.

In *Acme Harvester Co. v. Beekman Lumber Co.*, (1911) 222 U. S. 300, 32 S. Ct. 96, 56 U. S. (L. ed.) 208, commented on in the above quotation, the court said: "Whatever may be the limitations of the doctrine declared by this court, speaking by the late Chief Justice Fuller in *Mueller v. Nugent*, (1902) 184 U. S. 1, 14, where it is said: 'It is as true of the present law (1898) as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction, *International Bank v. Sherman*, (1879) 101 U. S. 403; and on adjudication, title to the bankrupt's property became vested in the trustee, sections 70, 21e, with actual or constructive possession, and placed in the custody of the Bankruptcy Court,' it is none the less certain that an attachment of the bankrupt's property after the filing of the petition and before adjudication cannot operate to remove the bankrupt's estate from the jurisdiction of the Bankruptcy Court for the purpose of administration under the Act of Congress. It is the purpose of the Bankruptcy Law, passed in pursuance of the power of Congress to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the Bankruptcy Court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition. It is true that under section 70a of the Act of 1898 the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt, but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings."

In *Shawnee County v. Hurley*, (C. C. A. 8th Cir. 1909) 169 Fed. 92, 22 Am. Bankr. Rep. 209, it was said that on the

day of the filing of the petition in bankruptcy the property of the bankrupt passes from his control to the court or to its officers, and thence to the trustee in trust for the creditors of the bankrupt in proportion to the amounts of their claims at that time. On that date there vests in each creditor, as a *cestui que trust*, an equitable estate in such a part of the property of the bankrupt as the amount of his provable claim at that time bears to the entire amount of the provable claims against the estate. On that date the Bankruptcy Law deprives the creditor of all his common-law remedies to collect his debt out of the property of his debtor and to collect subsequent interest on his claim against that property, and gives him in lieu thereof this equitable estate in the property of the bankrupt. Thus the filing of a petition upon which a subsequent adjudication of bankruptcy is rendered places all the property of the bankrupt "which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him" *in custodia legis*. From that hour the bankrupt is divested of the power to appropriate it to the payment of his debts or to use and dispose of it at will, and that authority is vested in the District Court. Every suit against him upon a provable claim may be stayed from the date of the filing of the petition (see section 11a). Every person is forbidden to receive from the bankrupt any material amount of property after that date with intent to defeat the Act (see section 29b). Every intentional preference after that date is voidable (see section 60b). Upon the filing of the petition the court may take immediate possession of the property if the bankrupt is neglecting it so that it is deteriorating in value (see section 69a). And upon the appointment of the trustee all the property of the bankrupt which, prior to the filing of the petition, he could have transferred, or which could have been seized or sold under judicial process against him, passes to this officer of the court (see section 70a (5)). Indeed, the condition at the time of the filing of the petition measures the extent of the estate and the rights of all creditors of the bankrupt, and all parties interested in the property, throughout all the provisions of the law. To the same effect see *Kopplin v. Ludwig*, (Tex. 1914) 170 S. W. 105.

It is the established doctrine that bankruptcy proceedings are *in rem*, and when commenced all of the property then held by the bankrupt or for his use (aside from exemptions) is subjected to the jurisdiction of the Bankruptcy Court, and that, when bankruptcy is adjudicated, the sequestration reaches all such property at least, and becomes operative from the institution of proceedings, as "a caveat

to all the world," preventing interference by attachments or other means in derogation of the interests of the estate. While title rests in the bankrupt up to adjudication, and in form until a trustee qualifies, it is subject to the pending sequestration, and no rights can be acquired thereunder which are not equally amenable. *Chicago State Bank v. Cox*, (C. C. A. 7th Cir. 1906) 143 Fed. 91, 16 Am. Bankr. Rep. 32. See also *In re Duncan*, (D. C. S. C. 1906) 148 Fed. 464.

The commencement of bankruptcy proceedings marks the division of the bankrupt's old financial condition and his new financial condition. The alleged bankrupt is supposed to give up everything and to be freed of his debts, and it is not in the spirit of the Bankruptcy Law to allow him, subsequent to the commencement of bankruptcy proceedings, to change his *status* so as to claim any greater rights out of the property than he possessed at the time the proceedings were commenced. *Matter of Fletcher*, (N. D. Ohio 1906) 16 Am. Bankr. Rep. 491.

Where a bankrupt was designated as beneficiary in a policy on the life of his mother, which directed that it should be paid to the beneficiary of the insured last designated on the back of the policy, if living, and the insured died four days after the filing of the bankruptcy petition, leaving the bankrupt as a designated beneficiary, it was held that his interest in the policy was one which he could have transferred under the state law, and therefore it vested in the trustee in bankruptcy of the beneficiary. *In re Hogan*, (W. D. Wis. 1911) 186 Fed. 537.

Although property fraudulently conveyed before the passage of the Bankruptcy Act, by a debtor who was subsequently adjudged bankrupt, was beyond the reach of the court of bankruptcy, yet if the title to the same had reverted in the bankrupt, and was in him at the time of the filing of the petition, it was a part of his estate to be administered in bankruptcy. *In re Brown*, (D. C. Ore. 1898) 91 Fed. 358.

**Removal of property enjoined.**—Where property, claimed to belong to one against whom an involuntary petition in bankruptcy is filed, is also claimed by a third person, who is about to remove it, the court, on petition of the creditors, will restrain such third person from removing such property or making any change therein. *In re Smith*, (N. D. Ga. 1902) 113 Fed. 993, 8 Am. Bankr. Rep. 55. See also the annotation to this effect, under section 2 (3), section 11a, section 23b, and section 69.

But see *In re Laplume Condensed Milk Co.*, (M. D. Pa. 1906) 145 Fed. 1013, 16 Am. Bankr. Rep. 729, wherein it was said that bankruptcy proceedings undoubtedly put the property within the control of the court, if it sees fit to exer-

cise the power; but pending and prior to an adjudication, it is still the bankrupt's, title only vesting in the trustee, as of that date, after an adjudication has been obtained. Subject then to the right of the trustee to avoid it as a preference, an honest disposition of his property by the bankrupt, even after proceedings have been instituted, therefore stands.

**Property in custodia legis.**—It seems to be generally conceded that from the time of the filing of the petition in bankruptcy the estate of the alleged bankrupt is *in custodia legis*. *Chicago State Bank v. Cox*, (C. C. A. 7th Cir. 1906) 143 Fed. 91, 16 Am. Bankr. Rep. 32; *In re Laplume Condensed Milk Co.*, (M. D. Pa. 1906) 145 Fed. 1013, 16 Am. Bankr. Rep. 729; *In re Duncan*, (D. C. S. C. 1906) 148 Fed. 464; *Shawnee County v. Hurley*, (C. C. A. 8th Cir. 1909) 169 Fed. 92, 22 Am. Bankr. Rep. 209; *In re Frazin*, (S. D. N. Y. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289; *In re Abrahamson*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 44; *Rand v. Sage*, (1905) 94 Minn. 344, 102 N. W. 864.

On the filing of a petition in bankruptcy all property held by or for the bankrupt is brought within the custody of the court of bankruptcy, and upon adjudication that court is vested with jurisdiction thereover coextensive with the United States. *Thomas v. Woods*, (C. C. A. 8th Cir. 1909) 173 Fed. 585, 23 Am. Bankr. Rep. 132, decree vacated (8th Cir. 1910) 178 Fed. 1005, 101 C. C. A. 664.

No other court, and no person acting under process, can, without permission of the Bankruptcy Court, interfere with the property of the bankrupt's estate. *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *In re Schloerb*, (E. D. Wis. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 224; *In re Dobert*, (W. D. Tex. 1908) 165 Fed. 749, 21 Am. Bankr. Rep. 634. See also *Carter v. Hobbs*, (1899) 92 Fed. 595.

**Effect of want of notice.**—Where a bank paid checks drawn by a depositor, in ignorance of the filing late the day before of an involuntary petition in bankruptcy against the depositor, and the receiver, who qualified on the day of the payment of the checks, made no demand for the depositor's funds until after the checks were honored, it was held that the trustee, subsequently elected, could not recover from the bank the amount paid on the checks. *In re Zotti*, (C. C. A. 2d Cir. 1911) 186 Fed. 84, wherein it was said that the rule that the filing of a petition is a caveat to all the world cannot be applied to a bank which has honestly paid checks of a depositor without notice that any petition in bankruptcy has been filed against him and who may never be adjudicated a bankrupt at all. On the other hand, it would apply if the bank had refused to pay moneys which

it had received prior to the filing of the petition and still had, or moneys which it had conclusively transferred.

**Effect of adjudication.**—It has been frequently decided that the title to the bankrupt's property formally passes to his trustee by operation of law as of the date of the adjudication. *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 S. Ct. 67, 47 U. S. (L. ed.) 122, 9 Am. Bankr. Rep. 36; *Babbitt v. Dutcher*, (1910) 216 U. S. 102, 30 S. Ct. 372; *In re Schloerb*, (E. D. Wis. 1899) 97 Fed. 326, 3 Am. Bankr. Rep. 224; *In re Goldman*, (S. D. N. Y. 1900) 102 Fed. 122, 4 Am. Bankr. Rep. 100; *In re Corbett*, (E. D. Wis. 1900) 104 Fed. 872, 5 Am. Bankr. Rep. 224; *In re Burka*, (1900) 104 Fed. 326; *In re Engle*, (E. D. Pa. 1901) 105 Fed. 893, 5 Am. Bankr. Rep. 372; *In re Kellogg*, (W. D. N. Y. 1902) 113 Fed. 120, 7 Am. Bankr. Rep. 623; *Chicago State Bank v. Cox*, (C. C. A. 7th Cir. 1906) 143 Fed. 91, 18 Am. Bankr. Rep. 32; *In re Youngstrom*, (C. C. A. 8th Cir. 1907) 153 Fed. 98, 18 Am. Bankr. Rep. 572; *In re Letson*, (C. C. A. 8th Cir. 1907) 157 Fed. 78, 19 Am. Bankr. Rep. 506; *In re Frazin*, (S. D. N. Y. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289; *In re Nisenson*, (D. C. N. J. 1910) 182 Fed. 912; *In re Hurley*, (D. C. Mass. 1910) 185 Fed. 851; *In re Zotti*, (C. C. A. 2d Cir. 1911) 186 Fed. 84; *Crosby v. Spear*, (1904) 11 Am. Bankr. Rep. 613, 98 Me. 542, 57 Atl. 881; *In re Federal Contracting Co.*, (C. C. A. 7th Cir. 1914) 212 Fed. 688.

A trustee is vested with title to the bankrupt's property as of the date of the adjudication; such title relates back to the commencement of the proceedings, and as between courts of different districts, in each of which a petition has been filed, and either of which would have jurisdiction, priority of jurisdiction is determined by the date of the filing of the petitions, and not by the date of adjudication. *In re Elmira Steel Co.*, (N. D. N. Y. 1901) 109 Fed. 456, 5 Am. Bankr. Rep. 484.

An adjudication in bankruptcy operates *in rem*, and from the time it is entered the bankrupt's property is in the custody of the court. *In re Hughes*, (D. C. N. J. 1909) 170 Fed. 809, 22 Am. Bankr. Rep. 303.

In the case of *In re Printograph Sales Co.*, (E. D. Pa. 1914) 210 Fed. 567, it appeared that distraint was made by a landlord for rent after adjudication. The court held that the property having passed into the custody of the law prior to the levy under the landlord's warrant, the landlord could take nothing by virtue of the seizure.

An adjudication in bankruptcy operates as a seizure of the bankrupt's property, by which it is taken *in custodia legis* wherever situated within the United States, and the title and right of posses-

sion pass by operation of law to the trustee, as custodian for the court, at once on his selection and qualification. *In re Granite City Bank*, (C. C. A. 8th Cir. 1905) 137 Fed. 818, 14 Am. Bankr. Rep. 404. And see to the same effect *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129; *French v. White*, (1905) 18 Am. Bankr. Rep. 905, 78 Vt. 89, 6 Ann. Cas. 479, 62 Atl. 35.

Where the bankrupt's mother died, intestate, at six o'clock in the morning of the day on which, at eleven o'clock, the petition in bankruptcy was filed and an adjudication entered, it was held that the bankrupt's interest in his mother's estate passed to his trustee. *In re Stoner*, (E. D. Pa. 1901) 105 Fed. 752, 5 Am. Bankr. Rep. 402. And see to the same effect *In re McKenna*, (N. D. N. Y. 1905) 137 Fed. 611, 15 Am. Bankr. Rep. 4.

From a bankrupt's adjudication until the appointment of a trustee the bankrupt is not to be regarded as civilly dead. *Plant v. Gorham Mfg. Co.*, (S. D. N. Y. 1909) 174 Fed. 852, 23 Am. Bankr. Rep. 42.

**Property acquired subsequent to adjudication.**—The bankrupt's creditors have no interest in, or claim to, property acquired by the bankrupt after his adjudication; therefore, the title to such property does not vest in the trustee. *In re McDonnell*, (N. D. Ia. 1900) 101 Fed. 239, 4 Am. Bankr. Rep. 92; *In re Le Claire*, (N. D. Ia. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733; *In re Lineberry*, (N. D. Ala. 1910) 183 Fed. 338; *In re Rennie*, (S. D. Ind. Ter.) 2 Am. Bankr. Rep. 182; *Matter of Fletcher*, (N. D. Ohio 1906) 16 Am. Bankr. Rep. 491; *In re Parish*, (N. D. Ia. 1903) 122 Fed. 553; *In re Home Discount Co.*, (N. D. Ala. 1906) 147 Fed. 538; *Mosby v. Steele*, (1845) 7 Ala. 299.

Thus a liquor license, granted to a person after he has been adjudicated a bankrupt, belongs to him personally, and not to his estate in bankruptcy; and the receiver has no right to sell such a license as an asset of the bankrupt's estate. *Whitlock's License*, (1909) 22 Am. Bankr. Rep. 262, 39 Pa. Super. Ct. 34.

Crops planted by a bankrupt after the adjudication cannot be subjected to his debts. *Jackson v. Jetter*, (Ia. 1913) 142 N. W. 431.

And where a bankrupt, subsequent to the filing of an involuntary petition and an adjudication thereon, fell heir to a certain interest in an estate, it was held that he was entitled to the benefit of such bequest in full, so far as his general creditors were concerned. *In re Woods*, (D. C. Pa. 1904) 133 Fed. 82, 13 Am. Bankr. Rep. 240.

The portion of the monthly salary of a public officer of a state which was earned, but not payable, at the time of his filing a petition in bankruptcy, does not pass to his trustee. *In re Doherty*, (D. C.

Conn. 1904) 135 Fed. 432, 13 Am. Bankr. Rep. 549.

The bankrupt's earnings, after the adjudication in bankruptcy, belong to him. *In re Karns*, (S. D. Ohio 1905) 148 Fed. 143; *Progressive Building, etc., Co. v. Hall*, (C. C. A. 4th Cir. 1914) 220 Fed. 45.

In the case of *In re Ghazal*, (C. C. A. 2d Cir. 1909) 174 Fed. 809, 23 Am. Bankr. Rep. 178, it was held that since, under R. S. sec. 3477 (in title CLAIMS), prohibiting the assignment of claims against the United States prior to allowance and ascertainment of the amount due, a bankrupt could not have assigned an expectancy of reward for information concerning smugglers prior to the allowance of the reward by the Secretary of the Treasury, which did not occur until after the bankruptcy adjudication, the reward subsequently awarded passed to the bankrupt, and not to his trustee for the benefit of creditors. But see *National Bank of Commerce v. Downie*, (1910) 218 U. S. 345, 31 S. Ct. 89, 54 U. S. (L. ed.) 1065, 20 Ann. Cas. 1116, holding that a bankrupt's unallowed claims against the United States passed to the trustee, despite the bankrupt's attempted transfer thereof in violation of the statute.

**Necessity of appointment of trustee.**—It has been held that an adjudication of bankruptcy divests the owner of property of the title thereto, which thereupon becomes *in custodia legis*, and on the appointment of a trustee his title relates back to the date of the adjudication. *In re Frazin*, (S. D. N. Y. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289. And see to the same effect *In re Letson*, (C. C. A. 8th Cir. 1907) 157 Fed. 78, 19 Am. Bankr. Rep. 506; *In re Lineberry*, (N. D. Ala. 1910) 183 Fed. 338. And see cases cited *supra*, p. 1154, at the head of this division III.

On the other hand it has also been held that the appointment of a trustee is essential to divest the bankrupt of the title to his property. *Rand v. Iowa Cent. R. Co.*, (1906) 16 Am. Bankr. Rep. 692, 186 N. Y. 58, 9 Ann. Cas. 542, 78 N. E. 574, *reversing* (1904) 12 Am. Bankr. Rep. 162; *Gordon v. Mechanics', etc., Ins. Co.*, (1907) 120 La. 441, 14 Ann. Cas. 886, 45 So. 384. See also cases cited in division IV of this note.

And it is certain that, until a trustee has been appointed, there is no legal representative of the bankrupt's estate clothed with title or authority regarding it. *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566.

But in this connection it must be borne in mind that, the property being *in custodia legis*, it is under the authority of the Bankruptcy Court; and that a receiver or the marshal may, under sections 2 (3), 3e, and 69, be appointed to take possession of it when the facts warrant such action. See the annotation under the sections referred to.

#### IV. CONDITION OF TITLE AFTER PETITION FILED, BUT BEFORE APPOINTMENT OF TRUSTEE.

**Defeasible title in bankrupt.**—In *Johnson v. Collier*, (1912) 222 U. S. 538, 32 S. Ct. 104, 56 U. S. (L. ed.) 306, holding that a voluntary bankrupt had the right, before a trustee was appointed, to bring an action for damages against a sheriff for an unlawful sale of certain property included in the bankrupt's schedule of assets after he had filed a claim of exemption, the court said: "There is a conflict in the conclusions reached in the few cases dealing with this question. . . . While for many purposes the filing of the petition operates in the nature of an attachment upon choses in action and other property of the bankrupt, yet his title is not thereby divested. He is still the owner, though holding in trust until the appointment and qualification of the trustee. . . . Until such election the bankrupt has title — defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so. There must always some time lapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court, in his own name, the one previously brought can be abated. If, however, he is of opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt, and avail himself of rights and priorities thereby acquired. *Thatcher v. Rockwell*, (1881) 105 U. S. 467, 26 U. S. (L. ed.) 949. If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some states the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the Bankruptcy Court, be amply protected against any danger of being made to pay twice. *Rand v. Iowa Cent. R. Co.*,

(1906) 186 N. Y. 58, 78 N. E. 574, 116 A. S. R. 530, 9 Ann. Cas. 542; *Southern Exp. Co. v. Connor*, (1872) 49 Ga. 415." Prior to the foregoing decision by the Supreme Court it was said in *Rand v. Sage*, (1905) 94 Minn. 344, 102 N. W. 864: "While the full legal title and control of the property does not pass to the trustee until one is appointed and qualified, yet if the creditors do not, for any reason, act within the time limited, the power is expressly conferred upon the court to appoint such trustee, and, if necessary, in the meantime, to take possession of the property and exercise dominion and control over it for the benefit of the creditors through the medium of a receiver specially appointed, or the marshal of the court. These powers would not have been granted if it had been the intention to deprive the court of dominion over or jurisdiction of the estate pending the time a trustee might be appointed. Title remaining in the bankrupt is inconsistent with control of the estate by the court. There must be either one thing or the other. The bankrupt retains title to his property, with power to exercise dominion over it, to transfer and encumber it, or the title passes conditionally to the court for the benefit of the creditors until a trustee is appointed or the estate is closed. The latter is the only rational view consistent with the provisions of the Act."

Pursuant to the doctrine declared by the Supreme Court in the preceding paragraph that the title to the property remains in the bankrupt and subject to his control until the trustee is appointed and qualified, it has been held that during the same period valid and effectual notices to fix contract rights upon the bankrupt may be served upon him, and that there is no good reason why third persons having interests in or liens upon the property may not, when necessary to the protection of their rights prior to the appointment of the trustee, make the bankrupt personally a party to any proceedings for that purpose. *Christopherson v. Harrington*, (1912) 118 Minn. 42, 136 N. W. 289, 41 L. R. A. (N. S.) 276.

In *Massachusetts Bonding, etc., Co. v. Kemper*, (C. C. A. 6th Cir. 1915) 220 Fed. 847, wherein the question arose whether the amendment of 1910 vested the trustee with the rights of a lienholding creditor as of the date of the bankruptcy petition or as of the date of the adjudication, the court said: "Since section 70a in general terms provides that the trustee is vested with the bankrupt's title as of the date of adjudication, it has been natural to assume that the rights of the trustee do not for any purpose reach back to the date of filing the petition; and there are decisions to that effect, or leaving the question open. *In re Rose*, (D. C.) 206 Fed. 991, 993; *Big Four Co. v. Wright*, (C. C. A.) 207

Fed. 535, 537, 125 C. C. A. 577, 47 L. R. A. (N. S.) 1223; *In re Jacobson*, (D. C.) 200 Fed. 812, 814. We can see no escape from applying to this situation the principle of the decision in *Acme Co. v. Beekman Co.*, 222 U. S. 300, 32 S. Ct. 96, 56 U. S. (L. ed.) 208, where it was held that, in spite of the language of section 70a, the trustee's rights extended, by relation, back to the commencement of the proceedings sufficiently to defeat the lien of an intervening attachment. The right of a general creditor to get a superior lien by levying an attachment and the right of the holder of an unrecorded mortgage to get a universally effective lien by recording the mortgage impress us as wholly analogous; and if the trustee's right goes back to the commencement of bankruptcy proceedings in the former case, it must in the latter. To the same general effect as the *Acme Case* is *Everett v. Judson*, 228 U. S. 474, 33 S. Ct. 568, 57 U. S. (L. ed.) 927, 46 L. R. A. (N. S.) 154, which holds that interest of the trustee in a life insurance policy maturing intermediate petition and adjudication, is to be fixed as of the earlier date. We have applied the same principle to the right of the bankrupt debtor to discharge his debt by payment to the bankrupt after petition filed. *Toof v. Bank*, 206 Fed. 250, 124 C. C. A. 118. The controlling principle must be that, for the purpose of fixing priority as between the trustee and adversely claiming lienholders, the time of filing the petition is the vital date, and that a lien which, on that date, was invalid as against creditors levying execution, cannot be perfected so as to make it valid against the trustee by action of the lienholder before adjudication. Indeed, to hold the contrary would be to say that, so far as this section is concerned, the mortgagee could with safety withhold his mortgage from the record, relying upon the mortgagor not to file a voluntary petition and to delay an adjudication upon an involuntary petition long enough to give the mortgagee an opportunity to file his mortgage."

It is true that, technically, the title to his property remains in the bankrupt until the trustee has been appointed and qualified. But during the period between the filing of the petition and the qualifying of the trustee, the bankrupt's title is that of a trustee, he occupying a sort of fiduciary relation to his creditors. No title can be acquired to the property through any act of his, or by operation of law, during that period. *Matter of Fletcher*, (N. D. Ohio 1906) 16 Am. Bankr. Rep. 491.

"The title to the property of the alleged bankrupt remains in him until adjudication, subject to the control of the court, to be exercised either by a receiver, or the marshal, if otherwise the interests of the creditors are not sufficiently protected. *In re Laplume Condensed Milk Co.*, (1906)

145 Fed. 1013." *Marcello v. Concordia Fire Ins. Co.*, (1912) 234 Pa. St. 31, 82 Atl. 1090, 39 L. R. A. (N. S. 366.

Section 70a is not antagonistic to clause (5) thereof in respect to the time the trustee's title takes effect. The words "as of the date he was adjudged" refer to time merely, while the apparently contradictory words "property which prior to the filing of the petition he could by any means have transferred," etc., used in clause (5), refer to what title passes, rather than the time of vesting. This view protects *ad interim* purchasers and keeps going concerns alive, for the benefit of the creditors if adjudications follow, and the benefit of the debtors themselves if dismissals result. Nor can it be said that, by recognizing a valid title in the bankrupt until adjudication, creditors may be at the mercy of a dishonest debtor; Congress, foreseeing that, also enacted section 69, by which creditors may take possession of the property of debtors likely to take advantage of the situation. *In re Pease*, (W. D. N. Y. 1900) 4 Am. Bankr. Rep. 578, *disapproving In re Harris*, (N. D. Ill. 1899) 2 Am. Bankr. Rep. 359.

In *Ex p. Fremont Nat. Bank*, (1875) 2 Lowell 409, 24 Fed. Cas. No. 14,169, a case under the Bankruptcy Act of 1867, the court said: "It has always been one of the anomalies of the Bankrupt Law, but probably a necessary one, that a plea of the plaintiff's bankruptcy is not a bar to an action unless an assignee has been appointed, and not always then, unless the assignee has forbidden the prosecution of the suit, though a plea of payment to the bankrupt might be had if the assignee should intervene. In other words, a bankrupt may sue, though he cannot, without suit, receive payment."

If no trustee is ever appointed, title does not pass out of the bankrupt. *Gordon v. Mechanics', etc., Ins. Co.*, (1907) 120 La. 441, 45 So. 384, 124 A. S. R. 434, 14 Ann. Cas. 886, 15 L. R. A. (N. S.) 827; *Rand v. Iowa Cent. R. Co.*, (1906) 186 N. Y. 58, 78 N. E. 574, 116 A. S. R. 530, 9 Ann. Cas. 542.

The foregoing doctrine of retention by the bankrupt of a defeasible title applies as well to voluntary as to involuntary bankruptcy proceedings. *Johnson v. Collier*, (1912) 222 U. S. 538, 32 S. Ct. 104, 56 U. S. (L. ed.) 306; *Gordon v. Mechanics', etc., Ins. Co.*, (1907) 120 La. 441, 45 So. 384, 124 A. S. R. 434, 14 Ann. Cas. 886, 15 L. R. A. (N. S.) 827.

Upon the same doctrine is based the weight of authority that an adjudication in bankruptcy will not violate a condition of a policy of fire insurance against the sale or transfer of insured property, if loss occurs prior to the appointment of a trustee in bankruptcy. 3 R. C. L. 235; *Gordon v. Mechanics', etc., Ins. Co.*, (1907) 120 La. 441, 45 So. 384, 124 A. S. R. 434, 14 Ann. Cas. 886, and note, 15 L. R. A.

(N. S.) 827; *Fuller v. Jameson*, (1904) 98 App. Div. 53, 90 N. Y. S. 456; *Fuller v. New York Firemen's Ins. Co.*, (1903) 184 Mass. 12, 67 N. E. 879.

#### V. BURDENSOME PROPERTY.

**Acceptance optional with trustee—Generally.**—"We have held that trustees in bankruptcy are not bound to accept property of an onerous or unprofitable character, and that they have a reasonable time in which to elect whether they will accept or not. If they decline to take the property, the bankrupt can assert title thereto. *American File Co. v. Garrett*, (1884) 110 U. S. 288, 295, 4 S. Ct. 90, 28 U. S. (L. ed.) 149, 152; *Sparhawk v. Yerkes*, (1891) 142 U. S. 1, 12 S. Ct. 104, 35 U. S. (L. ed.) 915; *Sessions v. Romadka*, (1892) 145 U. S. 29, 12 S. Ct. 799, 36 U. S. (L. ed.) 609; *Dushane v. Beall*, (1896) 161 U. S. 513, 16 S. Ct. 637, 40 U. S. (L. ed.) 791." *Jacksboro First Nat. Bank v. Lasater*, (1905) 196 U. S. 115, 25 S. Ct. 206, 49 U. S. (L. ed.) 408. See also to the point that it is optional with trustees to accept or refuse to accept assets of such character, 3 R. C. L. 229; *Smith v. Gordon*, (1843) 2 N. Y. Leg. Obs. 325, 22 Fed. Cas. No. 13,052; *Amory v. Lawrence*, (1872) 3 Cliff. 523, 1 Fed. Cas. No. 336; *Ex p. Houghton*, (1871) 1 Lowell 554, 12 Fed. Cas. No. 6,725; *In re Slingluff*, (D. C. Md. 1900) 106 Fed. 154, 5 Am. Bankr. Rep. 76; *Gordon v. Mechanics' Ins. Co.*, (1907) 120 La. 441, 45 So. 384, 124 A. S. R. 434, 14 Ann. Cas. 886, 15 L. R. A. (N. S.) 827; *Fleming v. Courtenay*, (1903) 98 Me. 401, 57 Atl. 592, 99 A. S. R. 414.

"The same principle is applicable also to receivers and official liquidators. *Quincy, etc., R. Co. v. Humphreys*, (1892) 145 U. S. 82, 12 S. Ct. 787, 36 U. S. (L. ed.) 632; *St. Joseph, etc., R. Co. v. Humphreys*, (1892) 145 U. S. 105, 12 S. Ct. 795, 36 U. S. (L. ed.) 640; *Sunflower Oil Co. v. Wilson*, (1892) 142 U. S. 313, 12 S. Ct. 235, 35 U. S. (L. ed.) 1025; *United States Trust Co. v. Wabash Western R. Co.*, (1893) 150 U. S. 287, 14 S. Ct. 86, 37 U. S. (L. ed.) 1085; *In re Oak Pits Colliery Co.*, (1882) 21 Ch. Div. (Eng.) 322, 330." *Dushane v. Beall*, (1896) 161 U. S. 513, 16 S. Ct. 637, 40 U. S. (L. ed.) 791. "If their judgment is unwisely exercised, the Bankruptcy Court is open to compel a different course." *Dushane v. Beall*, (1896) 161 U. S. 513, 16 S. Ct. 637, 40 U. S. (L. ed.) 791.

A trustee in bankruptcy is not bound to take property which may involve him in litigation. *Oldmixon v. Severance*, (1907) 18 Am. Bankr. Rep. 823, 117 App. Div. 921, 102 N. Y. S. 1144.

Nor is the trustee obliged to accept title to the property surrendered by the bankrupt, if to do so would not benefit the

creditors, or would prejudice them. *Gordon v. Mechanics', etc., Ins. Co.*, (1907) 22 Am. Bankr. Rep. 649, 120 La. 441, 14 Ann. Cas. 886, 45 So. 384.

Where it is doubtful whether a proceeding to set aside a voidable transfer of property would result in any benefit to the estate, such transfer will not be set aside at the instance of creditors, except upon their giving bond to indemnify the trustee for any loss which the estate may suffer. *In re Finlay*, (S. D. N. Y. 1900) 104 Fed. 675, 4 Am. Bankr. Rep. 745.

The trustee may, at the request of the creditors and with the sanction of the court, execute a quitclaim deed for property in which the bankrupt has an equitable interest, and which is deemed to be unprofitable. *Kenyon v. Mulert*, (C. C. A. 3d Cir. 1911) 184 Fed. 825.

*The bankrupt may assert title to property which the trustee declines to take.* *Jacksboro First Nat. Bank v. Lasater*, (1905) 196 U. S. 115, 25 S. Ct. 206, 49 U. S. (L. ed.) 408; *In re Frazin*, (1910) 183 Fed. 28, 105 C. C. A. 320, 33 L. R. A. (N. S.) 745; *Fleming v. Courtenay*, (1903) 98 Me. 401, 57 Atl. 592, 99 A. S. R. 414; *Dow v. Bradley*, (1913) 110 Me. 249, 85 Atl. 896, 44 L. R. A. (N. S.) 1041.

"But that doctrine can have no application when the trustee is ignorant of the existence of the property, and has had no opportunity to make an election. It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it." *Jacksboro First Nat. Bank v. Lasater*, (1905) 196 U. S. 115, 25 S. Ct. 206, 49 U. S. (L. ed.) 408, 13 Am. Bankr. Rep. 698.

*The contingent right of an insolvent debtor under a deferred annuity contract with an insurance company is something that his trustee in bankruptcy may seize and hold for the benefit of creditors, or he may waive it altogether under circumstances which justify it.* *Mutual Life Ins. Co. v. Smith*, (1910) 184 Fed. 1, 106 C. C. A. 593, 33 L. R. A. (N. S.) 439.

*Leases and other executory contracts of the bankrupt may be renounced by the trustee if he shall deem it for the best interests of the estate to do so.* *Watson v. Merrill*, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 454. See also the note to section 70a (5).

If the trustee is confronted with the alternative of an immediate ejection from the premises, with the consequent depreciation of the personal estate, or the assumption of an undesirable lease and the payment of a large sum for unsecured rent, whereby an unsecured creditor will secure a preference, a court of equity should relieve him from the coercion of the situa-

tion. If time is essential for an equitable adjustment of the various rights, the court may impose such delay as is reasonably necessary upon the enforcement of any particular right, making pecuniary compensation therefor whenever that is adequate. *In re Chambers*, (D. C. R. I. 1900) 98 Fed. 865, 3 Am. Bankr. Rep. 537.

*Encumbered property.*—A trustee in bankruptcy is not required to take charge of, or sell, any portion of the estate so heavily encumbered with valid liens that nothing can be realized therefrom for the unsecured creditors. *In re Cogley*, (N. D. Ia. 1901) 107 Fed. 73, 5 Am. Bankr. Rep. 731.

The trustee has the election to refuse to take possession of mortgaged property, if its value, over and above the incumbrance, is not sufficient to justify an attempt to administer it. *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 692.

Where it appears that the entire assets of a bankrupt corporation consist of a manufacturing plant encumbered by a mortgage for more than its value; that the trustee, after diligent effort, has been unable to sell the same, either at public or private sale, for any sum near its value; and that the property is a source of expense, the court of bankruptcy should permit it to be turned over to the mortgagee, subject to the right of the trustee of general creditors to contest the validity of the mortgage, if desired, in any court having jurisdiction. *Equitable Loan, etc., Co. v. Moss*, (C. C. A. 5th Cir. 1903) 125 Fed. 609, 11 Am. Bankr. Rep. 111.

*When trustee must act.*—A bankrupt's trustee has a reasonable time after his appointment to determine whether he will or will not accept such assets as appear to him to be unprofitable. *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566.

"If within such reasonable time, he does not elect to take the property, it is deemed an election to reject it." *Fleming v. Courtenay*, (1903) 98 Me. 401, 57 Atl. 592, 99 A. S. R. 414.

It is the duty of the trustee to elect whether he will assume an existing executory contract and continue its performance and ultimately dispose of it for the benefit of the estate, or renounce it, and leave the injured party to such legal remedies for the breach as the case affords. *Atchison, etc., R. Co. v. Hurley*, (C. C. A. 8th Cir. 1907) 153 Fed. 503, 18 Am. Bankr. Rep. 396.

Where property is encumbered the trustee should act promptly in the premises, and if he concludes not to redeem the property, he should at once notify the bankrupt of such conclusion, in order that the latter may redeem it if he wishes to do so. *In re Novak*, (N. D. Ia. 1901) 111 Fed. 161, 7 Am. Bankr. Rep. 27.

*Evidence of waiver by trustee.*—"If, with knowledge of the facts, or being so situated as to be chargeable with such knowledge," a trustee "by definite declaration or distinct action, or forbearance to act, indicates, in view of the particular circumstances, his choice not to take certain property, or if, in the language of Ware, J., in *Smith v. Gordon*, [(1843) 2 N. Y. Leg. Obs. 325, 22 Fed. Cas. No. 13,052] he, with such knowledge 'stands by without asserting his claim for a lapse of time and allows third persons in the prosecution of their legal rights to acquire an interest in the property,' then he may be held to have waived the assertion of his claim thereto." *Dushane v. Beall*, (1896) 161 U. S. 513, 16 S. Ct. 637, 40 U. S. (L. ed.) 791, holding, however, that the assignee of a bankrupt in an involuntary proceeding under the Bankruptcy Act of 1867 who failed to include a certain claim in his schedule of assets could not be held to have elected whether he would prosecute the claim or abandon it, in the absence of any evidence of his knowledge or sufficient means of knowledge of its existence.

"In this case, although the assignee had information in regard to the existence of this unliquidated claim for more than 22 years, he neglected to assert any title thereto. If nothing else appeared, the irresistible inference from his neglect to affirmatively assert his claim for these many years would be that he had elected not to accept this asset of the estate, believing it to be burdensome and unprofitable. But much more does appear confirmatory of this inference, if not sufficient to show a definite declaration or distinct action upon his part not to accept the claim." *Fleming v. Courtenay*, (1903) 98 Me. 401, 57 Atl. 592, 99 A. S. R. 414.

Under an earlier Bankruptcy Act it was held that assignees in bankruptcy could not be deemed to have abandoned the bankrupt's remainder interest under a testamentary trust because they did not sell such interest, where, as soon as they learned of the existence of the trust fund and of the fact that creditors of the bankrupt were seeking to reach and apply this interest in satisfaction to his debts, they brought a bill in equity in the nature of a bill *quia timet* to compel the transfer to them of the bankrupt's interest and to enjoin the trustee from paying any part of the trust fund to the bankrupt or those claiming under him. *Hammond v. Whittredge*, (1907) 204 U. S. 538, 27 S. Ct. 396, 51 U. S. (L. ed.) 606.

A finding in a summary proceeding in a court of bankruptcy that the trustee had received as such certain property of the bankrupt estate is conclusive against him and not subject to collateral attack by third persons. *Hebert v. Crawford*, (1913) 228 U. S. 204, 33 S. Ct. 484, 57 U. S. (L. ed.) 800.

## VI. EXEMPT PROPERTY.

*Title remains in bankrupt.*—"Under the Bankruptcy Act of 1867, it was held that property generally exempted by the state laws from the claims of creditors was not part of the assets of the bankrupt, and did not pass to the assignee, but that such property must be pursued by those having special claims against it in the proper state tribunals." *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061 citing *In re Bass*, (1877) 3 Woods 382, 384, 2 Fed. Cas. No. 1,091. To the same point see *Wilkinson v. Wait*, (1872) 44 Vt. 508, 8 Am. Rep. 391; *Sheldon v. Rounds*, (1879) 40 Mich. 425; *Bullymore v. Cooper*, (1871) 46 N. Y. 236; *Fehley v. Barr*, (1870) 66 Pa. St. 196; *In re Hester*, (1871) 5 Nat. Bankr. Reg. 285, 12 Fed. Cas. No. 6,437; *In re Hunt*, (1871) 5 Nat. Bankr. Reg. 493, 12 Fed. Cas. No. 6,883; *Henly v. Lanier*, (1876) 75 N. Car. 172; *Lix v. Capitol Bank*, (1873) 2 Dill. (U. S.) 367; *Seiling v. Gunderman*, (1872) 35 Tex. 545; *Winn v. Morse*, (1879) 59 N. H. 210.

The title to exempt property, under the express provisions of the present Bankruptcy Law (sections 70a and 6) remains in the bankrupt, and does not vest in his trustee. *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061; *In re Russie*, (D. C. Ore.) 1899) 96 Fed. 609; 3 Am. Bankr. Rep. 6; *In re Marquette*, (D. C. Vt. 1900) 103 Fed. 777, 4 Am. Bankr. Rep. 623; *In re Durham*, (1900) 104 Fed. 233; *In re Hill*, (1899) 96 Fed. 185; *In re Grimes*, (1899) 96 Fed. 529; *In re Black*, (1900) 104 Fed. 289; *In re Seabolt*, (W. D. N. C. 1902) 113 Fed. 766, 8 Am. Bankr. Rep. 60; *In re Edwards*, (S. D. Ala. 1907) 156 Fed. 794, 19 Am. Bankr. Rep. 632; *In re Cohn*, (D. C. N. D. 1909) 171 Fed. 568, 22 Am. Bankr. Rep. 761; *In re Mussey*, (W. D. Tex. 1910) 179 Fed. 1007; *In re National Grocer Co.*, (C. C. A. 6th Cir. 1910) 181 Fed. 33; *Sullivan v. Mussey*, (C. C. A. 5th Cir. 1910) 184 Fed. 60; *In re Carlon*, (S. D. S. D. 1911) 189 Fed. 815; *In re Orear*, (C. C. A. 8th Cir. 1911) 189 Fed. 888; *In re Cale*, (C. C. A. 8th Cir. 1911) 191 Fed. 31; *Bank of Nez Perce v. Pindel*, (C. C. A. 9th Cir. 1912) 193 Fed. 917; *In re Zimmerman*, (E. D. Wis. 1913) 202 Fed. 812; *Sayre First Nat. Bank v. Bartlett*, (1908) 21 Am. Bankr. Rep. 88, 35 Pa. Super. Ct. 593. And see the annotation under section 6. Observe, too, the express exception in section 67c.

"Title to exempt property does not vest in the trustee and cannot be administered by him for the benefit of the creditors." *Chicago, etc., R. Co. v. Hall*, (1913) 229 U. S. 511, 33 S. Ct. 885, 57 U. S. (L. ed.) 1306.

It is true that in the first instance all of the bankrupt's property passes to



the possession of the trustee in bankruptcy, but not for the purpose of vesting title to that part of it which is exempt, for he has no title to that and it only passes to him that it may be duly set apart to the bankrupt. *Bank of Mendon v. Mell*, (1914) 185 Mo. App. 510, 172 S. W. 484.

**Exemption provision controls entire section.**—The words "except in so far as it is to property which is exempt," are a qualification that excludes exempt property from all the provisions contained in the respective enumerations in the six following clauses. *Holden v. Stratton*, (1905) 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018.

**Section 6 must be construed with section 70a**, in so far as exempt property is concerned, so that both provisions may be given effect. *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061, 10 Am. Bankr. Rep. 107.

**The exemptions allowed a bankrupt are fixed and prescribed by the statutes of the state of his domicile** (see section 6a); but the provisions of the Bankruptcy Act are controlling as to the time and manner of claiming, awarding, selecting, and setting apart such exemptions, and the law is well settled that these provisions of the Bankruptcy Act should receive a liberal and not a narrow or technical interpretation. The laws securing exemptions are not to be frittered away by construction so as to destroy their value. *In re Andrews*, (W. D. Mich. 1911) 193 Fed. 776.

**Setting apart exemptions.**—See section 47a (11) and note thereto.

**Proceeds of sale of exempt property.**—"It has been held in numerous cases that it is not improper to permit the bankrupt to claim the proceeds of the sale of exempt property if such property has been sold by order of the court before the time for filing schedules has expired. *Lipman v. Stein*, (C. C. A. 3d Cir. 1905) 134 Fed. 235, 14 Am. Bankr. Rep. 30; *In re Sloan*, (E. D. Pa. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435; *In re Renda*, (D. C. Pa. 1906) 149 Fed. 614, 17 Am. Bankr. Rep. 521; *In re LeVay*, (M. D. Pa. 1903) 125 Fed. 990, 11 Am. Bankr. Rep. 114. The same reasoning and the same rule ought to apply to a case like the present where, prior to his adjudication, the bankrupt was deprived of the possession of his property by an officer of a court acting under an order of court, and where the trustee in bankruptcy sold the property without notice to him and without giving him an opportunity to make his selection before the sale." *In re Andrews*, (W. D. Mich. 1911) 193 Fed. 776.

**The purpose of the Bankruptcy Act is to give creditors only such rights as would have been theirs if bankruptcy had**

not supervened, and to save to the bankrupt and his family every right and exemption which would have been theirs as against creditors enforcing their claims by ordinary judicial process. *In re Cohn*, (D. C. N. D. 1909) 171 Fed. 568; 22 Am. Bankr. Rep. 761.

**On the death of a debtor**, property which would have been set apart to him under his exemption, had he lived, remains a part of his estate, and goes to his administrator. *In re Seabolt*, (W. D. N. C. 1902) 113 Fed. 766, 8 Am. Bankr. Rep. 60.

**Even though exempt property may be temporarily in the possession of the trustee**, he has no title or beneficial interest therein, and the possession, in effect, remains in the bankrupt, within the meaning of the state statute, and the trustee will be directed to surrender it to the bankrupt. *In re Durham*, (E. D. Ark. 1900) 104 Fed. 231, 4 Am. Bankr. Rep. 760.

**Notes taken for rental of exempt property.**—Notes taken by a bankrupt after adjudication, for the future rental of land which is exempt, do not constitute assets of his estate in bankruptcy. *In re Olsson*, (N. D. Ia. 1901) 110 Fed. 796, 7 Am. Bankr. Rep. 22.

**Waiver of exemption.**—The fact that a bankrupt has given notes in which he waived his right to exemptions does not give the Bankruptcy Court jurisdiction to administer his exempt property, nor affect his right to have the same set apart to him. *Goodman v. Curtis*, (C. C. A. 5th Cir. 1909) 174 Fed. 644, 23 Am. Bankr. Rep. 504. See also note to section 6a.

**If property is exempt at the date of filing of the petition** (see *supra*, division IV of this note) it cannot afterward become nonexempt and thereupon pass to the trustee. *Allen v. Central Wisconsin Trust Co.*, (1910) 143 Wis. 381, 127 N. W. 1003, 139 A. S. R. 1107.

**Exemptions accruing after adjudication in bankruptcy** do not affect the trustee's title to the property. *In re Rainwater*, (S. D. Miss. 1911) 191 Fed. 738.

**Homesteads—Generally.**—Since homestead property does not pass to a bankrupt's trustee, the fact that it was mortgaged to certain creditors does not make it assets to be administered in bankruptcy. *In re Bailey*, (D. C. Utah 1910) 176 Fed. 990, 24 Am. Bankr. Rep. 201.

The homestead of a bankrupt, exempt from his general debts under the laws of the state, does not pass to his trustee, and the court of bankruptcy is without power to order its sale because a particular creditor may have the right, under such laws, to subject it to the payment of his debt. *Ingram v. Wilson*, (C. C. A. 8th Cir. 1903) 125 Fed. 913, 11 Am. Bankr. Rep. 192.

In the absence of a local rule to the contrary, the mere use by an insolvent of non-exempt funds or assets in acquiring a homestead does not make it subject to the claims of his creditors in bankruptcy. *In re Letson*, (C. C. A. 8th Cir. 1907) 157 Fed. 78, 19 Am. Bankr. Rep. 506.

Where the location and extent of a bankrupt's homestead are uncertain and disputed, by reason of his claim being excessive, the title to all the estate may well be taken as vesting in the trustee, subject to the awarding and defining of the exemptions; and especially so where, as in Wisconsin, he may dispose of the property by his individual conveyance, subject only to a homestead right, if he is married. Where the homestead is abandoned before it has been set apart, the trustee's title becomes absolute for the benefit of the creditors. *In re Mayer*, (C. C. A. 1901) 108 Fed. 599.

**Law governing.**—The Bankruptcy Act making no provision, there is no question but that the state law will control, as to the extent of, and requisites of, a homestead exemption (see section 6a and note thereto); but the time within which exemptions are to be claimed and the manner of claiming the same are fixed by the Bankruptcy Act itself, and its provisions in that respect are controlling. And this applies where the claim to exemptions is made by the wife of the bankrupt. *In re Burnham*, (W. D. Wash. 1913) 202 Fed. 762.

**Time of claiming exemption.**—*In Brandt v. Mayhew*, (C. C. A. 9th Cir. 1914) 218 Fed. 422, the trustee contended that the provision of this section that the trustee shall be vested by operation of law with the title of the bankrupt's property, except as to property which is exempt, showed the intention of the law to be that property in order to be excepted, must be recognized as exempt at the date of the adjudication. The court said: "But section 70a does not deal with the time or manner of claiming exemptions. Those matters are regulated by other provisions. Section 7, clause 8, gives to the involuntary bankrupt the right to claim his exemptions within ten days after the adjudication, and the time within which he may do this may be further extended by amendment, as authorized by General Order 11." The court accordingly held that a bankrupt was not precluded from claiming a homestead as exempt from the operation of the Bankruptcy Law merely because, prior to the adjudication, he had failed to designate a homestead under the laws of the state, provided that, after claiming it, he proceed under the state law to perfect his right within a reasonable time.

**Land acquired by the bankrupt under the United States Homestead Law** cannot be subjected, in the bankruptcy proceedings, to the payment of any debt con-

tracted by him before the issuance of the patent for such land, it being exempt as to all such debts by the terms of the Homestead Act. *In re Daubner*, (D. C. Ore. 1899) 96 Fed. 805, 3 Am. Bankr. Rep. 368.

**Interest in homestead passing to trustee.**—The interest or title of the bankrupt in the land allotted as a homestead exemption, after the termination of the time for which such property is exempted from sale, is property; hence it is the duty of the trustee to reduce to money, by sale, such property or title or reversion, and apply the proceeds to the payment of debts proved according to law. *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 260, 2 Am. Bankr. Rep. 339.

The rule that the title to exempt property does not pass to the trustee has reference to an exemption covering all the property of the bankrupt, and is not applicable to an exemption of a homestead or real estate of a specified value, less than the actual value, where the trustee is directed by the statute to determine the claim of the bankrupt to the exemption and report its estimated value to the court so that any excess value may be preserved for the benefit of creditors. *In re Forbes*, (C. C. A. 9th Cir. 1911) 186 Fed. 79.

But see *In re Manning*, (D. C. S. C. 1903) 123 Fed. 180, 10 Am. Bankr. Rep. 498, wherein it was said that it is the intent of the homestead laws that a homestead in real estate in kind shall be set aside whenever practicable, and a bankrupt is entitled to retain the land assigned as his homestead, although valued in excess of the limit of exemption, on payment of the excess.

**Life insurance policies.**—Life insurance policies which are exempt under the law of the state must be so considered under the Bankruptcy Law, and therefore do not pass to the trustee. *Holden v. Stratton*, (1905) 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018, 14 Am. Bankr. Rep. 94, reversing (C. C. A. 9th Cir. 1902) 113 Fed. 141, 7 Am. Bankr. Rep. 615; *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771, 17 Am. Bankr. Rep. 484; *Steele v. Buel*, (C. C. A. 8th Cir. 1900) 104 Fed. 968, 5 Am. Bankr. Rep. 165, reversing (S. D. Ia. 1899) 98 Fed. 78, 3 Am. Bankr. Rep. 549; *In re Churchill*, (C. C. A. 7th Cir. 1913) 209 Fed. 766. And see the proviso to section 70a (5) *Policy of Insurance*, and the note thereto.

**Lands allotted to an Indian**, within the Umatilla reservation, under the Act of March 3, 1885 (23 Stat. L. 340), is incapable of being alienated, encumbered, or sold on execution; and, therefore, such land remains exempt to the allottee and cannot pass to his trustee in bankruptcy. *In re Russie*, (D. C. Ore. 1899) 96 Fed. 609, 3 Am. Bankr. Rep. 6.

## VII. RECLAMATION PROCEEDINGS.

**Right to reclaim.**—Whenever the trustee in bankruptcy obtains possession of the property of persons other than the bankrupt, the owner of such property has the undoubted right to recover it from the trustee in some appropriate proceeding. *In re Garner*, (N. D. Ga. 1901) 110 Fed. 123, 6 Am. Bankr. Rep. 596; *In re Galt*, (7th Cir. 1903) 120 Fed. 64, 56 C. C. A. 470, 13 Am. Bankr. Rep. 575; *In re Tice*, (M. D. Pa. 1905) 139 Fed. 52, 15 Am. Bankr. Rep. 97; *In re Poore*, (M. D. Pa. 1905) 139 Fed. 862, 15 Am. Bankr. Rep. 174; *In re Wells*, (M. D. Pa. 1905) 140 Fed. 752, 15 Am. Bankr. Rep. 419; *In re Wood*, (M. D. Pa. 1905) 140 Fed. 964, 15 Am. Bankr. Rep. 411; *In re Heckathorn*, (W. D. Pa. 1906) 144 Fed. 499, 16 Am. Bankr. Rep. 467; *In re Bolling*, (E. D. Va. 1906) 147 Fed. 786, 17 Am. Bankr. Rep. 399; *In re Berry*, (C. C. A. 2d Cir. 1906) 149 Fed. 176, 17 Am. Bankr. Rep. 467; *Nylin v. American Trust, etc., Bank*, (C. C. A. 7th Cir. 1908) 166 Fed. 276; *Franklin v. Stoughton Wagon Co.*, (C. C. A. 8th Cir. 1909) 168 Fed. 857, 22 Am. Bankr. Rep. 63; *Walter A. Wood Mowing, etc., Mach. Co. v. Vanstony*, (C. C. A. 4th Cir. 1909) 171 Fed. 375, 22 Am. Bankr. Rep. 740; *In re Susquehanna Roofing Co.*, (M. D. Pa. 1909) 173 Fed. 150, 23 Am. Bankr. Rep. 5; *In re Meadows*, (W. D. N. Y. 1909) 173 Fed. 694, 23 Am. Bankr. Rep. 124; *In re Corn*, (C. C. A. 2d Cir. 1910) 179 Fed. 841; *In re Monongahela Distillery Co.*, (E. D. Mich. 1910) 186 Fed. 220; *In re Woodman*, (D. C. Mass. 1910) 186 Fed. 533; *McEwen v. Totten*, (C. C. A. 5th Cir. 1908) 21 Am. Bankr. Rep. 336; *In re Kay-Tee Film Exch.*, (S. D. Cal. 1911) 193 Fed. 140; *In re Wall*, (E. D. Okla. 1910) 207 Fed. 994. And see the annotations under section 70a (5), and under section 23b.

**Claim allowed from proceeds of sale.**—And if the property claimed has been sold by the trustee, and the claimant proves his right thereto, the claim will be allowed out of the proceeds of such sale. *In re Randolph*, (N. D. W. Va. 1911) 187 Fed. 186.

**Property taken by receiver under erroneous order.**—Where property of a defendant is taken from his possession by a receiver against his consent, under an erroneous order, which he successfully resists in an appellate court, he is entitled to the return of such property without charge of any kind against it or against him by reason of the proceedings. *Beach v. Macon Grocery Co.*, (5th Cir. 1903) 125 Fed. 513, 60 C. C. A. 557, 11 Am. Bankr. Rep. 104.

**A trustee in bankruptcy has no equities greater than those of the bankrupt;** and he will be ordered to do full justice, even in some cases where the circumstances

would give rise to no legal right, and perhaps not even to a right which could be enforced in a court of equity as against an ordinary litigant. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery. *In re Chase*, (C. C. A. 1st Cir. 1903) 124 Fed. 753, 10 Am. Bankr. Rep. 677.

*In re MacDonald*, (D. C. Conn. 1905) 138 Fed. 463, 14 Am. Bankr. Rep. 797, it appears that the bankrupt at the time of his bankruptcy was conducting a shipyard, and had contracted with the several petitioners to build vessels for them, the contracts providing for the making of partial payments by them at certain stages in the progress of the work, and that title should vest as each payment was made. At the time of the bankruptcy one of said vessels had been practically completed, so far as the work of the bankrupt was concerned, the payments had been made, and it had been launched and delivered to the petitioner for whom it was built, who was to complete it himself. The others remained in the yard in various stages of construction, but the required payments had been made, and exceeded the value of the structures. None of such vessels were scheduled by the bankrupt, but all were taken possession of by the trustee, who declined to complete the contracts. It was held that the title to such vessels, so far as completed, was in the several petitioners, who were entitled to their possession.

**Question of fact.**—The question of title is, under conflicting evidence, one of fact. *In re U. S. Restaurant, etc., Co.*, (C. C. A. 2d Cir. 1911) 187 Fed. 118; *In re Donnelly*, (C. C. A. 2d Cir. 1911) 187 Fed. 121.

**The burden of proof rests on the claimant.** *In re Hurlbutt*, (C. C. A. 2d Cir. 1906) 143 Fed. 958, 16 Am. Bankr. Rep. 198; *In re Kessler*, (S. D. N. Y. 1908) 165 Fed. 508, 21 Am. Bankr. Rep. 583; *In re Sweeney*, (C. C. A. 6th Cir. 1909) 168 Fed. 612, 21 Am. Bankr. Rep. 866; *In re Burke*, (S. D. Ga. 1909) 168 Fed. 994, 22 Am. Bankr. Rep. 69; *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 338; *Ellet-Kendall Shoe Co. v. Ward*, (C. C. A. 8th Cir. 1911) 187 Fed. 982; *Matter of Mundle*, (S. D. N. Y. 1905) 13 Am. Bankr. Rep. 490.

*In re Mayer*, (E. D. Pa. 1907) 156 Fed. 432, 19 Am. Bankr. Rep. 480, a claim to property which was in the possession of a bankrupt at the time of the filing of the petition was held not to have been sufficiently established by the unsupported testimony of the claimant, where,

if it had been true, he could have produced other evidence in corroboration thereof.

**Reclamation precluded by act of claimant — Filing claim.**—A claimant who deposited money with a banking firm four days before it was adjudged a bankrupt on a voluntary petition, receiving a certificate of deposit therefor, on learning of the insolvency of the bank when it received his deposit, was bound to elect promptly whether to rescind the contract for the alleged fraud or to affirm it, and the fact that he filed a claim against the estate was held to constitute an irrevocable election, by which he was precluded from also claiming a rescission. *In re Kenyon*, (S. D. Ohio 1907) 156 Fed. 863, 19 Am. Bankr. Rep. 195.

So also it has been held that creditors of a bankrupt, by filing their claims for the price of goods alleged to have been wrongfully transferred by the bankrupt to defendant corporation, waived their right to dispute the passing of the title in the goods to the bankrupt prior to bankruptcy. *Lynch v. Bronson*, (D. C. Conn. 1908) 160 Fed. 139, 20 Am. Bankr. Rep. 409.

And where a firm of brokers, prior to their bankruptcy, without authority, pledged stocks of customers in their hands to secure loans to themselves, the action of such a customer in proving his claim against the estate for the value of his stock, without reservation, with full knowledge of the facts, was held to constitute an election of remedies, which prevented him from reclaiming such stock on its subsequent return to the trustee. *In re Berry*, (C. C. A. 2d Cir. 1909) 174 Fed. 409, 23 Am. Bankr. Rep. 27.

**Claimant bound by election made prior to bankruptcy.**—Where a corporation provided a bond issue with which to take up preferred stock, and a holder of such stock, on being tendered bonds in the place thereof, refused the tender and demanded money, to which he was entitled under the retirement proceedings, after which the bonds so tendered were kept in the corporation safe in an envelope, with the stockholder's name indorsed thereon, for more than a year, until the corporation became bankrupt, it was held that the stockholder was bound by his election, and that he could not then demand the bonds from the trustee in exchange for his stock. *In re Reading Hosiery Co.*, (E. D. Pa. 1909) 171 Fed. 195, 22 Am. Bankr. Rep. 562.

In *In re Esmark*, (E. D. Pa. 1911) 188 Fed. 687, it appears that a claimant, having received the bankrupt's judgment notes for money advanced, afterwards distrained for rent due him as landlord from the bankrupts, and levied on certain property as belonging to them; and it was held that he could not in bankruptcy thereafter claim title to such property as having been purchased by the bank-

rupts with claimant's funds, under an agreement that he should hold the title until the money was repaid. *In re Esmark*, (E. D. Pa. 1911) 188 Fed. 687.

**Jurisdiction.**—When a court of bankruptcy having jurisdiction in the premises, through its receiver or a trustee in bankruptcy, has taken actual possession of property scheduled by the bankrupt as assets of his estate, and holds the same for administration in bankruptcy, it is not competent for a stranger claiming to be the owner of such property to maintain a suit in a state court against the trustee for the purpose of establishing his title and restraining the officer from selling the property. His remedy is by petition in the court of bankruptcy. *Keegan v. King*, (D. C. Ind. 1899) 96 Fed. 758, 3 Am. Bankr. Rep. 79.

So, also, it has been held that a person claiming to be the owner of property in possession of the bankrupt, and which has passed into the hands of the trustee in bankruptcy, will not be allowed to prosecute replevin in a state court without the consent of the court of bankruptcy. *White v. Schloerb*, ( ) 178 U. S. 542, 20 S. Ct. 1007, 44 U. S. (L. ed.) 1183; *In re Russell*, (C. C. A. 2d Cir. 1900) 101 Fed. 248, 3 Am. Bankr. Rep. 658, wherein it was said that the claimant might have brought an action in the state court against the trustee for the recovery of the value of the property, but that replevin could not be maintained because it was an interference with the possession of the court of bankruptcy; *In re Brockton Ideal Shoe Co.*, (D. C. Mass. 1912) 212 Fed. 764, where leave to try the title to certain goods by a replevin action in the state court was denied, the court saying: "No special reasons are shown, except that the petitioner desires to retake the property at once and also prefers to try the title to it before a jury, instead of before a referee in bankruptcy."

Where the seller of goods, which had been delivered to the buyers prior to the institution of bankruptcy proceedings against them, rescinded the sale for fraud after such proceedings were commenced, and applied to the court in which the proceedings were pending for leave to commence a replevin action for the goods in the state court against the receiver in bankruptcy, and after such petition was denied applied for an order directing the receiver to set aside and hold the goods in question for petitioners, which was also denied, it was held that such seller thereby became a party to the bankruptcy proceedings, and was bound to prosecute its claim to the goods in the court where such proceedings were pending. *In re Mertens*, (N. D. N. Y. 1904) 131 Fed. 507, 12 Am. Bankr. Rep. 698.

**Practice — Reference to master.**—Where petitions for the reclamation of property

from a trustee are presented to a court of bankruptcy, it is the prevailing practice to refer the same to a special master, instead of to the referee in bankruptcy; and such practice should not be changed, except by a general order of the Supreme Court which would be uniform in its operations. *In re Tracy*, (C. C. A. 2d Cir. 1910) 179 Fed. 366.

*A referee in bankruptcy has authority* to entertain and consider the claim of an intervening petitioner to property or its proceeds in the hands of a trustee, alleged to be the property of the petitioner, and not of the estate in bankruptcy. *In re Drayton*, (E. D. Wis. 1904) 135 Fed. 883, 13 Am. Bankr. Rep. 602.

*Trial by jury.*—But a *bona fide* claimant has the right to a trial by jury in the federal court; and he cannot be compelled to submit the final determination of his claim to adjudication in a summary proceeding, on petition, rule to show cause, and reference of the case to the master or referee in bankruptcy. *In re Russell*, (C. C. A. 2d Cir. 1900) 101 Fed. 248, 3 Am. Bankr. Rep. 658. And see also the annotation under section 23b.

*Creditors have a right to be heard* as to ownership of any property which was in the possession of the debtor at the time of the institution of bankruptcy proceed-

ings. *In re Potteiger*, (E. D. Pa. 1910) 181 Fed. 640.

*Forms in reclamation proceedings* are given in (1902) 8 Am. Bankr. Rep. 763.

*Stoppage in transitu.*—Where goods, previously ordered, were shipped to a bankrupt after his bankruptcy and delivered to his receiver, who paid the freight and took possession of them, it was held that it was then too late for the seller to lay a foundation for reclaiming them from the trustee by an attempted exercise of the right of stoppage *in transitu*. *In re Allen*, (M. D. Pa. 1910) 178 Fed. 879.

*Conflict of law.*—Where the trustee in bankruptcy and a transferee of the bankrupt both claim certain property which once belonged to the bankrupt, it may be difficult to decide how far the title to the property in question depends upon the state law which determines the effect of the bankrupt's conveyance, and how far upon the Bankruptcy Act which declares what property the trustee shall take. The one law regulates the passage of title from the bankrupt, and is interpreted by the state court. The other law regulates its passage to the trustee, and is interpreted by the federal court. *In re Loveland*, (C. C. A. 1st Cir. 1907) 155 Fed. 838, 19 Am. Bankr. Rep. 18.

(1) [Documents.] documents relating to his property; [(1898) 30 Stat. L. 565.]

Corporate records and stock books of a bankrupt corporation pass to the trustee, and belong in the custody of the Bankruptcy Court, and the latter has power upon a petition and rule to show cause to compel their delivery to the trustee. *Babbitt v. Dutcher*, (1910) 216 U. S. 102, 30 S. Ct. 372, 54 U. S. (L. ed.) 402, 17 Ann. Cas. 969.

*All documents included.*—By section 70a (1) of the Bankruptcy Act the trustee takes, by operation of law, the bankrupt's title to all documents relating to his property. *In re Madden*, (C. C. A. 2d Cir. 1901) 110 Fed. 348, 6 Am. Bankr. Rep. 614.

Section 1a (13), given *supra*, p. 511, defines a "document" to include any book, deed, or instrument in writing, and includes deeds, all other muniments of title, contracts, securities, bills, receivable, notes, bankbooks, bills of exchange, account books, and all papers and books relating to the business of the bankrupt. These books and papers which come within the designation of documents are regarded by the Bankruptcy Act as personal property, the title to which, by operation of law, is vested in the trustee. They are valuable not so much as an asset that can be converted for the purpose of meeting the demands of creditors, as they are for their importance as evidence by which

assets can be discovered by the trustee. *In re Hess*, (E. D. Pa. 1905) 134 Fed. 109, 14 Am. Bankr. Rep. 559.

The bankrupt's books of account are covered by this subdivision. *In re Harris*, (1911) 221 U. S. 274, 31 S. Ct. 557, 55 U. S. (L. ed.) 732.

*Books containing incriminating evidence.*—Books can be lawfully required to be transferred to a trustee though containing incriminating evidence. *Johnson v. United States*, (1913) 228 U. S. 457, 33 S. Ct. 572, 57 U. S. (L. ed.) 919, 47 L. R. A. (N. S.) 263.

*Where a bankrupt pleads his constitutional privilege against a production of books of accounts*, alleged to contain incriminating evidence, he should be required to bring such books and papers either before the court or the referee in bankruptcy for the determination of the question whether the plea is well founded in fact, and for the making of an order for the protection of the bankrupt from the discovery of such evidence, and, if possible, to enable the trustee to obtain other necessary information from such books *In re Hark*, (E. D. Pa. 1905) 136 Fed. 986, following *In re Hess*, (E. D. Pa. 1905) 134 Fed. 109. And see the annotation under section 7a (4) and (9).

But where there is no foundation in fact for the claim of privilege set up by

a bankrupt on the ground that his books and papers, if produced, would tend to incriminate him, and the referee so finds, an order for the production of the books

will be affirmed. *In re Hess*, (E. D. Pa. 1905) 136 Fed. 988, 14 Am. Bankr. Rep. 559. And see the annotation under section 7a (4) and (9).

(2) [Patents, copyrights, and trade-marks.] interests in patents, patent rights, copyrights, and trade-marks; [(1898) 30 Stat. L. 566.]

**Title to application for patent.**—Patent applications which have afforded benefit and credit to a bankrupt before bankruptcy are a species of "property" which passes to the estate in bankruptcy. *In re Cantelo Mfg. Co.*, (D. C. Me. 1911) 185 Fed. 276, 26 Am. Bankr. Rep. 57, *disapproving In re McDonnell*, (N. D. Ia. 1900) 101 Fed. 239, 4 Am. Bankr. Rep. 92, and *In re Dann*, (N. D. Ill. 1904) 129 Fed. 495, 12 Am. Bankr. Rep. 27.

And in *Fisher v. Cushman*, (1st Cir. 1900) 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, it was suggested that a court of bankruptcy would compel an inventor to take out his application for a patent and assign it to his trustee.

In *In re Myers-Wolf Mfg. Co.*, (C. C. A. 3d Cir. 1913) 205 Fed. 239, it was held that section 70 of the Bankruptcy Act either by clause a (2) or by clause a (5) "vests in the trustee the bankrupt's interest, both in patents and in applications for patents;" that clause (2) and clause (5) "are so inclusive in their scope that we do not see how any valuable interest of a bankrupt, either in an application or in a patent, can possibly escape them both; and we think it unimportant to determine which of the two clauses should be regarded as the more effective. . . . If an application is not an interest in a patent, although the issue of a patent is the very object of the application, and if it is not property of any kind, although buyers are often found who are willing to pay a good deal of money for the right, it is not easy to see where the right arising out of an application should be classified."

Compare *In re McDonnell*, (N. D. Ia. 1900) 101 Fed. 239, 4 Am. Bankr. Rep. 92, wherein it was held that the statute does not declare that the bankrupt's interest in patentable inventions, or in pending applications for patents, shall be vested in the trustee, but only his interest in patents and patent rights; and that the words "patent rights" were intended to include rights acquired under a patent to a third party, such as a license or manufacturing right, and the word "patents" to include cases wherein the title in the letters patent, in whole or in part, is vested in the bankrupt, either by the issuance of the letters in his name or by proper assignment in writing from the patentee. And see to the same effect, *In re Dann*, (N. D. Ill. 1904) 129

Fed. 495, 12 Am. Bankr. Rep. 27, *explaining Fisher v. Cushman*, (1st Cir. 1900) 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292.

Where the president and manager of a corporation had completed certain inventions with the corporation's funds, while acting as the corporation's agent and employee, and thereafter the corporation obtained credit thereon, it was held that the pending applications for patents constituted "property" which passed to the corporation's trustee in bankruptcy. *In re Cantelo Mfg. Co.*, (D. C. Me. 1911) 185 Fed. 276.

**Assignment of patent unnecessary.**—"In cases of bankruptcy it is not necessary that the patentee should execute an assignment in writing in order to convey the title to the trustee, as that passes by operation of law." *In re McDonnell*, (1900) 101 Fed. 239.

The trustee may elect not to accept a patent, if, in his opinion, it is worthless or will prove to be burdensome and unprofitable, and where the trustee thus disclaims interest the title thereto will remain in the bankrupt. *Sessions v. Romadka*, (1892) 145 U. S. 29, 12 S. Ct. 799, 36 U. S. (L. ed.) 609. See also cases cited in division V of the note to section 70a, *supra*, p. 1160.

A copyright for a publication held under an absolute assignment from the author to the assignee, his successors and assigns, is property of the assignee, which passes to his trustee in bankruptcy. *In re Howley-Dresser Co.*, (S. D. N. Y. 1904) 132 Fed. 1002, 13 Am. Bankr. Rep. 94.

A contract between an author and publisher for the copyrighting, publication, and sale, by the latter, of a series of books, and the payment of a royalty thereon to the author, is a personal engagement, although the publisher may be a corporation; and where it expressly provides that it shall not be transferred without the author's consent, and that on a failure to carry out its provisions the copyrights shall revert to the author, such copyrights cannot be sold by a trustee in bankruptcy as an asset of the publisher's estate, against the objection of the author, who is entitled, on petition therefor, to have them assigned by the trustee in accordance with the contract. *In re McBride*, (S. D. N. Y. 1904) 132 Fed. 285, 12 Am. Bankr. Rep. 81

(3) [Powers.] powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; [(1898) 30 Stat. L. 566.]

The trustee of a bankrupt mortgagor is an assignee of the statutory right to redeem within the contemplation of an Alabama statute authorizing the exercise of the right of redemption by the assignee of the statutory right. *Johnson v. Davis*, (Ala. 1912) 60 So. 799.

Liquor license not a "power."—As to whether a liquor license was included in the word "powers," as used in the statute, Putnam, C. J., said: "We prefer not to attempt to rest the case on this expression, because we doubt whether so popular a signification can be given to the word, and whether, on a careful examination of the English statutes from which this was drawn, and of the decisions of the English courts in regard thereto, we might not be required to determine that it is to be construed technically, as known to the common law." *Fisher v. Cushman*, (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 654.

To the same point as to a liquor license, see *In re Beahn*, (D. C. Mass. 1912) 212 Fed. 762.

A husband's interest in his wife's real estate during her life is not a "power," within the meaning of section 70a (3). *Hesseltine v. Prince*, (D. C. Mass. 1899) 95 Fed. 802, 2 Am. Bankr. Rep. 600.

A power of appointment given to a life tenant who is bankrupt to be exercised by will only cannot be exercised by a trustee in bankruptcy. *Montague v. Silsbee*, (1914) 218 Mass. 107, 105 N. E. 611.

Defense of usury.—This clause (3) was cited in *In re Kellogg*, (C. C. A. 2d Cir. 1903) 121 Fed. 333, 10 Am. Bankr. Rep. 7, (affirming *W. D. N. Y.* 1902) 113 Fed. 120, 7 Am. Bankr. Rep. 623) wherein it was held that a trustee in bankruptcy of a mortgagor who has executed a usurious mortgage is a privy in estate with the bankrupt and therefore entitled to set up the defense of usury against the mortgagee.

(4) [Property transferred in fraud.] property transferred by him in fraud of his creditors; [(1898) 30 Stat. L. 566.]

Property fraudulently transferred vests in trustee.—In accordance with section 70a (4), above set out, it has frequently been decided that the title to all property transferred by the bankrupt in fraud of his creditors vests in the bankrupt's trustee for the benefit of such creditors. *Hewitt v. Berlin Mach. Works*, (1904) 104 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986, 11 Am. Bankr. Rep. 709; *In re Boston*, (D. C. Neb. 1899) 98 Fed. 587, 3 Am. Bankr. Rep. 388; *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815; *In re Hamilton Furniture, etc., Co.*, (D. C. Ind. 1902) 117 Fed. 774, 9 Am. Bankr. Rep. 65; *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; *Chicago State Bank v. Cox*, (C. C. A. 7th Cir. 1906) 143 Fed. 91, 16 Am. Bankr. Rep. 32; *In re Kohler*, (C. C. A. 6th Cir. 1908) 159 Fed. 871, 20 Am. Bankr. Rep. 89; *Belding Hall Mfg. Co. v. Mercer, etc., Lumber Co.*, (C. C. A. 6th Cir. 1909) 175 Fed. 335, 23 Am. Bankr. Rep. 595; *Ludvigh v. American Woolen Co.*, (S. D. N. Y. 1910) 176 Fed. 145, 23 Am. Bankr. Rep. 314; *In re Wisniefsky*, (D. C. N. J. 1910) 181 Fed. 896; *In re Bendall*, (N. D. Ala. 1910) 183 Fed. 816; *In re Spann*, (N. D. Ga. 1910) 183 Fed. 819; *In re Hartman*, (N. D. N. Y. 1911) 185 Fed. 196; *In re McNamara*, S. D.

N. Y. 1899) 2 Am. Bankr. Rep. 566; *Ridgeway v. Kendrick*, (C. C. A. 3d Cir. 1913) 208 Fed. 849; *Globe Bank, etc., of Paducah v. Martin*, (1915) 236 U. S. 288, 35 S. Ct. 377, 59 U. S. (L. ed.) 583.

See also the annotation under section 60b (as to voidable preferences); section 67e (as to fraudulent conveyances within the four months' period); and section 70e (as to the recovery of property transferred in fraud of creditors generally).

The trustee is clothed with the rights of creditors to reach as assets of the estate property fraudulently conveyed at common law. *Bailey v. Wood*, (1912) 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A 950. See also sections 70e and 47a (2) and notes thereto.

Property sold by the bankrupt, but retained in his possession, is subject to be taken by bona fide creditors as his property, and the good faith of the parties makes no difference. *In re Fitzgerald*, (D. C. Conn. 1911) 188 Fed. 763.

Mortgage fraudulently withheld from record.—Where a mortgage deed is executed by the bankrupt more than four months preceding the filing of a petition in involuntary bankruptcy, but is not recorded until a few hours before such filing, the delay being the result of an understanding for the purpose of protecting the mortgagor's credit, the trustee in bankruptcy may have the mortgage set aside because fraudulent as to general

creditors. *Nat. Bank of Athens v. Schackelford*, (1915) 239 U. S. 81, 36 S. Ct. 17, *affirming* (C. C. A. 5th Cir. 1913) 208 Fed. 677.

The trustee has a transferable interest in real estate owned by the bankrupt and transferred by him in fraud of his creditors, even though made more than four months prior to the proceedings in bankruptcy, and may sell this interest, together with the right vested in him by statute to maintain an action to set aside such fraudulent transfer. The sale is to be made without warranty or representation of any kind and the purchaser takes simply the trustee's interest in the real property and his right to bring an action. The right may be valuable and it may be worthless; whoever buys does so with a full understanding of the character of the claim. *In re Downing*, (C. C. A. 2d Cir. 1912) 201 Fed. 93, *affirming* (N. D. N. Y. 1912) 192 Fed. 683.

Money in the bankrupt's hands which was received by him as the consideration of a conveyance fraudulent and void as to his creditors clearly passes to the trustee in bankruptcy, either under this clause (4) or under clause (5). *Thomas v. Sugarman*, (1910) 218 U. S. 129, 30 S. Ct. 650, 54 U. S. (L. ed.) 967, 29 L. R. A. (N. S.) 250.

**Collusion essential.**—Up to the moment of bankruptcy a party may make a valid disposition of his property, where it is done for a fair consideration and with an honest motive; and even where there is a fraudulent intent, in order to affect the purchaser, collusion must be shown. *In re Benjamin*, (M. D. Pa. 1905) 140 Fed. 320, 15 Am. Bankr. Rep. 351.

**Bona fide transactions** are, of course, unaffected. Thus in *Lovell v. Newman*, (E. D. La. 1911) 188 Fed. 534, it appears that the bankrupts, having sold a quantity of cotton through their broker to various Italian spinners, forged certain bills of lading purporting to show shipment of the entire quantity to be carried to New Orleans and thence to Genoa by the line specified in the contract, consigned to the shippers' order, with instructions to notify the broker. They then drew drafts for the value of the cotton at the price for which it had been sold, and annexed the fraudulent bills of lading, together with the insurance certificates and invoices, the whole apparently in strict conformity to the contract, discounted the drafts, and received the money. The spinners ultimately paid the drafts. More than two months after the time the cotton should have been delivered under the contract, the bankrupts did ship an identical quantity of cotton, consigned according to the forged bills, and after obtaining bills of lading for this cotton held the same in their hands, but before the cotton had cleared the port, bankruptcy intervened, and a quan-

tity of it was claimed by the receivers from the steamship on which it had been placed. It was held that the contracts of sale being valid, they were fulfilled and became executed when the cotton was actually delivered to the carriers, the stipulations as to time of delivery, and time and manner of payment, being incidental merely, and that the bankrupts and their trustee were estopped to deny that the cotton shipped belonged to the buyers.

**A transfer between husband and wife**, as a gift, and good under the law of the state, is also valid in bankruptcy, in the absence of an actual intention to defraud. *Tucker v. Curtin*, (C. C. A. 1st Cir. 1906) 148 Fed. 929, 17 Am. Bankr. Rep. 354, *reversing* (D. C. Mass. 1904) 131 Fed. 647, 12 Am. Bankr. Rep. 594.

Thus where a husband when free from debt paid the consideration for real estate which was conveyed to his wife, the presumption is that a voluntary settlement upon her was intended, and the burden rests upon one seeking to establish a resulting trust in him to overcome such presumption by sufficient evidence. *In re Foss*, (D. C. Me. 1906) 147 Fed. 790, 17 Am. Bankr. Rep. 439.

A wife cannot retain for herself, as payment for her personal labor, surplus moneys furnished by the husband for household expenses, and retain the same from the husband's creditors, unless such surplus is substantially equivalent to a gift from the husband, made when his financial condition was such that he could make such gift as a voluntary transfer for the work done. *Milkman v. Arthe*, (E. D. N. Y. 1914) 221 Fed. 134.

**Statute refers to title as between bankrupt and creditors.**—As between the bankrupt and his fraudulent grantee, the bankrupt has no title; and to give any effect, or even meaning, to section 70a (4) the words "title of the bankrupt" must be construed to mean title as between the bankrupt and his creditors. *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138. See also section 47a (2), which, as amended by the Act of 1910, vests the trustee with the right of a creditor holding an execution duly returned unsatisfied.

**Right of grantee's creditor without notice.**—This clause (4) does not avoid absolutely the title of the fraudulent grantee. It merely renders such title voidable, and a creditor of the grantee without notice may acquire in the property rights superior to the trustee's. *In re Mullen*, (1900) 101 Fed. 413.

**All fraudulent transfers which affect creditor's rights included.**—Title is vested generally in the trustee in and to all property transferred by the bankrupt in



fraud of his creditors at any time; and this, undoubtedly, was intended to mean any past fraud whereby property which should rightfully be applied to the payment of the debts owing by the bankrupt could be followed and seized for that purpose. *In re Kohler*, (C. C. A. 6th Cir. 1908) 159 Fed. 871, 20 Am. Bankr. Rep. 89; *In re McNamara*, (S. D. N. Y. 1899) 2 Am. Bankr. Rep. 566.

The statute includes all such conveyances as are fraudulent either under the common law, under the provisions of a statute, or under any recognized rule of the law of the state. *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138.

**Right of trustee to subrogation.**—Where a debtor shortly before filing his voluntary petition in bankruptcy, and in contemplation thereof, sold property which was not exempt from execution, and applied the proceeds in part payment of a debt secured by a mortgage on property claimed to be exempt as a homestead, it

was held that the transaction was in fraud of the Bankruptcy Law, and that the trustee in bankruptcy, for the benefit of the creditors, should be subrogated to the extent of the money so paid. *In re Boston*, (D. C. Neb. 1899) 98 Fed. 587, 3 Am. Bankr. Rep. 388.

**Decree of state court available to trustee.**—The trustee is entitled to avail himself, in like manner as any judgment creditor, of a decree of a state court declaring certain transfers and conveyances of the debtor to have been fraudulent and void; and he may claim the property affected by such fraud as assets of the estate in bankruptcy, subject to any valid liens or charges against it. *In re Lesser*, (S. D. N. Y. 1900) 100 Fed. 433, 3 Am. Bankr. Rep. 815.

**Capital stock** is a trust fund for the benefit of creditors; and if such stock is fictitiously and fraudulently issued it may be collected by the trustee for their benefit. *In re L. M. Alleman Hardware Co.*, (C. C. A. 3d Cir. 1910) 181 Fed. 810.

(5) [Property which might have been transferred or levied upon.] property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: [(1898) 30 Stat. L. 566.]

- I. In general, 1171.
- II. Interests in real property, etc., 1174.
- III. Pledges, 1178.
- IV. Conditional sales, 1181.
- V. Trust funds and deposits, 1185.
- VI. Property fraudulently obtained, 1187.
- VII. Subscriptions for stock, 1188.
- VIII. Membership in stock exchange, 1189.
- IX. Contractual interests and obligations, 1191.
- X. Licenses, 1193.
- XI. Effect of commingling property, 1195.

#### I. IN GENERAL.

What constitutes "property," see division I in the note to section 70a, *supra*, p. 1150.

**Transferable and leviable property passes to trustee.**—Subdivision (5), set out above, is clearly the most comprehensive clause of section 70a; and the decisions thereunder are unanimous to the effect that this clause means precisely what its language imports, namely, that the trustee in bankruptcy is vested, by operation of law, with the title of the bankrupt to all property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against such bankrupt. *Globe Bank, etc., Co. of Paducah v. Martin*, (1915) 236 U. S. 288, 35 S. Ct. 377, 59 U. S. (L. ed.) 583; *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412; *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536,

3 Am. Bankr. Rep. 55; *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414; *In re Shenberger*, (N. D. Ohio 1900) 102 Fed. 978, 4 Am. Bankr. Rep. 487; *Fisher v. Cushman*, (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 654; *In re Burka*, (E. D. Mo. 1900) 104 Fed. 326, 5 Am. Bankr. Rep. 12; *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; *In re Butterwick*, (M. D. Pa. 1904) 131 Fed. 371, 12 Am. Bankr. Rep. 536; *In re Burnstine*, (E. D. Mich. 1903) 131 Fed. 828, 12 Am. Bankr. Rep. 596; *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; *In re Duncan*, (D. C. S. C. 1906) 148 Fed. 464, 17 Am. Bankr. Rep. 283; *In re Milbourne Mills Co.*, (E. D. Pa. 1908) 162 Fed. 988, 20 Am. Bankr. Rep. 746, *affirmed* (C. C. A. 3d Cir. 1909) 172 Fed. 177; *In re Gebbie*, (E. D. Pa. 1909) 167 Fed. 609, 21 Am. Bankr. Rep. 694; *In re Burke*, (S. D. Ga. 1909) 168 Fed. 994, 22 Am. Bankr. Rep. 69; *In re Faulkner*, (D. C. Conn. 1910) 181 Fed. 981; *Foerstner v. Citizens' Sav., etc., Co.*, (C. C. A. 6th Cir. 1911) 186 Fed. 1; *Hansen Mercantile Co. v. Wyman*, (1908) 22 Am. Bankr. Rep. 877, 105 Minn. 491, 117 N. W. 926; *In re Matschke*, (E. D. N. Y. 1912) 193 Fed. 284; *Clark v. Snelling*, (C. C. A. 1st Cir. 1913) 205 Fed. 240.

The maxim "expressio unius est exclusio alterius" does not apply; and the trustee's right to any particular asset

will not be denied merely because it does not fall literally within the statute. *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

Thus it has been held that clause (5), in connection with the other subdivisions of section 70a, embraces every species of property, and interests in property, of which one can be invested with ownership. *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414.

**Local law governs.**—Whether property is subject to seizure and sale under execution must, generally, be determined by the local law. *In re Shenberger*, (N. D. Ohio 1900) 102 Fed. 978, 4 Am. Bankr. Rep. 487; *Fisher v. Cushman*, (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 654; *In re Butterwick*, (W. D. Pa. 1904) 131 Fed. 371, 12 Am. Bankr. Rep. 536; *In re Waite-Robbins Motor Co.*, (D. C. Mass. 1911) 192 Fed. 47; *Rosenbluth v. De Forest & Hotchkiss Co.*, (1911) 85 Conn. 40, 81 Atl. 955.

**Transferability, rather than marketability**, determines whether property becomes an asset for the trustee. *In re Wright*, (1907) 157 Fed. 544, 85 C. C. A. 206, 18 L. R. A. (N. S.) 193.

The alternative "or which might have been," etc., "shows a statutory declaration . . . that there may be property which cannot be sold under judicial process, and that there may be property of that character which passes for the benefit of creditors." *Fisher v. Cushman*, (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 654, where the court said: "Very likely some of these words [in clause 5] were used for the purpose of meeting difficulties arising under previous statutes in bankruptcy, by reason of the fact that sometimes a large amount of property was held under unrecorded deeds, which had given the debtor a credit to which he was not entitled, and which might have been attached under the local practice in various states, or might have been conveyed by the debtor to an innocent purchaser, but which, however, did not pass to assignees in bankruptcy."

The disjunctive "or" operates to vest the trustee with property subject to either manner of disposition therein described, and if the property could have been "transferred" it is immaterial whether or not it could have been levied upon and sold under judicial process. *Page v. Edmunds*, (1903) 187 U. S. 596, 23 S. Ct. 200, 47 U. S. (L. ed.) 318, affirming (1901) 107 Fed. 89, 46 C. C. A. 160, 59 L. R. A. 94.

**Condition of property immaterial.**—Section 70a (5) is concerned only with furnishing a definition and prescribing a test to determine what property shall pass by operation of law from the bankrupt to his trustee, so as to become a part of the estate for administration and distribution among the creditors. Its

purpose is to distinguish between what passes and what does not pass, as regards specific property and property rights, without regard to the condition of the property, whether in possession or in action. With reference to its condition, the property might be found in adverse possession of a third person, or to have been fraudulently transferred, or under an invalid pledge or lien, in all of which cases suit by the trustee would or might become necessary in order to bring in the property or its proceeds; but these several conditions are provided for in other sections of the Act. *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138.

**A stock of intoxicating liquors owned by a bankrupt licensed liquor seller passed to his trustee and the question whether the latter could sell the liquors became academic where the bankrupt, by agreement with the trustee, sold the same under his license and turned the proceeds over to the trustee for determination by the court as to the title thereto.** *Strub v. Gamble*, (C. C. A. 8th Cir. 1915) 221 Fed. 253.

**Goods shipped to bankrupt after filing of petition.**—In the case of *In re Nicol*, (N. D. N. Y. 1915) 221 Fed. 82, the question certified for review and answered in the negative, read as follows: "Is the petitioner, Solomon Thanhauser, from whom merchandise was ordered before the filing of the petition in bankruptcy in the above-entitled matter, which goods were thereafter shipped and delivered by the railroad company to and accepted by the trustee herein, entitled to an order directing the said trustee to pay the full purchase price of said merchandise?" The court, affirming the decision of the referee, said: "I have somewhat reluctantly reached the conclusion that the petitioning creditor is estopped to claim full payment for the merchandise in question. The petition in bankruptcy was filed August 29, 1913, the adjudication was had September 29, 1913, and on November 10th of the same year the merchandise was shipped in compliance with an order given by the bankrupt prior to his bankruptcy. Although the trustee accepted the goods which came into his possession subsequent to the time of his appointment, the bankrupt estate should not now be held liable for their full value. . . . There is no doubt in my mind that, in view of the intervention of bankruptcy, the petitioning creditor could legally have refused to ship the goods, or having shipped them, without being actually apprised of the bankruptcy or insolvency of the bankrupt, could have resorted to stoppage *in transitu*, or could have reclaimed them from the receiver or trustee after delivery; but he did not avail himself of these remedies, and it is now too late to afford him relief. Fur-

thermore, he had constructive notice of bankruptcy, the filing of the petition being *caveat* to all the world; but he nevertheless shipped the goods to the bankrupt, even after the election of a trustee, of which he is also presumed to have had notice. It often happens that goods are delivered to a bankrupt after the petition in bankruptcy has been filed, without the seller having knowledge of such petition, and to require full payment in such cases by the receiver or trustee who received the goods would operate as a preference, and in many instances might appreciably decrease the assets."

"Governmental pensions and salaries of public officers are not affected by proceedings in bankruptcy; but neither of these can be presumed to represent any capital invested, and public policy forbids their transfer." *Fisher v. Cushman*, (1st Cir. 1900) 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292.

It may be that an officer in the United States army is not bound to include his pay in his schedule, as the Bankruptcy Act contains no such provision as the English Bankruptcy Act, authorizing the court, when the bankrupt is an officer in the army or navy, or employed in the civil service, to order a portion of his pay to be applied for the benefit of his creditors in bankruptcy. *Audubon v. Shufeldt*, (1901) 181 U. S. 575, 21 S. Ct. 735, 45 U. S. (L. ed.) 1009.

**Transfers and incumbrances ineffective as to creditors.**—Where, under the state laws, a transfer or incumbrance of property is void or voidable as to creditors, for want of record or otherwise, so as to be subject to execution, the property passes to the trustee in bankruptcy under section 70a (5). *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412; *Chesapeake Shoe Co. v. Seldner*, (C. C. A. 4th Cir. 1903) 122 Fed. 593, 10 Am. Bankr. Rep. 466; *In re Tweed*, (N. D. Ia. 1904) 131 Fed. 355, 12 Am. Bankr. Rep. 648; *Foerstner v. Citizens' Sav., etc., Co.*, (C. C. A. 6th Cir. 1911) 186 Fed. 1.

**Defeasible or contingent interest.**—The marketability and assignability of property are quite distinct, and the fact that an interest in property is defeasible or contingent does not prevent it from being transferable within the meaning of the Bankruptcy Law. *In re Wright*, (C. C. A. 2d Cir. 1907) 157 Fed. 544, 19 Am. Bankr. Rep. 454, *reversing* (W. D. N. Y. 1907) 16 Am. Bankr. Rep. 778.

The fact that transferability depends on the consent of a stranger does not defeat the claim of creditors in bankruptcy to realize what can be obtained on a transfer if made. *Fisher v. Cushman*, (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 654.

**Nontransferable property does not pass.**

—It was clearly the intention of Congress that property should not pass to the trustee which could not be the subject of conveyance or disposition by the bankrupt at the time the bankruptcy proceedings were inaugurated. *Hesseltine v. Prince*, (D. C. Mass. 1899) 95 Fed. 802, 2 Am. Bankr. Rep. 600; *In re Russie*, (D. C. Ore. 1899) 96 Fed. 609, 3 Am. Bankr. Rep. 6; *In re Burka*, (E. D. Mo. 1900) 104 Fed. 328, 5 Am. Bankr. Rep. 12.

Thus the interest of a legatee under a will which provided that "no income or principal shall in any case be assignable, or alienable by anticipation, or subject to attachment, levy, or seizure by any creditor of the beneficiary, prior to his or her actual receipt thereof," does not pass to the legatee's trustee in bankruptcy. *Munroe v. Dewey*, (Mass. 1900) 4 Am. Bankr. Rep. 264.

**Mere expectancy—Interest of beneficiary in life insurance policy.**—In the case of *In re Hogan*, (C. C. A. 7th Cir. 1912) 194 Fed. 846, it appeared that at the time of the adjudication the bankrupt was a beneficiary in a policy of insurance on the life of his mother. The policy provided, however, that "the insured may, with the consent of the company, change the beneficiary at any time, provided it has not been assigned, by filing with the company a written request duly acknowledged and accompanied by this policy, such change to take effect upon its indorsement thereon by the company." Shortly after the adjudication the mother died and the question arose whether the bankrupt should pay over to the trustee the money received under the policy. The court, in holding that the bankrupt was not bound so to do, said: "The mother was at the date of the bankruptcy adjudication vested with complete property rights in the policy, having possession and control of the policy, together with the unqualified right to dispose of the entire benefits of such insurance, with no obligation in evidence, legal or equitable, to vest any share otherwise, either in the bankrupt or in his estate in bankruptcy. Thus the utmost effect of the existing indorsement naming the bankrupt as one beneficiary, under the general rule applicable to contracts, would be an inchoate benefit, a mere expectancy in his favor, without vested interest or property right during the life of the insured. Resting entirely on the will of the insured during her lifetime, the expectancy of possible benefits under the policy has neither substantial present value, nor other element of property, which the bankrupt could then 'by any means have transferred, or which might have been levied upon and sold under judicial process against him,' defined in section 70a as property vesting in the trustee of the estate of a bankrupt by operation of law."

**Alimony.**—In *Bolton v. Bolton*, (1914) 86 N. J. L. 69, 89 Atl. 1014, the court said: "Notwithstanding the remark in *Loveland on Bankruptcy* (section 153), I feel unwilling, on a motion for summary judgment, to hold that arrears of alimony accrued at the time of filing the petition do not pass to the trustee. When it is considered that during the period of nonpayment the wife has in all probability been contracting debts for her support on the faith of recovering these payments, and that alimony is awarded for the express purpose of enabling her to meet the expense of her support by paying in cash as she goes along, and when it is considered further that by her discharge in bankruptcy these debts are wiped out, it seems manifestly unjust that the creditors should have no recourse to the very fund that the divorce court provided to pay them." It was held, however, that alimony accruing subsequently to the petition in bankruptcy belonged to the wife.

A mere claim or possible right to alimony asserted by the bankrupt in divorce proceedings pending and undetermined when the petition in bankruptcy was filed was not property within the terms of this clause (5) and did not pass to the trustee. *In re Le Claire*, (N. D. Ia. 1903) 124 Fed. 654, 10 Am. Bankr. Rep. 733.

A cause of action for personal injuries does not pass to the trustee. See end of division I in the first note to section 70a preceding clause (1).

## II. INTERESTS IN REAL PROPERTY, ETC.

**Generally.**—It is well settled that the trustee in bankruptcy is, on his appointment, vested, by operation of law, with all the right, title, and interest to real property which, prior to the filing of the petition in bankruptcy, the bankrupt might have transferred, or which might have been sold under judicial process issued against him. *In re Woodard*, (E. D. N. C. 1899) 95 Fed. 260, 2 Am. Bankr. Rep. 339; *In re St. John*, (N. D. N. Y. 1900) 105 Fed. 234, 5 Am. Bankr. Rep. 190; *In re Twaddell*, (D. C. Del. 1901) 110 Fed. 145, 6 Am. Bankr. Rep. 539.

And it has also been held that the interest of a bankrupt in his father's estate, vested prior to bankruptcy, goes to the trustee, even though such interest has not been determined. *In re Mosier*, (D. C. Vt. 1901) 112 Fed. 138, 7 Am. Bankr. Rep. 268.

**Vested remainder.**—Thus it has been held that a vested remainder passes to the trustee. *In re McHarry*, (C. C. A. 7th Cir. 1901) 111 Fed. 495, 7 Am. Bankr. Rep. 83.

In *In re Haslett*, (1902) 116 Fed. 680, certain interest in property was held to constitute a vested remainder under the laws of Georgia, and passed to the trustee in bankruptcy.

**Life interest.**—So, also, a bankrupt's

life interest in real property becomes a part of his estate on his adjudication. *In re Force*, (D. C. Mass. 1899) 4 Am. Bankr. Rep. 114.

**Interest under contract.**—The trustee is also entitled to any interest which the bankrupt may have under a contract for the sale of land. *In re Clark*, (M. D. Pa. 1902) 118 Fed. 358, 9 Am. Bankr. Rep. 252.

**Damages occasioned by change of grade** have been held to constitute a part of the estate in bankruptcy of the owner of the property. *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576.

**Bankrupt's power to estop himself.**—"Mere ability possessed by one who subsequently becomes a bankrupt, by deed, conveyance, or assignment, or by executory contract, to estop or preclude himself from claiming title to or enjoying property wholly acquired after the execution of such deed or contract, is not sufficient to constitute 'property which prior to the filing of the petition he could by any means have transferred.'" *In re Twaddell*, (1901) 110 Fed. 145.

**An unrecorded deed in which the bankrupt is the grantor** does not pass title to the property as against attaching or executing creditors, and the title to the property passes to the bankrupt's trustee subject only to the equities or claims of record against it. *Davis v. Pursel*, (Colo. 1913) 134 Pac. 107.

**Interest in growing crops.**—If the bankrupt's interest in growing crops is such that he could have transferred it before filing his petition, the title to such interest vests in the trustee as of the date of the adjudication; and the bankrupt must account for such part as he has disposed of. *In re Barrow*, (W. D. Va. 1899) 98 Fed. 582, 3 Am. Bankr. Rep. 414; *In re Luckenbill*, (E. D. Pa. 1904) 127 Fed. 984, 11 Am. Bankr. Rep. 455.

In Vermont the products of a wife's land which is held by her under a deed without limitation, occupied by the family, and farmed by her husband, are not her separate property, but are assets of the husband's estate in bankruptcy. *In re Rooney*, (D. C. Vt. 1901) 109 Fed. 601, 6 Am. Bankr. Rep. 478.

A growing crop upon land, held by a homestead entryman, subject to performance by him of conditions precedent of his contract to purchase from the United States, is not property of the character that vests in the trustee. *In re Miller*, (D. C. Mont. 1915) 221 Fed. 690.

**Property fraudulently conveyed but re-vested in bankrupt.**—If the title to property fraudulently conveyed before the passage of the Act by a debtor, who afterwards is adjudged bankrupt, which property, therefore, would otherwise be beyond the reach of the Bankruptcy Court, has re-vested in the bankrupt, and is in him when the petition is filed, it is part

of the estate which is to be administered. *In re Brown*, (1898) 91 Fed. 358.

**Intangible property.**—"It may be argued that section 70a (5) is to be limited in meaning to tangible or corporeal property, by reason of the context, since clauses (2), (3), and (6) relate to particular species of incorporeal or intangible property; but this construction is negated by the fact that section 70a (5) contains a proviso as to policies of life insurance and many valuable rights and species of intangible property have been held to come within the purview of that proviso." *Cleland v. Anderson*, (1902) 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. (N. S.) 136.

**Contingent testamentary interests** are not affected by this section and do not pass to the trustee. *Luttgen v. Tiffany*, (R. I. 1915) 93 Atl. 182.

Where, under the provisions of a will, the bankrupt's interest in an estate was contingent as to whether he should ever take, and not as to the time when he or his heirs should surely take, it was held that he had no vested interest which could pass to his trustee in bankruptcy. *In re Ehle*, (D. C. Vt. 1901) 109 Fed. 625, 6 Am. Bankr. Rep. 476. See also *In re Hoadley*, (S. D. N. Y. 1900) 101 Fed. 233, 3 Am. Bankr. Rep. 780.

A *contingent gift in futuro*, which carries no present interest that is alienable or subject to execution, does not vest in the donee's trustee in bankruptcy. *In re Gardner*, (S. D. N. Y. 1901) 106 Fed. 670, 5 Am. Bankr. Rep. 432.

**Vested interest in a contingent right.**—The interest of one who, living at the death of a testator, is a beneficiary in a will giving the income of property to his father for life, and upon the father's death giving the property to him if living, passes to the trustee in bankruptcy of the beneficiary. *Clarke v. Fay*, (1910) 205 Mass. 228, 91 N. E. 328, 27 L. R. A. (N. S.) 454, where the court said: "To use the language of our cases, this is something more than a mere possibility, and was a 'vested interest in a contingent right.' It is property, and is such an interest as could be assigned. . . . That it would have passed to the assignee in insolvency or bankruptcy under our insolvency laws and early United States Bankruptcy Acts has been expressly decided. *Gardner v. Hooper*, (1855) 3 Gray (Mass.) 398; *Nash v. Nash*, (1866) 12 Allen 345; *Belcher v. Burnett*, (1879) 126 Mass. 230; *Putnam v. Story*, (1882) 132 Mass. 205. Such seems to be the law of New York. *Smith v. Scholtz*, (1877) 68 N. Y. 41-61. It is clear that it would pass under the English Bankruptcy Act. *Higden v. Williamson*, (1731) 3 P. Wms. (Eng.) 132; *Robson's Law and Practice in Bankruptcy*, (6th ed. Eng.) 549; *Davidson v. Chalmers*, (1864) 33 Beav.

(Eng.) 653; *Hensley v. Mills*, 16 L. T. N. S. (Eng.) 582. There is nothing in the present Bankruptcy Act to call for a different decision. . . . Some decisions of federal Circuit or District Courts appear to be in conflict upon this subject. *In re Hoadley*, (D. C. N. Y. 1900) 101 Fed. 233; *In re Ehle*, (D. C. Vt. 1901) 109 Fed. 625; *In re St. John*, (D. C. N. Y. 1900) 105 Fed. 234; *In re Wetmore*, (1901) 108 Fed. 520, 47 C. C. A. 477; *In re Twaddell*, (D. C. Del. 1901) 110 Fed. 145; *In re Gardner*, (D. C. N. Y. 1901) 106 Fed. 670; *In re McCrea*, (1908) 161 Fed. 246, 88 C. C. A. 282, 20 L. R. A. (N. S.) 246. But it is not necessary to review or analyze them for the reason that they have been based upon state statutes or decisions in some instances differing from our own."

**Contingent remainder interest.**—Where, in the case of contingent remainders, "the contingency relates to the event, and not to the person, the remainderman possesses a right or title which may indifferently be considered or termed a vested right in or to a contingent interest or estate, or a contingent right to a future interest or estate, and such a right is alienable and transmissible to heirs or personal representatives, according to its nature," and passes, therefore, to the trustee. *In re Twaddell*, (1901) 110 Fed. 145.

**Encumbered property.**—Property on which there is a mortgage, or other lien, passes to the trustee in bankruptcy. *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 692.

The trustee of a bankrupt whose property has been seized under a mortgage and is in possession of a receiver appointed in a foreclosure suit by a state court of competent jurisdiction is entitled to the possession of the property not covered by the mortgage, and to the excess of the proceeds of a sale of the mortgaged property over the mortgage debt and costs of foreclosure. *Carling v. Seymour Lumber Co.*, (C. C. A. 5th Cir. 1902) 113 Fed. 483, 8 Am. Bankr. Rep. 29.

And where a corporation executed trust deeds for all of its property to secure debts not then due, such deeds not being absolute conveyances, it was held that the grantor retained an interest in the property conveyed, which passed to its trustee in bankruptcy for the benefit of unsecured creditors. *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 692.

Where a bankrupt holds the legal title to mortgaged property when the adjudication is made, it will pass into the custody of the Bankruptcy Court, and by operation of law the title of the bankrupt will vest in the trustee as of the date of such adjudication. *In re Novak*, (N. D. Ia. 1901) 111 Fed. 161, 7 Am. Bankr. Rep. 27; *In re Kellogg*, (W. D.

N. Y. 1902) 113 Fed. 120, 7 Am. Bankr. Rep. 623. See also *Barron v. Newberry*, (1857) 1 Biss. (U. S.) 149; *Robinson v. Tenny*, (1877) 57 Ala. 492.

**Right of redemption.**—So, also, the trustee is vested with the statutory right of redemption from a foreclosure sale, under a decree rendered after the adjudication. *In re Novak*, (N. D. Ia. 1901) 111 Fed. 161, 7 Am. Bankr. Rep. 27.

But bankruptcy neither enlarges nor prolongs the right of redemption. *In re Goldman*, (S. D. N. Y. 1900) 102 Fed. 122, 4 Am. Bankr. Rep. 100.

**Landlord's interests.**—Upon his adjudication as a bankrupt the interests of a landlord, as such, pass to his trustee. *In re Hays, etc., Co.*, (W. D. Ky. 1902) 117 Fed. 879, 9 Am. Bankr. Rep. 144.

**Rents accruing after adjudication** for mortgaged property of the bankrupt which comes into the possession of the trustee, and before the mortgagee has taken such action as to entitle him to possession of the property, belong to the estate. *In re Dole*, (D. C. Vt. 1901) 110 Fed. 926, 7 Am. Bankr. Rep. 21; *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576; *In re Force*, (D. C. Mass. 1899) 4 Am. Bankr. Rep. 114; *Alter v. Clark*, (1911) 193 Fed. 153.

**Rent of exempt land.**—Where a bankrupt after adjudication took notes for the future rent of exempt land, it was held that such notes were not assets of the estate. *In re Oleson*, (1901) 110 Fed. 797.

**Tenant's interest in leasehold.**—When a tenant has been declared bankrupt, his trustee, on his appointment, is vested with title to the leasehold subject to his acceptance thereof within a reasonable time. *In re Frazin*, (S. D. N. Y. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289.

The tenant's trustee is not obliged to accept the lease, and if there be no acceptance the title thereto never passes; therefore the property which may be said to pass immediately to the trustee is not the lease itself, but the option of accepting it. *In re Frazin*, (C. C. A. 2d Cir. 1910) 183 Fed. 28.

A lease will pass from the bankrupt to his trustee by operation of this section, although it is by its express terms not assignable. *In re Gutman*, (S. D. Ga. 1912) 197 Fed. 472.

**Term not affected.**—Bankruptcy does not, of itself, terminate the lease. *Watson v. Merrill*, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 454. And see *infra*, this note, p. 1191, *IX. Contractual Interests and Obligations*.

And a lessee's covenant not to assign, mortgage, or pledge the lease, or underlet the property, without the lessor's consent, is not violated by the lessee's bankruptcy. *In re Frazin*, (S. D. N. Y. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289.

And where an involuntary bankrupt is tenant under a lease containing a covenant against assignment, an adjudication in bankruptcy is not a breach, and the lease passes to the trustee. *In re Bush*, (D. C. R. I. 1904) 126 Fed. 878, 11 Am. Bankr. Rep. 415.

**When the trustee accepts a lease**, or a contract for a lease, made by the bankrupt, he must assume every obligation and be bound by all the conditions that the contract imposes upon the bankrupt. *In re Beachy*, (E. D. Wis. 1909) 170 Fed. 825, 22 Am. Bankr. Rep. 538.

In the event of an acceptance, the vesting of the trustee's title relates back to the time of the adjudication. *In re Frazin*, (C. C. A. 2d Cir. 1910) 183 Fed. 28.

And where, after the sale of a bankrupt's assets located on leased premises was confirmed, the trustee abandoned possession to the purchaser, and the landlord might have entered on that day, it was held that the trustee was not chargeable with the purchaser's occupation thereafter. *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566.

**If the trustee refuses to accept the lease** the bankrupt retains the term on precisely the same footing as before, with the right to occupy, and the obligation to pay rent. *In re Ellis*, (D. C. Mass. 1900) 98 Fed. 967; *In re Frazin*, (C. C. A. 2d Cir. 1910) 183 Fed. 28.

**Trustee not trespasser.**—Where a bankrupt's receiver and trustee entered under the bankrupt's lease, it was held that they were not trespassers, and could not be made so by a state statute. *In re Rubel*, (E. D. Wis. 1908) 166 Fed. 131, 21 Am. Bankr. Rep. 566.

**Right of trustee as against subsequent lessee.**—Where, prior to the bankruptcy of a tenant, the landlord took no steps to regain possession of the premises for rent in arrear, on the appointment of the tenant's trustee it was held that the latter was entitled to possession under the tenant's lease, as against lessees of the landlord subsequent to the adjudication. *In re Adams*, (D. C. Conn. 1905) 134 Fed. 142, 14 Am. Bankr. Rep. 23.

**Waiver of re-entry provisions.**—The acceptance of rent from the trustee constitutes a waiver of provisions authorizing re-entry in case of the bankruptcy of the lessor; and in such case the trustee may sell the lease and convey title to the purchaser, without being subject to re-entry on the part of the landlord, so long as the purchaser complies with the other provisions of the lease. *In re Frazin*, (S. D. N. Y. 1909) 174 Fed. 713, 23 Am. Bankr. Rep. 289.

**Lease terminated by dispossession.**—Where a lease on the premises occupied by a bankrupt was terminated by a warrant of dispossession issued at least four days before a receiver in bankruptcy was

appointed, and after the receiver took possession he appeared and announced in open court that he had finished the business and disposed of the bankrupt's assets contained in the premises, and made no objection to the dissolution of an injunction restraining the landlord from interfering with his possession, it was held that the bankrupt had no lease which could be an asset of his estate in bankruptcy, nor had the receiver either wrongfully parted with or been deprived of the premises by force of the warrant to dispossess; and hence the federal court had no jurisdiction of an action by a trustee to establish the lease as an asset of the estate. *Plaut v. Gorham Mfg. Co.*, (S. D. N. Y. 1909) 174 Fed. 852, 23 Am. Bankr. Rep. 42.

**Forfeiture enforced.**—Where, prior to his having been adjudged a bankrupt, a tenant was notified of the forfeiture of his lease in accordance with the terms thereof, it was held that, on petition of the lessor, the court of bankruptcy properly decreed the enforcement of the forfeiture, and directed the trustee to surrender possession of the property as the only effective remedy for the protection of the rights of the lessor. *Lindeke v. Associates Realty Co.*, (C. C. A. 8th Cir. 1906) 146 Fed. 630, 17 Am. Bankr. Rep. 215.

**Bankrupt's interest as lessee on shares.**

—Where the bankrupt was tenant of a farm under a contract whereby the landlord was entitled as rent to one-fourth of the crops, and at the date of the filing of the petition in bankruptcy the crops were unripe and uncut, it was held that the bankrupt's interest therein passed to his trustee as assets, and that after the crops were severed, the bankrupt must hand them over to the trustee or render an account of the proceeds of their sale. *In re Barrow*, (1899) 98 Fed. 582, where, however, upon surrendering the crops or their proceeds the bankrupt was held entitled to a reasonable allowance for labor and care thereon from the time of adjudication.

**Dower and curtesy rights.**—Under the statutes of *Massachusetts* a husband's interest in his wife's real estate during her life and after the birth of issue is not property assignable or transferable by him; and therefore the trustee is not entitled thereto as assets of the estate of the bankrupt. *Hesseltine v. Prince*, (1899) 95 Fed. 802. Compare *In re McKenna*, (1881) 9 Fed. 27.

See also to the same effect as to dower rights, which, it has been held, are not affected by section 70a (5), *In re Hays*, (C. C. A. 6th Cir. 1910) 181 Fed. 674. And see the annotation under section 8.

**The wife of a bankrupt is not estopped to claim and recover her interest** in the land, as against the general creditors of her husband, by any representations by him as to his sole ownership, made with-

out her consent or knowledge. *In re Garner*, (N. D. Ga. 1901) 110 Fed. 123, 6 Am. Bankr. Rep. 596.

**Annuity in lieu of dower.**—But where a widow accepts an annuity in lieu of her dower and subsequently becomes a bankrupt, it has been held that such annuity passes to a trustee in bankruptcy, being a right which could have been assigned by her, or seized by her creditors. *In re Burtis*, (E. D. N. Y. 1911) 188 Fed. 527.

**Community property.**—By the civil law which is in force in New Mexico, except as changed by statute, community property acquired by either husband or wife during the marriage, whether by purchase or their individual or joint labor, is held by them as partners, being primarily a fund for the payment of community debts; and, therefore, on the bankruptcy of a husband having only a community estate, the claims of an antenuptial creditor must be postponed until those of community creditors are satisfied in full. *In re Chavez*, (C. C. A. 8th Cir. 1906) 149 Fed. 73, 17 Am. Bankr. Rep. 641.

**Interest in trust fund.**—In *In re St. John*, (1900) 105 Fed. 234, it was held that the interest of the bankrupt in a certain trust fund passed to his trustee, under section 70a (5).

**Trust property converted by bankrupt.**

—Money which the bankrupt holds as a guardian, but which is indistinguishably mingled with his own, has lost its identity as trust money, and cannot be withheld from the trustee; nor will the fact that property was purchased by the bankrupt with such trust money entitle the bankrupt to withhold such property or the proceeds thereof from the trustee, the wards being, under the circumstances, merely creditors sharing along with the general creditors. *In re Richards*, (1900) 104 Fed. 792. See also *Adams v. Meyers*, (1870) 1 Sawy. (U. S.) 306; *Hosmer v. Jewett*, (1872) 6 Ben. (U. S.) 208; *In re Coan, etc., Carriage Mfg. Co.*, (1875) 6 Biss. (U. S.) 315; *In re Madison Bank*, (1874) 5 Biss. (U. S.) 515.

**Lien of bankrupt contractor.**—In *Duplan Silk Co. v. Spencer*, (C. C. A. 1902) 115 Fed. 689, the possession of the owner of a building in course of erection by a contractor having a lien for materials which went into the building was held to be such that the property could not be disposed of by the contractor, and such property did not pass to the latter's trustee in bankruptcy.

**The statutory individual or double liability of stockholders of a corporation cannot be enforced by the corporation and is not an asset passing to the trustee in bankruptcy of the corporation, but remains subject to the demands of creditors if the assets of the corporation are insufficient to discharge the debts.** *Tiger Shoe Mfg. Co. v. Shanklin*, (1907) 125

Ky. 715, 102 S. W. 295, 31 L. R. A. (N. S.) 365 and note. See also *Tibballs v. Libby*, (1877) 87 Ill. 142; *Pfohl v. Simpson*, (1878) 74 N. Y. 137, *affirming* (1873) 50 How. Pr. 341; *Younglove v. Kelly Island Lime Co.*, (1892) 49 Ohio St. 663, 33 N. E. 234; *Dutcher v. Marine Nat. Bank*, (1875) 12 Blatchf. 436, 8 Fed. Cas. No. 4,203; *Wilkins v. Davis*, (1876) 2 Lowell 511, 29 Fed. Cas. No. 17,664.

**Allotment to Indian bankrupt.**—In *re Russie*, (1899) 96 Fed. 609, it was held that land allotted by the United States government to an Indian on a reservation did not pass to the trustee of the Indian bankrupt, as the latter could not have transferred or encumbered the same, and as, furthermore, the land was exempt under a law which was unrepealed and unaffected by the Bankrupt Act.

### III. PLEDGES.

**Property held by bankrupt pledgee.**—As a general rule a *bona fide* pledge will be recognized in bankruptcy proceedings; and where such property comes into the possession of a trustee in bankruptcy of the pledgee, the pledgor may assert his rights thereto. *In re McCord*, (C. C. A. 2d Cir. 1909) 174 Fed. 820, 23 Am. Bankr. Rep. 164.

**Property pledged by bankrupt.**—Where, prior to his adjudication, the bankrupt makes a *bona fide* pledge of his property, which would be effective as against his creditors, the trustee takes title to the property so pledged subject to claims of the pledgee. *Van Kirk v. Vermont Slate Co.*, (N. D. N. Y. 1905) 140 Fed. 38, 15 Am. Bankr. Rep. 239; *In re Mertens*, (C. C. A. 2d Cir. 1906) 144 Fed. 818, 15 Am. Bankr. Rep. 362; *In re Bartlett*, (M. D. Pa. 1909) 172 Fed. 679, 22 Am. Bankr. Rep. 891; *In re Twining*, (E. D. Pa. 1911) 185 Fed. 555. And see the annotation under section 67d.

An agreement of pledge, made by one who subsequently became a bankrupt, authorizing the pledgee to sell the security pledged at public or private sale, with or without notice, and to purchase the same, is valid, and a sale made in accordance therewith at public auction, but without notice, and a purchase thereat by the pledgee, cannot be impeached by the trustee in bankruptcy of the pledgor, unless fraud or bad faith is affirmatively shown. *In re Mertens*, (C. C. A. 2d Cir. 1906) 144 Fed. 818, 15 Am. Bankr. Rep. 362.

**Where certain warehouse receipts were pledged to a bank, by a corporation while insolvent, to secure a certain note then executed and any liability thereafter contracted, and there was no evidence to impugn the good faith of the bank, it was held that the bank was entitled to maintain its right to the property so**

pledged not only for the payment of such note, but for other notes subsequently discounted, as against the corporation's trustee in bankruptcy, although the pledge was made within four months prior to the filing of the petition in bankruptcy. *Love v. Export Storage Co.*, (C. C. A. 6th Cir. 1906) 143 Fed. 1, 16 Am. Bankr. Rep. 171.

In *New Orleans Commercial Nat. Bank v. Canal-Louisiana Bank, etc., Co.*, (1916) 239 U. S. 520, 36 S. Ct. 194 (*reversing*) (C. C. A. 5th Cir. 1914) 211 Fed. 337, (E. D. N. Y. 1913) 205 Fed. 568, which was a controversy in bankruptcy between two claimants of property in the hands of the trustee in bankruptcy, it appeared that the bankrupt had pledged bills of lading for the property to one of the claimants to secure an indebtedness and later had secured a withdrawal of the bills of lading on trust receipts. He then got the property from the railroad company by surrendering the bills of lading and stored it with a warehouseman who gave him negotiable warehouse receipts which he pledged with the record claimant as security for an indebtedness. Later these warehouse receipts were withdrawn by the bankrupt and trust receipts similar in tenor to those given to the first claimant were given the second claimant. It was held, construing the Uniform Warehouse Receipts Act of Louisiana, that the second claimant was entitled to the property.

A distilling company's warehouse receipts, calling for whisky stored in its distillery warehouse, which is in practical effect, under the internal revenue laws, in the custody of the United States, and incapable of delivery by the distiller without payment of the tax, represent the property itself, and their transfer to a purchaser or pledgee in good faith, together with the gauger's certificates, in accordance with the usages of the business, under the law of Pennsylvania, operates as a delivery of the whisky; and, if made more than four months prior to the bankruptcy of the distiller, the sale or pledge is valid as against its trustee. *Taney v. Penn. Nat. Bank of Reading*, (1914) 232 U. S. 174, 34 S. Ct. 288, 58 U. S. (L. ed.) 558, *affirming* (C. C. A. 3d Cir. 1911) 187 Fed. 689.

**Pledge must be surrendered to trustee.**

—It has been held that a trustee in bankruptcy is vested by law with title to all the assets of the bankrupt, including securities in the hands of a creditor as collateral; and such creditor has no right to hold the securities until paid the amount of his debt, nor to sell or cancel them, or realize on them by the aid of a court or otherwise, independently of the bankruptcy proceedings, but he must surrender them to the trustee, who has sole authority to reduce them to money, and the claim of the creditor to priority



of payment out of the proceeds will be adjudged and administered in the Bankruptcy Court, which alone has jurisdiction of the matter. *In re Cobb*, (E. D. N. C. 1899) 96 Fed. 821, 3 Am. Bankr. Rep. 129. To the same effect see *Big- ham v. South Side Trust Co.*, (C. C. A. 3d Cir. 1914) 212 Fed. 1.

**Invalid pledge.**—A transaction intended as a pledge of property, but which for want of delivery is ineffectual as such, does not create an equitable lien as against a trustee in bankruptcy. *Fourth St. Nat. Bank v. Milbourne Mills Co.*, (C. C. A. 3d Cir. 1909) 172 Fed. 177, 22 Am. Bankr. Rep. 442. See also *Guarantee Title, etc., Co. v. Huntingdon First Nat. Bank*, (C. C. A. 3d Cir. 1911) 185 Fed. 373.

A transaction which in effect is a pledge of property, but which is based upon a contract void for usury, does not create an equitable lien as against the trustee in bankruptcy. *Home Bond Co. v. McChesney, etc., Co.*, (1916) 239 U. S. 568, 36 S. Ct. 170, wherein the court followed the conclusions reached by the special master, *affirmed* in 206 Fed. 309 and 210 Fed. 893, which held that a contract between the intervenor and the bankrupt by which bills receivable belonging to the bankrupt were transferred to the intervenor for an advancement of seventy-five per cent. of their face, on specified terms, was not a sale of the accounts receivable, but a pledge thereof as security for a loan, and that the discount of seventy-five per cent. provided for was usurious, and the contract therefore a mere sham and device to cover loans of money at usurious rates, and as such was void under the laws of New York, and ineffectual as a lien as against the trustee.

The legal effect of a pledge depends upon the local law. *Dale v. Pattison*, (1914) 234 U. S. 399, 34 S. Ct. 785, 58 U. S. (L. ed.) 1370, 52 L. R. A. (N. S.) 754, *following Taney v. Penn Nat. Bank of Reading*, (1914) 232 U. S. 174, 34 S. Ct. 288, 58 U. S. (L. ed.) 558.

**Stock brokerage transactions—Constitutes relation of pledgor and pledgee.**—Where a broker buys stock for a customer on a margin, the title to such stock is in the customer, and not in the broker, who holds the same merely as pledgee to secure the advances made by him in the purchase. *Richardson v. Shaw*, (C. C. A. 2d Cir. 1906) 147 Fed. 659, 16 Am. Bankr. Rep. 842, *affirmed* (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835, 19 Am. Bankr. Rep. 717. And see to the same effect *In re Swift*, (C. C. A. 1st Cir. (1901) 112 Fed. 315, 7 Am. Bankr. Rep. 374; *Hutchinson v. LeRoy*, (C. C. A. 1st Cir. 1902) 113 Fed. 202, 8 Am. Bankr. Rep. 20; *In re Bolling*, (E. D. Va. 1906) 147 Fed. 786, 17 Am. Bankr. Rep. 399; *In re Berry*, (C. C. A. 2d Cir. 1906) 149

Fed. 176, 17 Am. Bankr. Rep. 467; *In re Brown*, (S. D. N. Y. 1909) 171 Fed. 251, 22 Am. Bankr. Rep. 659; *In re Meadows*, (W. D. N. Y. 1909) 173 Fed. 694, 23 Am. Bankr. Rep. 124, *affirmed* (C. C. A. 2d Cir. 1910) 177 Fed. 1004, 24 Am. Bankr. Rep. 251.

A customer is entitled to any shares purchased for his account and owned by him, so long as he thereby does not become debtor to the broker or his bankrupt estate. *In re Carothers*, (W. D. Pa. 1910) 182 Fed. 501.

Where a broker who was carrying stocks for a customer, which he had bought on a margin, made a general assignment, and a few days afterwards the customer wrote him asking the amount of his account, which he did not know, and stating that he would remit the amount and take up the stocks; and no action was taken by the broker or assignee on such letter, the stocks having been previously pledged by the broker and sold by the pledgee, and the broker was subsequently adjudged a bankrupt, it was held that the letter constituted a demand, the failure to comply with which was a breach of the contract, and gave the customer an immediate right of action; it being shown that he was able and willing to pay the amount due from him to the broker. *In re Swift*, (D. C. Mass. 1902) 114 Fed. 947, 9 Am. Bankr. Rep. 237.

In *In re Meadows*, (W. D. N. Y. 1909) 173 Fed. 694, 23 Am. Bankr. Rep. 124, it appears that the bankrupts, who were stockbrokers in Buffalo, received orders from the petitioner to buy certain stocks, which they executed through their New York correspondent, who purchased the stocks, paid for the same, and charged the amount to the bankrupts' general account. They subsequently had the stocks transferred and certificates therefor issued in petitioner's name, but retained the same as security for the bankrupts' account. On being advised of the purchase, the petitioner paid the bankrupts for the stocks, but they did not remit the money to the New York brokers, and the stocks had not been delivered when the bankruptcy occurred. The bankrupts' indebtedness to the New York brokers was paid from the proceeds of a seat in the stock exchange, on which they had a lien under the rules of the exchange, and the stocks were delivered to the bankrupts' trustee. It was held that on the payment for the stocks the title vested in petitioner, subject, possibly, to a lien in favor of the New York brokers for the purchase price, and, such price having been paid from other property, on which they also had a lien, she was entitled to the certificates, as between her and the trustee.

**Money deposited for stock.**—Where a customer, on the morning of the failure

of the bankrupts, paid a certain sum to them as a margin for the purchase of stock which the bankrupts thereupon ordered, but bankruptcy intervened before its delivery, it was held that the contract was avoided, and that the customer was entitled to a return of the money. *In re Tracy*, (S. D. N. Y. 1911) 185 Fed. 844.

A deposit of securities with a stockbroker by a customer as margin, and as security against losses in stock transactions, under an agreement which does not contemplate a sale or disposition of such securities by the broker except in the event of losses, constitutes a pledge, and does not create the relation of debtor and creditor; and where the securities have not been sold by the broker to meet marginal requirements prior to his bankruptcy, they may be recovered by the pledgor from the bankrupt's trustee. *In re Berry*, (C. C. A. 2d Cir. 1906) 149 Fed. 176, 17 Am. Bankr. Rep. 467, affirmed (1908) 209 U. S. 385, 28 S. Ct. 519, 52 U. S. (L. ed.) 845.

*Effect of right to use stock.*—Where a stock certificate is pledged to a firm of stockbrokers, with the right to them to use the stock in their business, the stock remains the property of the pledgor; and where it survives the purposes for which it was pledged, and is capable of identification, it must be returned to him. *In re McIntyre*, (C. C. A. 2d Cir. 1910) 181 Fed. 955.

*Failure of customer to assert rights.*—Where stockbrokers in bankruptcy had in the possession of their New York correspondents securities belonging to customers whose rights were not asserted, or were either surrendered or lost subsequent to the filing of the petition in bankruptcy, it was held that the proceeds of such securities were applicable to the claims of the general creditors, and not to the owners of other specific securities contained in such New York account. *In re Carothers*, (W. D. Pa. 1910) 182 Fed. 501.

*Effect of conversion by broker.*—Where stockbrokers prior to bankruptcy had converted certain corporate stock belonging to a customer, and at the time of bankruptcy had one hundred shares of the same stock in their possession, it was held that the owners of the converted stock of that character, if more than one, were entitled to the stock on hand as tenants in common, and if only one, he was entitled to have such stock delivered to him, as against the bankrupt's general creditors. *In re Brown*, (S. D. N. Y. 1909) 171 Fed. 254, 22 Am. Bankr. Rep. 659.

Where stockbrokers, prior to bankruptcy, wrongfully rehypothecated securities pledged with them by customers, with a number of banks as security for loans, and some of the owners were able

after the bankruptcy to trace their securities to such banks, it was held that the surplus arising from the sale of such securities after payment of the loans belonged, not to the bankrupts, but to the owners of the securities, and constituted not a single fund in which all the owners could share, but several distinct funds belonging respectively to the particular customers whose securities created the fund. *In re Jamison*, (C. C. A. 3d Cir. 1913) 209 Fed. 541.

Where a bankrupt sold the stock of a corporation, a part of which was owned by him and a part by others, for whom he acted as agent, and received the proceeds, which fact he concealed from the other owners, who after his bankruptcy were unable to trace the money into any particular fund or property, and who filed their claims as general creditors, it was held that the bankrupt could not avoid accounting to his trustee for the proceeds of all of the stock, on the ground that a part of it did not belong to his estate. *Cummings v. Synnot*, (C. C. A. 3d Cir. 1911) 184 Fed. 718.

Even if a contract to purchase stock was originally invalid as a gambling transaction on margins in violation of a state law, it was held that such illegality could not be asserted by the broker's trustee in bankruptcy against a claim by the purchaser, where the contract was executed by the broker purchasing the stock, and where he disposed of it without the claimant's knowledge and consent, and misappropriated the proceeds. *In re Dorr*, (C. C. A. 9th Cir. 1911) 186 Fed. 276.

When a broker, prior to his bankruptcy, had pledged to a bank, as collateral to a loan, securities of others in his hands, which he had no right to hypothecate, and also others which he had authority to pledge, it was held that the owners of the first class of securities had a superior equity, and should be subrogated to the right of the bankrupt against the owners of the other class. *In re Ennis*, (C. C. A. 2d Cir. 1911) 187 Fed. 720.

Where it appears that stockbrokers, prior to their bankruptcy, had violated every obligation which they owed to a customer, and had at some time not shown converted the stocks which they pretended to carry for him, the court should not require him to make good losses for which he would have been liable, if the stocks had been kept, as a condition to his recovery of securities deposited to protect his account. *In re Ennis*, (C. C. A. 2d Cir. 1911) 187 Fed. 726.

But persons whose stock has been used by a bankrupt for his own purposes cannot establish title to specific certificates of stock, found after bankruptcy, as collateral to some loan, unless they identify

those certificates as representing the shares which the bankrupt took from the claimant. *In re McIntyre*, (C. C. A. 2d Cir. 1910) 181 Fed. 960. See also *In re Brown*, (S. D. N. Y. 1910) 183 Fed. 861; *In re Brown*, (C. C. A. 2d Cir. 1911) 184 Fed. 454; *In re Brown*, (S. D. N. Y. 1910) 185 Fed. 972.

#### IV. CONDITIONAL SALES.

The amendment of section 47a (2) in 1910 had an effect upon the validity of conditional sale contracts in respect of the vendor's trustee in bankruptcy. Prior to that amendment one line of decisions, supported by a ruling of the federal Supreme Court in *York Mfg. Co. v. Cassell*, (1906) 201 U. S. 344, 26 S. Ct. 481, 50 U. S. (L. ed.) 782, considered the trustee as standing in the shoes of the bankrupt, while in a minority of courts the trustee was regarded as the representative of the creditors and vested with all the rights and privileges of such creditors. The latter rule formed the basis of the amendment.

*In re Bazemore*, 189 Fed. 236 (Ala.), the court said: "Before the amendment . . . the trustee's title as against a claim under an unrecorded conditional sale, though the state law required record, did not prevail. . . . It was to obviate this, among other things, that [the] section . . . was amended by inserting the words 'And such trustees, as to all property in the custody or coming into the custody of the Bankruptcy Court, shall be deemed vested with all the rights remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon' (statement of Representative Shirley to the House of Representatives, Congressional Record, Sixty-first Congress, 2d Session, pp. 2552-2554 [36 Stat. 840]), and to vest in the trustee the same right to attack secret unrecorded liens, where record was required by the state law as was given to the judgment creditors and others under that law."

In the case of *In re O'Brien*, 215 Fed. 129 (N. J.), it was said: "The effect of the amendment of 1910 is to place the trustee, so far as his right to attack the validity of the instrument in question is concerned, in the same position as a judgment creditor and to invest him with the same rights. As the conditional bill of sale would, under the state law, be void as against a judgment creditor, it is likewise void as against the trustee. It seems unnecessary to cite any authorities in support of this proposition."

*Prospective or retrospective operation of amendment.*—It has been held by some courts that the amendment of section 47a (2) mentioned in the preceding paragraph is not applicable to contracts antedating the time of its enactment and that the rights of the parties should be construed in accord with the

earlier rule. *In re Gartman*, 186 Fed. 349 (Pa.); *Arctic Ice Mach. Co. v. Armstrong County Trust Co.*, 192 Fed. 114, 112 C. C. A. 458 (Pa.); *In re Schneider*, 203 Fed. 589 (Pa.); *In re White's Express Co.*, 215 Fed. 894, 132 C. C. A. 234 (N. Y.).

The contrary doctrine has been held, however, on the ground that the statute is purely remedial in its nature. *In re Farmers' Co-op. Co., etc.*, 202 Fed. 1008 (N. D.). And this ruling finds support in other cases wherein the modern doctrine is applied to contracts antedating the time of the amendment, although the question of the applicability of the statute is apparently not considered. *In re Franklin Lumber Co.*, 187 Fed. 281 (Pa.); *In re Gehris-Herbine Co.*, 188 Fed. 502 (Pa.); *In re Williamsburg Knitting Mill*, 190 Fed. 871-878, *affirmed* in *Holt v. Henley*, 193 Fed. 1020, 113 C. C. A. 87 (N. Y.).

*Contract invalid as to lien creditors.*—Subsequent to the amendment of section 47a (2) in 1910, above mentioned, the trustee in bankruptcy of a conditional sale vendee is considered as vested with all the rights and privileges of lien creditors and have consistently held that a vendor under such a sale has no remedy against a trustee in possession, where the contract has not been properly executed and recorded pursuant to a statute making it invalid as to lien creditors unless so recorded.

*Alabama.*—*In re Bazemore*, 189 Fed. 236; *In re Calhoun Supply Co.*, 189 Fed. 537. *Compare* *F. A. Ames Co. v. Slocumb Mercantile Co.*, 166 Ala. 99, 51 So. 994 (decided prior to 1910).

*Arkansas.*—*Compare* *Byrant v. Swoford Bros. Dry Goods Co.*, 214 U. S. 279, 29 S. Ct. 614, 53 U. S. (L. ed.) 997, *affirming* *In re Newton*, 153 Fed. 841, 83 C. C. A. 23 (decided prior to 1910).

*Connecticut.*—See the following cases decided prior to 1910: *In re Legg*, 96 Fed. 326, 2 Am. Bankr. Rep. 805; *In re Faulkner*, 181 Fed. 981.

*Georgia.*—*In re Farmers' Supply Co.*, 196 Fed. 999. See also *In re Burke*, 168 Fed. 994, 22 Am. Bankr. Rep. 69 (decided prior to 1910). *Compare* the following cases decided prior to 1910; *In re Atlanta News Pub. Co.*, 160 Fed. 519; *John Deere Plow Co. v. Anderson*, 174 Fed. 815, 98 C. C. A. 523; *In re Bozeman*, 2 Am. Bankr. Rep. 809.

*Hawaii.*—In a decision made prior to its annexation to the United States the validity of a conditional sale contract was recognized as against the vendee's trustee in bankruptcy. *Raymond v. Dole*, (1879) 4 Hawaii 233.

*Iowa.*—*Compare* the following cases decided prior to 1910: *In re Hagor*, 106 Fed. 972, *overruling* *In re Tweed*, 131 Fed. 355; *Nauman Co. v. Bradshaw*, 193 Fed. 350, 113 C. C. A. 274; *In re Walsh*, 195 Fed. 576.

*Kentucky.*—*In re Kreuger*, 197 Fed. 124. *Compare In re Lausman*, 183 Fed. 647.

*Maine.*—See *Hanson v. Blake*, 155 Fed. 342 (decided prior to 1910).

*Minnesota.*—*Compare* the following cases decided prior to 1910: *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435; *Monitor Drill Co. v. Mercer*, 163 Fed. 943, 16 Ann. Cas. 214, 90 C. C. A. 303, 23 L. R. A. (N. S.) 1065.

*Missouri.*—*L. A. Becker Co. v. Gill*, 206 Fed. 36, 124 C. C. A. 170. And see the following cases decided prior to 1910: *In re Fraizer*, 117 Fed. 746; *In re Rabenau*, 118 Fed. 471; *In re Martin-Vernon Music Co.*, 132 Fed. 983, 13 Am. Bankr. Rep. 276; *McElvain v. Hardesty*, 169 Fed. 31, 22 Am. Bankr. Rep. 320; *McFarlan Carriage Co. v. Wells*, 99 Mo. App. 641, 74 S. W. 878.

*Nebraska.*—See *Logan v. Nebraska Moline Plow Co.*, 3 Neb. (unofficial) Rep. 516, 92 N. W. 129, judgment *affirmed* 3 Neb. (unofficial) Rep. 526, 93 N. W. 1128 (decided prior to 1910). *Compare In re Great Western Mfg. Co.* 152 Fed. 123, 81 C. C. A. 341 (decided prior to 1910).

*New Hampshire.*—*Compare In re Cavagnaro*, 143 Fed. 668 (decided prior to 1910).

*New Jersey.*—*In re O'Brien*, 215 Fed. 129; *In re Vandewater*, 219 Fed. 627. See also *In re Franklin Lumber Co.*, 147 Fed. 852, 17 Am. Bankr. Rep. 443 (decided prior to 1910).

*New York.*—*Compare In re White's Express Co.*, 215 Fed. 894; also the following cases decided prior to 1910: *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 S. Ct. 690, 48 U. S. (L. ed.) 986; *In re Kellogg*, 118 Fed. 1017, 56 C. C. A. 383; *In re C. V. Hutchins Co.*, 179 Fed. 864; *In re Forse*, 182 Fed. 212; *Crocker-Wheeler Co. 4. Genesee Recreation Co.*, 140 App. Div. 726, 125 N. Y. S. 721.

*North Carolina.*—See the following cases decided prior to 1910: *In re Tatem*, 110 Fed. 519, 6 Am. Bankr. Rep. 426; *In re Dunn Hardware, etc., Co.*, 132 Fed. 719, 13 Am. Bankr. Rep. 147.

*North Dakota.*—*In re Farmers' Co-operative Co.*, 202 Fed. 1008.

*Ohio.*—*Potter Mfg. Co. v. Arthur*, (C. C. A. 6th Cir. 1915) 220 Fed. 843, Ann. Cas. 1916A 1268. And see the following cases decided prior to 1910: *In re Press-Post Printing Co.*, 134 Fed. 998, 13 Am. Bankr. Rep. 797; *In re Sheets Printing, etc., Co.*, 136 Fed. 989. But *compare* the following cases decided prior to 1910: *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 S. Ct. 481, 50 U. S. (L. ed.) 782; *In re McKay*, 1 Am. Bankr. Rep. 292, *disapproved* in *In re Yukon Woolen Co.*, 2 Am. Bankr. Rep. 805; *In re Ohio Co-operative Shear Co.*, 2 Am. Bankr. Rep. 775.

*Oklahoma.*—*In re Johnson*, 212 Fed.

311. *Compare In re Wall*, 207 Fed. 994 (decided prior to 1910).

*Pennsylvania.*—*In re Franklin Lumber Co.*, 187 Fed. 281, *reversed* on other grounds in *L. C. Smith, etc., Typewriter Co. v. Alleman*, 199 Fed. 1, 117 C. C. A. 577; *In re Gehies-Herbine Co.*, 188 Fed. 502. And see the following cases decided prior to 1910: *In re Levin*, 127 Fed. 886; *In re Butterwick*, 131 Fed. 371; *In re Miller*, 135 Fed. 868, 14 Am. Bankr. Rep. 439; *In re Tice*, 139 Fed. 52, 15 Am. Bankr. Rep. 97; *In re Poore, etc., Co.*, 139 Fed. 862; *In re Poore*, 140 Fed. 786; *In re Burt*, 155 Fed. 267; *In re G. & K. Trunk Co.*, 176 Fed. 1007 *Liquid Carbonic Co. v. Quick*, 182 Fed. 603, 105 C. C. A. 141, *reversing In re Rinker*, 174 Fed. 490; *Arctic Ice Mach. Co. v. Armstrong County Trust Co.*, 192 Fed. 114, 112 C. C. A. 458. *Compare* the following cases decided prior to 1910: *Davis v. Compton*, 158 Fed. 735, 85 C. C. A. 633; *In re Greek Mfg., etc., Co.*, 167 Fed. 425; *In re Beihl*, 176 Fed. 583, 23 Am. Bankr. Rep. 905; *In re Gartman*, 186 Fed. 349.

*South Carolina.*—*Townsend v. Ashpoo Fertilizer Co.*, 212 Fed. 97, 128 C. C. A. 613; *Augusta Grocery Co. v. Southern Moline Plow Co.*, 213 Fed. 786, 130 C. C. A. 444. See also *In re M. L. B. Sturkey Co.*, 224 Fed. 251.

*South Dakota.*—*In re Nelson*, 191 Fed. 233.

*Texas.*—*In re Texas Moline Plow Co.*, 202 Fed. 1003; *In re Zephyr Mercantile Co.*, 203 Fed. 576. *Compare York Mfg. Co. v. Brewster*, 174 Fed. 566, 98 C. C. A. 348.

*Virginia.*—*In re Williamburg Knitting Mill*, 190 Fed. 871, *affirmed* in *Holt v. Henley*, 193 Fed. 1020, 113 C. C. A. 87. See also *Chesapeake Shoe Co. v. Seldner*, 122 Fed. 593, 58 C. C. A. 261 (decided prior to 1910).

*Washington.*—*In re U. S. Lumber Co.*, 206 Fed. 236; *In re Pacific Electric, etc., Co.*, 224 Fed. 220; *In re Frankel*, 225 Fed. 129. See also *Chilberg v. Smith*, 174 Fed. 805, 98 C. C. A. 513 (decided prior to 1910).

*Wisconsin.*—See *In re Beachy*, 170 Fed. 825, 22 Am. Bankr. Rep. 538 (decided prior to 1910); *Mishawaka Woolen Mfg. Co. v. Teasdale*, 145 Wis. 73, 129 N. W. 671.

If the sale is valid and binding in all respects the trustee succeeds to the rights and disabilities of the bankrupt under the contract, and the vendor's right to reclaim the goods may be exercised against him. *Southern Hardware, etc., Co. v. Clark*, 201 Fed. 1, 119 C. C. A. 339 (Fla.); *In re Studebaker*, 202 Fed. 1000 (Tex.); *In re Texas Harvester Co.*, 202 Fed. 1002 (Tex.); *In re Texas Moline Plow Co.*, 202 Fed. 1003 (Tex.); *In re Superior Drop Forge, etc., Co.*, 208 Fed. 813 (Ohio); *In re Wegman Piano Co.*, 221 Fed. 128 (N. Y.); *In re Covington Lumber Co.*, 225 Fed. 444 (Wash.); *Breakstone v. Buffalo Foundry*,

etc., Co., 167 App. Div. 62, 152 N. Y. S. 394. See also *In re Gray*, 170 Fed. 638 (Okla.—decided prior to 1910); *In re Cannet Lumber Co.*, 178 Fed. 340 (Ga.—decided prior to 1910); *Nauman Co. v. Bradshaw*, (C. C. A. 8th Cir. 1912) 193 Fed. 350; *Hart v. Emmerson-Brantingham Co.*, (E. D. Mo. 1913) 203 Fed. 60; *Keeble v. John Deere Plow Co.*, 190 Fed. 1019, 111 C. C. A. 668 (Tex.). Compare *In re B. F. Avery, etc.*, Plow Co., 202 Fed. 996 (Tex.).

In the case of *In re Wegman Piano Co.*, 221 Fed. 128 (N. Y.), it was held that the receiver in bankruptcy, with the approval of the court and the trustee, when appointed, has the right to pay the amount due for the purchase price of an article held under a conditional sale contract, and retain the same. In such an event the title to the article vests in the estate of the bankrupt. And to the same effect see *In re Lyon*, 7 Nat. Bankr. Reg. 182, 15 Fed. Cas. No. 8,644 (decided prior to 1910).

In the case of *In re Superior Drop Forge, etc., Co.*, 208 Fed. 813 (Ohio), it appeared that certain machinery was delivered to the bankrupt at different dates, under conditional sale agreements, some of which were not immediately recorded, but all of the agreements were duly recorded before the vendee was declared a bankrupt. On the petition of the vendors to recover the property the court said: "By the amendment of 1910 . . . the trustee is vested with all the 'rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon.' . . . In other words, the amendment of 1910 simply puts the trustee in his representative capacity in the position of a creditor who has reduced his claim to judgment. Such a creditor, by the settled law, is subject to all latent or secret prior liens or equities in favor of third persons. . . . Nor does the language of the Ohio Code respecting conditional sale contracts, which reads that the contracts 'shall be void as to all subsequent purchasers and mortgagees in good faith and creditors, unless the conditions are evidenced by writing,' etc., help any. Creditors, as the term is there used, by analogy of the same expressions in the law respecting the validity of mortgages of chattel property, means those who have at least taken steps to acquire liens upon the property of the debtor for their claims. . . . And the fact that the filing of the verified statement of the claim and contract was not contemporaneous with the execution does not avail to avoid the effect of the contract with respect to the creditors whose claims become liens through the appointment of the trustee. The delay only operates in favor of those creditors who may have acquired liens during the interim. The delayed filing causes the benefits of the statute to work

in favor of the vendor against all other creditors of the vendee. This is the law of Ohio with reference to the delayed filing of chattel mortgages and by analogy applies here."

However, in the case of *In re O'Callaghan*, 225 Fed. 133 (Mass.), it appeared that the seller shipped goods to the bankrupt on condition that the goods were to be paid for when received if found satisfactory. Twenty-one days after the goods were shipped, during which time the vendors took no steps to see that the condition of payment was complied with, a petition in bankruptcy was filed against the vendee. The seller thereafter claimed title as against the trustee and the court held that under the circumstances the condition as to payment had been waived and that title vested in the trustee. And in *Meir, etc., Co. v. Sabin*, 214 Fed. 231, 130 C. C. A. 605 (Ore.), the court held that while there were no statutory requirements for the filing or recording of conditional sales in Oregon and while it was not required that they should be in writing, still if the property so delivered was not sufficiently described so as to be identified properly the trustee could take advantage of that fact and retain the property.

Where ranges were sold to a bankrupt under a conditional contract of sale, it was held that the vendor's property therein before payment of the price, as against the bankrupt's trustee, was not impaired by the fact that the use of the ranges on the buyer's property was inconsistent with the idea of a return to the seller, nor because of the claim that the ranges became a part of the real estate, and were therefore incapable of continued ownership in the vendor. *In re Cohen*, (E. D. N. Y. 1908) 163 Fed. 444, 20 Am. Bankr. Rep. 796.

*Contract filed within four months.*—A conditional sale contract otherwise valid as to third persons has been held to be valid against the trustee even though filed within four months preceding the bankruptcy of the vendee regardless of when it was executed. *In re Farmers' Co-operative Co.*, 202 Fed. 1005 (N. D.); *In re Anson Mercantile Co.*, 203 Fed. 871 (Tex.); *Big Four Implement Co. v. Wright*, 207 Fed. 535, 125 C. C. A. 577, 47 L. R. A. (N. S.) 1223 (Kan.); *In re White's Express Co.*, 215 Fed. 894, 132 C. C. A. 234 (N. Y.); *In re Brown Wagon Co.*, 224 Fed. 266 (Ga.); *Bradley, etc., Co. v. Benson*, 93 Minn. 91, 100 N. W. 670; *John Deere Plow Co. v. Edgar Farmer Store Co.*, 154 Wis. 490, 143 N. W. 194. See also *Keeble v. John Deere Plow Co.*, 190 Fed. 1019, 111 C. C. A. 668. Compare *In re Builders' Lumber Co.*, 148 Fed. 244 (N. C.); *Bradley, etc., Co. v. McAfee*, 149 Fed. 254 (Mo.).

It has been held that the trustee cannot follow goods conditionally sold to the

bankrupt, but reclaimed by the vendor within four months of the vendee's adjudication in bankruptcy, although the contract is not recorded. *Hart v. Emerson-Brantingham Co.*, 203 Fed. 60 (Mo.); *Jennings v. Swartz*, (Wash.) 149 Pac. 947 (overruling 82 Wash. 209, 144 Pac. 39). See also *In re Klingaman*, 2 Am. Bankr. Rep. 44 (Ia.) (decided prior to 1910); *In re Zitron*, 203 Fed. 79 (Wis.).

**Sale in form of lease.**—Where possession of machinery was given under an instrument in the form of a lease which provided for a certain cash payment and certain monthly payments, and further provided that if the specified number of monthly payments were paid the lessee should have the option of purchasing the property by the payment of an amount equal to the rental for one month, and it appeared that the cash payment was made on the delivery of the machinery and negotiable notes were also at the same time signed and delivered by the person named as lessee, not only for the respective amounts provided as monthly rentals, but for the amount provided to be paid in the event of the exercise of the option of purchase, it was held that the transaction constituted a sale and not a bailment, and therefore that after the bankruptcy of the person named as lessee the title to the machinery passed to his trustee in bankruptcy as part of his estate. *In re Gaglione & Son*, (M. D. Pa. 1912) 200 Fed. 81.

Where machines in possession of a bankrupt under contracts of conditional sale, which required monthly payments from the bankrupt, called "rental" in the contracts, were reclaimed by the vendors after the bankruptcy, it was held that they could not recover such contract rentals for the time the machines remained in the possession of the trustee during the determination of their rights; but, if the trustee used the machines without their consent, the extent of their right is, on proof, to recover the reasonable value of such use. *In re Daterson Pub. Co.*, (C. C. A. 3d Cir. 1911) 188 Fed. 64.

**Goods sold for purpose of resale.**—In many jurisdictions it seems that where a contract of conditional sale permits the vendee to resell in the usual course of business, it is invalid as to the vendee's trustee in bankruptcy on the ground that such contracts are considered fraudulent as to creditors.

*Alabama.*—*In re Priegle Paint Co.*, 175 Fed. 586, 23 Am. Bankr. Rep. 385.

*Georgia.*—*In re Burke*, 168 Fed. 994, 22 Am. Bankr. Rep. 69. *Compare In re McGehee*, 166 Fed. 928.

*Illinois.*—*In re Galt*, 120 Fed. 443.

*Iowa.*—*In re Smith*, 132 Fed. 301.

*Maine.*—*In re Perkins*, 155 Fed. 237.

*Massachusetts.*—*Flanders Motor Co. v.*

*Reed*, 220 Fed. 642, 136 C. C. A. 250, affirming *In re Harrington*, 212 Fed. 542. *Mississippi.*—*In re Agnew*, 178 Fed. 478.

*New York.*—*In re Howland*, 109 Fed. 869, 6 Am. Bankr. Rep. 495; *In re Garcewich*, 115 Fed. 87, 53 C. C. A. 510; *Pontiac Buggy Co. v. Skinner*, 158 Fed. 858, 20 Am. Bankr. Rep. 206; *In re Penny*, 176 Fed. 141, 23 Am. Bankr. Rep. 115. See also *In re Carpenter*, 125 Fed. 831. *Compare* *Ludvig v. American Woolen Co.*, 188 Fed. 30, 110 C. C. A. 180, affirmed (1913) 231 U. S. 522, 34 S. Ct. 161, 58 U. S. (L. ed.) 345.

*Oregon.*—*In re Rasmussen*, 136 Fed. 704, 706; *In re Roellich*, 223 Fed. 687.

*Vermont.*—*In re Hassam*, 153 Fed. 932.

*Wisconsin.*—*Smith v. Mishawaka Woolen Mfg. Co.*, 172 Fed. 98, overruling 158 Fed. 885.

Thus in the case of *In re Garcewich*, 115 Fed. 87, 53 C. C. A. 510, it was said: "It is the settled law of this state [New York] that personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent, and until the performance the title does not vest in the buyer. It is one of the exceptional cases in which the law tolerates the separation of the apparent from the real ownership of chattels when the honesty of the transaction is made to appear. But when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The transaction will be deemed merely colorable, and the title to have been vested absolutely in the buyer. . . . When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee." And in the case of *In re Burke*, 168 Fed. 994 (Ga.) 22 Am. Bankr. Rep. 69, wherein it appeared that cultivators and other farm implements had been delivered to the bankrupt under a conditional sale agreement which provided, *inter alia*, that the vendee might resell the property, the court said: "It would seem that the very essence of a reservation of title depends upon the fact that the property itself may not be conveyed by the vendee to an innocent third person. If the instrument expressly recognizes the possibility, and also the probability, of such sale, and provides for the apportionment of the proceeds, the transaction would

seem to be a consignment for ordinary bargain and sale, rather than upon condition. Subdivision 5 of section 70 of the Bankruptcy Law . . . vests in the trustee the title of the bankrupt to 'all property which prior to the filing of the petition he could by any means have transferred,' etc. If, then, these cultivators and implements could have been the subject of transfer by the express authority of the instrument of sale, it seems clear that the title of the trustee is good as against the vendor."

However, in other jurisdictions such contracts have been considered valid and binding and therefore enforceable against the vendee's trustee in bankruptcy. *In re Newton*, 153 Fed. 341, 83 C. C. A. 23 (Ark.), *affirmed* in *Bryant v. Swofford Bros. Dry Goods Co.*, 214 U. S. 279, 29 S. Ct. 614, 53 U. S. (L. ed.) 997; *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435 (Minn.); *In re Gray*, 170 Fed. 638 (Okla.); *Andre v. Murray*, 179 Ind. 576, 101 N. E. 81, *overruling* *West v. Fulling*, 36 Ind. App. 617, 76 N. E. 325. See also *Monitor Drill Co. v. Mercer*, 163 Fed. 943, 16 Ann. Cas. 214, 90 C. C. A. 303, 20 L. R. A. (N. S.) 1065 (Minn.); *In re Wall*, 207 Fed. 994 (Okla.). *Compare* *Troy Wagon Works Co. v. Hancock*, 152 Fed. 605, 81 C. C. A. 595 (Ind.) (decision based on *West v. Fulling*, 36 Ind. App. 617, 67 N. E. 325, later *overruled* in *Andre v. Murray*, (Ind.) 101 N. E. 81).

In *General Electric Co. v. Brower*, (C. C. A. 9th Cir. 1915) 221 Fed. 597, the court distinguishing *In re Penny*, (S. D. N. Y. 1909) 176 Fed. 141, held that a contract under which goods were delivered by one party to another to be sold by the latter and the proceeds paid to the former, less an agreed discount, the unsold goods to be returned to the consignor, disclosed only an agreement of bailment for sale, or a contract strictly of agency and did not evidence a conditional sale. The court said: "To constitute a sale, there must have been in the contract a vendor and a vendee, and a provision for a transfer of property by the vendor to the vendee, and an obligation by the vendee to pay an agreed price therefor. Or the circumstances outside of the contract must have been such as to show that it was the intention of the parties to make of the contract a fraudulent concealment of an actual sale." See also *Ludvig v. American Woolen Co.*, (1913) 231 U. S. 522, 34 S. Ct. 161, 58 U. S. (L. ed.) 345.

**Sale under trust agreement.**—Where a bankrupt sells property consigned to him under a contract which requires him to hold the proceeds of such sales in trust separate from his own funds, until paid over to the owner, it has been held that the owner is entitled to recover such trust funds. *Walter A. Wood Co. v. Eubanks*,

(C. C. A. 4th Cir. 1909) 169 Fed. 929, 22 Am. Bankr. Rep. 307; *Walter A. Wood Mowing, etc., Mach. Co. v. Vanstory*, (C. C. A. 4th Cir. 1909) 171 Fed. 375, 22 Am. Bankr. Rep. 740. See also *In re McGehee*, (N. D. Ga. 1909) 166 Fed. 928, 21 Am. Bankr. Rep. 656; *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 338. And see the following division V in this note.

In England it seems that the property of the bankrupt divisible among his creditors comprises all goods which at the commencement of the bankruptcy are in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner thereof. The provision is directed against false credit obtained by a person carrying on a trade or business from the visible possession of property to which he is not entitled, and its effect is to transfer to the trustee certain property which does not belong to the bankrupt at all or in which he has only a qualified interest. (Halsbury's Laws of England, vol. 2, p. 173.) This is known as the doctrine of "reputed ownership" and provisions of a similar nature are included in all of the later Bankruptcy Acts of England, 32 & 33 Vict. ch. 71, § 15; 12 & 13 Vict. ch. 106; 6 Geo. IV, ch. 16, § 72; 21 Jac. I, ch. 19, § 11.

In Canada the principle that a conditional sale is valid as against the vendee's trustee or assignee in insolvency seems to have been recognized by the court in *Turgeon v. St. Charles*, 22 Que. K. B. 58, 7 Dominion L. Rep. 445, wherein it was held that if a purchaser of a restaurant license, under a contract reserving title in the vendor until payment, became insolvent before all of the instalments were paid, the vendor was entitled to retake the same, even if it was the only asset of the creditors. On appeal, however, this holding was reversed, 48 Can. Sup. Ct. 473, 15 Dominion L. Rep. 298, but apparently on the ground that under the provisions of the Quebec License Law any property which might exist in a license in that province must remain vested in the holder of the license.

#### V. TRUST FUNDS AND DEPOSITS.

**Where bankrupt is beneficiary.**—The trustee, on his appointment, is vested with any interest which the bankrupt formerly owned in any trust fund or estate, and which, at the institution of the proceedings in bankruptcy, was capable of transfer, or subject to sale under judicial process. *In re Baudouine*, (S. D. N. Y. 1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55; *In re Dunavant*, (W. D. N. C. 1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41; *In re Jersey Island Packing Co.*, (C. C. A. 9th Cir. 1905) 138 Fed. 625, 14 Am. Bankr. Rep. 689.

An income received from a bankrupt under a trust created by a will which provides that the whole income "is to be free from the interference or control of her creditors," does not pass to the trustee in bankruptcy. *Boston Safe Deposit, etc., Co. v. Luke*, (1915) 220 Mass. 484, 108 N. E. 64.

An interest in the nature of a resulting trust in realty, owned by the bankrupt, will pass to his trustee in bankruptcy for the benefit of his creditors, notwithstanding a previous levy of an execution on such interest and a sale thereunder, when by the law of the state a resulting trust is not such property as can be sold on execution. *In re Dunavant*, (W. D. N. C. 1899) 96 Fed. 542, 3 Am. Bankr. Rep. 41.

Where bankrupt is trustee.—As to such property as was held by the bankrupt, at the time of his adjudication, in trust for another, it comes into the hands of his trustee in bankruptcy impressed with the rightful claims of the beneficiary thereof, whose interests will be fully protected upon proper proof. *In re Davis*, (D. C. Mass. 1901) 112 Fed. 129, 7 Am. Bankr. Rep. 258; *In re Mulligan*, (D. C. Mass. 1902) 116 Fed. 715, 9 Am. Bankr. Rep. 8; *In re Cattus*, (C. C. A. 2d Cir. 1910) 183 Fed. 733; *In re Emerson, Marlow & Co.*, (C. C. A. 7th Cir. 1912) 199 Fed. 95.

*Burden of proof.*—A trust creditor of a bankrupt is not entitled to a preference over general creditors merely because of the character of his claim; but he must show that the trust fund, or the property into which it was converted, came into the hands of the trustee in bankruptcy, although the specific property need not be identified. *In re Brunsing*, (N. D. Cal. 1909) 169 Fed. 668, 22 Am. Bankr. Rep. 129. And see to the same effect *In re Marsh*, (D. C. Conn. 1902) 116 Fed. 396, 8 Am. Bankr. Rep. 576; *In re Mulligan*, (D. C. Mass. 1902) 116 Fed. 715, 9 Am. Bankr. Rep. 8; *In re Teter*, (N. D. W. Va. 1909) 173 Fed. 798, 23 Am. Bankr. Rep. 223, *affirmed* (4th Cir. 1910) 179 Fed. 655, 103 C. C. A. 213; *In re McIntyre*, (C. C. A. 2d Cir. 1911) 185 Fed. 96; *In re Brown*, (C. C. A. 2d Cir. 1910) 185 Fed. 766. See also *In re Richard*, (E. D. Tenn. 1900) 104 Fed. 792, 4 Am. Bankr. Rep. 700; *In re Day*, (M. D. Tenn. 1909) 176 Fed. 377, 23 Am. Bankr. Rep. 785.

The burden of showing that his property has been wrongfully mingled in the mass of property of the wrongdoer is upon the owner who seeks to follow the same; but, when this is done, the burden shifts to the wrongdoer to show that the owner's money or property has passed out of his hands, and, in that respect, his trustee in bankruptcy stands in the same position. *Smith v. Mottley*, (C. C. A. 6th Cir. 1906) 150 Fed. 266.

*Loss of identity as trust fund.*—Money

held by a bankrupt as guardian, which he has mingled with his own funds, thereby loses its identity as a trust fund; and the bankrupt cannot withhold property or its proceeds from his trustee on the ground that it was purchased with the money of his wards; but the wards, in such case, are merely creditors, who must share with the general creditors in the distribution of the estate. *In re Richard*, (E. D. Tenn. 1900) 104 Fed. 792, 4 Am. Bankr. Rep. 700.

A bankrupt who, prior to the filing of the petition in bankruptcy, had used in his business certain money in his hands as trustee, which he thereafter paid back to himself as trustee, must restore the same to his trustee in bankruptcy to whom the title passed. *In re Longbottom*, (E. D. Pa. 1905) 142 Fed. 291, 15 Am. Bankr. Rep. 437.

So, funds that have been dissipated, or that have been used to pay other creditors, or that have been spent to pay current business expenses, are not recoverable, because they are gone and there is nothing remaining to be the subject of the trust. *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 338.

If there has been expenditure, and the funds are gone, and no specific property or money is found instead of the funds, it is inequitable that some other property found should be applied to pay one creditor in preference to another. *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 338.

*Trust agreement as to property delivered to be sold, and proceeds thereof.*—Where a contract, under which certain merchandise was furnished to the bankrupt, provided that all goods on hand and the proceeds of all sales of goods received under the contract, whether consisting of notes, cash, or book accounts, should be held by the bankrupt as collateral security, in trust for the benefit of the person furnishing the merchandise, and subject to his order until all obligations due thereunder should be paid in full, it was held that such contract was not one of conditional sale, but one creating a trust for the benefit of the petitioner, and on the bankruptcy he was entitled to reclaim the goods on hand from the bankrupt's trustee. *Walter A. Wood Co. v. Eubanks*, (C. C. A. 4th Cir. 1909) 169 Fed. 929, 22 Am. Bankr. Rep. 307; *Walter A. Wood Mowing, etc., Mach. Co. v. Vanstory*, (C. C. A. 4th Cir. 1909) 171 Fed. 375, 22 Am. Bankr. Rep. 740. See also *In re McGehee*, (N. D. Ga. 1909) 166 Fed. 928, 21 Am. Bankr. Rep. 656; *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 338.

*Deposits—Creating trust.*—Where a claimant deposited money in the private bank of a bankrupt, at a time when the latter was insolvent and knew himself to



be so, although the claimant did not, it was held that a trust for the benefit of the claimant was impressed on the general fund with which his deposits were commingled, and followed that fund, so long as it was never exhausted but remained greater than the amount of his deposits and finally came into the hands of the trustee; and, in such case, the claimant was entitled to reclaim his deposits, even though it affirmatively appears that the general fund was kept up by the deposits of subsequent depositors who did not draw out their deposits, and have not been paid. *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

In *In re Salmon*, (W. D. Mo. 1906) 145 Fed. 649, it appears that several banks entered into an agreement to the effect that they were not to compete with each other in bidding for the deposit of the county funds, that the bank receiving the deposit was to share it with the others, and that the funds so distributed were not to be drawn upon except to meet county warrants or checks. This arrangement was carried out, and the bank receiving the deposit subsequently became insolvent and the illegal contract became known. It was held that, as against the general creditors of the insolvent bank, the county had a superior claim to an allotment of the original deposit held by one of the conspiring banks, because the latter bank was in contemplation of law a principal debtor to the county therefor, and further because the money was demandable only by the insolvent bank to meet county warrants. See also *Crawford County v. Patterson*, (N. D. Ohio 1906) 149 Fed. 229.

**Deposit creating debt only.**—Where an alleged special deposit made with a bankrupt, a mercantile concern, amounts merely to a loan or an investment in the business, and is not secured by a mortgage or other instrument giving a lien to the depositor or creditor, it constitutes only a personal debt, which is to be settled in accordance with the claims of general creditors. *Riley v. Pope*, (S. D. Ga. 1911) 186 Fed. 857.

So, also, where it appeared that a bankrupt corporation had been a general depository for the funds of a grocer's association of which its president was treasurer, its other directors having been told by him that such deposits were authorized by the association to be repaid on demand, it was held that the corporation did not hold such funds as a special deposit in trust, but that the association was a general creditor only, and not entitled to priority. *In re Smith, etc., Co.*, (C. C. A. 7th Cir. 1909) 170 Fed. 900, 22 Am. Bankr. Rep. 350.

And where a town supervisor deposited town funds with a private banker, without any agreement that he should hold and keep the money separate from his other funds or that he should not use

them in the usual course of his banking business, the relation created was held to be that of debtor and creditor only, so that on the insolvency of the banker the supervisor had no lien or preference over other creditors. *In re Nichols*, (N. D. N. Y. 1909) 166 Fed. 603, 22 Am. Bankr. Rep. 216. And see to the same effect *In re Smart*, (N. D. Ohio 1905) 136 Fed. 974, 14 Am. Bankr. Rep. 672.

#### VI. PROPERTY FRAUDULENTLY OBTAINED.

**Recovery by vendor.**—Where property has been fraudulently obtained by the bankrupt, and the fraud is of such a nature as to warrant a rescission of the sale and the recovery of property by the vendor, the property so obtained comes into the hands of the trustee subject to such right of rescission and recovery, providing it be exercised in due time. *In re Weil*, (S. D. N. Y. 1901) 111 Fed. 897, 7 Am. Bankr. Rep. 90; *In re Davis*, (S. D. N. Y. 1901) 112 Fed. 294, 7 Am. Bankr. Rep. 276; *In re O'Connor*, (N. D. Ga. 1902) 114 Fed. 777; *In re Hildebrandt*, (N. D. N. Y. 1903) 120 Fed. 992, 10 Am. Bankr. Rep. 184; *In re Patterson*, (N. D. Tex. 1903) 125 Fed. 562, 10 Am. Bankr. Rep. 748; *In re Hess*, (E. D. Pa. 1905) 138 Fed. 954, 14 Am. Bankr. Rep. 647; *In re Levi*, (S. D. N. Y. 1906) 148 Fed. 654, 17 Am. Bankr. Rep. 430; *Lowry v. Hitch*, (1908) 110 S. W. 833, 33 Ky. L. Rep. 573, 17 L. R. A. (N. S.) 1032; *In re Johnson*, (N. D. Ohio 1913) 208 Fed. 164.

Thus it has been held that one from whom a bankrupt obtains goods on time, on false representation that they are to fill an order, when the bankrupt has no order, the goods being turned over to secure a bondsman of the bankrupt in another matter, and being secreted, is entitled thereto, the whole transaction being a fraud. *Bloomington v. Empire Rubber Mfg. Co.*, (E. D. N. Y. 1902) 114 Fed. 1016, 8 Am. Bankr. Rep. 74.

**False representation need not be sole consideration.**—It is not essential that false representations, made by a bankrupt to secure goods on credit should have been the sole consideration of the credit, in order to entitle the seller to reclaim the goods; but it is sufficient if they were material, and the credit would probably not have been given otherwise. *In re Gany*, (S. D. N. Y. 1900) 103 Fed. 930, 4 Am. Bankr. Rep. 576.

**Obtaining release of mortgage by fraud.**—A bill against a trustee in bankruptcy of a corporation which alleges facts showing that the complainant was induced by the fraudulent representations of the bankrupt, through its officers having apparent authority to release a mortgage or its property, and offers to restore the consideration received therefor, states a cause of action for equitable relief by a restoration of the lien, the question of the intervening rights of creditors being one to be

determined on the hearing. *Cleminshaw v. International Shirt, etc., Co.*, (N. D. N. Y. 1908) 165 Fed. 797, 21 Am. Bankr. Rep. 616.

**Necessity of disaffirming sale.**—A contract, under which goods were delivered on fraudulent representations, cannot be affirmed in part and disaffirmed as to the rest; the vendor cannot proceed to obtain a return of all the goods found, and procure the allowance of its claim for the balance of the account under and pursuant to the terms of the contract, at the same time. *In re Hildebrant*, (N. D. N. Y. 1903) 120 Fed. 992, 10 Am. Bankr. Rep. 184; *Standard Varnish Works v. Haydock*, (C. C. A. 6th Cir. 1906) 143 Fed. 318, 16 Am. Bankr. Rep. 286.

But one from whom a bankrupt obtains goods by means of fraudulent representations has his election to confirm the sale and assume the position of a creditor for the price, or to repudiate the sale and recover the goods. *Standard Varnish Works v. Haydock*, (C. C. A. 6th Cir. 1906) 143 Fed. 318, 16 Am. Bankr. Rep. 286.

**Effect of ignorance of facts constituting fraud.**—The proof and allowance of a claim, and the payment and acceptance of a dividend, do not bar a rescission or constitute an irrevocable election when the party proving the claim is ignorant of the facts constituting the fraud which gives him the right to rescind the contract and recover the property obtained. *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

**Evidence—Required proof.**—To authorize the rescission of an executed sale of goods to one who subsequently became a bankrupt, on the ground that he obtained the same by false and fraudulent representations, it must be shown that he made such representations knowing them to be false, or without reasonable grounds for believing them to be true, and they must have induced the seller to consummate the sale when he otherwise would not have done so. *In re Roalswick*, (D. C. Mont. 1901) 110 Fed. 639, 6 Am. Bankr. Rep. 752.

Parties who petition for an order rescinding and setting aside a sale to a bankrupt must establish three propositions to entitle them to rescind the sale in question: (1) That the bankrupt was insolvent at the time of the purchase of the goods. (2) That the bankrupt concealed its insolvency from the petitioners. (3) That the bankrupt intended not to pay for the goods. *In re Sol. Aarons & Co.*, (C. C. A. 2d Cir. 1912) 193 Fed. 646.

The burden of proof rests on the party claiming the right to rescind the sale and recover the property. *In re American Nat. Beverage Co.*, (N. D. Ga. 1912) 193 Fed. 772; *In re Berg*, (D. C. Mass. 1910) 183 Fed. 885.

**Sufficiency of evidence.**—In the case of

*In re Henry Siegel Co.*, (D. C. Mass. 1915) 223 Fed. 369, which was a proceeding begun by petition against a trustee in bankruptcy to reclaim goods sold to the bankrupt on credit upon the ground that when the goods were ordered and delivered the buyer was bankrupt, and did not intend to pay for them, a referee's order dismissing the petition was reversed and the petition was allowed. The court said: "The learned referee was of the opinion that an intent not to pay for the goods had not been made out. While such an intent must be, of course, established, it is not necessary that there should be direct evidence of it; it may be, and usually is, inferred from the facts. When these goods were purchased the buyer was deeply and hopelessly insolvent. Presumably the men in control of it were aware of its condition; there is no evidence to the contrary. They must have known, and their knowledge is imputable to the bankrupt, that it could not pay for these goods except at the expense of its other creditors, and by giving what would have been a preference; in other words, that it could not pay in an honest and regular way. Purchase under those conditions was, I think, the legal equivalent of purchase with an intent not to pay, and was fraudulent. The facts are meager, but they seem to me as strong for the claimants as those on which, in *Watson v. Silsbee*, 166 Mass. 57, 43 N. E. 1117, it was held to be a question of fact for the jury whether the purchaser bought without an intention to pay. See, too, *In re Spann*, (D. C.) 183 Fed. 819; *In re Gillespie v. Piles*, 24 Am. Bankr. Rep. 502, 178 Fed. 886, 102 C. C. A. 120, 44 L. R. A. (N. S.) 1. The intent not to pay inferable from the financial condition of the buyer might perhaps have been rebutted by evidence that its managers honestly expected to be able to continue, and bought the goods in an effort to do so. Nothing of that sort, however, appeared. I accordingly find that at the time when the goods were purchased and delivered there could have been no reasonable expectation on the part of the buyer's managers that it would be able properly to pay for them, and consequently no honest intention to pay for them at all; and that the purchase was therefore a fraudulent one, which the sellers were entitled to rescind. It follows that the order of the referee dismissing the petition must be reversed, and the petition allowed."

## VII. SUBSCRIPTIONS FOR STOCK.

**Trustee may recover stock subscriptions.**—A trustee in bankruptcy, as the representative of a corporation's estate, is vested with the right of such corporation to recover subscriptions for its stock; and where the corporation, in the absence of

amounts due for such subscriptions, the trustee in like manner may recover them. *In re* Remington Automobile, etc., Co., (2d Cir. 1907) 153 Fed. 345, 82 C. C. A. 421; *In re* Eureka Furniture Co., (E. D. Pa. 1909) 170 Fed. 485, 22 Am. Bankr. Rep. 395; *In re* L. M. Alleman Hardware Co., (3d Cir. 1910) 181 Fed. 810, 104 C. C. A. 320, *reversing* (M. D. Pa. 1909) 172 Fed. 611, 22 Am. Bankr. Rep. 871; *Thrall v. Union Maid Tobacco Co.*, (Ohio 1909) 22 Am. Bankr. Rep. 287; *In re* Newfoundland Syndicate, (D. C. N. J. 1912) 197 Fed. 443; *In re* M. Stipp Const. Co., (C. C. A. 3d Cir. 1915) 221 Fed. 372; *Bernard v. Carr*, (1914) 167 N. C. 481, 83 S. E. 816; *Perkins v. Cowles*, (1910) 157 Cal. 625, 108 Pac. 711, 137 A. S. R. 158, 30 L. R. A. (N. S.) 283; *Terry v. Anderson*, (1877) 95 U. S. 628, 24 U. S. (L. ed.) 365; *Foreman v. Bigelow*, (1878) 4 Cliff. 508, 9 Fed. Cas. No. 4,934; *Seovill v. Shaw*, (1878) 4 Cliff. 549, 21 Fed. Cas. No. 12,552; *Payson v. Coffin*, (1878) 5 Dill. 473, 19 Fed. Cas. No. 10,859.

In a jurisdiction where certificates of stock are held not to be negotiable instruments, unpaid subscriptions constitute assets in the hands of the trustee in bankruptcy, even though the stock has been transferred from the possession of the original subscribers to one who had no notice that the stock was not fully paid. *Perkins v. Cowles*, (1910) 157 Cal. 625, 108 Pac. 711, 137 A. S. R. 158, 30 L. R. A. (N. S.) 283.

*But where the state law does not give the corporation itself a right of action against the stockholders for the recovery of their subscriptions, no such right vests in the trustee.* *In re Jassoy Co.*, (C. C. A. 2d Cir. 1910) 178 Fed. 515.

*Trustee not estopped by act of bondholders.*—The fact that bondholders of a bankrupt corporation may be estopped, by a waiver expressed in the bonds or mortgage, to assert any personal claim against the stockholders, is no defense by the stockholders to a suit by the trustee to enforce their liability on unpaid subscriptions, where there are other creditors who are not so estopped. *Babbitt v. Read*, (S. D. N. Y. 1909) 173 Fed. 712, 23 Am. Bankr. Rep. 254.

*Determination of amount due.*—Where plenary suits are necessary to collect unpaid subscriptions from stockholders of a bankrupt corporation, it is not necessary that the Bankruptcy Court should determine the amount due from the stockholders, which may be left to the courts in which such suits are brought, and authority given by the Bankruptcy Court to the trustee to collect amount due is a sufficient demand on the stockholders. *Babbitt v. Read*, (S. D. N. Y. 1909) 173 Fed. 712, 23 Am. Bankr. Rep. 254.

*Jurisdiction.*—A District Court, as a court of bankruptcy, has jurisdiction of a suit by a trustee in bankruptcy of a cor-

poration, against a number of defendants, to recover unpaid subscriptions to the stock of the corporation; such suit being one which could not have been maintained by the bankrupt. *Skillin v. Magnus*, (N. D. N. Y. 1907) 162 Fed. 689, 19 Am. Bankr. Rep. 397; *In re* Monarch Corporation, (D. C. Conn. 1912) 196 Fed. 252. So, also, it has been held that a court of bankruptcy has power to order assessments on unpaid subscriptions to the stock of a bankrupt corporation. *In re* Eureka Furniture Co., (E. D. Pa. 1909) 170 Fed. 485, 22 Am. Bankr. Rep. 395.

*Hearing confined to necessity of "call."*—While the Bankruptcy Court has jurisdiction to make a call on the stockholders of a bankrupt corporation, the hearing before the referee to take evidence on such question should be expressly limited to the question, "Should there be a call on the shareholders of unpaid stock, and, if so, to what amount?" *In re* Munger Vehicle Tire Co., (C. C. A. 2d Cir. 1908) 168 Fed. 910, 21 Am. Bankr. Rep. 395.

#### VIII. MEMBERSHIP IN STOCK EXCHANGE.

*Property rights in seat on stock exchange pass to trustee.*—Practically all the authorities agree that a membership or seat in a stock or produce exchange is an asset in bankruptcy and may be disposed of by the member's trustee in bankruptcy. This rule obtains though memberships in these organizations are limited to a certain number; though the seat of a member is not salable or assignable, except by the permission and consent of the exchange; and though it is provided in the exchange's constitution and by-laws that when a member becomes bankrupt or insolvent his seat shall be sold and the proceeds of the sale disposed of in a specified manner. 3 R. C. L. 224; *Hyde v. Woods*, 2 Sawy. 655, 10 Nat. Bankr. Reg. 54, 12 Fed. Cas. No. 6,975, *affirmed* 94 U. S. 523; *Sparhawk v. Yerkes*, 142 U. S. 1, 12 S. Ct. 104, 35 U. S. (L. ed.) 915; *Page v. Edmunds*, 187 U. S. 596, 23 S. Ct. 200, 47 U. S. (L. ed.) 318, *affirming* 107 Fed. 89, 46 C. C. A. 160, 59 L. R. A. 94, which *affirmed* (1900) 102 Fed. 746; *In re* Ketchum, 1 Fed. 840; *In re* Warder, 10 Fed. 275; *In re* Werder, 15 Fed. 789; *Matter of Gallagher*, 16 Blatchf. 410, 9 Fed. Cas. No. 5,192; *In re* Gaylord, 111 Fed. 717; *In re* Neimann, 124 Fed. 738; *In re* Hurlbutt, 135 Fed. 504, 68 C. C. A. 216; *Burleigh v. Foreman*, (C. C. A. 1st Cir. 1904) 130 Fed. 13, 12 Am. Bankr. Rep. 88; *O'Dell v. Boyden*, (C. C. A. 6th Cir. 1906) 150 Fed. 731, 17 Am. Bankr. Rep. 757, 10 Ann. Cas. 239 and note; *In re* Gregory, (C. C. A. 2d Cir. 1909) 174 Fed. 629, 23 Am. Bankr. Rep. 270, 27 L. R. A. N. S. 613 and note; *In re* Currie, (C. C. A. 2d Cir. 1911) 185 Fed. 263; *State v. Chamber of Commerce*, 77 Minn. 308, 79 N. W. 1026; *McCabe v. Emmons*,

51 N. Y. Super. Ct. 219; *Platt v. Jones*, 96 N. Y. 24; *Cohen v. Budd*, (Supm. Ct. Tr. T.) 52 Misc. (N. Y.) 217, 103 N. Y. S. 45, affirmed without opinion 117 N. Y. App. Div. 922, 102 N. Y. S. 1133; *People v. Feitner*, 167 N. Y. 1, 60 N. E. 265, 88 A. S. R. 698 (obiter); *Wrede v. Gilley*, (1909) 21 Am. Bankr. Rep. 821, 132 App. Div. 293, 117 N. Y. S. 5; *Clarkson v. Toronto Stock Exch.*, 13 Ont. 213. And see opinion of Crompton, J., in *Nicholson v. Gooch*, 5 El. & Bl. 999, 85 E. C. L. 999.

*In re Sutherland*, 6 Biss. 526, 23 Fed. Cas. No. 13,637, seems to be the only case in conflict with the rule that a seat in an exchange is an asset in bankruptcy. That case may be distinguished on the ground that the court considered the right in the nature of a franchise or privilege. The court said: "It will be seen there is no pecuniary profit to the members of this body further than what is derived from the incidental use made by a member of the privileges which his membership gives him. It confers no property rights; that is, it represents no interest in property, but only, like the membership of a Masonic lodge, or church, or social club, confers upon the member the privileges of the order." In *In re Ketchum*, 1 Fed. 842, the court, in commenting on the case last cited, said: "The case of *In re Sutherland*, 6 Biss. 526, 23 Fed. Cas. No. 13,637, can, perhaps, be distinguished from *Hyde v. Woods*, 94 U. S. 523, and from *In re Gallagher*, 16 Blatchf. 410, 19 Nat. Bankr. Reg. 224, 9 Fed. Cas. No. 5,192, on the ground suggested in the latter case, that the right in that case was less distinctly of a mere business character. But if not, I am not satisfied, by the reasoning in that case, that property like this seat in the New York Stock Exchange was not intended to pass to the assignee in bankruptcy, under the Bankrupt Law." In *Sparhawk v. Yerkes*, 142 U. S. 1, 12 S. Ct. 104, the court, in discussing the nature of a member's property in his membership in a stock exchange, said: "While the property is peculiar and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by creditors."

#### Applications of and exceptions to rule.

—In case a member of a stock exchange is suspended or expelled from the association, the trustee in bankruptcy is entitled to the proceeds of a sale of the seat of the expelled member, after payment of the claims of all co-members, as such proceeds are not forfeited to the stock exchange, in the absence of an express provision for forfeiture in its constitution or by-laws. *In re Gaylord*, 111 Fed. 717, wherein it appeared that the members of a firm which had become bankrupt had possessed seats in a stock exchange, the

constitution of which provided that when any member was found guilty of fraud he should be expelled and his membership disposed of by the committee on admissions. The two members constituting the firm had been found guilty of fraud, and, having been expelled, their seats had been sold and the proceeds paid to the treasurer of the exchange. The trustee demanded the sum realized from the sale of the seats, but the treasurer of the exchange refused to pay it to him, claiming that when the members were expelled they forfeited all their right to the property in the seats. It was held that the trustee in bankruptcy was entitled to the proceeds, after payment of the claims of the members of the stock exchange. The court said: "It was open to the stock exchange to have made provision for the forfeiture of all rights in the association, in cases of fraudulent conduct on the part of members of the exchange, but to insure the right to inflict a punishment of this nature, proper provision must be made in the laws of the association. The right to expel a member guilty of fraudulent conduct is clearly provided for in the articles, but no express provision is made for a forfeiture of the money realized from a sale of the membership of an expelled member, and courts are not justified in assuming that the right of forfeiture exists, when no provision to that effect is found in the laws of the association. The reason why such provisions are not found in the constitution of the exchange is probably due to the fact that the originators of the association realized that the creditors of the expelled member would be the actual sufferers from the adoption of such a provision, and hence it is not included in the constitution."

Where it is doubtful whether the membership or seat in the stock exchange is a valuable asset of the estate of the bankrupt, the trustees in bankruptcy must elect within a reasonable time whether they will accept it, and in case they do not accept it and it becomes valuable property through the acts of the bankrupt subsequent to his discharge, the trustees are barred from asserting any further claim. *Sparhawk v. Yerkes*, 142 U. S. 1, 12 S. Ct. 104.

Where the laws of the state wherein the member resides and the exchange is located exempt the seat from sale under judicial process, the seat cannot be considered as an asset of the estate of the member when he becomes bankrupt. *Page v. Edmunds*, 187 U. S. 596, 23 S. Ct. 200, 47 U. S. (L. ed.) 318. But it seems that a provision in the by-laws of a stock exchange that the surplus funds arising from dues and assessments after all expenses are paid shall constitute a "gratuity fund" to be invested and raise an

income, which net income shall be divided, at the end of each year, among the widows and heirs of the members who have died during the year, does not bring a membership in the exchange within the meaning of a state statute exempting certificates of membership in assessment insurance companies, and that therefore a membership passes to the member's assignee in bankruptcy. *In re Ketchum*, 1 Fed. 840; *In re Neimann*, 124 Fed. 738. In the case last cited, the court, in discussing the effect of the insurance provision, said: "The prime objects thereof are the privileges of trade which the member thus obtains, and the gratuity fund provision is a mere arrangement for equitable distribution of the surplus means, arising from dues and assessments, to the representatives of deceased members, thereafter having no benefits of the association, in lieu of dividing the surplus among all members. It merely saves for the family a small share in the surplus when the interest of the member ends with his death."

**Subject to valid liens.**—The title taken by the trustee to a membership in the stock exchange is, like all other property, subject to any valid lien that may exist against it. *Wrede v. Gilley*, (1909) 21 Am. Bankr. Rep. 821, 132 App. Div. 293, 117 N. Y. S. 5.

**Transfer compulsory.**—The usual method of procedure a trustee in bankruptcy takes to avail himself of a seat in a stock exchange held by a bankrupt is to compel the bankrupt, by an action in equity, to execute and deliver such papers as shall be necessary in order to effectuate a transfer and sale of the seat in the stock exchange, which when done enables the trustee to sell the seat with the consent of the members of the stock exchange. *In re Ketchum*, 1 Fed. 840; *In re Warder*, 10 Fed. 275; *Platt v. Jones*, 96 N. Y. 24. It has been held that a court of equity has the power to compel the transfer of a seat in a stock exchange, under the provisions of the Bankruptcy Act empowering a court of bankruptcy to "cause the estates of bankrupts to be collected, reduced to money, and distributed," empowering the court to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act," and making it the duty of the bankrupt to "execute and deliver such papers as shall be ordered by the court." *In re Hurlbutt*, (2d Cir. 1903) 135 Fed. 504, 68 C. C. A. 216. But after a bankrupt has been discharged, a court of equity will not compel him to execute writings or instruments to enable an assignee to make available, as assets of the bankrupt's estate, a seat held by the bankrupt at the time of the filing of his petition. *Matter of Nichols*, 1 Fed. 842.

**Distribution of proceeds from sale of membership.**—Where, on the bankruptcy of a member of a stock exchange, his seat is sold and his transactions on the floor closed out under its rules, the proceeds of both pass to the member's trustee in bankruptcy, subject, however, to the rules of the exchange that they should be appropriated, first, to the payment of the member's indebtedness to the exchange, second, to claims arising against him out of the transactions on the floor of the exchange, and, third, loans from members, as against his general creditors. *In re Gregory*, (C. C. A. 2d Cir. 1909) 174 Fed. 629, 23 Am. Bankr. Rep. 270; *In re Currie*, (C. C. A. 2d Cir. 1911) 185 Fed. 263.

#### IX. CONTRACTUAL INTERESTS AND OBLIGATIONS.

**Bankruptcy does not terminate contractual relations.**—Under the rule that the trustee in bankruptcy takes the property of the bankrupt subject to all valid claims, liens, and equities, it has been held that contractual obligations existing at the time of the filing of the petition in bankruptcy are not terminated by the adjudication; and that, throughout the entire field of contractual obligations, the adjudication in bankruptcy absolves from no agreement, terminates no contract, and discharges no liability. *Thompson v. Fairbanks*, (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577; *Zartman v. Waterloo First Nat. Bank*, (1910) 216 U. S. 134, 30 S. Ct. 368, 23 Am. Bankr. Rep. 635, *affirming* (1907) 189 N. Y. 533, 82 N. E. 1126; *Watson v. Merrill*, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 454; *In re Wright*, (W. D. N. Y. 1907) 151 Fed. 361, 18 Am. Bankr. Rep. 199, *affirmed* (C. C. A. 2d Cir. 1907) 157 Fed. 544; *In re Spitzel*, (E. D. N. Y. 1909) 168 Fed. 156, 21 Am. Bankr. Rep. 729; *Franklin v. Stoughton Wagon Co.*, (C. C. A. 8th Cir. 1909) 168 Fed. 857, 22 Am. Bankr. Rep. 63; *In re Boschelli*, (M. D. Pa. 1910) 183 Fed. 864.

**Assumption of executory contracts optional with trustee.**—The effect of the adjudication is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these. It is the assignment of the property of the bankrupt to the trustee by operation of law. It neither releases nor absolves the debtor from any of his contracts or obligations, but, like any other assignment of property by an obligor, leaves him bound by his agreements and subject to the liabilities he has incurred. *Watson v. Merrill*, (C. C. A. 8th Cir. 1905) 136 Fed. 359, 14 Am. Bankr. Rep. 454.

*If the trustees elect to assume a contract, they take it cum onere, as the*

bankrupt held it, subject to all of its provisions and conditions; and any valid modification of a written contract which may have been made by the bankrupt before adjudication, whether oral or in writing, and whether known or unknown to the trustees, will be binding upon them. *Atchison, etc., R. Co. v. Hurley*, (C. C. A. 8th Cir. 1907) 153 Fed. 503, 18 Am. Bankr. Rep. 396.

**Assignment of money to become due under a contract is binding on trustee.**—Where a party to a contract assigned to his creditor the money to become due under the contract, and the party's receiver and trustee in bankruptcy carried out the contract, it was held that the money becoming due must be used to discharge the debt due the creditor, though on the failure of the receiver and trustee to complete the contract there would have been no money to which the assignment could apply. *In re De Long Furniture Co.*, (E. D. Pa. 1911) 188 Fed. 686.

**Contract vesting title in bankrupt.**—Where certain agency contracts appointed the bankrupt agent for the sale of manufacturers' furniture and carpets for a certain period, the contract providing that the bankrupt on final termination of the agreement agreed "to buy and pay for at the then current prices, and on the regular terms, such goods as may be then on hand," it was held that the contract was not executory as to the goods remaining at the termination of the contract, but, as to such goods, constituted a sale, so that the title to the goods so remaining passed to the bankrupt's trustee. *Parlett v. Blake*, (C. C. A. 8th Cir. 1911) 188 Fed. 200.

**The interest of an insurance agent in a contract for renewal premiums on policies previously written has been held to be property capable of transfer which passes to his trustee in bankruptcy, subject to the terms of the contract under which such interest was earned.** *In re Wright*, (C. C. A. 2d Cir. 1907) 157 Fed. 544.

**The trustee cannot take advantage of a mistake made by the bankrupt when reducing to writing a contract made by him; and such mistake is not an asset in the hands of the trustee, nor does the bankruptcy bar the reformation of the contract because of it.** *Zartman v. Waterloo First Nat. Bank*, (1910) 216 U. S. 134, 30 S. Ct. 368, 23 Am. Bankr. Rep. 635, *affirming* (1907) 189 N. Y. 533, 82 N. E. 1126.

**Where a bankrupt contractor was entitled to a mechanic's lien at the date of his adjudication in bankruptcy, such right cannot be enforced by the trustee in a court of bankruptcy, but must be enforced in the state courts, unless the adverse parties consent to be sued in the United States Circuit Court.** *In re Gris-*

*ler*, (C. C. A. 2d Cir. 1905) 136 Fed. 754, 13 Am. Bankr. Rep. 508.

**A paid-up life insurance policy vests in the trustee to the extent of the bankrupt's interest therein.** *In re Schaeffer*, (N. D. Ohio 1910) 189 Fed. 187.

**An endowment policy assigned by a bankrupt to his wife before his adjudication in bankruptcy held not to pass to a trustee in bankruptcy by virtue of a state statute making such a policy when transferred to the wife inure to her separate use and benefit.** *Eldredge v. Mutual Life Ins. Co. of New York*, (1914) 217 Mass. 444, 105 N. E. 361.

**Fire insurance policy.**—The interest of the bankrupt in a policy of fire insurance vests in his trustee, on his appointment, by operation of law; and in case of loss the trustee may recover. *Fuller v. New York F. Ins. Co.*, (1903) 184 Mass. 12, 67 N. E. 879. See also *In re Hamilton*, (W. D. Ark. 1900) 102 Fed. 683; *Gordon v. Mechanics', etc., Ins. Co.*, (1907) 120 La. 441, 14 Ann. Cas. 886, 45 So. 384.

The mere adjudication as a bankrupt of the insured in a fire insurance policy does not work a forfeiture of the policy under a clause providing in effect that the policy shall become void upon any sale or transfer of the property. *Fuller v. New York F. Ins. Co.*, (1903) 184 Mass. 12, 67 N. E. 879; *Fuller v. Jameson*, (1904) 98 App. Div. 53, 90 N. Y. S. 456, *affirmed* (1906) 184 N. Y. 605, 77 N. E. 1187.

According to the weight of authority, if in the bankruptcy proceeding a receiver has been appointed, but no trustee has been appointed, at the time of the fire, such a policy still remains in force. *Gordon v. Mechanics', etc., Ins. Co.*, (1907) 120 La. 441, 45 So. 384, 124 A. S. R. 434, 14 Ann. Cas. 886, 15 L. R. A. (N. S.) 827; *Fuller v. New York Fire Ins. Co.*, (1903) 184 Mass. 12, 67 N. E. 879; *Southern Pants Co. v. Rochester German Ins. Co.*, 159 N. C. 78, 74 S. E. 812; *Marcello v. Concordia F. Ins. Co.*, 234 Pa. St. 31, 82 Atl. 1090, 39 L. R. A. (N. S.) 366; *Smith v. Security Mut. Fire Ins. Co.*, (1912) 29 S. D. 328, 137 N. W. 46, Ann. Cas. 1914D 930 (*obiter*). See also *Roper v. National F. Ins. Co.*, 161 N. C. 151, 76 S. E. 869.

**Compare *Bronson v. New York F. Ins. Co.***, (1908) 64 W. Va. 494, 63 S. E. 283, wherein it was held that the appointment of a receiver in bankruptcy proceedings avoided a policy providing in effect that the policy should become void if any change took place in the interest, title, or possession of the subject insured, whether by legal process or judgment, or by the voluntary act of the assured, or otherwise, or if the policy was assigned before loss. The court said: "The sole question here is whether the change of possession into the hands of the said receivers avoids the

policy, and bars recovery because of the clause in the policy above quoted. We think no recovery can be had upon it. By the appointment of the receiver and his taking actual possession of the property, the distilling company, which was in possession when the policy issued, was deprived of the possession. When an insurance company insures property for one person, it has inquired into his carefulness and character, and it trusts him to provide for the safety of his own property while he has it in possession; but it does not trust everybody into whose hands it may come, whether he be receiver or not. The very thing against which that policy provided had taken place before the fire—a total change of possession. The distilling company no longer guarded the property. It was in the hands of one not moved by the same interest to care for the property as would be the distilling company when solvent and operating. Its interest had practically ceased."

As soon, however, as a trustee is appointed in bankruptcy proceedings and by qualification acquires the property of the insured, any fire insurance policies providing that upon the sale or transfer of the property or any interest therein, or a change in the possession thereof, they shall become void are at once forfeited and no liability attaches to the insurance companies in case the property is thereafter destroyed. This rule has been applied where the bankruptcy was involuntary. *Perry v. Lorillard F. Ins. Co.*, 61 N. Y. 214, 19 Am. Rep. 272; *Smith v. Security Mut. Fire Ins. Co.*, (1912) 29 S. D. 328, 137 N. W. 46, Ann. Cas. 1914D 930. See also *In re Hamilton*, 102 Fed. 683. The rule has likewise been applied where the bankruptcy proceedings were voluntary. *In re M. J. Hibbler Mach. Supply Co.*, (W. D. N. Y. 1912) 192 Fed. 741; *Adams v. Rockingham Mut. F. Ins. Co.*, 29 Me. 292; *New Kensington Lumber Co. v. German Ins. Co.*, 35 Pa. Super. Ct. 32. In the case last cited it appeared that the plaintiff was a contractor, and had a claim against the owner of a house that he was constructing. The plaintiff, without the knowledge of the owner, secured insurance from the defendant in the name of the owner, loss, if any, payable to the plaintiff as its interest might appear. Within a few hours after the insurance was secured the owner of the house filed a petition in bankruptcy and a trustee of the estate was appointed. Thereafter the property was destroyed. The court held that the policy became void upon the appointment of a trustee in bankruptcy, notwithstanding the fact that the whole transaction was for the benefit of the plaintiff.

Although under a condition in a fire insurance policy that the policy shall not be assigned without the consent of the insurers, the appointment of a trustee in

bankruptcy of the insured will operate to make the policy void as to future losses, such appointment does not render void matured obligations for losses occurring after the adjudication and before the appointment of the trustee. *Fuller v. New York F. Ins. Co.*, 184 Mass. 12, 67 N. E. 879.

Under the Bankruptcy Act of 1867 the register in involuntary cases made the assignment, and it was held that the bankruptcy of the insured and the appointment of an assignee did not work a forfeiture of a policy prohibiting a sale or transfer of the property. *Starkweather v. Cleveland Ins. Co.*, 2 Abb. 67, 22 Fed. Cas. No. 13,308, wherein the court said: "The control of the property, merely and solely by the judgment of the court, is taken from him and vested in the assignee, who has merely the power to do what the general as well as the Bankrupt Law requires, namely, to appropriate the bankrupt's property to the payment of his debts. In other words, that the assignee is a mere agent of the debtor to use his property in the payment of his debts. It therefore follows from this that the bankrupt remains as much interested in watching over and guarding the insured property after as before bankruptcy, and that the assignee does not acquire such an interest in the policy, nor in the insured property, as to work the forfeiture contemplated by the clauses in question."

Proceedings in bankruptcy, and the assignment or transfer made by the bankrupt to his trustee will not avoid a fire insurance policy on chattels, which is made payable to a chattel mortgagee as his interest may appear. As the whole legal title to the chattels is vested in the mortgagee conditionally, leaving no such interest in the bankrupt as will pass to the trustee under the deed of assignment, the assignment by the mortgagor to the trustee really works no change in the title or possession of the chattel. *Appleton Iron Co. v. British America Assur. Co.*, 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100.

#### X. LICENSES.

**Liquor license.**—The general rule is that a liquor license is an asset of a licensed bankrupt's estate which, upon compliance with the law of the state, may be reduced to money by his trustee in bankruptcy. *In re Brodbine*, (D. C. Mass. 1899) 93 Fed. 643, 2 Am. Bankr. Rep. 53; *In re Fisher*, (D. C. Mass. 1899) 98 Fed. 89, 3 Am. Bankr. Rep. 406, *affirmed* (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 646; *In re Becker*, (E. D. Pa. 1899) 98 Fed. 407, 3 Am. Bankr. Rep. 412; *In re Olewine*, (M. D. Pa. 1903) 125 Fed. 840, 11 Am. Bankr. Rep. 40; *In re Baumblatt*, (E. D. Pa. 1907) 153 Fed. 485, 19 Am. Bankr. Rep. 500; *In re Wiesel*, (E. D. Pa. 1909) 173 Fed. 718,

23 Am. Bankr. Rep. 59; *In re May*, (D. C. Minn. 1900) 5 Am. Bankr. Rep. 1; *In re Benz*, (C. C. A. 3d Cir. 1914) 218 Fed. 50, wherein the court said: "It is true that a lien cannot be obtained by issuing execution against a license to sell liquor; but a license is nevertheless a valuable species of property, which may be sold in bankruptcy." But in Georgia it has been held that a liquor license duly granted to the bankrupt by the city of Brunswick is not property which passes to his trustee in bankruptcy. *Matter of Keller*, (D. C. Ga. 1906) 16 Am. Bankr. Rep. 727.

Even though, under the state law, the license itself cannot actually be sold, nevertheless the trustee may sell the lease of the licensed premises and the fixtures, etc., conditioned on the transfer of the license by the court. *Snyder v. Bougher*, (1906) 16 Am. Bankr. Rep. 792, 214 Pa. St. 453, 63 Atl. 893.

The bankrupt will be required to execute any instruments necessary for the purpose of effectuating the sale of a license made by his trustee. *In re Fisher*, (D. C. Mass. 1899) 98 Fed. 89, 3 Am. Bankr. Rep. 406, *affirmed* (C. C. A. 1st Cir. 1900) 103 Fed. 860, 4 Am. Bankr. Rep. 646; *In re Becker*, (E. D. Pa. 1899) 98 Fed. 407, 3 Am. Bankr. Rep. 412; *In re Emrich*, (W. D. Pa. 1900) 101 Fed. 231, 4 Am. Bankr. Rep. 89; *In re Wiesel*, (E. D. Pa. 1909) 173 Fed. 718, 23 Am. Bankr. Rep. 59.

A bankrupt will not be compelled to assist the trustee in disposing of his liquor license for the benefit of the estate, when it does not appear that it was the practice of the licensing board either to issue a new license in place of the one surrendered or having done so, to grant a refund, or that the surrender will benefit the estate. That the estate might possibly be benefited by a surrender of the license is not enough. *In re Beahn*, (D. C. Mass. 1912) 212 Fed. 762.

Where the assignment of a liquor license is void under the state law, the assignee thereof can have no claim as against the assignor's trustee in bankruptcy, either for the license or the proceeds thereof. *In re Flaherty*, (E. D. Va. 1911) 184 Fed. 962. And see to the same effect *In re McArdle*, (D. C. Mass. 1903) 126 Fed. 442, 11 Am. Bankr. Rep. 358.

The right to renew a liquor license does not pass to a trustee as assets of the estate. *In re Doyle*, (E. D. Pa. 1913) 205 Fed. 543, wherein the court said: "The question is whether, the petition for renewal of the license having been filed after the adjudication in bankruptcy, the license granted upon that petition is after-acquired property, which does not pass as part of the bankrupt estate. Judge Holland decided in the case of *Wiesel & Knaup*, (E. D. Pa. 1909) 23 Am. Bankr. Rep. 59, 173 Fed. 718, that the right of

a bankrupt to apply for renewal of his license is an asset which passes to his trustee, and that, where the application was filed prior to adjudication, the rights under such application passed to the trustee in bankruptcy. I think the case at bar may be readily distinguished from that case. At the time of adjudication no application for renewal of the license had been filed. Applications of the receiver, the purchaser, and the bankrupt were subsequently filed, and a license for the year beginning June 1, 1913, was, upon consideration of petitions of all parties, granted by the court of quarter sessions to the bankrupt. If the right to apply for a license had matured by the filing of an application prior to adjudication, the case would come within the rule in the case of *Wiesel & Knaup*, *supra*. In *Buck's Estate*, 185 Pa. St. 57, 39 Atl. 821, 64 Am. St. Rep. 816, it was held by Mr. Chief Justice Fell that a license to sell liquor is a personal privilege, which at the death of the licensee does not go to his representatives, and is not an asset of his estate. And in *Whitlock's License*, 39 Pa. Super. Ct. 34, distinguished by Judge Holland from the *Wiesel* case, it was held that a liquor license granted to a person after he had been adjudicated a bankrupt belongs to him personally, and not to his receiver in bankruptcy, and that the receiver has no right to sell such license as an asset of the bankrupt's estate. In the present case the receiver, after adjudication, applied for a renewal of the license, which application was refused by the quarter sessions court. Whatever inchoate rights existed prior to the adjudication and passed out of the bankrupt at the time of his adjudication were in the nature of a personal privilege. If the license court had seen fit to confer this privilege upon the receiver of the bankrupt estate, it would have been within its discretion to do so. The action of the court of quarter sessions in granting the license to the bankrupt vested the personal privilege arising under the license in the bankrupt as of the time the license was granted. Questions affecting title to property which is created under a state statute must be construed in accordance with the rules of property established by the decisions of the state courts. *Smith Type-writer Co. v. Alleman*, 199 Fed. 1, 117 C. C. A. 577; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. ed. 359. The conclusion is inevitable to my mind that, under the rule of property established by the decisions of the state courts, the property in the license vested in the bankrupt, and it was, therefore, after-acquired property, and belongs to the licensee, and is no part of the bankrupt estate."

A license to occupy a stall in a city market is property which passes from a bankrupt licensee to his trustees; and the bankrupt may be ordered by the court of



bankruptcy to transfer the license to the trustee, and to make the necessary and customary application to the proper authorities for the reissue of the license to the trustee or his vendee. *In re Emrich*, (1900) 101 Fed. 231. See also *Matter of Gallagher*, (1879) 16 Blatchf. (U. S.) 410.

#### XI. EFFECT OF COMMINGLING PROPERTY.

**When identity is lost.**—Where the money or other property of third persons is so far commingled with that of the bankrupt as to lose its identity as a separate fund or chattel, the owner will not be entitled to a preferential claim for the value thereof as against the general creditors represented by the trustee, excepting where it is shown that the result is a net gain to the bankrupt's estate. *In re Richard*, (E. D. Tenn. 1900) 104 Fed. 792; *In re Kurtz*, (E. D. Pa. 1903) 125 Fed. 992, 11 Am. Bankr. Rep. 129; *John Deere Plow Co. v. McDavid*, (C. C. A. 8th Cir. 1905) 137 Fed. 802, 14 Am. Bankr. Rep. 653; *Erie R. Co. v. Dial*, (C. C. A. 6th Cir. 1905) 140 Fed. 689, 15 Am. Bankr. Rep. 559; *In re Kearney*, (E. D. Pa. 1909) 167 Fed. 995, 21 Am. Bankr. Rep. 721; *Ritchie County Bank v. McFarland*, (C. C. A. 4th Cir. 1910) 183 Fed. 715; *In re Lindsley*, (W. D. Mich. 1910) 185 Fed. 684, *following Crawford County v. Strawn*, (6th Cir. 1907) 157 Fed. 49, 84 C. C. A. 553; *In re Larkin*, (D. C. S. D. 1912) 202 Fed. 572; *Baltimore Merchants' Nat. Bank v. Corr*, (C. C. A. 4th Cir. 1915) 221 Fed. 419; *In re Swift*, (D. C. Mass. 1901) 5 Am. Bankr. Rep. 232; *Zartman v. Waterloo First Nat. Bank*, (1907) 19 Am. Bankr. Rep. 27, 189 N. Y. 267, 82 N. E. 127.

The court will go no farther than to give a lien when the facts are that there remain in the estate specific funds or property which have increased the assets of the estate, and which represent the proceeds of the specific property intrusted to the bankrupt. *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 338.

Thus it has been held that where cotton was by mistake delivered to factors to whom it was not consigned, and by mistake of a warehouseman it was sold, and the proceeds deposited in bank to the factors' account, and subsequently, on the bankruptcy of the factors, a balance greater than the amount of the cotton passed from the bank to the bankrupt estate, the owner of the cotton was entitled to the value thereof. *In re Woods*, (S. D. Ga. 1903) 121 Fed. 599, 9 Am. Bankr. Rep. 615.

*In Smith v. Au Gres Tp.*, (C. C. A. 6th Cir. 1906) 150 Fed. 257, 17 Am. Bankr. Rep. 745, it appears that a bankrupt, who was a township trustee, used the township's money with which to purchase goods for sale in his business as a merchant, and so mingled the goods that it was impos-

sible to distinguish them from the rest of his stock, and it was held that the township was entitled at least to an equitable lien on the proceeds of a sale of the entire stock by the bankrupt's trustee for the amount so appropriated; the general creditors of the bankrupt being entitled only to share in the residue, if any.

*In re City Bank*, (W. D. Mich. 1910) 186 Fed. 250, it appears that prior to its adjudication as a bankrupt, the "D" bank collected a check payable to the "C" bank, the proceeds of which were mingled with the general funds, and the latter drew on the New York correspondent of the "D" bank for the amount, which it refused to pay, though it had sufficient funds which were subsequently transmitted to the trustee; and it was held that the payee of the check was entitled to a preferential lien for the amount thereof.

**When property traceable.**—But if the owner can identify and trace the property claimed, or the proceeds thereof, he will be entitled to recover it from the trustee. *In re Taft*, (C. C. A. 6th Cir. 1904) 133 Fed. 511, 13 Am. Bankr. Rep. 417; *In re Coffin*, (C. C. A. 2d Cir. 1907) 152 Fed. 381, 18 Am. Bankr. Rep. 127, *reversing* (D. C. Conn. 1906) 146 Fed. 181, 16 Am. Bankr. Rep. 682; *In re Northrup*, (N. D. N. Y. 1907) 152 Fed. 763; *In re City Bank*, (W. D. Mich. 1910) 186 Fed. 250.

**Officers of one corporation owning stock of another.**—Where a bankrupt corporation had organized another corporation to develop oil and gas wells to furnish the bankrupt corporation with fuel to operate its business, and the officers of the bankrupt owned all the stock of the oil company, and used it as a mere agent of the bankrupt, and not as engaged in a separate business, they were properly required to surrender the capital stock thereof to the bankrupt's receiver. *In re Muncie Pulp Co.*, (C. C. A. 2d Cir. 1905) 139 Fed. 546, 14 Am. Bankr. Rep. 70.

**Expenditure of trust fund by bankrupt not presumed.**—Where the bankrupt deposited the money of other persons with his own and, after filing the petition, he expended from such account, for his private purposes, the sum of \$270, it will be presumed that the amount so expended was his personal money, and he will be required to pay over such sum to his trustee. *In re Kurtz*, (E. D. Pa. 1903) 125 Fed. 992, 11 Am. Bankr. Rep. 129. See also *In re Richard*, (E. D. Tenn. 1900) 104 Fed. 792.

**Burden of proof.**—The burden of showing that his property has been wrongfully mingled in a mass of the property of the wrongdoer is upon the owner. *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

But if the owner succeeds in making the requisite proof, it then devolves upon the bankrupt or his trustee to distinguish between what is his and that of the *cestui*

*que trust.* *Smith v. Au Gres Tp.*, (6th Cir. 1906) 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876; *Smith v. Mottley*, (6th Cir. 1906) 150 Fed. 266, 80 C. C. A.

154; *In re J. M. Acheson Co.*, (C. C. A. 9th Cir. 1909) 170 Fed. 427, 22 Am. Bankr. Rep. 338; *In re Stewart*, (N. D. N. Y. 1910) 178 Fed. 463.

**[Policy of insurance.]** *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and [(1898) 30 Stat. L. 566.]

**Policies having surrender or other value.**

—Policies of insurance having a surrender value within the definition given in the following paragraph, and not exempt under the law of the state, pass to the trustee in bankruptcy, subject to the right of the bankrupt to retain it, under the provisions of the statute, by paying or securing to the trustee the ascertained value thereof. *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771, 17 Am. Bankr. Rep. 484, *affirming* (C. C. A. 2d Cir. 1905) 142 Fed. 445, 15 Am. Bankr. Rep. 701; *In re Lange*, (N. D. Ia. 1899) 91 Fed. 361, 1 Am. Bankr. Rep. 189; *In re Buelow*, (D. C. Wash. 1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389; *In re Diack*, (S. D. N. Y. 1900) 100 Fed. 770, 3 Am. Bankr. Rep. 723; *In re Boardman*, (D. C. Mass. 1900) 103 Fed. 783, 4 Am. Bankr. Rep. 620; *In re Becker*, (N. D. N. Y. 1901) 106 Fed. 54, 5 Am. Bankr. Rep. 438; *In re Slingluff*, (D. C. Md. 1900) 106 Fed. 154, 5 Am. Bankr. Rep. 76; *In re Welling*, (C. C. A. 7th Cir. 1902) 113 Fed. 189, 7 Am. Bankr. Rep. 340; *Gould v. New York L. Ins. Co.*, (E. D. Ark. 1904) 132 Fed. 927, 13 Am. Bankr. Rep. 235; *In re Coleman*, (2d Cir. 1905) 136 Fed. 818, 69 C. C. A. 496, 14 Am. Bankr. Rep. 461; *Clark v. Equitable L. Assur. Soc.*, (E. D. Pa. 1906) 143 Fed. 175, 16 Am. Bankr. Rep. 137; *In re Wolff*, (E. D. N. Y. 1908) 165 Fed. 984, 21 Am. Bankr. Rep. 452; *In re Moore*, (E. D. Tenn. 1909) 173 Fed. 679, 23 Am. Bankr. Rep. 109; *In re White*, (2d Cir. 1909) 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451, 23 Am. Bankr. Rep. 90; *In re Hettling*, (2d Cir. 1909) 175 Fed. 65; 99 C. C. A. 87, 23 Am. Bankr. Rep. 161; *In re Orear*, (C. C. A. 8th Cir. 1910) 178 Fed. 632, 24 Am. Bankr. Rep. 343; *In re Herr*, (M. D. Pa. 1910) 182 Fed. 716; *Matter of Phelps*, (W. D. N. Y. 1905) 15 Am. Bankr. Rep. 170; *In re Phillips*, (E. D. N. Y. 1912) 192 Fed. 1020; *Waldron v. Becker*, (Supm. Ct. Tr. T. 1900) 33 Misc. (N. Y.) 182.

“Cash surrender value.”—Contrariety of opinion was expressed by the lower federal courts as to the exact meaning of the

words “cash surrender value” as employed in the proviso, some courts holding that they mean a surrender value expressly stipulated by the contract of insurance to be paid, and other courts holding that the words embrace policies even though a stipulation in respect to surrender value is not contained therein, where the policy possesses a cash value which would be recognized by the insurer on the surrender of the policy. See *Equitable Life Assur. Soc. v. Miller*, (1911) 185 Fed. 98, 107 C. C. A. 316; *In re White*, (1909) 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451; *In re Herr*, (1910) 182 Fed. 716; *Van Kirk v. Vermont Slate Co.*, (1905) 140 Fed. 38; *In re Coleman*, (1905) 136 Fed. 818, 69 C. C. A. 496; *In re Welling*, (1902) 113 Fed. 189, 51 C. C. A. 151; *In re Boardman*, (1900) 103 Fed. 783; *Pulsifer v. Hussey*, (1903) 97 Me. 434, 54 Atl. 1076. Because the latter construction harmonizes with the practice under the Bankruptcy Act of 1867 and tends to elucidate and carry out the purposes contemplated by the proviso, it has been adopted by the federal Supreme Court. *Holden v. Stratton*, (1905) 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018; *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771, 17 Am. Bankr. Rep. 483, *affirming* (C. C. A. 2d Cir. 1905) 142 Fed. 445, 15 Am. Bankr. Rep. 701 (which reversed (1904) 131 Fed. 972); *Burlingham v. Crouse*, (1913) 228 U. S. 459, 33 S. Ct. 564, 57 U. S. (L. ed.) 920, 46 L. R. A. (N. S.) 148.

The fact that the company will not accept the surrender of a policy until it has lapsed, and that it had not lapsed either when the petition was filed or when the bankruptcy was adjudged, does not prevent the policy from having a cash surrender value within the meaning of the policy. *Hiscock v. Mertens*, 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771.

*Purpose of provision.*—It was not the intent of Congress in the enactment of the insurance proviso to deprive the family of a debtor of the protection which he may have secured to them in taking out

policies for their benefit payable at his death; but it was intended to prevent debtors from availing themselves of the opportunity of making investments for their own benefit in the form of endowment policies, or policies payable to themselves, and holding the same, while seeking a discharge from their debts through the Bankrupt Act. *In re Lange*, (N. D. Ia. 1899) 91 Fed. 361, 1 Am. Bankr. Rep. 189. See also *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771, 17 Am. Bankr. Rep. 483.

*Under the Bankruptcy Act of 1867* "no specific provision was made for insurance policies. The section providing for the passing of the assets of the bankrupt to the trustee contained the broad language of 'all the estate, real and personal.' Under this statute it was held in *In re McKinney*, (1883) 15 Fed. 535, that the insurance upon the life of the bankrupt vested in the bankrupt estate only to the extent of its cash surrender value at the time of the filing of the petition." *Burlingham v. Crouse*, (1913) 228 U. S. 459, 33 S. Ct. 564, 57 U. S. (L. ed.) 920, 46 L. R. A. (N. S.) 148.

*In England* a policy of insurance on a bankrupt's life passes to the trustee in bankruptcy. Thus where a bankrupt did not disclose the existence of a policy of insurance on his life at the liquidation proceedings, and after the liquidation proceedings were closed he continued to pay premiums on the policy until his death, it was held that the official receiver who represented the trustee was entitled to the proceeds of the policy as against the personal representatives of the insured. *Tapster v. Ward*, 101 L. T. (N. S.) 503. Likewise where a bankrupt prior to his discharge took out a life insurance policy, and died a few days after becoming a bankrupt again, it was held that the second trustee in bankruptcy was not entitled to retain from the first trustee the amount of the premiums the debtor had paid. *In re Phillips*, 83 L. J. K. B. 1364, [1914] 2 K. B. 689, 110 L. T. N. S. 939, 21 Manson 144, 58 Sol. J. 364. Similarly, where a policy on the life of a bankrupt was assigned to his wife previous to bankruptcy and on a lapse of the policy after bankruptcy certain payments were made by the insurer to the bankrupt, and later the old policy was changed to one of a different nature, on which advances were made to the bankrupt's wife, it was held that the trustee in bankruptcy was entitled to the sums paid by the insurance company irrespective of any notice of the bankruptcy, but that the trustee was not entitled to receive the policy free from incumbrances if the payments were made by the company without notice. *In re Shrager*, 108 L. T. (N. S.) 346.

**Date of cash surrender value.**—The cash surrender value of a policy should

be ascertained as of the date of the filing of the petition in bankruptcy. *Everett v. Judson*, (1913) 228 U. S. 474, 33 S. Ct. 568, 57 U. S. (L. ed.) 927, 46 L. R. A. (N. S.) 154. See also *Andrews v. Partridge*, (1913) 228 U. S. 479, 33 S. Ct. 570, 57 U. S. (L. ed.) 929, *reversing* 191 Fed. 325, 112 C. C. A. 69, 41 L. R. A. (N. S.) 123, on another point; *In re Judson*, 192 Fed. 834, 113 C. C. A. 158.

The bankrupt's death between that time and the date of the adjudication of bankruptcy does not make the proceeds of a policy over and above its cash surrender value assets in the hands of the trustee. *Everett v. Judson*, (1913) 228 U. S. 474, 33 S. Ct. 568, 57 U. S. (L. ed.) 927, 46 L. R. A. (N. S.) 154.

On the other hand, the bankrupt's right to pay or secure to the trustee the cash surrender value as of the date of the filing of the petition is not extinguished by the bankrupt's death before adjudication, and may be exercised by his personal representative. *Andrews v. Partridge*, (1913) 228 U. S. 479, 33 S. Ct. 570, 57 U. S. (L. ed.) 929, *reversing* (1911) 191 Fed. 325, 112 C. C. A. 69, 41 L. R. A. (N. S.) 123.

The "loan value" of a policy is not necessarily to be treated as a cash surrender value. *In re Hammel*, (C. C. A. 2d Cir. 1915) 221 Fed. 56, wherein the policy had no cash surrender value either provided for on its face or established by concession and practice of the company. It was contended that it had a "loan value," that is, under its provisions the insured might borrow of the company a certain sum of money on the sole security of the policy. This loan, however, would be made only in the event that the beneficiary consented to it and signed the note or agreement for repayment of the loan. The court said: "Not a dollar can be obtained on this policy from the company, unless the beneficiary consents and signs the loan agreement. That beneficiary is now Bertha Hofmann. The contention is that the insured should, under the power reserved in the contract with the insurance company, cancel the original designation of a beneficiary, and substitute himself or his estate, should then obtain the loan from the company and turn it over to the trustee—possibly the trustee, if the designation were changed to insured's estate, might himself obtain the amount of the loan from the company—that proposition need not be passed upon. Twelve years ago the bankrupt took out this policy for the benefit of his wife, so as to secure to her three thousand dollars in the event of his death. This was a laudable and proper thing to do; public policy encourages the making of such provisions for an uncertain future. The policy contains a clause authorizing the insured to change his beneficiary, a perfectly proper clause;

she might predecease him, or desert him, or become unfaithful. There is nothing to suggest any such reason for making a change. On the contrary, the presumption is that now, when he is a bankrupt, and his death in the near future would, except for this insurance, possibly leave her in poverty, he would not voluntarily cancel his designation of her as the beneficiary. It cannot be assumed that, of his own motion, he would take away from her the small sum which the beneficial system of life insurance and his own savings during twelve years have made it possible to secure to her as a last resource, should he die and leave nothing behind him. The proposition that he should be constrained against his will, by an order enforceable by imprisonment in the event of disobedience, to deprive his wife of her present interest in the policy, to make himself the beneficiary, to borrow two-thirds of the \$3,000 from the company, and turn it over to his creditors, and then to make her again the beneficiary of the remaining third, seems contrary to public policy and to good morals. We are unwilling to give this effect to the statute."

**Loan and paid-up value.**—Where certain insurance policies belonging to a bankrupt had no cash surrender value, but they had a collateral loan value and a paid-up insurance value, it was held that they had an inchoate value to which the bankrupt's trustee was entitled as property which, prior to the filing of the petition, the bankrupt could have transferred. *In re Coleman*, (C. C. A. 2d Cir. 1905) 136 Fed. 818, 14 Am. Bankr. Rep. 461.

**Retention of policy by bankrupt.**—*Right to retain policy passes to bankrupt's representatives.*—The right of a bankrupt to retain a life insurance policy which has a cash surrender value, on payment of such value to the trustee, is not affected by his death after adjudication, but passes to his legal representatives. *Van Kirk v. Vermont Slate Co.*, (N. D. N. Y. 1905) 140 Fed. 38, 15 Am. Bankr. Rep. 239.

*After the payment of the cash surrender value of a policy*, or where there is no cash surrender value, the bankrupt may be entitled to hold, own, and carry such policy free from the claims of creditors. *In re Josephson*, (S. D. Ga. 1903) 121 Fed. 142, 9 Am. Bankr. Rep. 608.

**The investment feature of so-called tontine policies of life insurance** does not exclude the bankrupt from the privilege of redeeming them given by the proviso to section 70a (5). *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771.

**Policies not payable to bankrupt, or his estate or personal representatives.**—Section 70a (5) does not include policies payable to the wife or kindred of the

assured, but only applies to policies payable to the assured, or his estate, or his personal representatives. *Pulsifer v. Hussey*, (1903) 9 Am. Bankr. Rep. 657, 97 Me. 434, 54 Atl. 1076; *Allen v. Central Wisconsin Trust Co.*, (1910) 143 Wis. 381, 127 N. W. 1003, 139 A. S. R. 1107; *In re Dreuil*, (E. D. La. 1915) 221 Fed. 796.

The fact that a paid-up policy payable to the wife of the insured shares in the annual dividends does not render it less purely a life insurance policy in which the trustee in bankruptcy takes no interest. *Allen v. Central Wisconsin Trust Co.*, (1910) 143 Wis. 381, 127 N. W. 1003, 139 A. S. R. 1107.

In the case of *In re Jamison*, (E. D. Pa. 1915) 222 Fed. 92, the court held that where the wife, children or a dependent relative of the insured has been made the owner of a policy, within the meaning of a state statute, by it having been taken out for or *bona fide* assigned to them, then nothing passed to the trustee.

The trustee takes no title in life insurance policies wherein the bankrupt is named as a beneficiary, but wherein he is not the contracting party with the company, and the surrender value whereof would not be payable to him or his estate. *In re McDonnell*, (1900) 101 Fed. 239.

**Policy in possession of wife of bankrupt.**—When it appeared that the wife of a bankrupt had paid out of her own earnings several premiums of a life insurance policy on her husband's life, and had possession of the policy, it was held that the court would not, on the application of the trustee in bankruptcy, issue a summary order requiring the bankrupt to surrender the policy to the trustee, but, at most, would only require the bankrupt to assign in writing all of his rights under the policy. *In re Loveland*, (C. C. A. 1st Cir. 1912) 200 Fed. 136.

**Vested interest under policy passes.**—The right to receive at a certain date a specified sum of money, contingent upon his surviving to that date, is a vested right of property existing in the bankrupt, which passes to the trustee. It is a property right which he could have transferred, and it falls within the comprehensive language of section 70a, which vests title in the trustee. *In re Welling*, (C. C. A. 7th Cir. 1902) 113 Fed. 189, 7 Am. Bankr. Rep. 340; *Haskell v. Equitable L. Assur. Soc.*, 181 Mass. 341, 63 N. E. 899. *In re Slingluff*, 106 Fed. 154, wherein the question whether a tontine investment policy passed to the trustee was under consideration, Morris, District Judge, said: "A policy may have no surrender value, and yet have a very large actual value, which can be secured to the bankrupt's creditors without in any manner affecting the contingent interest which

it was contemplated should be secured to the beneficiaries. . . . It would therefore seem that the test by which to determine whether a trustee shall retain such a policy or shall deliver it to the beneficiary is not whether the policy has a cash surrender value, in the sense that by its terms or by practice a cash payment can be obtained from the company for its surrender, but whether or not it has an actual value which will be of benefit to the bankrupt's creditors. If the policy is a 'paid-up' endowment policy, by which a sum is made payable to the bankrupt at a fixed date, all that the trustee would need to do would be to hold the policy until maturity, or, if the bankrupt died before maturity, then to hand it to the beneficiary."

*Partly paid-up life insurance policies*, with the usual contingencies and provisions as to changing the beneficiaries and as to surrendering policies and receiving the benefits thereof, are assets of the insured's estate in bankruptcy to which creditors are entitled. *In re Whelpley*, (D. C. N. H. 1909) 169 Fed. 1019, 22 Am. Bankr. Rep. 433.

**Effect of right to change beneficiary.**—A policy which empowers the insured to change the beneficiary named therein, without the latter's concurrence and even against his will, and which entitles the insured to exercise this power for his own benefit, is property which the bankrupt "could by any means have transferred" within the meaning of section 70 of the Bankruptcy Act and which therefore passes to the trustee under the provisions of that section. *In re White*, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451; *Mutual Ben. Life Ins. Co. v. Swett*, (C. C. A. 6th Cir. 1915) 222 Fed. 200; *In re Hettling*, 175 Fed. 65, 99 C. C. A. 87; *In re Orear*, (1910) 178 Fed. 632, 102 C. C. A. 78, *distinguishing* *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 S. Ct. 41, 32 U. S. (L. ed.) 370.

In the case of *In re Jamison*, (E. D. Pa. 1915) 222 Fed. 92, the court said: "Where there has been merely a designation of a beneficiary to receive the moneys payable on the death of the insured, and this designation is open to recall or change by the insured, to whom also belongs the right to cancel or surrender the policy there, if the insured be bankrupt, the surrender value of the policy passes to his trustee."

So it has been held that the trustee is entitled under section 70a to either the policy or its surrender value, where although the wife of the bankrupt is the contingent beneficiary the policy is under his complete control, he having the right to change the situation at any moment, and realize upon it, without regard to her, either giving it up and getting the surrender value, or continuing it with a newly designated beneficiary, just as he

may choose. *In re Herr*, (M. D. Pa. 1910) 182 Fed. 716, *distinguishing In re Booss*, 154 Fed. 494, on the ground that therein the right to change the beneficiary was apparently not given; *In re Wolff*, (E. D. N. Y. 1908) 165 Fed. 984; *In re Dolan*, (E. D. Pa. 1910) 182 Fed. 949. In *In re Herr*, *supra*, the court said: "It is true that, if the bankrupt died to-day, the money due on the policy would belong to his wife. But it is also true that at once, upon the discharge of the present rule, the bankrupt could eliminate her by the designation of a new beneficiary, and get the surrender value of the policy, which the trustee therefore, by the terms of the statute, is entitled to claim. It is the uncertainty of her interest that makes it of no concern. It is only to policies where she has something dependable that the exemption applies. Because of the bankrupt's absolute command over it, the surrender value is to be regarded as payable to him, within the meaning of the law." Compare *In re Dewa*, 96 Fed. 181.

"A policy of insurance on the life of a bankrupt, payable to his wife if she survives him, otherwise to his estate or any designated beneficiary, and which, while having no cash surrender value, gives him the right to change the beneficiary at any time and the privilege of several options if he lives beyond a stated term, among which are to receive its then value in cash or paid-up insurance, is property of the bankrupt which passes to his trustee." *In re Hettling*, (2d Cir. 1909) 175 Fed. 65, 99 C. C. A. 87, *followed in In re Draper*, (N. D. N. Y. 1914) 211 Fed. 230.

In other cases, where at the time of the adjudication in bankruptcy a person other than the insured was named in the policy as beneficiary, the policy has been held to be exempt under the provisions in state laws exempting such policies from the demands of creditors. *In re Pfaffinger*, 164 Fed. 526; *In re Johnson*, 176 Fed. 591. See also *In re Whelpley*, 169 Fed. 1019.

It has also been held that where there is a right in the insured to change the beneficiary, but the insurance has no investment features, it does not pass to the trustee. *Allen v. Central Wisconsin Trust Co.*, 143 Wis. 381, 127 N. W. 1003, 139 A. S. R. 1107, wherein the court said: "The policy, after the surplus was withdrawn at the end of the tontine period, and the wife made the beneficiary, was and remained strictly a life insurance policy payable to the wife of the insured. As such it was exempt from the claims of the creditors of the husband. . . . The policy was, therefore, exempt from the creditors of the husband in the bankruptcy proceedings, and did not pass to the trustee. But it is claimed by counsel for defendant that, inasmuch as the insured reserved to himself the right or power to change the beneficiary, such right or power passed to

the trustee; and . . . cases . . . are cited to sustain the claim. Reference to those cases will show that the policy in each of them was in the nature of an endowment policy, and provided for the payment to the insured, at the end of a stated period, of a fixed, definite sum; and it was held that the insured had property rights in the policy that passed to the trustee, notwithstanding it was made payable to the wife in the event of her surviving the husband. We have no such case here. The investment feature of the policy in behalf of the insured was entirely eliminated when the surplus was paid him. . . . It is further claimed that, inasmuch as the insured reserved the right to change the beneficiary, he may yet do so, and convert the policy into property that may pass to the trustee. Conceding, but not deciding, that he still has the right to change the beneficiary, and assuming that he may do so, yet it is not easy to perceive upon what ground it can be claimed that the trustee is at all concerned with what may afterward become of exempt property. The trustee is vested with the title to the property of the bankrupt, if at all, as of the date he was adjudged a bankrupt. At that time this policy was exempt, and did not pass to the trustee. It cannot pass later, no matter what the bankrupt may do."

**Policies having optional benefits.**—It has been held that a twenty-year payment policy of life insurance which had no cash surrender value but which provided valuable optional benefits available to the insured at the expiration of the period, does not vest in the trustee in bankruptcy of the insured. *In re Churchill*, (7th Cir. 1913) 209 Fed. 766, 126 C. C. A. 490, *reversing* (1912) 198 Fed. 711.

**Surrender value subject to valid liens.**—**Payment of premiums.**—Where a policy of life insurance was made payable to the wife of the assured if he died during the term, or to himself if living at the expiration of the stipulated period, and was issued upon their joint application, and for several years before the bankruptcy of the husband the wife saved the policy from lapsing by paying the premiums out of her own money, it was held that the bankrupt's interest in the surrender value of the policy, upon passing to his trustee, was subject to an equitable lien or right in the wife to be reimbursed for such proportion of the premiums paid by her as had gone to keep the policy alive for the benefit of the husband's interest. *In re Diack*, (S. D. N. Y. 1900) 100 Fed. 770, 3 Am. Bankr. Rep. 723.

**Pledge.**—A *bona fide* assignee of life insurance policies, pledged more than four months before the bankruptcy of the pledgor, is entitled to hold the same against the trustee in bankruptcy. *Van Kirk v. Vermont Slate Co.*, (N. D. N. Y. 1905) 140 Fed. 38, 15 Am. Bankr. Rep.

239; *In re Davison*, (N. D. N. Y. 1910) 179 Fed. 750; *In re Judson*, (S. D. N. Y. 1911) 188 Fed. 702.

If loans have been made on the life insurance policy of a bankrupt, the trustee is entitled only to so much of the amount of the cash surrender value as exceeds the loan; and if the loans have been made to the full surrender value of the policy, nothing passes to the trustee. *Burlingham v. Crouse*, 228 U. S. 459, 33 S. Ct. 564, 57 U. S. (L. ed.) 920, 46 L. R. A. (N. S.) 148; *In re Judson*, (S. D. N. Y. 1911) 188 Fed. 702.

**Assignment or gift of policy.**—The purpose of section 70a of the Bankruptcy Act is to vest the cash surrender value of the policy in the trustee for the benefit of his creditors, and not otherwise to limit the bankrupt in dealing with his policy; hence, where there is an absolute assignment of a policy by a bankrupt the proceeds do not vest in the trustee of the bankrupt's estate. *Burlingham v. Crouse*, 228 U. S. 459, 33 S. Ct. 564, 57 U. S. (L. ed.) 920, 46 L. R. A. (N. S.) 148. So a policy made in favor of another and given to such person does not pass to the trustee. Thus where a policy is secured by a husband for the benefit of his wife, and delivered to her for that purpose sometime prior to his bankruptcy, this constitutes an executed gift, and the trustee in bankruptcy is not entitled to the policy. *Grems v. Traver*, 87 Misc. 644, 148 N. Y. S. 200.

**Policies having no cash value.**—In *Burlingham v. Crouse*, (1913) 228 U. S. 459, 33 S. Ct. 564, 57 U. S. (L. ed.) 920, 46 L. R. A. (N. S.) 148, the court said in respect of section 70a (5) and its proviso: "Two constructions have been given this section, and the question, as presented in this case, has not been the subject of direct determination in this court. The one favors the view that only policies having a cash surrender value are intended to pass to the trustee for the benefit of creditors. *In re Buelow*, (D. C. Wash. 1899) 98 Fed. 86; *In re Josephson*, (1903) 121 Fed. 142 [*affirmed*] (1903) 124 Fed. 734, 59 C. C. A. 650; *Gould v. New York Life Ins. Co.*, (E. D. Ark. 1904) 132 Fed. 927; *Morris v. Dodd*, (1900) 110 Ga. 606, 36 S. E. 83, 78 A. S. R. 129, 50 L. R. A. 33. The other, conceding that the proviso deals with this class of policies, maintains that policies of life insurance which have no surrender value pass to the trustee under the language of 70a immediately preceding the provision, which reads: 'Property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him.' *In re Becker*, (1901) 106 Fed. 54; *In re Slingluff*, (1900) 106 Fed. 154; *In re Welling*, (1902) 113 Fed. 189, 51 C. C. A. 151; *In re Coleman*, (1905) 136 Fed. 818, 69 C. C. A. 496;

*In re Hettling*, (1900) 175 Fed. 65, 99 C. C. A. 87; *In re Orear*, (1910) 178 Fed. 332, 102 C. C. A. 78, 30 L. R. A. (N. S.) 990. . . . Life insurance policies are a species of property and might be held to pass under the general terms of subdiv. 5, § 70a, but a proviso dealing with a class of this property was inserted and must be given its due weight in construing the statute. . . . We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset; otherwise to leave to the insured the benefit of his life insurance." *Burlingham v. Crouse*, (1913) 228 U. S. 459, 33 S. Ct. 564, 57 U. S. (L. ed.) 920, 46 L. R. A. (N. S.) 148. To the point last stated see also *Sanders v. Etna Life Ins. Co.*, (1913) 95 S. C. 36, 78 S. E. 532, Ann. Cas. 1915B 1284; *Benjamin v. Chandler*, 142 Fed. 217, 15 Am. Bankr. Rep. 439; *Pace v. Pace*, 19 Fla. 438 (under Act of 1867); *In re Churchill*, (7th Cir. 1913) 209 Fed. 766, 126 C. C. A. 490, reversing (1912) 198 Fed. 711; *King v. Miles*, (Miss. 1915) 67 So. 182; *In re Dreuil*, (E. D. La. 1915) 221 Fed. 796; *Wheatman v. Andrews*, 85 N. J. L. 107, 89 Atl. 285; *Gremis v. Traver*, 87 Misc. 644, 148 N. Y. S. 200.

A policy that possesses no substantial present value or other element of property will not pass to the trustee even under the general provisions of section 70a (5), irrespective of the proviso relative to policies with a cash surrender value. *In re Hogan*, 194 Fed. 846, 114 C. C. A. 634, reversing 186 Fed. 537.

Thus it has been held that a policy of insurance on the life of a bankrupt, which has no cash surrender value, and no value for any purpose except the contingency of its becoming valuable at the death of the bankrupt if the premiums are kept paid, does not vest in the trustee in bankruptcy as assets of the estate. *In re Buelow*, (D. C. Wash. 1899) 98 Fed. 86, 3 Am. Bankr. Rep. 389; *In re Judson*, (S. D. N. Y. 1911) 188 Fed. 702, where the court said: "In the case of policies having no cash surrender value the proviso does not apply especially, but reading it in connection with the other provisions, we think that such policies are not 'property' within the meaning of the statute, but are in the nature of personal rights. True they are 'property' within technical definitions of the term. But they represent nothing more than the right to pay future premiums at a fixed rate. Their value is altogether speculative, and, in our opinion, it was not the intention of Congress that bankrupts should be deprived of their policies, to enable trustees of bankrupt estates to use their funds to speculate with."

Where a policy on the bankrupt's life for the benefit of others does not reserve to the insured the right to change the

beneficiaries, and the only right to a surrender value is in the beneficiaries after a stated period, the policy does not pass to the trustee. *In re Young*, 208 Fed. 373.

*Effect of abandonment by trustee.*—Where the trustees of a bankrupt failed to have insurance policies on his life appraised, or to provide for the payment of premiums thereon, but abandoned the same to the bankrupt as valueless to the estate, which abandonment was subsequently approved by the court, it was held that the trustee was not entitled to recover the proceeds of such policies, on the death of the bankrupt pending the proceedings, from the beneficiaries, the premiums having been kept up by them or by the bankrupt. *Meyers v. Josephson*, (C. C. A. 5th Cir. 1903) 124 Fed. 734, affirming (S. D. Ga. 1903) 121 Fed. 142, 9 Am. Bankr. Rep. 608.

*Exempt policies do not pass.*—As to whether a policy of insurance, exempt under the laws of the state from levy and execution by creditors, passes to the trustee in bankruptcy, there was formerly a contrariety of opinion; but this question has also been solved by the federal Supreme Court, and it is now well settled that the provisions of section 70 are limited by those contained in section 6 of the Act; and that in accordance with section 6 a policy of insurance which is exempt under the law of the state does not pass to the trustee in bankruptcy of the insured. *Holden v. Stratton*, (1905) 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018; *Hiscock v. Mertens*, (1907) 205 U. S. 202, 27 S. Ct. 488, 51 U. S. (L. ed.) 771, 17 Am. Bankr. Rep. 483, affirming (C. C. A. 2d Cir. 1905) 142 Fed. 445, 15 Am. Bankr. Rep. 701; *Steele v. Buel*, (C. C. A. 8th Cir. 1900) 104 Fed. 968, 5 Am. Bankr. Rep. 165, reversing (S. D. Ia. 1899) 98 Fed. 78, 3 Am. Bankr. Rep. 549; *In re Booss*, (E. D. Pa. 1907) 154 Fed. 494, 18 Am. Bankr. Rep. 658; *In re Pfaffinger*, (W. D. Ky. 1908) 164 Fed. 526, 21 Am. Bankr. Rep. 255; *In re Whelpley*, (D. C. N. H. 1909) 169 Fed. 1019, 22 Am. Bankr. Rep. 433; *In re Johnson*, (D. C. Minn. 1910) 176 Fed. 591, 24 Am. Bankr. Rep. 277; *In re Herr*, (M. D. Pa. 1910) 182 Fed. 716; *Pulsifer v. Hussey*, (1903) 9 Am. Bankr. Rep. 657, 97 Me. 434, 54 Atl. 1076; *In re Morse*, (D. C. Kan. 1912) 206 Fed. 350; *In re Young*, (N. D. Ohio 1912) 208 Fed. 373; *Young v. Thomason*, (Ala. 1912) 60 So. 272; *King v. Miles*, (Miss. 1915) 67 So. 182, wherein it was also held that a listing of the policies by the bankrupt in his schedule did not constitute a waiver of exemption.

*Deposits to secure payment of insurance.*—There would seem to be no reason why the deposits in a life insurance company to secure a sum payable to the assured at a given date, if he should be then

alive, should be treated differently from a similar contract with a savings bank or building association. *In re Slingluff*, (D. C. Md. 1900) 106 Fed. 154, 5 Am. Bankr. Rep. 76.

**Deferred annuity contract.**—An insurance contract, entered into by the company with one who was then insolvent and was subsequently adjudged a bankrupt, by which the insurer obligated itself to pay the insured a certain sum yearly, commencing in the future and continuing during the life of the insured, is not void; and the sum paid for such insurance cannot be recovered by the trustee in bankruptcy of the insured, on the theory that

such payment was a transfer in fraud of creditors, and that the insurance company, though acting *bona fide*, was not a purchaser for value, because it had not paid the purchase money or secured it in such a manner that it could not be relieved against payment. In such case, however, a bill asking that the company be compelled to pay the trustee the sum received from the bankrupt upon the surrender of the contract, will be dismissed without prejudice to any right the trustee may have to claim whatever beneficial interest the bankrupt has, or may thereafter have, under the contract. *Mutual L. Ins. Co. v. Smith*, (C. C. A. 1st Cir. 1911) 184 Fed. L.

(6) [Rights of action.] rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property. [(1898) 30 Stat. L. 566.]

The bankrupt's trustee is vested by operation of law with title to all the bankrupt's books, papers, contracts, securities, etc., relating to his business. *In re Hess*, (E. D. Pa. 1905) 134 Fed. 109, 14 Am. Bankr. Rep. 559. And see division IX in the note to section 70a (5).

**Right of trustee to sue.**—The Bankruptcy Act does not expressly give the trustee the right to sue in his own name on a claim due before the commencement of bankruptcy proceedings. Section 70a, providing for the vesting in the trustee of the title to the bankrupt's property, along with sections 21e, 23b and 46a, impliedly gives the trustee such right. *Pease v. McQuillin*, (Mass. 1901) 61 N. E. 819.

**Jurisdiction of trustee's suit.**—The Municipal Court of the city of New York has jurisdiction of actions by a trustee in bankruptcy, to recover chattels in which it is claimed a bankrupt had an interest at the time of filing the petition. *Frank v. McAdams*, (Supm. Ct. App. T. 1900) 32 Misc. (N. Y.) 512.

**Money due to a bankrupt on a paving contract** at the time of the filing of his bankruptcy petition, though subject to valid liens, was held to have been properly paid to the bankrupt's trustee to be administered and paid over to those entitled thereto under the direction of the Bankruptcy Court. *In re Cramond*, (N. D. N. Y. 1906) 145 Fed. 966, 17 Am. Bankr. Rep. 22.

**Right of action in creditors only.**—Where a state statute which provides that "if the indebtedness of any stock corporation shall exceed the amount of its capital stock the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation," as construed by the Supreme Court of the state, gives a right of action against officers which belongs exclusively to creditors, such right of action is not an asset

of the estate of the corporation in bankruptcy, and does not pass to its trustee, but may be enforced by creditors as a secondary security independently of the bankruptcy proceedings. *In re Beachy*, (E. D. Wis. 1909) 170 Fed. 825, 22 Am. Bankr. Rep. 538.

**Action for partition.**—The bankrupt's right to partition does not arise out of contract. Partition does not involve unlawful taking, or detention of, or injury to property. *Hobbs v. Frazier*, (1908) 22 Am. Bankr. Rep. 684, 56 Fla. 796, 47 So. 929, 20 L. R. A. (N. S.) 105.

A test applied in some cases to determine whether a cause of action passes to the assignee or trustee in bankruptcy is whether the right of action would survive to the personal representative. If so, it passes to the trustee; if not, it is not assignable, and the trustee gets no title. *Tufts v. Matthews*, (1882) 10 Fed. 609; *Slauson v. Schwabacher*, (1892) 4 Wash. 783, 31 Pac. 329, 31 A. S. R. 948. See also *Noonan v. Overton*, (1874) 34 Wis. 259, 17 Am. Rep. 441.

**Actions for personal torts in general** do not pass to the trustee in bankruptcy. *Stone v. Boston, etc., R. Co.*, (1856) 7 Gray (Mass.) 539; *Monongahela Nat. Bank v. Overholt*, (1880) 96 Pa. St. 327; *Rand v. Fleishman*, (1879) 6 W. N. C. (Pa.) 497. See also *Comegys v. Vasse*, (1828) 1 Pet. 193, 7 U. S. (L. ed.) 108; *Lafountain v. Burlington Sav. Bank*, (1883) 56 Vt. 332.

The right to sue for a personal tort, such as slander or libel, malicious prosecution, assault, etc., is strictly personal. It cannot be assigned, is not subject to levy and sale upon judicial process, and the statute does not contemplate that the bankrupt's right to maintain an action to recover damages for such wrongs shall constitute any part of his estate in bankruptcy. The law follows, in this respect, section 14 of the Bankruptcy Act of 1867,



in the construction of which it was uniformly held that rights of action for personal torts did not vest in the assignee in bankruptcy. *In re Haensell*, (N. D. Cal. 1899) 91 Fed. 355, 1 Am. Bankr. Rep. 286; *Sibley v. Nason*, (1907) 196 Mass. 125, 12 Ann. Cas. 938, 81 N. E. 887; *Irion v. Knapp*, (1913) 132 La. 60, 60 So. 719, 43 L. R. A. (N. S.) 940; *Cleland v. Anderson*, (1902) 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. (N. S.) 136.

**A cause of action for personal injuries** is not covered by this section. *Beechwood v. Joplin-Pittsburg R. Co.*, (1913) 173 Mo. App. 371, 158 S. W. 868.

**A right of action for assault and battery** does not pass to the trustee. *Whitaker v. Gavit*, (1847) 18 Conn. 522; *Sullivan v. Bridge*, (1805) 1 Mass. 511. See also *Wright v. Greensburg First Nat. Bank*, (1878) 8 Biss. 243, 30 Fed. Cas. No. 18,078; *Hudson v. Plets*, (1844) 11 Paige (N. Y.) 180.

**A right of action for malicious prosecution, wrongful levy, or abuse of process**, does not pass to the trustee. *Sommer v. Wilt*, (1818) 4 Serg. & R. (Pa.) 19; *Stanly v. Duhurst*, (1793) 2 Root (Conn.) 52; *In re Haensell*, (1899) 91 Fed. 355; *Whitaker v. Gavit*, (1847) 18 Conn. 522; *Francis v. Burnett*, (1886) 84 Ky. 23; *Slauson v. Schwabacher*, (1892) 4 Wash. 783, 31 Pac. 329, 31 A. S. R. 948; *Noonan v. Orton*, (1874) 34 Wis. 259, 17 Am. Rep. 441. See also *Lawrence v. Martin*, (1863) 22 Cal. 173; *O'Donnell v. Seybert*, (1825) 13 Serg. & R. (Pa.) 54.

**A right of action for seduction** does not pass to the trustee. *Drake v. Beckham*, (1843) 11 M. & W. (Eng.) 316; *Howard v. Crowther*, (1841) 8 M. & W. (Eng.) 601, 5 Jur. 914.

**A right of action for trespass** does not pass to the trustee. *Rose v. Buckett*, (1901) 2 K. B. (Eng.) 449; *Clark v. Calvert*, (1819) 8 Taunt. 742, 4 E. C. L. 266, 3 Moore 96, 21 Rev. Rep. 528; *Brewer v. Dew*, (1843) 11 M. & W. (Eng.) 625; *Rogers v. Spence*, (1846) 12 Cl. & F. (Eng.) 700, 13 M. & W. 571, 15 L. J. Exch. 49, 2 Dowl. N. S. 999; *Smith v. Commercial Union Ins. Co.*, (1873) 33 U. C. Q. B. 529.

**A right of action for slander or libel** is personal to the bankrupt and does not pass to the trustee. *White v. Elliott*, (1870) 30 U. C. Q. B. 253; *Ex p. Vine*, (1878) 8 Ch. D. (Eng.) 364; *Dillard v. Collins*, (1874) 25 Grat. (Va.) 343; *Whitaker v. Gavit*, (1847) 18 Conn. 527; *Milwaukee Mut. Fire Ins. Co. v. Sentinel Co.*, (1892) 81 Wis. 207, 51 N. W. 440, 15 L. R. A. 627. See also *Hancock v. Caffyn*, (1832) 8 Bing. 358, 21 E. C. L. 318; *Wright v. Greensburg First Nat. Bank*, (1878) 18 Nat. Bankr. Reg. 87.

**A right of action for trespass in detaining a ship** does not pass to the trustee.

*Bird v. Hempstead*, (1808) 3 Day (Conn.) 272, 3 Am. Dec. 269. See also *Hempstead v. Bird*, (1806) 2 Day (Conn.) 293.

**A right of action for deceit** is not an asset of the estate. *In re Crockett*, (1868) 2 Ben. 514, 6 Fed. Cas. No. 3,402; *Shoemaker v. Keely*, (1793) 2 Dall. 213, 1 U. S. (L. ed.) 353; *Tufts v. Matthews*, (1882) 10 Fed. 609.

**Action for conspiracy.**—A trustee in bankruptcy cannot maintain an action in tort for conspiracy, in assisting a bankrupt to place his property beyond the reach of his creditors, against persons who are alleged to have performed their acts of conspiracy during the pendency of the bankruptcy proceedings but before the adjudication therein, where no allegation is made that any of the defendants received any portion of the bankrupt's estate, and the sole result of the conspiracy is to turn the bankrupt's property into money in his hands for which he himself failed to account to his trustee. *Friedman v. Myers*, (1907) 19 Am. Bankr. Rep. 883, 30 Ohio Cir. Ct. Rep. 303.

In a few exceptional cases, actions for torts which injure the property of the bankrupt rather than his person have been held to pass to his trustee in bankruptcy. *Borden v. Bradshaw*, (1880) 68 Ala. 362; *Whitaker v. Gavit*, (1847) 18 Conn. 527; *North v. Turner*, (1823) 9 Serg. & R. (Pa.) 245; *Hubbard v. Gould*, (1906) 74 N. H. 25, 64 Atl. 668; *Wheelock v. Lee*, (1873) 15 Abb. Pr. N. S. (N. Y.) 24, (1876) 64 N. Y. 242.

Thus in *Lovell v. Hammond Co.*, (1895) 66 Conn. 500, 34 Atl. 511, it was held that under the state insolvency laws an insolvent estate should have the benefit of all rights of action belonging to the assigning debtor for injuries affecting his property, whether they are founded on contract or in tort.

Examples of torts affecting the estate of a bankrupt are torts in the nature of waste, *Bullock v. Hayward*, (1865) 10 Allen (Mass.) 460; and the deceit which affects the estate rather than the person of the bankrupt, *Hyde v. Tufts*, (1879) 45 Super. Ct. (N. Y.) 56. See also *Hodgson v. Sidney*, (1866) 4 H. & C. (Eng.) 492, 35 L. J. Exch. 182, L. R. 1 Exch. 313, 12 Jur. N. S. 694, 14 L. T. N. S. 624, 14 W. R. 923.

It seems that an action against an attorney for negligence in conducting an action, or for a breach of duty, passes to an assignee in bankruptcy. *Wetherell v. Julius*, (1850) 10 C. B. 267, 70 E. C. L. 267. See also *In re Daines*, 16 L. T. N. S. (Eng.) 127; *Crawford v. Cinnamon*, 1 Ir. R. C. L. (Eng.) 325, 15 W. R. 996. Compare *Morgan v. Steble*, (1872) L. R. 7 Q. B. (Eng.) 611, 41 L. J. Q. B. 260, 26 L. T. N. S. 906.

In *Sullivan v. Bridge*, (1805) 1 Mass. 511, it was held that an action on the case

brought to obtain the benefit of a judgment in favor of a bankrupt, which judgment had been lost, or at least suspended by the misconduct of the sheriff, passed to the assignee in bankruptcy.

There are a few decisions to the effect that causes of action for tort, which survive by force of express statute and are enforceable by the personal representatives, pass to the trustee in bankruptcy and may be realized upon by him. *In re Burnstine*, (1903) 131 Fed. 828; *Hyde v. Tufts*, (1879) 45 Super. Ct. (N. Y.) 56.

**Damage by change of grade.**—The trustee is entitled to a sum awarded as damages to real estate, resulting from a change of street grade. *In re Torchia*, (C. C. A. 3d Cir. 1911) 188 Fed. 207. And see division II in note to section 70a (5).

**A statutory right of action for injury to "business, employment, or property"** passes to the trustee in bankruptcy, even though it sounds in tort. *Cleland v. Anderson*, (1905) 75 Neb. 273, 105 N. W. 1092, 5 L. R. A. (N. S.) 148, *reversing* on rehearing (1902) 66 Neb. 276, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. (N. S.) 147.

**Malicious attachment of corporate property.**—It has been held that a right of action in favor of a corporation for malicious attachment of its property vests in its trustee in bankruptcy, and perhaps that would be so in respect of the same cause of action in behalf of a partnership, but it might be different in the case of an individual. *Hansen Mercantile Co. v. Wyman*, (1908) 22 Am. Bankr. Rep. 877, 105 Minn. 491, 117 N. W. 928.

**b [Appraisal and sale.]** All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value. [(1898) 30 Stat. L. 566.]

As to

Duty of trustee to collect and reduce assets, see section 47a (2).

Power of Bankruptcy Courts to reduce estates to money, see section 2 (7).

I. Appraisal of property, 1204.

II. Sales, 1205.

III. Sale of perishable property, 1211.

#### I. APPRAISAL OF PROPERTY.

The referee may appoint appraisers to value the estate of the bankrupt. *In re Styer*, (E. D. Pa. 1899) 98 Fed. 290, 3 Am. Bankr. Rep. 424.

And such appointment should be made by the referee in the exercise of his inde-

**An action to recover damages for false and fraudulent representations**, wherein the bankrupt is plaintiff and which is pending at the time of his adjudication, alleging that the bankrupt had been induced to purchase certain bonds from the defendants, who were in the same business, at prices greater than their value, by false and fraudulent representations made by the defendants regarding facts materially affecting the value of the bonds, and claiming damages for alleged losses to the plaintiff resulting from the purchase, is a right of action arising from injury to the bankrupt's property, and passes, as such, to his trustee under section 70a (6). *In re Gay*, (D. C. Mass. 1910) 182 Fed. 260.

**Action for death of child.**—Under a state law providing that an action may be brought by an administrator, but that the recovery shall pass to decedent's next of kin, it was held that a father being entitled to the entire recovery for the wrongful killing of his son, his right thereto constitutes assets belonging to his estate in bankruptcy. *In re Burnstine*, (E. D. Mich. 1903) 131 Fed. 828, 12 Am. Bankr. Rep. 596.

**After the close of bankruptcy proceedings**, and discharge of the trustee, an asset of the bankrupt (right of action to recover, with penalty, usurious interest paid) which has passed to the trustee by the bankruptcy proceedings, though he had no knowledge of its existence, may be recovered by the bankrupt himself, where neither the creditors nor the trustee assert any rights in it. *Lasater v. Jacksboro First Nat. Bank*, (1903) 96 Tex. 345, 72 S. W. 1057.

pendent judgment and should not be submitted to a vote of the creditors, especially where there is a sharp conflict of views and interests between them. *In re Columbia Iron Works*, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 528.

**Qualification of appraisers.**—An appraiser must be a disinterested person. *In re Frazin*, (C. C. A. 2d Cir. 1910) 181 Fed. 307.

It has been held, however, that a person is not disqualified for appointment as an appraiser of a bankrupt's property merely because some of the officers and directors of a corporation creditor are also officers and directors of another corporation of which such appraiser is president. *In re*

Columbia Iron Works, (E. D. Mich. 1904) 142 Fed. 234, 14 Am. Bankr. Rep. 526.

A lessee who had an interest in land owned by the bankrupt, which was ordered to be sold subject to the lease, but who was not shown to have any interest in the bankruptcy proceedings, or in the sale of the property, was not disqualified. (Clark Hardware Co. v. Sauve, (C. C. A. 8th Cir. 1915) 220 Fed. 102.

There is an official form of appointment, oath and report of appraisers. Form No. 13, 172 U. S. 688, 43 U. S. (L. ed.) 1211.

The purpose of the appraisement, which is directed to be made, is to secure for the benefit and protection of all parties concerned a designation and estimate of the property which passes into the hands of the trustee, for which in the first instance he is to be accountable. *In re* Gordon Supply, etc., Co., (M. D. Pa. 1904) 133 Fed. 798, 13 Am. Bankr. Rep. 352.

"The object of the statute in requiring an appraisal of the estate of a bankrupt is evidenced by the last clause of this subsection. . . . Where the assets are in excess of exemptions, the statute clearly requires that the property should be appraised." *In re* Grimes, (1899) 96 Fed. 532.

In certain contingencies the amount of the appraisal determines the validity of a sale of the property appraised, and in all cases the values are of the utmost importance in determining the question of the confirmation of the sale. *In re* Frazin, (C. C. A. 2d Cir. 1910) 181 Fed. 307.

The particularity with which such appraisal is to be made depends somewhat upon the circumstances. It should, however, be general and not special, and should not go into the detail practiced by a merchant taking an inventory of stock; only such particularity being indulged in as is sufficient to reasonably identify the property in character and quantity, and give a fair idea of its value. *In re* Gordon Supply, etc., Co., (M. D. Pa. 1904) 133 Fed. 798, 13 Am. Bankr. Rep. 352.

**Disregarding appraisal.**—Any appraisal of the property made in the usual course of bankruptcy proceedings may be disregarded in selling it and the sale approved by the court, if the price is considered adequate. *In re* Zehner, (E. D. La. 1912) 193 Fed. 787.

## II. SALES.

**What may be sold—Liquor license.**—In the District Courts of Pennsylvania and in some other jurisdictions also, a license to sell liquor has been regarded from the beginning of the present Bankruptcy Law as a salable asset. *In re* Doyle, (C. C. A. 3d Cir. 1913) 209 Fed. 1. See also division X in note to section 70a (5).

Where a note becomes the property of a bankrupt estate, title thereto cannot pass

except by sale made as provided by the United States Bankruptcy Act. A bankrupt sale of "open accounts and claims," without further description, cannot be construed as including a promissory note, inventoried as being in the hands of an attorney for collection, and which was never appraised for the purpose of the sale, and was never in the possession of the trustee or the auctioneer. *Segen v. Fabacher*, (1915) 136 La. 568, 67 So. 369.

An article which infringes a patent may not be sold. *United Wireless Telegraph Co. v. National Electric Signaling Co.*, (C. C. A. 1st Cir. 1912) 198 Fed. 386.

The practice and good will of a physician which are of course attributable to his personality, reputation, or skill, cannot be sold by his trustee in bankruptcy. *In re* Myers, (C. C. A. 7th Cir. 1913) 208 Fed. 407.

A trustee in bankruptcy may convey real estate located in a jurisdiction other than that in which he is appointed. — *Robertson v. Howard*, (1913) 229 U. S. 255, 33 S. Ct. 854, 57 U. S. (L. ed.) 1174, 1175 (reversing (1910) 83 Kan. 453, 112 Pac. 162), wherein the court said: "This provision makes it manifest that it was the purpose of Congress to give Bankruptcy Courts full and complete equitable power in matters of the administration and sale of the bankrupt estate, wholly irrespective of the mere situs of the property, the controlling factor being, not where the property is situated, but did it pass to the trustee and is it a part of the estate subject to administration under the direction of the court. In view of the fact that the Bankruptcy Act was enacted long after the passage of the statute of 1893 (Act of March 3, 1893, ch. 25, 27 Stat. L. 751; see title EXECUTION), and of the complete right of administration which the Bankruptcy Act confers over the property, real and personal, of the bankrupt estate, we think it follows that the authority to realize, by way of sale, on the property of the bankrupt estate, cannot be held to be limited by the provisions of the Act of 1893. Indeed, this conclusion is additionally demonstrated by the fact that as recognized by No. 18 of the General Orders in Bankruptcy, in disposing by sale of the property of the bankrupt, a Bankruptcy Court, as to both real and personal property, may, if reason for doing so exists, direct a private sale to be made." See to the same effect *T. F. Wells & Co. v. Sharp*, (C. C. A. 8th Cir. 1913) 208 Fed. 393.

**Joinder of all trustees in petition for sale.**—Where the creditors of a bankrupt appointed two trustees at their first meeting, who applied for a sale of the bankrupt's assets, pending which a third trustee was elected, who qualified and

joined in the petition for sale, the fact that the petition was presented by two trustees only in the first instance was no objection thereto, since, if title to the bankrupt's estate was not vested in the two trustees on their appointment and qualification, it became vested in the three on the appointment and qualification of the third. *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366.

Several official forms for petitions and orders for sale have been provided. Forms Nos. 42-46, in the pages preceding section 31 in this title.

**Sale of assets free of incumbrances.**—

*In general.*—It is well settled that either the judge or the referee may order the sale of assets free of incumbrances. *In re Worland*, (N. D. Ia. 1899) 92 Fed. 893, 1 Am. Bankr. Rep. 450; *In re Pittelkow*, (E. D. Wis. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 472; *In re Sanborn*, (D. C. Vt. 1899) 96 Fed. 551, 3 Am. Bankr. Rep. 54; *Southern Loan, etc., Co. v. Benbow*, (W. D. N. C. 1899) 96 Fed. 514, 3 Am. Bankr. Rep. 9; *In re Utt*, (C. C. A. 7th Cir. 1901) 105 Fed. 754, 5 Am. Bankr. Rep. 383; *In re Keller*, (N. D. Ia. 1901) 109 Fed. 131, 6 Am. Bankr. Rep. 351; *In re Waterloo Organ Co.*, (W. D. N. Y. 1902) 118 Fed. 904, 9 Am. Bankr. Rep. 427; *In re Union Trust Co.*, (C. C. A. 1st Cir. 1903) 122 Fed. 937, 9 Am. Bankr. Rep. 767; *In re Keet*, (M. D. Pa. 1903) 128 Fed. 651, 11 Am. Bankr. Rep. 117; *In re Shoe, etc., Reporter*, (C. C. A. 1st Cir. 1904) 129 Fed. 558, 12 Am. Bankr. Rep. 248; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675; *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366; *Sturgiss v. Corbin*, (4th Cir. 1905) 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543; *In re Wylie*, (C. C. A. 3d Cir. 1907) 153 Fed. 281, 18 Am. Bankr. Rep. 503, *affirming* (1906) 17 Am. Bankr. Rep. 404; *In re Miners' Brewing Co.*, (E. D. Pa. 1908) 162 Fed. 327, 20 Am. Bankr. Rep. 717; *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576; *In re Progressive Wall Paper Corp.*, (N. D. N. Y. 1915) 222 Fed. 87.

The present Bankruptcy Law makes no express provision for sale by the trustee free of incumbrance, but it is uniformly held that he may be authorized so to sell if there are reasonable grounds for believing that more could be realized than the amount of the incumbrance. *In re Roger Brown & Co.*, (C. C. A. 8th Cir. 1912) 196 Fed. 758.

In *Citizens' Sav. Bank v. Paducah*, (1914) 159 Ky. 583, 167 S. W. 870, the court said: "It is well settled that a trustee should not be required to sell any portion of the estate, where the appraisers' return shows it to be so heavily encumbered with valid liens that nothing can be realized for the unsecured cred-

itors. *In re Cogley*, (D. C.) 107 Fed. 73, 5 Am. Bankr. Rep. 731. It is further held that a sale free of liens does not affect a lien in the nature of a tax assessment against the property, but in such a case the trustee should protect the purchaser by providing for the payment of the taxes. *In re Keller*, (D. C.) 109 Fed. 131, 6 Am. Bankr. Rep. 351."

**Lien claims transferred to proceeds.**—A court of bankruptcy has power to order property of a bankrupt which has come into the possession of his trustee sold free of liens, and to transfer all claims against it to the proceeds, notwithstanding the objection of one claiming a lien thereon. *In re E. A. Kinsey Co.*, (C. C. A. 6th Cir. 1911) 184 Fed. 694. See also *In re Worland*, (N. D. Ia. 1899) 92 Fed. 893, 1 Am. Bankr. Rep. 450; *In re U. S. Graphite Co.*, (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 573; *Citizens' Sav. Bank v. Paducah*, (1914) 159 Ky. 583, 167 S. W. 870.

In *In re National Boat, etc., Co.*, (D. C. Me. 1914) 216 Fed. 208, the court said: "It has been repeatedly held that a fund derived from the sale of property free of liens will stand as a substitute for the property sold, and will be held by the trustee for the benefit of those holding *bona fide* claims and liens to the extent their respective interests may appear; as a consequence of the power to order a sale free of liens, the court has jurisdiction to determine the extent and validity, and the relative priority of claims of lienholders to the proceeds. The court should also make provision for protection of the rights of the several lien creditors in the fund derived from the sale, in order that such creditors may prosecute their claims to a preference against the fund; and it follows that the trustee in bankruptcy should appear and protect the rights of the estate in proceedings for the distribution of the fund derived from such sale."

**Legal and equitable interests protected.**—In *McKay v. Hamill*, (C. C. A. 3d Cir. 1911) 185 Fed. 11, Gray, J., said: "Undoubtedly the general rule is that the property of the bankrupt is taken by the trustee in the situation in which it was held by the bankrupt, and that any disposition of said property made by the trustee must be made with reference to the superior rights of lienholders when legally ascertained. But the court of bankruptcy, in the exercise of its equitable powers, in selling and disposing of the proceeds of the bankrupt's estate, will take care of and protect the legal and equitable interests of third parties attaching thereto."

Where a bankrupt merchant's landlord was equitably entitled only to security for future rent to accrue under the lease, it was held that an order approving a sale of the lease sufficiently protected the

landlord's rights, by ordering the purchaser to execute a bond to the trustee securing the payment of such rent, especially since the rental value of the premises exceeding the rent provided in the lease, and the landlord had additional recourse against the new tenant, by proceeding against the latter's stock of goods or to dispossess. *In re Varley, etc., Clothing Co.*, (N. D. Ala. 1911) 188 Fed. 761.

*Whether property is within the district or not is immaterial* to affect the exclusive right of the court which made the adjudication to direct its sale, and to determine all claims thereto, on proper notice to the parties in interest, whether they reside within or without the district; the filing of the petition in bankruptcy itself being a caveat to all the world. *In re Granite City Bank*, (C. C. A. 8th Cir. 1905) 137 Fed. 818, 14 Am. Bankr. Rep. 404.

*Levy by sheriff under execution does not prevent sale by trustee.*—An adjudication in bankruptcy draws to the Bankruptcy Court jurisdiction to administer all the property of the bankrupt estate not in the actual custody of some other court, and the trustee is entitled to sell property to the exclusion of a sheriff, although the latter may have a valid lien thereon by virtue of the levy of an execution more than four months prior to the bankruptcy. *In re Vasthinder*, (M. D. Pa. 1904) 132 Fed. 718, 13 Am. Bankr. Rep. 148.

*Validity, extent, and priority of liens.*—Where the Bankruptcy Court has acquired the lawful custody of property to which conflicting liens attach, it has jurisdiction to determine the validity, extent, and priority of such liens, though the trustee has no interest in such question. *Chauncey v. Dyke*, (C. C. A. 8th Cir. 1902) 119 Fed. 1, 9 Am. Bankr. Rep. 444; *In re Miners' Brewing Co.*, (E. D. Pa. 1908) 162 Fed. 327, 20 Am. Bankr. Rep. 717; *In re Torchia*, (W. D. Pa. 1911) 185 Fed. 576.

But the court may order a sale of the estate of the bankrupt upon which a lien is asserted, without first determining either the validity or amount of the lien. *In re Union Trust Co.*, (1st Cir. 1903) 122 Fed. 937, 59 C. C. A. 461; *In re Loveland*, (C. C. A. 1st Cir. 1907) 155 Fed. 838, 19 Am. Bankr. Rep. 18.

*Failure of lienholders to object to sale equivalent to assent.*—Holders of liens on realty of a bankrupt, who with knowledge of proceedings by the trustee for the sale of the same free from liens permit such proceedings to continue without objection, and the proceeds of the property to be used in the payment of expenses of administration, by necessary implication assent to the same and cannot afterward object to such proper expenditures. *In re*

*Torchia*, (C. C. A. 3d Cir. 1911) 188 Fed. 207.

*Effect of pending composition proceeding.*—Where the money necessary to pay taxes and other debts having priority, required to be deposited by section 12b as a condition to the enforcement of a composition, had not been deposited, though several months had intervened since the court declared that such deposit must be made before any composition could be confirmed, it was held that the pendency of the petition for such composition was no defense to a petition for the sale of the bankrupt's assets. *In re Fisher*, (D. C. N. J. 1905) 135 Fed. 223, 14 Am. Bankr. Rep. 366.

*Sale of assets free of dower rights.*—Where a bankrupt's wife, by letter to his trustees, agreed to extinguish her dower interest in her husband's real estate for a specified price, it was held that she thereby consented to a sale of the real estate free from her dower interest, which the court thereupon had power to order. *In re Acretelli*, (S. D. N. Y. 1909) 173 Fed. 121, 21 Am. Bankr. Rep. 537. See also *Savage v. Savage*, (C. C. A. 4th Cir. 1905) 141 Fed. 346, 15 Am. Bankr. Rep. 599.

*When sale free from incumbrances will be ordered—Generally.*—The court of bankruptcy will not order the trustee to sell encumbered property of the bankrupt free of its incumbrances unless it appears that a price will probably be realized substantially greater than the amount of the liens; that there are no rights which cannot be brought before the Bankruptcy Court, and which would require foreclosure proceedings proper; that the court is accurately informed as to the facts; and that all parties in interest have had notice and full opportunity to be heard. *In re Pittelkow*, (E. D. Wis. 1899) 92 Fed. 901, 1 Am. Bankr. Rep. 472. And see to the same effect *In re Goldsmith*, (N. D. Tex. 1902) 118 Fed. 763, 9 Am. Bankr. Rep. 419; *Chauncey v. Dyke*, (C. C. A. 8th Cir. 1902) 119 Fed. 1, 9 Am. Bankr. Rep. 444; *George Carroll, etc., Co. v. Young*, (C. C. A. 3d Cir. 1903) 119 Fed. 576, 9 Am. Bankr. Rep. 643; *In re Shoe, etc., Reporter*, (C. C. A. 1st Cir. 1904) 129 Fed. 588, 12 Am. Bankr. Rep. 248; *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675; *In re Saxton Furnace Co.*, (E. D. Pa. 1905) 136 Fed. 697, 14 Am. Bankr. Rep. 483; *In re Fayetteville Wagon-Wood & Lumber Co.*, (W. D. Ark. 1912) 197 Fed. 180.

*Essential that estate be benefited.*—The power of the court in ordering a sale of mortgaged property should never be exercised unless the bankrupt estate will be benefited thereby or the mortgagee proves his claim on the mortgage in the bankruptcy proceedings. *In re Foster*, (D. C. Vt. 1910) 181 Fed. 703.

The court of bankruptcy will not order a trustee in bankruptcy to sell the bankrupt's real property free of liens, unless satisfied that the interests of the general creditors will be advanced thereby, and that the interests of creditors holding liens on such property will not be injuriously affected. *In re Styer*, (E. D. Pa. 1899) 98 Fed. 290, 3 Am. Bankr. Rep. 424; *In re Shaeffer*, (E. D. Pa. 1900) 105 Fed. 352, 5 Am. Bankr. Rep. 248.

**Value need not affirmatively appear.**—Where a bankrupt's trustee applied to sell all the interest of the bankrupt in the estate of his father, and the referee found that there was a purchaser who was willing to give a substantial sum for the proposed transfer, and it did not plainly appear that the bankrupt had no right in his father's estate which passed to his trustee, the sale was authorized. *In re Gutterson*, (D. C. Mass. 1905) 136 Fed. 698, 14 Am. Bankr. Rep. 495.

**Necessity of notice.**—An order directing a sale of a bankrupt's property on which valid liens exist should be granted only on notice to lien creditors, and the record should affirmatively disclose that every creditor whose lien will be discharged by the sale has received such notice. *In re Platteville Foundry, etc., Co.*, (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291.

Where the time fixed in an order by a referee authorizing a private sale of the property of a bankrupt at a specified upset price had expired without a sale having been made, it was held that notice to creditors and others interested was essential before the making of a new order of sale. *Allgair v. Fisher*, (C. C. A. 3d Cir. 1906) 143 Fed. 962, 16 Am. Bankr. Rep. 278.

But see *In re Hawkins*, (W. D. N. Y. 1903) 125 Fed. 633, 11 Am. Bankr. Rep. 49, wherein it was held that under General Order No. 18 (2) a court of bankruptcy or a referee has discretionary power to order a private sale of a bankrupt's property, with or without notice; and that the action of a referee in directing such a sale ought not to be disturbed, unless it clearly appears that his discretion was improvidently exercised.

**Lienors entitled to hearing.**—If the trustee desires to sell the real estate free of liens, without redemption, he must give the lienholders their day in court, because they are entitled to be heard before the property is discharged from their liens, and the liens transferred to the fund arising from the sale thereof. *In re Gerdes*, (S. D. Ohio 1900) 102 Fed. 318, 4 Am. Bankr. Rep. 346; *In re Saxton Furnace Co.*, (E. D. Pa. 1905) 136 Fed. 697, 14 Am. Bankr. Rep. 483.

**Lienor may be brought into court on rule to show cause.**—One claiming a lien on the property of a bankrupt, which is in the possession of his trustee, may be

brought into the court of bankruptcy by service of a rule to show cause for the purposes of a petition by the trustee for an order to sell the property free of liens and transferring all liens to the proceeds. A plenary suit is not absolutely required, and is not usual when the trustee is in possession of the property, and the controversy is only of a matter of procedure in administration, the substantial rights of the parties not being affected. *In re E. A. Kinsey Co.*, (C. C. A. 6th Cir. 1911) 184 Fed. 694.

Upon the application of the trustee for an order of sale of the bankrupt estate in his possession, the court has jurisdiction, at the instance of the trustee, to bring in an adverse claimant and determine the extent and character of his right, this feature of the proceeding being in the nature of a bill to remove a cloud on the trustee's title. *Gazlay v. Williams*, (1906) 147 Fed. 678, 77 C. C. A. 662, 14 L. R. A. (N. S.) 1199, *affirmed in* (1908) 210 U. S. 41, 28 S. Ct. 687, 52 U. S. (L. ed.) 950. See also for a similar case *Thomas v. Woods*, (1909) 173 Fed. 585, 97 C. C. A. 535, 19 Ann. Cas. 1080, 26 L. R. A. (N. S.) 1180.

**Manner of selling assets**—*General rules of procedure govern.*—A sale by a trustee in bankruptcy, except where otherwise controlled by statute, is subject to the general rules and principles of procedure obtaining in other judicial proceedings. *In re Williams*, (C. C. A. 4th Cir. 1912) 197 Fed. 1.

**The power to sell is under the direction of the court;** the trustee has no authority with reference to the estate, to which he has the statutory title, except such as is expressly or impliedly given by the law. *Hobbs v. Frazier*, (Fla. 1908) 22 Am. Bankr. Rep. 684. See also *In re Shea*, (C. C. A. 1st Cir. 1903) 126 Fed. 153, 11 Am. Bankr. Rep. 210.

The court will direct the method of sale and distribution so as to protect the rights and interests of all parties concerned. *In re Worland*, (N. D. Ia. 1899) 92 Fed. 893, 1 Am. Bankr. Rep. 450.

**Public sale.**—General Order 18 provides that all sales shall be by public auction unless otherwise ordered by the court.

The provisions of the Act of March 3, 1893, ch. 225, § 1, title EXECUTION, requiring the sale of real property under decree of any United States court to be by public sale at the court house of the county, parish or city in which the land, or the greater part thereof, is located or on the premises, applies to a sale of real property of a bankrupt. *In re Britannia Mining Co.*, (W. D. Wis. 1912) 197 Fed. 459.

Though the trustee reduces the estate to money "under the direction of the court," this no more necessitates an order of the court to sell realty at public auction than to collect a chose in action. Therein the

court may, but need not, give special directions, in the nature of orders. The creditors are entitled to notice of proposed sales, but this may be given by the trustee by order of the judge. *In re La France Copper Co.*, (D. C. Mont. 1913) 205 Fed. 207.

**Private sale.**—The Bankruptcy Court, under the broad powers given by the statute, may order the sale of either real or personal property at private sale. *In re Edes*, (D. C. Me. 1905) 135 Fed. 595, 14 Am. Bankr. Rep. 382. And see General Order 18, paragraph 2.

A bankrupt is not entitled to object to a private sale of his interest in the estate, before appraisal, for the first time before the judge; but should raise such objections on an application to the referee for a modification of the original judgment. *In re Gutterson*, (D. C. Mass. 1905) 136 Fed. 698, 14 Am. Bankr. Rep. 495.

**Sale by auctioneer.**—The statute authorizes the appointment of an auctioneer by the court to sell property of a bankrupt's estate, in advance of any particular occasion therefor. *In re Benjamin*, (C. C. A. 2d Cir. 1905) 136 Fed. 175, 14 Am. Bankr. Rep. 481.

**The court may appoint commissioners to make the sale;** there being no requirement that such sales shall be made by the trustee. *Sturgiss v. Corbin*, (4th Cir. 1905) 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543.

**Attorney cannot sell assets.**—The general employment of an attorney at law, as counsel and attorney by the receiver of a bankrupt, does not authorize the attorney to make a sale of the bankrupt's assets, nor to take the proceeds thereof. *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 699, 17 Am. Bankr. Rep. 714.

**Liens must be paid.**—When a sale of the property free of liens has been ordered, the proceeds must be applied to their satisfaction, undiminished by anything except the costs of sale, and the expenses, if any, which have been undertaken for their benefit. *In re Prince*, (M. D. Pa. 1904) 131 Fed. 546, 12 Am. Bankr. Rep. 675; *In re U. S. Graphite Co.*, (E. D. Pa. 1908) 161 Fed. 583, 20 Am. Bankr. Rep. 573; *In re Goldsmith*, (E. D. N. Y. 1909) 168 Fed. 779, 21 Am. Bankr. Rep. 845; *In re Stevens*, (D. C. Ore. 1909) 173 Fed. 842, 23 Am. Bankr. Rep. 239.

**Right to interest.**—When the proceeds of the sale are sufficient to warrant it the lienor is entitled to the interest legally due on his debt. *Coder v. Arts*, (C. C. A. 8th Cir. 1907) 152 Fed. 943, 18 Am. Bankr. Rep. 513, *modifying* (S. D. Ia. 1906) 16 Am. Bankr. Rep. 583, *affirmed* (1909) 213 U. S. 223, 29 S. Ct. 436, 53 U. S. (L. ed.) 772, 22 Am. Bankr. Rep. 1; *In re Allert*, (W. D. N. Y. 1908) 173 Fed. 691, 23 Am. Bankr. Rep. 101; *In re Stevens*, (D. C. Ore. 1909) 173 Fed. 842, 23 Am. Bankr. Rep. 239.

#### **Lienor not liable for expenses of estate.**

—A court of bankruptcy has no power to take the proceeds of mortgaged property of the bankrupt, which belongs to the lien creditor, to pay the expenses of the general estate, or the expense of conducting the bankrupt's business through a receiver or the trustee, without the consent of the lien creditor, express or implied. *In re Clark Coal, etc., Co.*, (W. D. Pa. 1909) 173 Fed. 658, 23 Am. Bankr. Rep. 273; *In re Allert*, (W. D. N. Y. 1908) 173 Fed. 691, 23 Am. Bankr. Rep. 101.

**Sale subject to incumbrances.**—An order by the Bankruptcy Court directing a sale of the bankrupt's property without mentioning liens will be construed as authorizing only a sale subject to existing liens. *In re Platteville Foundry, etc., Co.*, (W. D. Wis. 1906) 147 Fed. 828, 17 Am. Bankr. Rep. 291.

Where the property of a bankrupt has been sold subject to incumbrances, the purchaser takes title subject to existing municipal claims and taxes. *In re Gerry*, (E. D. Pa. 1902) 112 Fed. 957, 7 Am. Bankr. Rep. 459.

**The doctrine of caveat emptor applies** in the case of a purchaser who is expressly informed that the trustee is selling only such title as he possessed and knows that the title is in litigation. *In re Frasin*, (C. C. A. 2d Cir. 1912) 201 Fed. 343.

**Quitclaim deed.**—In *Hinchman v. Consolidated Arizona Smelting Co.*, (D. C. Me. 1912) 198 Fed. 907, wherein the purchaser of land got only a quitclaim deed, it was held that he took only the property which the bankrupt had.

**Effect of sale of assets on good will and trademarks.**—In the case of *In re Jaysee Corset Co.*, (S. D. N. Y. 1911) 201 Fed. 779, a trustee sold the goods and chattels of the bankrupt but made no attempt to sell the good will of his business, nor her trademark, nor did he sell the business as a going concern. The court said: "The effect of these proceedings by the trustee was to kill the good will and destroy the trademark; for it is admitted that this particular kind of trademark cannot pass except in conjunction with the good will of a business. What has become of the bankrupt's business? It stopped by bankruptcy, was killed by the trustee's sale, and the present intended action on the part of the trustee is an attempt to galvanize it into life again, something which cannot be done."

#### **Sale ordered to preserve value of estate.**

—The court of bankruptcy will, on a proper showing, order the sale of property when such a course is necessary for the preservation of its value as an asset of the estate. *In re Becker*, (E. D. Pa. 1899) 98 Fed. 407, 3 Am. Bankr. Rep. 412; *In re Edes*, (D. C. Me. 1905) 135 Fed. 595, 14 Am. Bankr. Rep. 382; *In re Harris*, (S. D. Ala. 1907) 156 Fed. 875, 19 Am. Bankr. Rep. 635.

**Effect of sale as to adverse claimant.**—Unless there is some special direction in an order for the sale of real estate of a bankrupt, the trustee sells only the interest of the bankrupt therein; and one claiming an interest adverse to the bankrupt, and who is a stranger to the proceedings, is not affected by the sale, and has no interest in the proceeds; nor has the court of bankruptcy, after the property has been sold and conveyed, jurisdiction to adjudicate the rights of such claimant therein. *In re Muhlhauser*, (C. C. A. 6th Cir. 1903) 121 Fed. 669, 10 Am. Bankr. Rep. 236.

**Setting sale aside—Subsequent offer.**—A sale will not be set aside except for gross inadequacy of price, or circumstances impeaching its fairness. A subsequent offer of a better price than that realized cannot, alone, authorize a resale. *In re Ethier*, (E. D. Wis. 1902) 118 Fed. 107, 9 Am. Bankr. Rep. 160; *In re Belden*, (N. D. N. Y. 1903) 120 Fed. 524, 9 Am. Bankr. Rep. 679; *Sturgiss v. Corbin*, (4th Cir. 1905) 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543.

**Inadequacy of price.**—While a sale may be set aside on the sole ground of inadequacy, it must be such as to be unconscionable. *In re Shapiro*, (M. D. Pa. 1907) 154 Fed. 673, 19 Am. Bankr. Rep. 125.

Mere inadequacy of price is not enough to warrant setting aside the sale. It must be admitted that no hard and fast line can be drawn between mere inadequacy and gross inadequacy; but there is a difference, although it is impossible to state it with precision. Every case must necessarily be judged upon its own facts. *In re Metallic Specialty Mfg. Co.*, (E. D. Pa. 1912) 193 Fed. 300.

**Irregularity in proceedings.**—Where the original order of sale was incorrect in form, the proof of notice of sale indefinite, and the parties appearing in the proceedings were served by mail rather than personally or by attorney, and the "sale" was only a receipt of bid by the auctioneer, it would seem that the sale should not be confirmed. And where the order of confirmation was not on notice to the parties whose rights were cut off, the sale, and all proceedings based thereon, should be set aside and a new sale ordered on conditions. *In re Bur Mfg., etc., Co.*, (E. D. N. Y. 1913) 209 Fed. 138.

**Agreement to raise bid.**—An auction sale of property by a trustee in bankruptcy is not invalid because of a private arrangement between the attorney for the purchaser and the auctioneer, that the bid of any other person should be raised a certain amount each time until a sign to stop was given. *In re Ketterer Mfg. Co.*, (M. D. Pa. 1907) 156 Fed. 719, 19 Am. Bankr. Rep. 638.

**Bidding prevented.**—A sale will be set aside on petition of a creditor who was prevented from bidding by the action of

the trustee, on his giving security to make a substantially higher bid for the property at a resale. *In re Shea*, (D. C. Mass. 1903) 122 Fed. 742, 10 Am. Bankr. Rep. 481.

**Trustee's misconduct.**—A court of bankruptcy has general authority to set aside a sale of a bankrupt's property, made under an order of a referee, on the ground of misconduct of the trustee in making such sale, without proof of fraud on the part of the purchaser, and although the order of the referee did not require the sale to be made subject to the approval of the court. *In re Shea*, (D. C. Mass. 1903) 122 Fed. 742, 10 Am. Bankr. Rep. 481; *In re Williams*, (C. C. A. 4th Cir. 1912) 197 Fed. 1.

**Purchase by appraiser.**—The principles of equity and considerations of public policy forbid a purchase, at the sale of a trustee in bankruptcy, by one of the appraisers of the property; and, in such case, the sale will be set aside with leave to the District Court to restore the parties so far as practicable to their original situation. *In re Frazin*, (C. C. A. 2d Cir. 1910) 181 Fed. 307.

**Purchase by trustee.**—So, where the property has been purchased by the trustee, the sale must be set aside. *In re Hawley*, (N. D. Ia. 1902) 117 Fed. 364, 9 Am. Bankr. Rep. 61.

**For circumstances held to be insufficient** to require the setting aside of a sale, see *In re Charles Knosher & Co.*, (C. C. A. 9th Cir. 1912) 197 Fed. 136.

**On the setting aside of a private sale**, the purchaser thereat, when not in fault, will be protected to the extent of the price paid, and the improvements made, by him. *In re Fisher*, (D. C. N. J. 1906) 148 Fed. 907, 17 Am. Bankr. Rep. 404.

**Review of order setting aside sale.**—An order of a District Court in bankruptcy, setting aside a sale of property and directing a resale, is not reviewable on a petition to superintend and revise, until after the resale has been made and confirmed. *Sturgiss v. Corbin*, (4th Cir. 1905) 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543.

**Confirmation of sale.**—Notice need not be given the creditors of an application to confirm the sale. *In re Nevada-Utah Mines & Smelters Corporation*, (S. D. N. Y. 1912) 198 Fed. 497.

**An order confirming a sale of the interest of the bankrupt in property left to him under a will** was reviewed in the case of *In re Crouse*, (N. D. N. Y. 1912) 196 Fed. 907, and the order of confirmation affirmed.

**An order by a referee confirming a trustee's sale** of the bankrupt's interest in real estate is sufficient to validate the sale as against collateral attack because of mere irregularities such as alleged lack of appraisal and error in the description of the property in the published notice of sale. *Robertson v. Howard*, (1913) 229



U. S. 254, 33 S. Ct. 854, 57 U. S. (L. ed.) 1174.

**Summary proceeding as to proceeds of sale.**—Aside from the power of the Bankruptcy Court with regard to the assets of bankrupts, which is especially given by the Bankruptcy Act, it has all the authority which any court exercising equity jurisdiction has to protect its receivers and contracts made by them. Wherever a receiver by direction of the court appointing him makes a sale of assets in his possession, the parties concerned in the sale are bound to recognize him as an officer of the court. Consequently, the court appointing him has power to enforce in a summary manner the completion of the contract of sale, and may, for instance, order one who, by direction of a receiver in bankruptcy, sold the bankrupt's property, to turn over the proceeds of the sale to the trustee succeeding him. And if the sale were originally unauthorized such order of the court would effectually affirm it. If the party making the sale and the attorney for the receiver were joint actors in such sale and jointly responsible for the proceeds, payment by one to the other would not release or change the joint liability. But laches of the trustee or of interested creditors in applying for an order to turn over the proceeds might make it inequitable to require payment of interest. *Mason v. Wolkowich*, (1906) 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765.

### III. SALE OF PERISHABLE PROPERTY.

**General Order No. 18, par. 3,** authorizes the court to order a sale of "perishable" estate "upon petition by a bankrupt, creditor, receiver, or trustee, setting forth," etc.

"The sale of goods as perishable is for the benefit of all concerned, the money realized therefrom standing in stead of the property itself against which the parties interested may assert their rights the same as if the sale had not taken place." *In re Le Vay*, (M. D. Pa. 1903) 125 Fed. 990.

One of the official forms is that of a petition and order for sale of perishable property. Form No. 46, in the pages preceding section 31 in this title.

**Bills receivable may be sold as perishable,** and a bankruptcy receiver's assignment of "all bills receivable" to a purchaser at the receiver's sale thereof, includes a judgment covered by the bankrupt

for the price of goods sold by him, the judgment having been recovered before the assignment, and neither the receiver nor the assignee being aware that the claim had been reduced to judgment when the assignment was made. The sale and assignment also operate to transfer the right to sue on a bond given to dissolve an attachment in the action wherein the judgment was recovered. *Rogers v. Abbot*, (1910) 206 Mass. 270, 92 N. E. 472, 138 A. S. R. 394.

A receiver appointed under section 3 (3) may be authorized by the court to sell property that is of a perishable nature and likely to deteriorate in value with time. *In re Garner*, (N. D. Ala. 1907) 153 Fed. 914; *In re Becker*, (E. D. Pa. 1899) 98 Fed. 407 (liquor license). See also *In re Roberts*, (7th Cir. 1908) 166 Fed. 96, 92 C. C. A. 80; *In re De Lancey Stables Co.*, (E. D. Pa. 1909) 170 Fed. 860, where the cost of keeping and feeding horses would soon have exhausted their value.

Sales by receivers are justified only when property is perishable or is rapidly depreciating in value on a falling market or for other reasons. No bankrupt estate should be charged with the expense of such a proceeding except in case of plain necessity. *In re Desrochers*, (N. D. N. Y. 1911) 183 Fed. 991; *In re Harris*, (S. D. Ala. 1907) 156 Fed. 875.

"A perishable estate may be sold, even without notice to creditors, and the courts have been very liberal in their construction of what is 'perishable.' . . . It is the custom to order sales of perishable personal property even without notice." *In re Edes*, (D. C. Me. 1905) 135 Fed. 595.

**Modification of order.**—An order having been made for the sale of the bankrupt's property as perishable, the court, on petition by the bankrupt, ordered that certain articles claimed as his state exemption be set aside for him at the valuation fixed by the appraisers. *In re Joyce*, (M. D. Pa. 1904) 128 Fed. 985.

**Order of sale and confirmation of sale.**—When a Bankruptcy Court orders property in the hands of a receiver to be sold because perishable, and the sale is made on that ground, and is confirmed by the court on the petition of the trustee, it is not necessary to state the ground on which the property, taken as a whole, was considered to be in the nature of perishable property. *Rogers v. Abbot*, (1910) 206 Mass. 270, 92 N. E. 472, 138 A. S. R. 394.

**c [Trustee to convey title.]** The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee. [(1898) 30 Stat. L. 566.]

**Court may summarily enforce contract of sale.**—Whenever the receiver of a bankrupt, by direction of the court appointing

him, makes a sale of assets in his possession, the parties concerned are bound to recognize him as an officer of the court;

and hence such court not only has power to enforce in a summary manner the completion of the contract of sale, but the parties involved are deemed to have consented to such proceeding. *Mason v. Wolkowich*, (C. C. A. 1st Cir. 1906) 150 Fed. 699, 17 Am. Bankr. Rep. 714; *In re Jungmann*, (C. C. A. 2d Cir. 1911) 186 Fed. 302.

**Purchaser has right to be heard.**—Under a contract made with a receiver in bankruptcy for the purchase of property of the estate, including a stock of goods, by which the purchaser agreed to take "all salable merchandise in good condition at the lowest market purchase price," it was held that he could not be required to accept the inventory and prices made by the appraisers appointed by the court, without having an opportunity to be heard as to the condition and market price of the goods. *In re Jungmann*, (C. C. A. 2d Cir. 1911) 186 Fed. 302.

**Bankrupt corporation cannot interfere with purchaser of its business, good will, and name.**—In *S. F. Myers Co. v. Tuttle*,

(S. D. N. Y. 1911) 188 Fed. 532, it appears that the S. F. Myers Company, doing a mail order jewelry business, became bankrupt, and its assets, including its good will and corporate name, were purchased by T. Thereafter the sons of Myers formed a corporation called the "S. F. Myers' Sons Company" and undertook to carry on a similar business at the same place occupied by the bankrupt corporation. This was enjoined, at the suit of T., and the new corporation was ordered either to change its name, so as not to produce confusion, or change its place of business; it also being enjoined from interfering with the business carried on by T. under the name of the old corporation. And it was held that the old corporation, having obtained a discharge in bankruptcy, but having no assets, was not entitled to enjoin T. from continuing to use the name of the old corporation; but that such corporation could be restrained from interfering with the business of T. which he was carrying on under such name.

**d [Composition set aside — vesting title in trustee.]** Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge. [(1898) 30 Stat. L. 566].

As to

Revocation of discharge, see section 15.

Setting aside composition, see section 13.

**A secret agreement between a debtor and a single creditor, joining in a composition, by which such creditor is to receive an advantage over the others, cannot be enforced so long as it remains executory; and if fully executed at the**

time of or prior to the composition, the excess may be recovered back on the theory that it was paid under compulsion; but such transactions render the composition only voidable at the instance of other creditors joining therein. They have no lien or other right which entitles them to recover the excess paid or secured to the preferred creditor. *Batchelder, etc., Co. v. Whitmore*, (C. C. A. 1st Cir. 1903) 122 Fed. 355, 10 Am. Bankr. Rep. 641.

**e [Avoiding certain transfers — recovery of property.]** The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. [(1898) 30 Stat. L. 566.]

As to

Jurisdiction as to adverse claimants, see section 23 a and b.

Recovery of voidable preferences, see section 60b.

Recovery of property fraudulently transferred within four months of bankruptcy, see section 67e.

**Contrasted with section 60b.**—Section 70e differs from section 60b, in that it

authorizes the trustee to set aside fraudulent transfers although made prior to four months before the filing of the petition in bankruptcy, but it is identical with section 60b in so far as it authorizes the trustee in such cases to recover the property or its value. In consequence of this identity it may be impossible in many cases to ascertain from the pleadings in a suit by the trustee, under which

section relief is sought. See *Allen v. Gray*, (1911) 201 N. Y. 504, 94 N. E. 652, Ann. Cas. 1912B 123.

**Power conferred on trustee.**—Under section 70e, the trustee may assert any right which the creditor might have asserted on the facts as they were at the time of the filing of the petition in bankruptcy; and the trustee may impeach or set aside any fraudulent act or transaction of the bankrupt, and recover property or its proceeds, just as creditors might have done if bankruptcy had not occurred, and the rights and remedies of the creditors had not been vested in the trustees. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412; *Thomas v. Sugarman*, (1910) 218 U. S. 129, 30 S. Ct. 650; *Globe Bank, etc., Co. v. Martin*, (1915) 236 U. S. 288, 35 S. Ct. 377, 59 U. S. (L. ed.) 583; *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; *Mitchell v. Mitchell*, (E. D. N. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382; *Hurley v. Devlin*, (D. C. Kan. 1906) 149 Fed. 268, 17 Am. Bankr. Rep. 797; *Burns v. O'Gorman Co.*, (C. C. R. I. 1906) 150 Fed. 226, 17 Am. Bankr. Rep. 815; *Hull v. Burr*, (C. C. A. 5th Cir. 1907) 153 Fed. 945, 18 Am. Bankr. Rep. 541; *In re Gerstman*, (C. C. A. 2d Cir. 1907) 157 Fed. 549, 19 Am. Bankr. Rep. 145; *In re Siegel*, (E. D. N. Y. 1908) 164 Fed. 559, 21 Am. Bankr. Rep. 154; *In re Bement*, (C. C. A. 7th Cir. 1909) 172 Fed. 98, reversing (W. D. Wis. 1908) 158 Fed. 885, 20 Am. Bankr. Rep. 317; *In re Bothe*, (C. C. A. 8th Cir. 1909) 173 Fed. 597, 23 Am. Bankr. Rep. 151; *In re Berkowitz*, (D. C. N. J. 1908) 173 Fed. 1013, 22 Am. Bankr. Rep. 233; *Gorham v. Buzzell*, (D. C. Me. 1910) 178 Fed. 596; *In re Famous Clothing Co.*, (W. D. N. Y. 1910) 179 Fed. 1015; *Greenhall v. Carnegie Trust Co.*, (S. D. N. Y. 1910) 180 Fed. 812; *In re Shinn*, (D. C. N. J. 1911) 185 Fed. 990; *In re Kessler*, (C. C. A. 2d Cir. 1911) 186 Fed. 127; *Peterson v. Mettler*, (W. D. Wash. 1912) 198 Fed. 938; *National Bank of Athens v. Shackelford*, (C. C. A. 5th Cir. 1913) 208 Fed. 677; *Casey v. Baker*, (N. D. N. Y. 1915) 212 Fed. 247; *Milkman v. Arthe*, (C. C. A. 2d Cir. 1915) 223 Fed. 507; *Bentley v. Young*, (C. C. A. 2d Cir. 1915) 223 Fed. 536; *In re Adams*, (N. D. N. Y. 1898) 1 Am. Bankr. Rep. 94; *Coleman v. Dana*, (1915) 191 Mo. App. 370, 178 S. W. 256; *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618; *Skillen v. Endelman*, (1902) 11 Am. Bankr. Rep. 766, 39 Misc. 261, 79 N. Y. S. 413; *Beasley v. Coggins*, (1904) 12 Am. Bankr. Rep. 355, 48 Fla. 215, 37 So. 213; *Breckons v. Snyder*, (1905) 15 Am. Bankr. Rep. 112, 211 Pa. St. 176, 60 Atl. 575; *Zartman v. Waterloo First Nat. Bank*, (1907) 19 Am. Bankr. Rep. 27, 189 N. Y. 267, 82 N. E. 127; *Thomas v. Roddy*, (1907) 19 Am. Bankr. Rep. 873, 122 App.

Div. 851, 107 N. Y. S. 473; *Ryker v. Gwynne*, (N. Y. 1908) 21 Am. Bankr. Rep. 95; *Prescott v. Galluccio*, (N. D. N. Y. 1908) 21 Am. Bankr. Rep. 229; *In re Overholzer*, (N. D. N. Dak. 1909) 23 Am. Bankr. Rep. 10; *Phillips v. Kleinman*, (Pa. 1909) 23 Am. Bankr. Rep. 266; *Hood v. Blair State Bank*, (1902) 3 Neb. (unofficial) Rep. 432, 91 N. W. 701; *Sheldon v. Parker*, (1902) 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015; *Shreck v. Hanlon*, (1905) 74 Neb. 264, 104 N. W. 193; *Nye v. Hart*, (1901) 12 Ohio Cir. Dec. 419; *Mueller v. Bruss*, (1901) 112 Wis. 406, 88 N. W. 229.

*Fraud, actual or constructive, is a necessary element* in order to give the trustee in bankruptcy a right of action under section 70e. *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; *In re Calvi*, (N. D. N. Y. 1911) 185 Fed. 642. See also *Grinstead v. Union Savings, etc., Co.*, (C. C. A. 9th Cir. 1911) 190 Fed. 546.

**"Transfer by bankrupt."**—Of course a transfer by a third party for the benefit of the bankrupt is not such a transfer by the bankrupt of his property as any creditor might avoid, but if the transfer by a third party is the transfer of funds from the bankrupt's estate to another party for use, it falls within the section. Thus in *Milkman v. Arthe*, (E. D. N. Y. 1914) 213 Fed. 642, the court held that while a transfer by a third person for the benefit of the bankrupt could not be avoided by a creditor, where the money of the bankrupt was by agreement used by such third person for the purpose of creating a trust for the bankrupt's wife and the entire transaction was an attempt to conceal the money of the bankrupt by transferring it into the form of stock, the transfer could be avoided by the trustee in bankruptcy.

**May replevin property purchased from bankrupt prior to bankruptcy.**—While it is well settled that a creditor has no direct action against one holding the possession of property which might otherwise be subjected to the payment of claims against the debtor, because there is no privity of contract between one in the possession of the property and creditor seeking to apply it to his claim, and that in such circumstances the creditor must first establish his claim by judgment or acquire a lien by attachment, nevertheless in bankruptcy proceedings, the reason of the rule is satisfied when the debtor has been adjudged insolvent and unable to pay his debts. The appointment and qualification of the trustee in such circumstances show that he is entitled to the possession of the property for the purpose of applying it to the claims of the creditors. Under the Bankruptcy Act the trustee is vested with title to the bankrupt's property, and is given the right to recover it from whomsoever has possession. It is the conjunction of

title and the right to possession in one and the same person, that is the trustee, which constitutes the basis for an action of replevin in his favor. *Goodwin v. Tuttle*, (1914) 70 Ore. 424, 141 Pac. 1120.

*Not limited to transfers within four months' period.*—The right of the creditors of a bankrupt to pursue and reclaim property transferred fraudulently by an insolvent debtor as a voluntary gift is not limited to transfers made within four months of the institution of the bankruptcy proceedings. *In re Schenck*, (D. C. Wash. 1902) 116 Fed. 554, 8 Am. Bankr. Rep. 727; *Corey v. Blackwell Lumber Co.*, (1913) 24 Idaho 642, 135 Pac. 742; *Underleak v. Scott*, (1912) 117 Minn. 136, 134 N. W. 731.

*The trustee may resist the establishment of a lien upon the bankrupt's property*, in his hands, under a chattel mortgage which was void as to creditors at the time of the adjudication in bankruptcy. *Knapp v. Milwaukee Trust Co.*, (1910) 216 U. S. 545, 30 S. Ct. 412.

*May seize property conveyed to corporation for personal benefit.*—Where it is shown that a bankrupt, while insolvent, organized a corporation to which he conveyed his property, and which he conducted solely for his own benefit, for the evident purpose of placing such property beyond the reach of his creditors, his trustee may properly be ordered to seize such property as assets of the estate. *In re Berkowitz*, (D. C. N. J. 1908) 173 Fed. 1013, 22 Am. Bankr. Rep. 233.

*May enforce equitable rights.*—A trustee in bankruptcy represents all persons interested in the estate; and he may enforce, in the court of bankruptcy, the equitable rights existing in favor of certain of the creditors only. *In re Bothe*, (C. C. A. 8th Cir. 1909) 173 Fed. 597, 23 Am. Bankr. Rep. 151.

*May sue as stockholder.*—Where, between the passing of a bankruptcy adjudication and the appointment of a trustee, the assets of a corporation, in which the bankrupt was a large stockholder, were sold at the instance of the majority stockholders, in such a manner and for such a consideration as to prejudice the bankrupt's estate, and to apply the bankrupt's interest to an indebtedness owing to a single creditor, it was held that such sale was subject to vacation by the trustee, after his appointment, suing as a stockholder for an alleged abuse by the majority. *Greenhall v. Carnegie Trust Co.*, (S. D. N. Y. 1910) 180 Fed. 812.

*Usury recoverable.*—A trustee may maintain an action to recover usurious interest paid by the bankrupt. *Reed v. American-German Nat. Bank*, (W. D. Ky. 1907) 155 Fed. 233, 19 Am. Bankr. Rep. 140.

*Effect of discharge.*—The discharge of a debtor in bankruptcy in no way precludes the trustee from recovering prop-

erty of the bankrupt's estate which has been fraudulently transferred. *In re Pierce*, (N. D. N. Y. 1900) 103 Fed. 64; *Nye v. Hart*, (1901) 12 Ohio Cir. Dec. 419.

*A receiver has no power to sue for the purpose of setting aside a fraudulent transfer.* *Guaranty Title, etc., Co. v. Pearlman*, (W. D. Pa. 1906) 144 Fed. 550, 16 Am. Bankr. Rep. 461.

*Action to recover former funds of bankrupt.*—A suit by a trustee in bankruptcy against wrongdoers, who have appropriated funds of the bankrupt without his assent, is not within the section. *Park v. Cameron*, (1915) 237 U. S. 616, 35 S. Ct. 719, 59 U. S. (L. ed.) 1147.

Nor can the trustee maintain a suit, under this section, to recover property held by a defendant which belonged to the bankrupt and consequently passed to the trustee as the representative of the bankrupt's estate and which the defendant wrongfully refuses to surrender. *Harris v. Mt. Pleasant First Nat. Bank*, 216 U. S. 382, 30 S. Ct. 296, 54 U. S. (L. ed.) 528.

*Trustee vested with rights of creditor.*—Since the amendment of section 47a (2) in 1910, trustees as to all property in the custody or coming into the custody of the Bankruptcy Court are vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the Bankruptcy Court, are vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. See section 47a (2).

Since the amendment of 1910 decisions holding that a trustee has no other right than belonged to the bankrupt are no longer controlling. *In re Gehris-Herbine Co.*, (E. D. Pa. 1911) 188 Fed. 502.

*And even prior to the amendment of 1910* it was held that when, under section 70e, the trustee seeks to set aside a fraudulent or voidable transfer of the bankrupt antedating the four months' period, he does so in the creditors' right, to which he is subrogated, and which is vested in him exclusively. *In re Gray*, (1900) 3 Am. Bankr. Rep. 647, 47 App. Div. 554, 62 N. Y. S. 618.

A creditor of one discharged in bankruptcy cannot maintain a suit to set aside an alleged fraudulent transfer of the property of the bankrupt, although such transfer may have been made more than four months prior to the filing of the petition in bankruptcy. The right to sue for such property, and subject it to the payment of the bankrupt's debts, is vested alone in the trustee, and the failure of the trustee to bring such suit within the time prescribed by law does not transfer the right to do so to the creditor. *In re Adams*, (N. D.

N. Y. 1898) 1 Am. Bankr. Rep. 94; Ruhl-Koblegard Co. v. Gillespie, (1907) 22 Am. Bankr. Rep. 643, 61 W. Va. 584, 11 Ann. Cas. 929, 56 S. E. 898.

But prior to the appointment of a trustee it would seem clear that the general creditors, by bill or other appropriate proceedings, may take steps to set aside fraudulent transfers of property; and under section 11 the suit so pending might then be continued by the trustee after his appointment. See Guaranty Title, etc., Co. v. Pearlman, (W. D. Pa. 1906) 144 Fed. 550. And see the annotation under section 64b (2).

*Trustee cannot recover when creditor could not do so.*—A trustee in bankruptcy cannot set aside a transfer in the interest of creditors, when the creditor himself would have no standing to do so. *In re Sayed*, (W. D. Mich. 1910) 185 Fed. 962; *Holbrook v. International Trust Co.*, (1915) 220 Mass. 150, 107 N. E. 665; *Mayhew v. Todisman*, (1912) 246 Mo. 288, 151 S. W. 436.

*Status of trustee.*—The trustee in bankruptcy, under the United States Bankruptcy Law, holds a position analogous to that formerly held by the assignee in insolvency under the state law. Such assignee had the right to sue for and recover everything due to the estate for the benefit of the creditors. Where a pretended transfer from the assignor was void as to creditors, the title passed to the assignee in insolvency for the benefit of the creditors, and he was authorized to maintain an action on their behalf to reduce the property to possession. As between the creditors and the debtor, who fraudulently conveyed property to defeat them, he was regarded as holding the title to, or an interest in, the property conveyed, and it therefore passed to the assignee. The same principle holds now as to the trustee in bankruptcy. *Meyer v. Perkins*, (1912) 20 Cal. App. 661, 130 Pac. 206, 208.

The estate and subject matter being *in custodia legis*, the law takes care of the creditor, and the trustee in bankruptcy, as the arm of the court, acts for and on behalf of the creditor in that particular, so that whatever the creditor might do in avoiding the deed of his debtor for fraud the trustee in bankruptcy may do under the present Bankruptcy Act as a sort of *alter ego*. Such trustee takes title to the bankrupt's property, including that conveyed in fraud of creditors, contrary to the terms of the Bankruptcy Act, but he takes it subject to outstanding equities, to which the title was subject in the hands of the bankrupt. *Coleman v. Hagey*, (1913) 252 Mo. 102, 158 S. W. 829.

*Fraudulent conveyances.*—This section includes fraudulent conveyances which are so by common law, by statute law, and

by any recognized rule of law other than the special provisions of the bankruptcy statute. To give the trustee the title to property transferred by the bankrupt, and a right to recover such property, the conveyance must be fraudulent as to creditors under the common law or statute law. There must be fraud in fact, as distinguished from the constructive fraud that is sufficient where it is so provided in the Bankruptcy Act. *Underleak v. Scott*, (1912) 117 Minn. 136, 134 N. W. 731.

*Insolvency of transferor.*—It is not necessary in order to avoid a transfer as a transfer made to hinder and delay creditors that the transferor at the time of the transfer was insolvent. If the circumstances are such the jury can find that the transfer was made with intent to hinder and delay creditors it is voidable. Where a transfer is made by a debtor who is in embarrassed circumstances although not insolvent, a jury in some cases may be warranted in finding the fact of intent to delay and defraud. *Holbrook v. International Trust Co.*, (1915) 220 Mass. 150, 107 N. E. 665.

*Consent of defendant.*—Since the amendment of 1910 to section 23b, actions may be brought by a trustee in the courts of bankruptcy, in cases coming within the terms of section 70e, without the consent of the defendant. Prior to the amendment, such suits could not be brought in the United States District Courts, unless by consent of the proposed defendant. *Newcomb v. Biwer*, (D. C. S. D. 1912) 199 Fed. 529.

*Amount of recovery.*—Where a summary action is brought by a trustee to recover the value of property transferred after the petition in bankruptcy was filed and it appears that the transferee had mingled the property with his own and sold part of it, the amount required to be restored for the property sold should represent the actual value of the goods when transferred, and not the amount paid by the transferee for them. *In re Denson*, (N. D. Ala. 1912) 195 Fed. 854.

*Bona fide transactions* are excepted from the operation of the statute, as, indeed, they would have been without being expressly excepted; therefore the power conferred on the trustee, under section 70e, does not warrant interference with, or the disturbance of, the rights of *bona fide* purchasers for value. *In re Rudnick*, (D. C. Wash. 1900) 102 Fed. 750, 4 Am. Bankr. Rep. 531; *Bush v. Export Storage Co.*, (E. D. Tenn. 1904) 136 Fed. 918, 14 Am. Bankr. Rep. 138; *Gorham v. Buzzell*, (D. C. Me. 1910) 178 Fed. 596.

*Cannot enjoin disposition of property.*—The statute does not vest a court of bankruptcy with jurisdiction to take property alleged to belong to the bankrupt out of the possession of a third

party, unless by his consent, either permanently, by a plenary suit, or temporarily and by summary process, pending adjudication on a petition filed; and, lacking such jurisdiction, it is without power to enjoin the third party from disposing of such property. *In re Ward*, (D. C. Mass. 1900) 104 Fed. 985, 5 Am. Bankr. Rep. 215; *In re Berkowitz*, (E. D. Pa. 1906) 143 Fed. 998, 18 Am. Bankr. Rep. 251. But see the annotation under section 11a.

**Burden of showing bona fides.**—In proceedings by a trustee in bankruptcy to set aside a fraudulent transfer made by the bankrupt, the burden is on the defendants to show that they are *bona fide* purchasers for value, such a defense being an affirmative one. *Lawrence v. Lowrie*, (M. D. Pa. 1903) 133 Fed. 995, 13 Am. Bankr. Rep. 297.

**Valid liens protected.**—Under the rule heretofore stated (see *supra*, p. 1150, division I in note to section 70a) the title of the trustee to the property of the bankrupt is subject to all valid liens, and to all legal and equitable claims existing against it; and this rule also applies where recovery is sought under section 70e. *Philadelphia Fourth St. Bank v. Yardley*, (1897) 165 U. S. 634, 17 S. Ct. 439, 41 U. S. (L. ed.) 855. And see to the same effect *Duplan Silk Co. v. Spencer*, (C. C. A. 3d Cir. 1902) 115 Fed. 689, 8 Am. Bankr. Rep. 367; *Hurley v. Devlin*, (D. C. Kan. 1906) 149 Fed. 268, 17 Am. Bankr. Rep. 793; *Manning v. Evans*, (D. C. N. J. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217; *Aldine Trust Co. v. Smith*, (C. C. A. 3d Cir. 1910) 182 Fed. 449.

Thus, if under the state law it is not unlawful for an insolvent debtor to prefer a creditor by a transfer of property, if made in good faith and for an adequate consideration, the trustee of a bankrupt cannot set aside such a transfer under section 70e. *Manning v. Evans*, (D. C. N. J. 1907) 156 Fed. 106, 19 Am. Bankr. Rep. 217.

**[Jurisdiction.]** For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. [(Inserted 1903, which excepted pending cases) 32 Stat. L. 800.]

This paragraph was not in the original Act, but was inserted by amendment in 1903.

**In general—Reconcilable with section 23 a and b.**—This amendment seems to have no limitation except that the transfer must be one which any creditor could avoid and is reconcilable with section 23, subdivisions a and b. The amendment was a part of the same Act and was passed at the same time

So, also, where a bankrupt treats certain property as having been sold by him, and assigns the proceeds thereof as collateral security for a loan, neither he nor his trustee will be heard to assert the contrary. *Philadelphia Fourth St. Bank v. Yardley*, (1897) 165 U. S. 634, 17 S. Ct. 439, 41 U. S. (L. ed.) 855 *Aldine Trust Co. v. Smith*, (C. C. A. 3d Cir. 1910) 182 Fed. 449.

**Reducing claim to judgment.**—The title of the bankrupt having vested in the trustee under the general provisions of section 70a, it is not necessary that the trustee should reduce his claim to judgment prior to proceeding for the recovery of property under the provisions of section 70e. *Mitchell v. Mitchell*, (E. D. N. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382; *Zartman v. Waterloo First Nat. Bank*, (1905) 109 App. Div. 406, 96 N. Y. S. 633, *affirmed* (1907) 19 Am. Bankr. Rep. 27, 189 N. Y. 267, 82 N. E. 127; *Beasley v. Coggins*, (1904) 12 Am. Bankr. Rep. 355, 5 Ann. Cas. 801, 48 Fla. 215, 37 So. 213; *Prescott v. Galluccio*, (N. D. N. Y. 1908) 21 Am. Bankr. Rep. 229; *Crary v. Kurtz*, (1906) 132 Ia. 105, 105 N. W. 590, 109 N. W. 452; *Sheldon v. Parker*, (1902) 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015; *Hood v. Blair State Bank*, (1902) 3 Neb. (unofficial) Rep. 432, 91 N. W. 701; *Shreck v. Hanlon*, (1905) 74 Neb. 264, 104 N. W. 193; *Mueller v. Bruss*, (1901) 112 Wis. 406, 88 N. W. 229.

But the trustee does not, by obtaining a judgment against the bankrupt for the proceeds of a transfer in fraud of creditors, make an election which prevents him from suing in equity to set aside such transfer. *Thomas v. Sugarman*, (1910) 218 U. S. 129, 30 S. Ct. 650.

**Sale pending trustee's suit.**—In an action by the trustee to set aside as fraudulent certain conveyances, the receiver who was appointed before the trial ought not to be authorized to sell the property, his duty being merely to preserve it. *Small v. Muller*, (1901) 67 App. Div. 143, 73 N. Y. S. 667.

that the amendment to subdivision b of section 23 was, and the assumption is that they were intended not to conflict but to be in accord as provisions for different situations. In other words, that it was the intention that each should have its proper application distinct from and harmonious with that of the other.

Such application is observed by distinguishing between jurisdiction over the subject-matter and jurisdiction over the person, as pointed out by the Circuit Court of Appeals for the Fifth Circuit in *Hull v. Burr*, (1907) 153 Fed. 945, *approving and following* *Gregory v. Atkinson*, (E. D. Mo. 1904) 127 Fed. 183. In other words, the respective sections and their subdivisions confer jurisdiction on the designated courts so far as it is dependent upon the character of the suits, but when the condition expressed in subdivision b of section 23 exists the consent of the defendant determines the court, except when the suit is for the recovery of property under section 60, subdivision b, section 67, subdivision e, and section 70, subdivision e. These special exceptions exclude any other. *Wood v. A. Wilbert's Sons Shingle, etc., Co.*, (1912) 226 U. S. 384, 33 S. Ct. 125, 57 U. S. (L. ed.) 264.

**Jurisdiction of Bankruptcy Court.**—Under the statute, as enacted originally, the jurisdiction of the Bankruptcy Court over actions for the recovery of property under section 70e was not provided for, and it was held that such jurisdiction depended on the consent of the adverse party. Apparently for the purpose of correcting this and other defects, section 23b was amended in 1903; but the amendment failed to expressly specify section 70e, and for that reason there was a conflict of authority as to whether actions instituted under section 70e could be prosecuted in the Bankruptcy Court without the consent of the defendant; this subject, however, was finally set at rest by the amendment of section 23b by the Act of June 25, 1910, which provides that in such cases the consent of the defendant is not necessary in order to confer jurisdiction on the court of bankruptcy. See section 23b and annotation thereunder, *supra*. See also *Hurley v. Devlin*, (D. C. Kan. 1906) 149 Fed. 268, 17 Am. Bankr. Rep. 797; *Palmer v. Roginsky*, (S. D. N. Y. 1910) 175 Fed. 883; *Sheppard v. Lincoln*, (S. D. N. Y. 1910) 184 Fed. 182 (decided prior to the amendment of 1910, but reported since then); *Milkman v. Arthe*, (C. C. A. 2d Cir. 1915) 223 Fed. 507.

**Jurisdiction of state courts.**—In actions under section 70e jurisdiction may be exercised by the state courts. *McLaughlin v. Knop*, (E. D. La. 1913) 214 Fed. 260; *Hull v. Hudson*, (1911) 9 Del. Ch. 205, 80 Atl. 674; *Hobbs v. Frazier*, (1911) 61 Fla. 611, 55 So. 848; *Blick v. Nimmo*, (1913) 121 Md. 139, 88 Atl. 116; *Mueller v. Brussa*, (1901) 8 Am. Bankr. Rep. 442, 112 Wis. 406, 88 N. W. 229; *Breckons v. Snyder*, (1905) 15 Am. Bankr. Rep. 112, 211 Pa. St. 176, 60 Atl. 575. And see the annotation under section 23b.

Where a trustee in bankruptcy is entitled to assets of the bankrupt which are in the possession of a receiver appointed by a state court of competent jurisdiction, comity requires, as a general rule, that the trustee should first make application to the state court, instead of to the Bankruptcy Court, for an order for the possession of such assets. *Carling v. Seymour Lumber Co.*, (C. C. A. 5th Cir. 1902) 113 Fed. 483, 8 Am. Bankr. Rep. 29.

**Effect of subsequent proceedings in Bankruptcy Court.**—A trustee in bankruptcy may institute proceedings in a court of bankruptcy or in a state court for the recovery of property fraudulently disposed of by the bankrupt. And where a judgment creditor, more than four months prior to the filing of a petition in bankruptcy against his debtor, files a bill in a state court to set aside a fraudulent transfer of his property, and the state court acquires jurisdiction of the parties and the subject matter of the suit, its jurisdiction is not divested by subsequent proceedings in bankruptcy against the debtor. This rule is now well recognized, and is firmly established by the decisions of the Supreme Court of the United States. *Blick v. Nimmo*, (1913) 121 Md. 139, 88 Atl. 116.

**Referees.**—Prior to the amendment of section 23b by the Act of June 25, 1910, it was held that a referee had no jurisdiction of an action under section 70e to recover property, for the reason that in such case the property is not in the possession of the court. *In re Overholzer*, (N. D. N. Dak. 1909) 23 Am. Bankr. Rep. 10, *disapproving* *In re Shultz*, (W. D. N. Y. 1904) 11 Am. Bankr. Rep. 690. And see the annotation under section 23b.

**Ancillary jurisdiction.**—The District Court of a district other than that in which the bankruptcy proceedings are pending may entertain a suit to set aside a fraudulent transfer made by the bankrupt to parties residing in such other district. *Lawrence v. Lowrie*, (M. D. Pa. 1904) 133 Fed. 995, 13 Am. Bankr. Rep. 297. And see section 2 (20) and the annotation thereunder.

Prior to enactment of the amendment of 1910 it was held that when a trustee in bankruptcy seeks to enforce rights or to recover property in a district other than that of the court which appointed him, he stands in the position of those whose rights he has acquired, and can resort only to the same courts, state or federal, and is confined to the same remedies, subject to the exceptions made by the Bankruptcy Law. *Hull v. Burr*, (C. C. A. 5th Cir. 1907) 153 Fed. 945, 18 Am. Bankr. Rep. 541.

**Remedies available.**—The trustee may prosecute any suit to recover assets in the hands of third parties, or to enforce the payment of claims, that could have been prosecuted by the creditors themselves had

no proceedings in bankruptcy been instituted. *Mitchell v. Mitchell*, (E. D. N. C. 1906) 147 Fed. 230, 17 Am. Bankr. Rep. 382; *Thomas v. Roddy*, (1907) 19 Am. Bankr. Rep. 873, 122 App. Div. 851, 107 N. Y. S. 473. See also *Hull v. Burr*, (C. C. A. 5th Cir. 1907) 153 Fed. 945, 18 Am. Bankr. Rep. 541. And see the annotation under section 23b.

And in such action the presumption is that the trustee has complied with all the requirements of the Bankruptcy Law, and is qualified to act. *Breckons v. Snyder*, (1905) 15 Am. Bankr. Rep. 112, 211 Pa. St. 176, 60 Atl. 575.

The plaintiff, as the trustee in bankruptcy of a mortgagor, has the same rights as a creditor armed with an attachment or an execution. *Zartman v. Waterloo First Nat. Bank*, (1907) 19 Am. Bankr. Rep. 27, 189 N. Y. 267, 82 N. E. 127. And see section 47a (2).

It has also been held that the Bankruptcy Law, instead of vesting in the trustee the remedies of the creditors against the property, such as judgment, execution, and creditor's bills, vests in him at once the title to the property—makes him the owner of it. *Mitchell v. Mitchell*, (E. D. N. C. 1906) 147 Fed. 280, 17 Am. Bankr. Rep. 382.

**When plenary suit necessary.**—Where a third person is in possession of goods alleged to belong to the bankrupt, and such property is held under claim and color of title, the claimant is entitled to retain them until dispossessed in a plenary suit. *In re Jackier*, (M. D. Pa. 1910) 179 Fed. 720; *In re Shinn*, (D. C. N. J. 1911) 185 Fed. 990. And see the annotation under section 23b.

**When plenary suit not necessary.**—A trustee in bankruptcy who has been appointed within four months of a general assignment made by a debtor for the benefit of his creditors has a right to obtain an order from the Bankruptcy Court, and in a summary proceeding compel the assignee to submit his accounts and to turn over to him all money and property in his hands which belonged to his assignor. No plenary suit is necessary in a case of that sort. The assignee under such conditions is not an adverse claimant, but merely the agent of the assignor for the distribution of the proceeds of the property, and as such agent his possession is that of the principal. He is a mere naked bailee for the creditors and has no right to retain possession as against the trustee in bankruptcy. *In re McCrum*, (C. C. A. 2d Cir. 1914) 214 Fed. 207.

**Trover and conversion.**—A trustee in bankruptcy may sue in trover for a conversion of goods occurring either before or after bankruptcy; and in the declaration he may joint a count upon the bankrupt's title and a count upon the trustee's title, being vested by section 70a (6) with the bankrupt's right of action. *Burns v.*

*O'Gorman Co.*, (C. C. R. I. 1906) 150 Fed. 226, 17 Am. Bankr. Rep. 815.

**Fraudulent transferee as party.**—A fraudulent transferee, who has transferred to another fraudulent transferee all the property rights which were received under the transfer, is not a necessary party to the trustee's action. *Skillen v. Endelman*, (1902) 11 Am. Bankr. Rep. 766, 39 Misc. 261, 79 N. Y. S. 413.

**Bill in equity.**—A trustee in bankruptcy occupies a relation similar to that of a judgment creditor of the bankrupt, and may file a bill in equity to set aside a fraudulent conveyance of real estate by the bankrupt, although neither the trustee nor any creditor has reduced any claim against the bankrupt to judgment. *Beasley v. Coggins*, (1904) 12 Am. Bankr. Rep. 355, 48 Fla. 215, 37 So. 213.

*In Wall v. Cox*, (C. C. A. 4th Cir. 1900) 101 Fed. 403, *affirming* (1900) 99 Fed. 546, it was held that a bill in equity brought by a trustee to set aside a fraudulent transfer of property made by a bankrupt will not be dismissed on the ground that there is plain, clear, and adequate remedy at law, for such matters properly fall within equitable jurisdiction. However, in *Wall v. Cox*, (1900) 181 U. S. 244, 21 S. Ct. 642, 45 U. S. (L. ed.) 845, on a certificate, in the same case, from the Circuit Court of Appeals, the Supreme Court ruled that the District Court had no jurisdiction of a bill in equity, filed by the trustee in bankruptcy, unless by consent of the defendants. But the latter decision, it will be observed, was rendered prior to the amendment of 1910 to section 23b, under which the consent of the defendant is no longer required in cases coming within the terms of section 70e. See *Newcomb v. Biwer*, (D. C. S. D. 1912) 199 Fed. 529.

**Pleading—Essential averments.**—The Bankruptcy Act gives the trustee the power to set aside any conveyance that could be avoided by a creditor; therefore, if the conveyance is attacked as being only voluntary, the bill by the trustee must show that there were existing creditors, as this is essential to defeat such a conveyance. If, however, the bill charges such a fraudulent intent as would avoid the sale by subsequent creditors, we do not think it necessary for the bill to name all of said creditors, or to specify and describe their respective debts. The adjudication of bankruptcy is a determination of the insolvency of the bankrupt and the existence of creditors, not necessarily creditors antecedent to the conveyance, but at least subsequent thereto. Neither is it essential, in a bill filed by the trustee, to aver that the demands are due. The averment is essential when the bill is filed by a creditor, as he has no right to institute the suit until the obligation matures; but such is not the case as to a trustee in bankruptcy, for the reason that the



debts of the bankrupt mature, under the terms of the Act, immediately upon the adjudication. *Cartwright v. West*, (1913) 185 Ala. 41, 64 So. 293.

**Alleging reduction of claim to judgment and insufficiency of assets.**—Where a trustee in bankruptcy brings suit to set aside a transfer of property in fraud of creditors, it is not essential as in ordinary bills, to the maintenance of the suit that the complainant shall have reduced his claim to judgment, but it is essential that he show by his bill that the assets are insufficient to satisfy the claims of creditors. The trustee can only apply the assets upon allowed claims. If the assets in his hands are sufficient to pay such claims, there is no reason for the exercise of the equitable jurisdiction to set aside, as fraudulent, conveyances of property to third persons. Conveyances which may be set aside because they are constructively fraudulent as to creditors are valid between the parties, and under the Bankruptcy Act are valid against all persons except those entitled to share in the proceeds of such property—that is, creditors whose claims have been allowed under the Act. Unless it appears from the allegations and proof that the property so conveyed is needed to pay such claims, the trustee, whose rights are not superior to those of the creditors he represents, has no right to have such conveyances set

aside. *McKey v. Smith*, (1912) 255 Ill. 465, 99 N. E. 695; *Mueller v. Bruss*, (1901) 112 Wis. 406, 88 N. W. 229.

**Amendment of pleading.**—Where the pleading fails to show that the property of the bankrupt is not sufficient to pay his creditors in full, the defect may be amended. *Prescott v. Galluccio*, (N. D. N. Y. 1908) 21 Am. Bankr. Rep. 229.

**Alleging fraud.**—A bill by a trustee to set aside a fraudulent transfer of the bankrupt must state facts showing that the transfer was made for the purpose of defrauding creditors, a general allegation to that effect being insufficient. *McKey v. Smith*, (1912) 255 Ill. 465, 99 N. E. 695.

**Rules governing pleading and proof.**—A trustee in bankruptcy suing under the provisions of section 70e of the Bankrupt Act must, if suit is brought in a state court, bring himself within the limits of the pleading and proof prescribed by the statutes and decisions of the state where the suit is brought. *Coleman v. Hagey*, (1913) 252 Mo. 102, 158 S. W. 829.

**Jury trial.**—In an action at law brought by the trustee for the recovery of "its value," authorized by section 70e, the parties are entitled to a jury trial. But if the trustee sues for equitable relief there is no absolute right to a jury trial. *Allen v. Gray*, (1911) 201 N. Y. 504, 94 N. E. 652, Ann. Cas. 1912B 123.

**f [Revestment of title on confirmation of composition.]** Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him. [(1898) 30 Stat. L. 566.]

**Revesting of title.**—On the confirmation of a composition the title to all the property passes from the trustee and reverts in the bankrupt free from the claims of his creditors. *In re Rider*, (N. D. N. Y. 1899) 96 Fed. 808, 3 Am. Bankr. Rep. 178. See also *Stone v. Jenkins*, (1900) 4 Am. Bankr. Rep. 568, 176 Mass. 544, 57 N. E. 1002.

**Funds of the bankrupt in the hands of a third person**, and never in the actual custody of the trustee and forming no part of the sum deposited in the confirmation proceeding, revert in the bankrupt on the confirmation of the composition. *In re Frischknecht*, (C. C. A. 2d Cir. 1915) 223 Fed. 417. And see section 12e and the notes thereunder.

**Accumulated interest on composition deposit.**—Where money is deposited by the bankrupt, with a clerk of court, in pursuance of an offer of composition, the interest accruing thereon pending confirmation belongs to the bankrupt on the composition being confirmed. *In re Kelley*, (D. C. Mass. 1915) 223 Fed. 383.

**Adverse claimant may assert rights as against bankrupt.**—On the conformation of a composition the title to property in the custody of the court, and claimed adversely, is to be determined as between the bankrupt and the claimant; in such case the bankrupt does not stand in the shoes of his former creditors. *In re J. C. Winship Co.*, (7th Cir. 1903) 120 Fed. 93, 56 C. C. A. 45, 9 Am. Bankr. Rep. 638.

**SEC. 71. [BANKRUPTCY RECORDS.]**—That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be

entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: *Provided*, That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor. [(Inserted 1903, which excepted pending cases) 32 Stat. L. 800.]

This section was not in the Act as originally enacted, but was added in 1903.

As to duty of clerks generally, see the several subdivisions of section 51.

**SEC. 72. [COMPENSATION OF OFFICERS RESTRICTED.]**—That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act. [(Inserted 1903, which excepted pending cases) 32 Stat. L. 800; (amended 1910, which excepted pending cases) 36 Stat. L. 842.]

The Bankruptcy Act as originally enacted was amended in 1903 "by adding thereto a new section" as follows:

"§ 72. That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this Act." [32 Stat. L. 800.]

In 1910 it was amended "to read as" in the text.

As to

Compensation of referees generally, see the several subdivisions of section 40.

Compensation of trustees, receivers, and marshals, see the several subdivisions of section 48.

**Bar to extra allowances.**—Section 72 is an absolute bar to any extra allowance, however onerous or valuable the service rendered may have been. *In re Coventry Evans Furniture Co.*, (N. D. N. Y. 1909) 171 Fed. 673, 22 Am. Bankr. Rep. 623; *In re M. F. Rourke Co.*, (E. D. Tenn. 1913) 209 Fed. 877; *In re Van Denburg*, (N. D. N. Y. 1914) 221 Fed. 475; *Holland v. McIlwaine*, (C. C. A. 4th Cir. 1915) 223 Fed. 777. See also *In re Epstein*, (W. D. Ark. 1901) 109 Fed. 878, 6 Am. Bankr. Rep. 191; *In re Screws*, (S. D. Ga. 1906) 147 Fed. 989, 17 Am. Bankr. Rep. 269. And see the annotation under sections 40 and 48.

Thus it has been held that the court has no power to allow special compensation to a referee for services rendered on a reference to him of a contested application for discharge as authorized by General Order in Bankruptcy No. 12. *In re Wilcox*, (W. D. Mich. 1907) 156 Fed. 685, 19 Am. Bankr. Rep. 241.

The purpose of the section limiting trustee's fees was to prevent the using up of the estate or exorbitant charges to be paid out of the estate. *In re Margolies*, (E. D. N. Y. 1911) 191 Fed. 369.

**Power of court.**—The court is powerless to increase the compensation of referees regardless of inadequacy in any special case. But expenses necessarily incurred, accounted for in detail and accompanied by vouchers and verified by oath, will be allowed. *In re Daniels*, (1904) 130 Fed. 597.

**Referee as special master.**—It has been held that there is no authority for converting a referee in bankruptcy into a special master, nor for allowing him compensation as such. *In re Sweeney*, (C. C. A. 6th Cir. 1909) 168 Fed. 612, 21 Am. Bankr. Rep. 866. See also *In re Wilcox*, (W. D. Mich. 1907) 156 Fed. 685, 19 Am. Bankr. Rep. 241.

But in some districts it has been the practice to allow compensation for services, in the nature of master's services, outside of the duties of the referee. *Fellows v. Freudenthal*, (C. C. A. 7th Cir. 1900) 102 Fed. 731, 4 Am. Bankr. Rep. 490; *In re Grossman*, (E. D. Mich. 1901) 111 Fed. 507, 6 Am. Bankr. Rep. 510; *Matter of Hart*, (D. C. Hawaii 1907) 18 Am. Bankr. Rep. 137.

#### THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

a [Force and effect.] This Act shall go into full force and effect upon its passage:

*Provided, however*, That no petition for voluntary bankruptcy shall be

filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof. [(1898) 30 Stat. L. 566.]

**Time of taking effect.**—The Bankruptcy Act took effect, as to involuntary proceedings, from the date of its approval, July 1, 1898. *Blake v. Francis-Valentine Co.*, (N. D. Cal. 1898) 89 Fed. 691, 1 Am. Bankr. Rep. 372; *In re Bruss-Ritter Co.*, (E. D. Wis. 1898) 90 Fed. 651, 1 Am. Bankr. Rep. 58.

And from the first moment of that day. *Leidigh Carriage Co. v. Stengal*, (C. C. A. 6th Cir. 1899) 95 Fed. 637, 2 Am. Bankr. Rep. 383.

From the date of the taking effect of the Bankruptcy Act, though by its terms no proceedings thereunder for involuntary bankruptcy could be commenced for four months thereafter, the relations of debtor and creditor and those between creditors were governed by its provisions; and an act of bankruptcy committed by a debtor after that date entitles every creditor to

the rights given by the Act, and to invoke the aid of the court in preserving such rights until they are enforceable. *Blake v. Francis-Valentine Co.*, (N. D. Cal. 1898) 89 Fed. 691, 1 Am. Bankr. Rep. 372. And see to the same effect *E. C. Westcott Co. v. Berry*, (N. H. 1899) 4 Am. Bankr. Rep. 264; *Kosches v. Libowitz*, (Tex. 1900) 4 Am. Bankr. Rep. 265 note, 56 S. W. 613.

**Not retroactive.**—It is apparent that it was the intention of Congress that the law should not be retroactive, so that a person could be forced into the Bankruptcy Courts for any act done by him prior to July 1, 1898. It was only intended to act in the future, and to take cognizance of such acts of bankruptcy as were committed after its passage. *Grunsfeld v. Brownell*, (1904) 11 Am. Bankr. Rep. 599, 12 N. M. 192, 76 Pac. 310.

**[The amendment of Feb. 5, 1903, provides:]** That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said Act of July first, eighteen hundred and ninety-eight. [32 Stat. L. 801.]

**Not retroactive.**—The amendatory Act of Feb. 5, 1903, by its express terms does not apply to nor affect any proceeding instituted before it took effect, and in such proceedings all of the provisions of the original Act are to be enforced the same as though not amended. *In re Docker-Foster Co.*, (E. D. Pa. 1903) 123 Fed. 190, 10 Am. Bankr. Rep. 584.

**As to suit brought by trustee.**—The provision contained in the Act of 1903, that it "shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions" of the original Act, applies to the admin-

istration of bankruptcy cases proper, and not to a suit brought by a trustee. Such a suit is not a bankruptcy case within the meaning of the provision in the amended Act. The general rule is that the right to any particular remedy is not a vested right, and that a statute creating new remedies, or conferring jurisdiction upon courts which previously did not have it, is not confined to rights of action arising thereafter, but may be availed of to enforce any existing rights of action. *Pond v. New York Nat. Exch. Bank*, (S. D. N. Y. 1903) 124 Fed. 992, 10 Am. Bankr. Rep. 343.

**[The amendment of June 25, 1910, provides:]** That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said Act approved July first, eighteen hundred and ninety-eight, as amended by said Act approved February fifth, nineteen hundred and three, and as further amended by said Act approved June fifteenth, nineteen hundred and six. [36 Stat. L. 842.]

**Not retroactive.**—The amendment of 1910 is not retroactive. *In re U. S.*

*Restaurant, etc., Co.*, (C. C. A. 2d Cir. 1911) 187 Fed. 118.

**b [Cases pending under state laws.]** Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it. [(1898) 30 Stat. L. 566.]

**Suspension of state insolvency laws.**—The enactment by Congress of a national Bankruptcy Act suspends the operation of state insolvency laws from the time of such enactment, subject only to such limitations as may be prescribed in the Bankruptcy Act. See cases cited *supra*, this title, p. 505.

The Bankruptcy Law is paramount to all the state insolvent laws, and where the effect of enforcing the state law is to defeat the object of the provisions of the Bankruptcy Act, that part of the state law must yield to the provisions of the latter. *In re International Coal Min. Co.*, (E. D. Pa. 1906) 143 Fed. 665, 16 Am. Bankr. Rep. 309.

The Bankruptcy Act on its passage at once suspended and superseded all state insolvency laws, as to cases coming within its purview, whether the insolvent be a person, partnership, or corporation; and proceedings instituted thereafter under any such insolvency law by or against an insolvent subject to adjudication as a bankrupt, either voluntary or involuntary, are void. *In re F. A. Hall Co.*, (D. C. Conn. 1903) 121 Fed. 992, 10 Am. Bankr. Rep. 88.

Proceedings in state courts under state insolvent laws are, as against proceedings under the Bankruptcy Act, *coram non judice*. Such proceedings have no validity, no more than have proceedings in a state court when once a cause has been properly removed therefrom into a federal court. *In re Standard Fuller's Earth Co.*, (S. D. Ala. 1911) 186 Fed. 578.

**Extent of suspension.**—State insolvency laws are suspended by the Bankruptcy Act only so far as the two are in conflict, and in so far as the Bankruptcy Law covers and supplies what is undertaken to be disposed of by the state law. Cases cited *supra*, this title, p. 505.

And in *Singer v. National Bedstead Mfg. Co.*, (N. J. 1903) 11 Am. Bankr. Rep. 276, it was said, *per Stevenson, V. C.*: "It is perfectly plain that state systems of voluntary and involuntary bankruptcy may remain to-day in full operation upon large numbers of insolvent natural persons and corporations who cannot be brought within the operations of the national Bankruptcy Act under any possible state of facts. It is also, it seems to me, equally plain that a state system of involuntary insolvency also remains in full operation upon persons and corporations, who are, as possible bankrupts, within the operation of the national Bankruptcy Act, so far as the state system deals with cases of which the Bankruptcy Courts, under the federal Act, can obtain no jurisdiction. . . . The intention of the Act is to supply the law of certain cases, and to supply a special

court to enforce that law. All other cases of bankruptcy or insolvency are left to be dealt with as the state legislature may see fit."

The Bankruptcy Law does not attempt to supervise insolvency proceedings under state laws, undertaken and carried out more than four months prior to the institution of bankruptcy proceedings; nor to inquire into the assignments and transfers of the bankrupt's property not made within such period. *In re Boner*, (N. D. W. Va. 1909) 169 Fed. 727, 22 Am. Bankr. Rep. 151.

**Dissolution or winding-up proceedings.**—The operation of the Bankruptcy Laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. *In re Watts*, (1903) 190 U. S. 1, 23 S. Ct. 718, 47 U. S. (L. ed.) 933, 10 Am. Bankr. Rep. 113. And see cases cited *supra*, this title, p. 506.

**Assignments for the benefit of creditors.**—As assignments for the benefit of creditors are, under section 3a (4), in themselves, acts of bankruptcy on the part of the assignor, proceedings under such assignments are superseded by his bankruptcy. See section 3a (4), and the annotation thereunder.

But it has been held that state statutes which merely regulate the administration of the trust created by an assignment for the benefit of creditors are not suspended; and proceedings under such statutes, or under a common-law deed of assignment, are not void or voidable by reason of the existence merely of a Bankruptcy Law, or unless proceedings in bankruptcy are subsequently instituted against the assignor. See cases cited *supra*, this title, p. 506.

**Supplementary proceedings.**—The action of a receiver under a statute, like that of New York, permitting the examination of judgment debtors supplementary to an execution, is a substitute for a receivership in a creditor's bill (*Olney v. Tanner*, 10 Fed. 101), and is not a proceeding commenced under a state insolvency law. *In re Meyers*, (N. D. N. Y. 1899) 1 Am. Bankr. Rep. 347.

**Laws authorizing imprisonment for debt.**—A state law which authorizes the arrest and imprisonment of a judgment debtor, on a showing that he is about to remove or has concealed property with intent to defraud his creditors, is not an insolvency law of the state, although it provides that the debtor may be released on his giving a bond that he will apply within thirty days for the benefit of such law and comply with its requirements, but merely provides a remedy in aid of execution, and its operation is not suspended by the national Bankruptcy Act. *Ex p. Crawford*, (C. C. A. 3d Cir. 1907) 154 Fed. 769.

## BANKS

*National and Federal Reserve Banks.* See NATIONAL BANKS  
*Savings Depositories.* See POSTAL SERVICE

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## BARRELS

*Standard Barrels.* See AGRICULTURE

## BIGAMY, POLYGAMY, AND UNLAWFUL INTERCOURSE

*Act of March 22, 1882, ch. 47 ("Anti-Polygamy Act of 1882"), 1224.*

*Sec. 2. Prosecution of Offenses Already Committed Not Affected, 1224.*

*6. Amnesty for Past Offenses, 1224.*

*7. Issue of Mormon Marriages before January, 1883, Legitimated, 1225.*

*8. Bigamists, etc., Disqualified as Voters, and Ineligible to Appointments, 1225.*

*Act of March 3, 1887, ch. 397 ("Anti-Polygamy Act of 1887" or "Edmunds-Tucker Act"), 1225.*

*Sec. 1. In Prosecutions for Bigamy, etc., Husband or Wife May Testify, 1225.*

*2. Attachment When It Is Believed Witness Will Fail to Appear, 1225.*

### CROSS-REFERENCES.

*As to Polygamy, Unlawful Cohabitation, Adultery, Incest and Fornication committed anywhere "within the exclusive Jurisdiction of the United States," see PENAL LAWS, secs. 313-318.*

**An Act To amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes.**

[*Act of March 22, 1882, ch. 47, 22 Stat. L. 30.*]

**SEC. 2. [Prosecution of offenses already committed not affected.]** That the foregoing provisions shall not affect the prosecution or punishment of any offense already committed against the section amended by the first section of this act. [22 Stat. L. 31.]

This is the second section of the "Anti-Polygamy Act of 1882" known also as the "Edmunds Act." The first section amended R. S. sec. 5352 which was incorporated into the Penal Laws and repealed by section 341 thereof, as were sections 3 and 4 of this Act. Section 5 was incorporated in the Judicial Code and repealed by section 297 thereof. Sections 6, 7, and 8 are given *infra*.

**SEC. 6. [Amnesty for past offenses.]** That the President is hereby authorized to grant amnesty to such classes of offenders guilty of bigamy, polygamy, or unlawful cohabitation, before the passage of this act, on such conditions and under such limitations as he shall think proper; but no such amnesty shall have effect unless the conditions thereof shall be complied with. [22 Stat. L. 31.]

**SEC. 7. [Issue of Mormon marriages before January, 1883, legitimated.]** That the issue of bigamous or polygamous marriages, known as Mormon marriages, in cases in which such marriages have been solemnized according to the ceremonies of the Mormon sect, in any Territory of the United States, and such issue shall have been born before the first day of January, anno Domini eighteen hundred and eighty-three, are hereby legitimated. [22 Stat. L. 31.]

**SEC. 8. [Bigamists, etc., disqualified as voters, and ineligible to appointments.]** That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States. [22 Stat. L. 31.]

A juror is not an officer within the meaning of this section. *People v. Hopt*, (1884) 3 Utah 396, 4 Pac. 250.

An appointment by the governor under 22 Stat. L., ch. 433, p. 313, of one to the office of probate judge in the territory of Utah was valid to fill a vacancy

occurring by reason of the failure to hold the elections under the ninth section of the Act of March 22, 1882, when the incumbent was disqualified to hold over under this section. *Wenner v. Smith*, (1886) 4 Utah 238, 9 Pac. 293.

**[Sec. 1.] [In prosecutions for bigamy, etc., husband or wife may testify.]** That in any proceeding or examination before a grand jury, a judge, justice, or a United States commissioner, or a court, in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the person accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceeding, examination, or prosecution without the consent of the husband or wife, as the case may be; and such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation, deemed confidential at common law. [24 Stat. L. 635.]

This and the following section are from an Act of March 3, 1887, ch. 397, entitled "An act to amend an act entitled 'An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two," and is known as the "Anti-Polygamy Act of 1887" or the "Edmunds-Tucker Act." As to R. S. sec. 5352 mentioned in the title see the notes to the Act of March 22, 1882, ch. 47, sec. 1, *supra*.

**SEC. 2. [Attachment when it is believed witness will fail to appear.]** That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, whether before a United States commissioner, justice, judge, a grand jury, or any court, an attachment for any witness may be issued by the court, judge, or commissioner, without a previous subpoena, compelling the immediate attendance of such witness, when it shall appear by oath or affirmation, to the commissioner, justice, judge, or court, as the case may be, that there is reasonable ground to

believe that such witness will unlawfully fail to obey a subpoena issued and served in the usual course in such cases; and in such case the usual witness-fee shall be paid to such witness so attached: *Provided*, That the person so attached may at any time secure his or her discharge from custody by executing a recognizance with sufficient surety, conditioned for the appearance of such person at the proper time, as a witness in the cause or proceeding wherein the attachment may be issued. [24 Stat. L. 635.]

**Applicability to Creek Nation.**—This act was never in force in the Creek Nation in the Indian Territory, among the members who intermarried according to tribal usages and customs, and

while the tribal relations were maintained and recognized by the United States government. *Oklahoma Land Co. v. Thomas*, (1912) 34 Okla. 681, 127 Pac. 8.



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